AMERICANS for TAX REFORM
722 12th Street, N.W. • 4th Floor • Washington, D.C. 20005

September 9, 2024

The Honorable Michael C. Burgess
Chairman
Committee on Rules
U.S. House of Representatives
H-312, The Capitol
Washington, D.C. 20515

The Honorable James P. McGovern
Ranking Member
Committee on Rules
U.S. House of Representatives
H-152, The Capitol
Washington, D.C. 20515

Re: Support for Rules Committee Print 118-50, Text of H.R. 5339, (Protecting Americans' Investments from Woke Policies Act)

Dear Chairman Burgess and Ranking Member McGovern:

We write in support of the *Protecting Americans' Investments from Woke Policies Act*, which is composed 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 bills.

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 governs retirement plans run by private sector employers and nonprofits. This includes defined contribution (DC) and defined benefit (DB) plans. ERISA oversees retirement assets for about 152 million workers, dependents, and retirees. According to the U.S. Bureau of Labor Statistics, about 67 percent of private sector workers have access to a DC plan while about 15 percent of workers have access to a DB plan.

The majority of Americans have money invested through a retirement account. According to the 2022 Survey of Consumer Finances, over 54 percent of families held money in a 401(k), 403(b), or other retirement plan. The report also states that "[t]he conditional median value of retirement accounts increased 15 percent between 2019 and 2022 to $86,900, while the conditional mean value rose 13 percent to $334,000 in 2022." Enabling Americans to maximize financial returns for their retirement is essential to maintain consistent growth.

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.

In July, the U.S. Court of Appeals for the Fifth Circuit remanded one of the lawsuits filed against the DOL rule, *State of Utah v. Su*, back to the federal district court. The lower court's ruling relied on Chevron deference, which was overturned by *Loper Bright*.

There should be no consideration of "collateral benefits" because that implies a "mixed motive" that fails to solely consider plan participants' interests, which is in violation of ERISA and a breach of fiduciary duty. The U.S. Supreme Court already made it clear that ERISA plan benefits must be explicitly "financial" in nature.

Fortunately, lawmakers 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 DC 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. This enables certain investments to pursue non-pecuniary investment objectives that could cost the beneficiary financial returns. The bill would make these shortcomings abundantly clear to plan participants by requiring certain disclosure requirements to enhance transparency.

There is no room for ESG when considering how to invest Americans' lifesavings. Retirement plan managers should only consider pecuniary factors when making investment decisions and voting proxies. **We encourage lawmakers to vote in support of these bills.**

Sincerely,

Americans for Tax Reform

CC: Members of the House Committee on Rules