AMERICANS for TAX REFORM

722 12th Street N.W.
Fourth Floor
Washington, D.C.
20005
T: (202)785-0266
F:(202)785-0261
www.atr.org

September 13, 2023

The Honorable Virginia Foxx
Chairwoman
Committee on Education and the Workforce
U.S. House of Representatives
2176 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
2101 Rayburn House Office Building
Washington, DC 20515

**Re: Support for H.R. 5337, H.R. 5338, H.R. 5339, and H.R. 5340**

Dear Chairwoman Foxx and Ranking Member Scott:

**I write in support of four bills referred to your committee: (1) *Retirement Proxy Protection Act* (H.R. 5337), (2) *No Discrimination In My Benefits Act* (H.R. 5338), (3) *Roll back ESG To Increase Retirement Earnings Act* (H.R. 5339), and (4) *Providing Complete Information To Retirement Investors Act* (H.R. 5340). The committee should adopt these pieces of legislation during deliberations at its next business meeting.**

The *Employee Retirement Income Security Act of 1974* (ERISA) is the seminal statutory framework for ensuring that fiduciaries uphold their duties of loyalty and prudence when managing the $12 trillion in assets belonging to U.S. private sector employees.

ERISA covers pension plans run by private sector employers and nonprofits. This includes defined contribution (DC) and defined benefit (DB) plans. ERISA governs retirement assets for about 152 million workers, dependents, and retirees. According to the Bureau of Labor Statistics, "As of March 2022, 69 percent of private industry workers had access to [DC or DB] benefits." Of these workers, 52 percent of private industry workers participated in their retirement plan. In 2019, 79 percent of private industry workers participated in savings and thrift plans, 15 percent in deferred profit-sharing plans, 16 percent in money purchase pension plans, and 4 percent in employee stock ownership plans (ESOPs). Based on a Congressional Research Service analysis of the 2019 Survey of Consumer Finances, about 19 percent of households with a net worth less than $6,370 have DC savings, 29 percent of households with a net worth between $6,370 and $67,650 have DC savings, and 41 percent of households with a net worth between $67,650 and $200,950 have DC savings.

In December 2022, the Department of Labor (DOL) issued a final rule impacting millions of private sector employee retirement plans. The final rule entitled, *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, allows fiduciaries (e.g., employers or registered investment advisers) of ERISA plans to consider non-pecuniary factors for investment decision-making and proxy voting. The final rule lays the groundwork to allow institutional investors and plan fiduciaries to divert retirement savings to environmental, social, and governance (ESG) offerings that may have higher fees and lower returns than conventional funds.

There should be no consideration of "collateral benefits" because that would imply a "mixed motive" that is in violation of ERISA. Moreover, the U.S. Supreme Court has already made it clear that ERISA plan benefits must be explicitly "financial" in nature.

Fortunately, members of the committee have introduced legislation to codify the interpretations of *Fifth Third Bancorp v. Dudenhoeffer* and ensure that plan fiduciaries focus solely on financial or "pecuniary" returns instead of non-pecuniary ESG factors:

- Rep. Rick Allen (R-Ga.) introduced the *Roll back ESG To Increase Retirement Earnings (RETIRE) Act*. This bill is a derivative version of the *Ensuring Sound Guidance Act*. It amends ERISA by requiring that fiduciaries focus solely on pecuniary factors when making investment decisions. A plan fiduciary may only use non-pecuniary factors when investing if (1) two investments are indistinguishable based purely on pecuniary factors; and (2) the plan fiduciary produces documents showing why pecuniary factors were not sufficient to make a determination; how the selected investment compares to alternatives based on liquidity, diversification, cash flow, and returns; and how the non-pecuniary factors are consistent with producing financial benefits for retirees.

- Rep. Erin Houchin (R-Ind.) introduced the *Retirement Proxy Protection Act*. This bill requires fiduciaries to vote proxies in accordance with the "economic interest" of the plan beneficiaries. Fiduciaries are prohibited from subordinating financial benefits to "non-pecuniary objectives," or promoting non-pecuniary benefits unrelated to the financial interests of beneficiaries. Fiduciaries must also prudently monitor the voting activities of investment managers and proxy advisory firms to ensure they are not subordinating economic interests for non-pecuniary objectives.

- Rep. Bob Good (R-Va.) introduced the *No Discrimination In My Benefits Act*. This bill requires that fiduciaries, counsels, employees, and ERISA plan service providers are selected with regard to the duties of loyalty and prudence, and without regard to race, color, religion, sex, or national origin.

- Rep. Jim Banks (R-Ind.) introduced the *Providing Complete Information To Retirement Investors Act*. This bill requires that defined contribution plan beneficiaries receive written notifications of the potential investment risks of choosing investments through a brokerage window or self-directed brokerage account. The investments chosen through these arrangements have not been prudently selected or monitored by a plan fiduciary. Certain investments may pursue non-pecuniary investment objectives that could cost the beneficiary financial returns.

There is no room for ESG when considering how to invest retirees' lifesavings. Retirement plan managers should only consider pecuniary factors when making investment decisions and voting proxies. **I applaud the committee's work and encourage all lawmakers to vote for passage of these bills.**

Onward,

Grover Norquist
President, Americans for Tax Reform

cc: Members of the Committee on Education and the Workforce