

September 13, 2023

The Honorable Virginia Foxx
Chair, Committee on Education and the Workforce
U.S. House of Representatives
2262 Rayburn House Office Building
Washington, DC 20515

The Honorable Robert C. "Bobby" Scott
Ranking Member, Committee on Education and the Workforce
U.S. House of Representatives
1201 Longworth House Office Building
Washington, DC 20515

Re: Markup of anti-ESG bills

Dear Chair Foxx and Ranking Member Scott:

Americans for Financial Reform (AFR) writes in opposition to four legislative proposals that the House Committee on Education and the Workforce is scheduled to consider at its September 14th Full Committee Markup. These bills' amendments to the Employee Retirement Income Security Act (ERISA) would undermine workers' retirement security and are part of a broader political campaign against common sense investment practices. The campaign seeks to force financial actors to ignore a slew of financial risks regardless of the consequences for workers' retirement security and the integrity of our financial system.

As part of this campaign, Republican lawmakers introduced 165 pieces of legislation in 37 states this year, some of which are already exacting great costs on retirees and taxpayers.¹ These bills have faced significant pushback from public pension beneficiaries, retirement officials, bank and local business associations, and unions.²

At the federal level, the House Financial Services Committee held what was dubbed "ESG month" in July, which featured six hearings and culminated in a markup of bills that would undermine regulations important for investor protection and insulate the management of public companies from investor input

¹ Pleiades Strategy, "2023 Statehouse Report: Right-Wing Attacks on the Freedom to Invest Responsibly Falter in Legislatures," Summer 2023, *available at* <https://drive.google.com/file/d/1VJ82mMNupoFSZPQ98nLcW7AtcyBQWB18/view>.

² See Steven Musfon, "The conservative battle against 'woke' banks is backfiring," The Washington Post, Feb. 28, 2023, *available at* <https://www.washingtonpost.com/climate-environment/2023/02/28/climate-change-wall-street-investments/>; see also Michael Katz, "Kentucky Retirement System Trustees Say It Is Not Subject to State's Anti-ESG Law," Chief Investment Officer, Feb. 15, 2023, *available at* <https://www.ai-cio.com/news/kentucky-retirement-system-trustees-say-it-is-not-subject-to-states-anti-esg-law/>.

and accountability.³ The month's agenda was opposed by many stakeholders, including labor unions, climate justice organizations, responsible investing groups, asset managers, and civil society organizations.⁴ A few months earlier in May, the House Oversight Committee held two hearings on responsible investing practices, one of which featured Illinois Treasurer Michael Frerichs, who repeatedly emphasized the importance of considering all financially relevant information for workers' retirement security.⁵

Two of the bills being marked up today – H.R. 5339 and H.R. 5337 – have a longer history, mirroring two Trump-era Department of Labor (DOL) rules.⁶ Those rules were widely criticized and have since been rescinded due to having produced significant confusion about what fiduciaries are allowed to consider when making investment decisions, and causing a chilling effect on the consideration of financially relevant information – thereby putting workers' retirement security at risk. The other two bills being marked up today would also harm workers saving for retirement, H.R. 5338 by interfering with efforts to increase diversity amongst asset managers managing workers' savings and H.R. 5340 by mandating confusing and misleading information be sent to investors.

H.R. 5339, Roll Back ESG To Increase Retirement Earnings (RETIRE) Act

The RETIRE Act would: 1) require fiduciaries to make investment decisions based solely on “pecuniary” factors; 2) require extra documentation when fiduciaries consider “non-pecuniary” factors in investment decisions when distinguishing between investment choices only based on “pecuniary” factors is not possible; and 3) prohibit a default investment option “if its investment objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors.”

This bill largely mirrors a now-rescinded Trump-era DOL rule⁷ that stakeholders reported caused investor

³ Americans for Financial Reform, Letter in Opposition to Bills Being Marked up by the House Financial Services Committee, Jul. 25, 2023, *available at* <https://ourfinancialsecurity.org/wp-content/uploads/2023/07/Americans-for-Financial-Reform-Letter-Opposing-Anti-ESG-Bills.pdf>.

⁴ Letter for the Record Against Anti-ESG Policy Agenda of the House Financial Services Committee, Jul. 11, 2023, *available at* <https://ourfinancialsecurity.org/wp-content/uploads/2023/07/7.11.23-Letter-for-the-record-1.pdf>.

⁵ House Committee on Oversight and Accountability, “ESG Part I: An Examination of Environmental, Social, and Governance Practices with Attorneys General,” May 10, 2023, *available at* <https://oversight.house.gov/hearing/esg-part-i-an-examination-of-environmental-social-and-governance-practices-with-attorneys-general/>.

⁶ Financial Factors in Selecting Plan Investments, Final Rule, Employee Benefits Security Administration, Nov. 13, 2020, *available at* <https://www.federalregister.gov/documents/2020/11/13/2020-24515/financial-factors-in-selecting-plan-investments#h-11>; Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, Final Rule, Employee Benefits Security Administration, Dec. 16, 2020, *available at* <https://www.federalregister.gov/documents/2020/12/16/2020-27465/fiduciary-duties-regarding-proxy-voting-and-shareholder-rights>.

⁷ Financial Factors in Selecting Plan Investments, Final Rule, Employee Benefits Security Administration, Nov. 13, 2020, *available at*

confusion and had a chilling effect on the proper integration of financially relevant environmental, social, and governance (ESG) factors in investment decisions.⁸ Indeed, when the rule was being considered, the AFL-CIO warned that the proposed rule contained “vague terms that create additional liability for fiduciaries.”⁹ The SEIU similarly warned that the proposed rule would result in “increased and unnecessary liability for fiduciaries, significant confusion on how to comply with the Proposed Rule, and reduced investment options for plan participants and beneficiaries.”¹⁰

These warnings are consistent with a recent analysis by three legal experts, who found that the “pecuniary” versus “non-pecuniary” distinction – which first appeared in the Trump-era rule but has since proliferated in state-level legislation – is unworkable because it is “so blurry that the bills are self-contradictory.”¹¹ The concern is that fiduciaries would disfavor investment options that could be perceived as having “non-pecuniary” benefits, even if such investments are prudently judged as being in the best interest of the beneficiary.

The bill’s extra documentation requirements for when a fiduciary takes into account “non-pecuniary” factors when “pecuniary” factors are not decisive would interfere with the ability of beneficiaries’ retirement savings to benefit them in other ways while not sacrificing financial returns. At the time the Trump-era DOL rule was proposed, the AFL-CIO warned “the Proposed Rule will create unnecessary and burdensome regulations that will discourage fiduciaries from making prudent investments that generate collateral benefits for communities and economic growth for working people.”¹²

For example, the new DOL rule that was finalized in November 2022 permits the consideration of collateral benefits like stimulating union jobs and investing in the geographic region where beneficiaries live and work if – and only if – “competing investments, or competing investment courses of action,

<https://www.federalregister.gov/documents/2020/11/13/2020-24515/financial-factors-in-selecting-plan-investments#h-11>.

⁸ Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, Final Rule, Employee Benefits Security Administration, Dec. 1, 2022, *available at*

<https://www.federalregister.gov/documents/2022/12/01/2022-25783/prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights> (noting that many stakeholders indicated that the Trump-era rule “has been interpreted as putting the thumb on the scale against the consideration of ESG factors, even when those factors are financially material” and that the rule and investor confusion about it had “a chilling effect on appropriate integration of climate change and other ESG factors in investment decisions”).

⁹ Brandon J. Rees & Alex Roe, AFL-CIO Comment on Financial Factors in Selecting Plan Investments, Jul. 30, 2020, *available at* <https://www.regulations.gov/comment/EBSA-2020-0004-0633>.

¹⁰ Renaye Manley, SEIU Comment on Financial Factors in Selecting Plan Investments, Jul. 30, 2020, *available at* <https://www.regulations.gov/comment/EBSA-2020-0004-0672>.

¹¹ David J. Berger, David H. Webber, and Beth Young, “The Liability Trap: Why the ALEC Anti-ESG Bills Create a Legal Quagmire for Fiduciaries Connected with Public Pensions,” SSRN, Feb. 17, 2023, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4360119.

¹² Brandon J. Rees & Alex Roe, AFL-CIO Comment on Financial Factors in Selecting Plan Investments, Jul. 30, 2020, *available at* <https://www.regulations.gov/comment/EBSA-2020-0004-0633>.

equally serve the financial interests of the plan over the appropriate time horizon.”¹³ It also allows for fiduciaries to take into account beneficiaries’ preferences when selecting investment options, as long as they still abide by the ERISA prudence requirements. This bill would make it much more difficult for fiduciaries to take these collateral benefits and beneficiary preferences into account – and therefore for beneficiaries to benefit from them.

H.R. 5337, Retirement Proxy Protection Act

The Retirement Proxy Protection Act would: 1) make the exercise of shareholder rights – including proxy voting – optional for fiduciaries; 2) impose extra considerations and record-keeping requirements when fiduciaries exercise shareholder rights; 3) prohibit “promot[ing] non-pecuniary benefits or goals unrelated to those financial interests of the plan’s participants and beneficiaries”; and 4) create safe harbor voting policies that, if adopted, would result in very limited proxy voting in shareholder proposals by fiduciaries.

This bill largely mirrors another Trump-era DOL rule¹⁴ criticized for creating the perception that fiduciaries “would need to have special justifications for even ordinary exercises of shareholder rights.”¹⁵ This bill would put a thumb on the scale against fiduciaries exercising shareholder rights on behalf of workers whose deferred wages they are responsible for managing for them, which would result in enhancing the power of public companies’ management and decreasing the say and power of workers in the companies they are invested in.

The bill also suffers from the creation of the confusing and unworkable distinction between “pecuniary” and “non-pecuniary” factors by prohibiting the “promot[ion of] non-pecuniary benefits or goals unrelated to those financial interests of the plan’s participants and beneficiaries.” This prohibition would have a chilling effect on fiduciaries voting in favor of shareholder proposals that are in the financial interests of beneficiaries, but could be perceived as promoting additional benefits or goals. For example, earlier this year, in the wake of rampant union-busting activity, shareholders voted in favor of an important proposal calling on Starbucks to conduct a third-party assessment of its labor practices.¹⁶ If

¹³ Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, Final Rule, Employee Benefits Security Administration, Dec. 1, 2022, *available at* <https://www.federalregister.gov/documents/2022/12/01/2022-25783/prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights>.

¹⁴ Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, Final Rule, Employee Benefits Security Administration, Dec. 16, 2020, *available at* <https://www.federalregister.gov/documents/2020/12/16/2020-27465/fiduciary-duties-regarding-proxy-voting-and-shareholder-rights>.

¹⁵ Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, Final Rule, Employee Benefits Security Administration, Dec. 1, 2022, *available at* <https://www.federalregister.gov/documents/2022/12/01/2022-25783/prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights>.

¹⁶ Hilary Russ, “Starbucks shareholders approve review of labor union practices,” Reuters, Mar. 29, 2023, *available at*

this bill became law, fiduciaries would likely feel pressure to vote against such a proposal, fearing that they would be perceived as running afoul of the new “pecuniary”/“non-pecuniary” distinction.

H.R. 5338, No Discrimination in My Benefits Act

The No Discrimination in My Benefits Act would prohibit the consideration of “race, color, religion, sex, or national origin” in “selecting, monitoring, and retaining any fiduciary, counsel, employee, or service provider of the plan.”

This bill seems to be a thinly-veiled attempt to stymie efforts to “increase the absolute number of, and assets under management by, diverse-owned asset management firms for institutional investors.”¹⁷ These efforts have been gathering steam, with some institutional investors committing to increase opportunities for diverse-owned asset managers. Illinois Treasurer Michael Frerichs has commented on these efforts, noting that “[u]sing diverse investment firms is not only about creating growth and opportunity in our communities, but it’s integral to increasing our investment returns.”¹⁸ Similarly, working for New York City Comptroller Brad Lander, Steven Meier, Chief Investment Officer and Deputy Comptroller for Asset Management noted that “[d]iversity, equity and inclusion are an important component of our fiduciary duty to generate sustainable and superior returns to benefit the nearly 800,000 City employees, retirees and their families who participate in the City’s pension funds.”¹⁹

This bill is one of many attempts to stymie initiatives to ameliorate racial inequalities by falsely equating the consideration of race to immoral (and sometimes illegal) discrimination. For example, some Republican Attorneys General recently wrote to large companies with threats that they “will be held accountable — sooner rather than later — for [their] decision to continue treating people differently because of the color of their skin.”²⁰ Some Democratic Attorneys General responded by sending a letter to companies stating that “corporate efforts to recruit diverse workforces and create inclusive work environments are legal and reduce corporate risk for claims of discrimination.”²¹ As illustrated by the above quotes, there are sound reasons consistent with fiduciary duty to consider racial, gender, and

<https://www.reuters.com/business/retail-consumer/starbucks-shareholders-approve-review-labor-union-practices-2023-03-29/>.

¹⁷ Diverse Asset Managers Initiative, *available at* <https://www.diverseassetmanagers.org/>.

¹⁸ Illinois State Treasurer Michael W. Frerichs, *Diversity, Equity & Inclusion*, *available at* https://www.illinoistreasurer.gov/Financial_Institutions/Equity_Diversity_Inclusion.

¹⁹ New York City Comptroller Brad Lander, “Comptroller Unveils First Public Report Detailing Share of Minority and Women-Owned Businesses in NYC’s Asset Management and Public Finance,” Nov. 1, 2022, *available at* <https://comptroller.nyc.gov/newsroom/comptroller-unveils-first-public-report-detailing-share-of-minority-and-women-owned-businesses-in-nycs-asset-management-and-public-finance/>.

²⁰ Trisha Thadani, “Republican attorneys general warn companies against ‘race-based quotas,’” *The Washington Post*, Jul. 13, 2023, *available at* <https://www.washingtonpost.com/technology/2023/07/13/gop-attorneys-general-warn-against-dei/>.

²¹ Olivia Olander, “Democratic AGs blast Republicans trying to ‘intimidate’ corporations on diversity efforts,” *Politico*, Jul. 19, 2023, *available at* <https://www.politico.com/news/2023/07/19/corporate-dei-efforts-top-democratic-state-lawyers-00107189>.

other types of diversity in selecting asset managers²² and such considerations should not be made illegal.

H.R. 5340, Providing Complete Information to Retirement Investors Act

The Providing Complete Information to Retirement Investors Act would require a notice to be sent to beneficiaries that choose investment alternatives not chosen by a fiduciary. The notice would need to include various statements, including that the beneficiary's choice was not selected by a fiduciary and that as a result, the beneficiary may "experience diminished returns, higher fees, and higher risk." The bill would also require a graph illustrating the impact of a 4%, 6%, and 8% return on the beneficiary's retirement balance projected to age 67.

It is unclear why this bill would require such a graph, as its requirement is divorced from any indication of expected rates of return of investment options a beneficiary may be considering. The graph would likely be confusing and misleading to beneficiaries trying to make decisions about their retirement investments, suggesting that choosing an investment alternative not chosen by a fiduciary would necessarily result in a specific rate of return.

AFR strongly opposes these bills, as they propose misguided amendments to ERISA that would undermine workers' retirement security. Thank you for your consideration of our perspective. Please do not hesitate to contact Natalia Renta at natalia@ourfinancialsecurity.org if you have any questions.

Sincerely,

Americans for Financial Reform

CC: Members of the House Committee on Education and the Workforce

²² See Jenna Weinberg & Simon Greer, "Fiduciary Guide to Investing with Diverse Asset Managers and Firms," 8-10, Diverse Asset Managers Initiative, Apr. 2017, available at <https://www.sec.gov/files/amac-background-dami-fiduciary-guide.pdf>.