

118TH CONGRESS
1ST SESSION

H. R. 4237

To amend the Investment Advisers Act of 1940 and the Employee Retirement Income Security Act of 1974 to specify requirements concerning the consideration of pecuniary and non-pecuniary factors.

IN THE HOUSE OF REPRESENTATIVES

JUNE 21, 2023

Mr. BARR (for himself, Mr. ALLEN, and Mr. HUIZENGA) introduced the following bill; which was referred to the Committee on Financial Services, and in addition to the Committee on Education and the Workforce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend the Investment Advisers Act of 1940 and the Employee Retirement Income Security Act of 1974 to specify requirements concerning the consideration of pecuniary and non-pecuniary factors.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Ensuring Sound Guid-
5 ance Act”.

1 **SEC. 2. INVESTMENT ADVISORS ACT OF 1940 AMENDMENT.**

2 (a) IN GENERAL.—Section 211(g) of the Investment
3 Advisers Act of 1940 (15 U.S.C. 80b–11(g)) is amended
4 by adding at the end the following:

5 “(3) BEST INTEREST BASED ON PECUNIARY
6 FACTORS.—

7 “(A) IN GENERAL.—For purposes of para-
8 graph (1), the best interest of a customer shall
9 be determined using pecuniary factors, which
10 may not be subordinated to or limited by non-
11 pecuniary factors, unless the customer provides
12 informed consent, in writing, that such non-pe-
13 cuniary factors be so considered.

14 “(B) DISCLOSURE OF PECUNIARY FAC-
15 TORS.—If a customer provides a broker, dealer,
16 or investment adviser with the informed consent
17 to consider non-pecuniary factors described
18 under subparagraph (A), the broker, dealer, or
19 investment adviser shall also—

20 “(i) disclose the expected pecuniary
21 effects to the customer over a time period
22 selected by the customer and not to exceed
23 three years; and

24 “(ii) at the end of the time period de-
25 scribed under clause (i), disclose, by com-
26 parison to a reasonably comparable index

1 or basket of securities selected by the cus-
2 tomer, the actual pecuniary effects of that
3 time period, including all fees, costs, and
4 other expenses incurred to so consider non-
5 pecuniary factors.

6 “(C) PECUNIARY FACTOR DEFINED.—The
7 term ‘pecuniary factor’ has the meaning given
8 such term in section 404(a)(3)(D) of the Em-
9 ployment Retirement Income Security Act of
10 1974 (29 U.S.C. 1104(a)(3)(D)).”.

11 (b) RULEMAKING.—Not later than the end of the 12-
12 month period beginning on the date of enactment of this
13 Act, the Securities and Exchange Commission shall revise
14 or issue such rules as may be necessary to implement the
15 amendment made by subsection (a).

16 (c) EFFECTIVE DATE.—The amendment made by
17 subsection (a) shall apply to actions taken by a broker,
18 dealer, or investment adviser on or after the date that is
19 12 months after the date of enactment of this Act.

20 **SEC. 3. EMPLOYEE RETIREMENT INCOME SECURITY ACT**
21 **OF 1974 AMENDMENT.**

22 (a) IN GENERAL.—Section 404(a) of the Employee
23 Retirement Income Security Act of 1974 (29 U.S.C.
24 1104(a)) is amended by adding at the end the following:

1 “(3) INTEREST BASED ON PECUNIARY FAC-
2 TORS.—

3 “(A) IN GENERAL.—For purposes of para-
4 graph (1), a fiduciary of a plan shall be consid-
5 ered to act solely in the interest of the partici-
6 pants and beneficiaries of the plan with respect
7 to an investment or investment course of action
8 only if the fiduciary’s action with respect to
9 such investment or investment course of action
10 is based only on pecuniary factors (except as
11 provided in subparagraph (B)). The fiduciary
12 may not subordinate the interests of the partici-
13 pants and beneficiaries in their retirement in-
14 come or financial benefits under the plan to
15 other objectives and may not sacrifice invest-
16 ment return or take on additional investment
17 risk to promote non-pecuniary benefits or goals.
18 The weight given to any pecuniary factor by a
19 fiduciary should appropriately reflect a prudent
20 assessment of the impact of such factor on risk
21 and return.

22 “(B) USE OF NON-PECUNIARY FACTORS
23 FOR INVESTMENT ALTERNATIVES.—Notwith-
24 standing paragraph (A), if a fiduciary is unable
25 to distinguish between or among investment al-

1 ternatives or investment courses of action on
2 the basis of pecuniary factors alone, the fidu-
3 ciary may use non-pecuniary factors as the de-
4 ciding factor if the fiduciary documents—

5 “(i) why pecuniary factors were not
6 sufficient to select a plan investment or in-
7 vestment course of action;

8 “(ii) how the selected investment com-
9 pares to the alternative investments with
10 regard to the composition of the portfolio
11 with regard to diversification, the liquidity
12 and current return of the portfolio relative
13 to the anticipated cash flow requirements
14 of the plan, and the projected return of the
15 portfolio relative to the funding objectives
16 of the plan; and

17 “(iii) how the selected non-pecuniary
18 factor or factors are consistent with the in-
19 terests of the participants and beneficiaries
20 in their retirement income or financial ben-
21 efits under the plan.

22 “(C) INVESTMENT ALTERNATIVES FOR
23 PARTICIPANT-DIRECTED INDIVIDUAL ACCOUNT
24 PLANS.—In selecting or retaining investment
25 options for a pension plan described in sub-

1 section (c)(1)(A), a fiduciary is not prohibited
2 from considering, selecting, or retaining an in-
3 vestment option on the basis that such invest-
4 ment option promotes, seeks, or supports one or
5 more non-pecuniary benefits or goals, if—

6 “(i) the fiduciary satisfies the require-
7 ments of paragraph (1) and subparagraphs
8 (A) and (B) of this paragraph in selecting
9 or retaining any such investment option;
10 and

11 “(ii) such investment option is not
12 added or retained as, or included as a com-
13 ponent of, a default investment under sub-
14 section (c)(5) (or any other default invest-
15 ment alternative) if its investment objec-
16 tives or goals or its principal investment
17 strategies include, consider, or indicate the
18 use of one or more non-pecuniary factors.

19 “(D) PECUNIARY FACTOR DEFINED.—For
20 the purposes of this paragraph, the term ‘pecu-
21 niary factor’ means a factor that a fiduciary
22 prudently determines is expected to have a ma-
23 terial effect on the risk or return of an invest-
24 ment based on appropriate investment horizons
25 consistent with the plan’s investment objectives

1 and the funding policy established pursuant to
2 section 402(b)(1).”.

3 (b) **EFFECTIVE DATE.**—The amendments made by
4 this section shall apply to actions taken by a fiduciary on
5 or after the date that is 12 months after the date of enact-
6 ment of this Act.

7 **SEC. 4. STUDY OF STATE AND LOCAL PENSION PLANS.**

8 (a) **STUDY.**—The Comptroller General of the United
9 States shall conduct a study on the potential impact of
10 underfunded State and local pension plans on the Federal
11 Government, including—

12 (1) the extent to which such pension plans sub-
13 ordinate the pecuniary interests of participants and
14 beneficiaries to environmental, social, governance, or
15 other objectives; and

16 (2) legislative and administrative actions that,
17 if implemented at the Federal level, would prevent
18 such pension plans from subordinating the interests
19 of participants and beneficiaries to environmental,
20 social, or governance objectives.

21 (b) **REPORT.**—Not later than 12 months after the
22 date of enactment of this Act, the Comptroller General
23 submit to Congress a report containing the results of the
24 study.

1 **SEC. 5. STUDY ON CLIMATE CHANGE AND OTHER ENVIRON-**
2 **MENTAL DISCLOSURES IN MUNICIPAL BOND**
3 **MARKET.**

4 (a) IN GENERAL.—The Securities and Exchange
5 Commission shall solicit public comment and thereafter
6 conduct a study to determine the extent to which issuers
7 of municipal securities (as such term is defined in section
8 3(a)(29) of the Securities Exchange Act of 1934 (15
9 U.S.C. 78c(a)(29)) make disclosure to investors regarding
10 climate change and other environmental matters.

11 (b) CONTENTS.—The study under subsection (a)
12 shall consider and analyze, among other things—

13 (1) the frequency of such disclosures;

14 (2) whether such disclosures made by issuers of
15 municipal securities in connection with offerings of
16 securities align with such disclosures made by
17 issuers of municipal securities in other contexts or to
18 other audiences other than investors;

19 (3) any voluntary or mandatory disclosure
20 standards observed by issuers of municipal securities
21 in the course of making such disclosures; and

22 (4) the degree to which investors consider such
23 disclosures in connection with making an investment
24 decision.

25 (c) REPORT.—The Securities and Exchange Commis-
26 sion shall issue a report on the study required under this

1 section to the Committee on Banking, Housing, and
2 Urban Affairs of the Senate and the Committee on Finan-
3 cial Services of the House of Representatives not later
4 than 12 months after the date of enactment of this Act.
5 The report shall include a detailed discussion of the finan-
6 cial risks to investors from investments in municipal secu-
7 rities and whether those risks are being adequately dis-
8 closed as well as a discussion of regulatory or legislative
9 steps that are recommended or that may be necessary to
10 address any concerns identified in the study.

11 **SEC. 6. STUDY ON SOLICITATION OF MUNICIPAL SECURI-**
12 **TIES BUSINESS.**

13 (a) IN GENERAL.—The Securities and Exchange
14 Commission shall solicit public comment and thereafter
15 conduct a study to determine the effectiveness of Rule G–
16 38 of the Municipal Securities Rulemaking Board and
17 Rule 206(4)–5 of the Securities and Exchange Commis-
18 sion (17 CFR 275.206(4)–5) in preventing the payment
19 of funds to elected officials or candidates for elected office
20 in exchange for the receipt of government business in con-
21 nection with the offer or sale of municipal securities (as
22 such term is defined in section 3(a)(29) of the Securities
23 Exchange Act of 1934 (15 U.S.C. 78c(a)(29)).

24 (b) CONTENTS.—The study under subsection (a)
25 shall consider and analyze, among other things—

1 (1) whether Rule G-38 and Rule 206(4)-5 have
2 had their intended effects and whether they have
3 had any unintended adverse effects;

4 (2) the frequency and scope of enforcement ac-
5 tions undertaken under Rule G-38 and Rule
6 206(4)-5;

7 (3) the degree to which persons subject to Rule
8 G-38 and Rule 206(4)-5 have put in place policies
9 and procedures intended to ensure compliance with
10 such rules;

11 (4) the degree to which other State and Federal
12 regulations impact the solicitation of municipal secu-
13 rities business; and

14 (5) the degree to which persons subject to Rule
15 G-38 and Rule 206(4)-5 are disadvantaged from
16 participating in the political process both as a gen-
17 eral matter and relative to persons who solicit or re-
18 ceive government business or government licenses,
19 permits, and approvals other than in connection with
20 the offer or sale of municipal securities.

21 (c) REPORT.—The Securities and Exchange Commis-
22 sion shall issue a report on the study required under this
23 section to the Committee on Banking, Housing, and
24 Urban Affairs of the Senate and the Committee on Finan-
25 cial Services of the House of Representatives not later

1 than 12 months after the date of enactment of this Act.
2 The report shall include a discussion of the extent to which
3 persons affiliated with small businesses, as well as persons
4 affiliated with minority and women opened businesses,
5 have been affected by Rule G-38 and Rule 206(4)-5 and
6 a discussion of regulatory or legislative a discussion of reg-
7 ulatory or legislative steps that are recommended or that
8 may be necessary to address any concerns identified in the
9 study.

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