

118TH CONGRESS  
1ST SESSION

# S. 2700

To amend the Investment Advisers Act of 1940 to require investment advisers for passively managed funds to arrange for pass-through voting of proxies for certain securities, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

JULY 27, 2023

Mr. SULLIVAN (for himself, Mr. CRAPO, Mr. GRASSLEY, Mr. CORNYN, Mr. TILLIS, Ms. LUMMIS, Mr. DAINES, Mr. CRAMER, Mr. RUBIO, and Mr. SCOTT of Florida) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

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## A BILL

To amend the Investment Advisers Act of 1940 to require investment advisers for passively managed funds to arrange for pass-through voting of proxies for certain securities, and for other purposes.

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 “INvestor Democracy  
5 is EXpected Act” or the “INDEX Act”.

1 **SEC. 2. PROXY VOTING OF PASSIVELY MANAGED FUNDS.**

2 (a) IN GENERAL.—The Investment Advisers Act of  
3 1940 (15 U.S.C. 80b–1 et seq.) is amended by inserting  
4 after section 208 (15 U.S.C. 80b–8) the following:

5 **“SEC. 208A. REQUIREMENT WITH RESPECT TO PROXY VOT-**  
6 **ING OF PASSIVELY MANAGED FUNDS.**

7 “(a) DEFINITIONS.—In this section—

8 “(1) the term ‘covered security’—

9 “(A) means a voting security, as that term  
10 is defined in section 2(a) of the Investment  
11 Company Act of 1940 (15 U.S.C. 80a–2(a)), in  
12 which a qualified fund is invested; and

13 “(B) does not include any voting security  
14 (as defined in subparagraph (A)) of an issuer  
15 registered with the Commission as an invest-  
16 ment company under section 8 of the Invest-  
17 ment Company Act of 1940 (15 U.S.C. 80a–8);

18 “(2) the term ‘passively managed fund’ means  
19 a qualified fund that—

20 “(A) is designed to track, or is derived  
21 from, an index of securities or a portion of such  
22 an index;

23 “(B) discloses that the qualified fund is a  
24 passive fund or an index fund;

25 “(C) allocates not less than 40 percent of  
26 the total assets of the qualified fund to an in-

1 investment strategy that is designed to track, or  
2 is derived from, an index of securities or a por-  
3 tion of such an index; or

4 “(D) discloses that an allocation described  
5 in subparagraph (C) follows an investment  
6 strategy that is passive or based on an index of  
7 securities;

8 “(3) the term ‘qualified fund’ means—

9 “(A) an investment company, as that term  
10 is defined in section 3 of the Investment Com-  
11 pany Act of 1940 (15 U.S.C. 80a–3);

12 “(B) a private fund;

13 “(C) an eligible deferred compensation  
14 plan, as that term is defined in section 457(b)  
15 of the Internal Revenue Code of 1986;

16 “(D) an entity described in section  
17 3(e)(11) of the Investment Company Act of  
18 1940 (15 U.S.C. 80a–3(c)(11));

19 “(E) a plan maintained by an employer de-  
20 scribed in clause (i), (ii), or (iii) of section  
21 403(b)(1)(A) of the Internal Revenue Code of  
22 1986 to provide annuity contracts described in  
23 section 403(b) of such Code;

24 “(F) a common trust fund, or similar  
25 fund, maintained by a bank;

1           “(G) any fund established under section  
2           8438(b)(1) of title 5, United States Code; or

3           “(H) any separate managed account of a  
4           client of an investment adviser;

5           “(4) the term ‘registrant’ means an issuer of  
6           covered securities;

7           “(5) the term ‘routine matter’ does not in-  
8           clude—

9           “(A) a proposal that is not submitted to a  
10          holder of covered securities by means of a proxy  
11          statement comparable to that described in sec-  
12          tion 240.14a–101 of title 17, Code of Federal  
13          Regulations, or any successor regulation;

14          “(B) a proposal that is—

15               “(i) the subject of a counter-solicita-  
16               tion; or

17               “(ii) part of a proposal made by a  
18               person other than the applicable registrant;

19          “(C) a proposal that relates to a merger or  
20          consolidation, except when, with respect to a  
21          registrant—

22               “(i) the proposal is to merge with a  
23               wholly owned subsidiary of the registrant;  
24               and

1                   “(ii) holders of covered securities  
2                   issued by the registrant that dissent to the  
3                   proposal do not have rights of appraisal;

4                   “(D) a proposal that relates to the sale,  
5                   lease, or exchange of all, or substantially all, of  
6                   the property and assets of a registrant;

7                   “(E) an election for directors (or com-  
8                   parable positions); or

9                   “(F) any other matter determined by the  
10                  Commission or an exchange registered under  
11                  section 6 of the Securities Exchange Act of  
12                  1934 (15 U.S.C. 78f) to be not routine; and

13                 “(6) the term ‘voting person’ means a person  
14                 that provides voting instructions under subsection  
15                 (b) or (c).

16                 “(b) REQUIREMENT.—

17                 “(1) IN GENERAL.—Subject to subsection (g), if  
18                 an investment adviser holds authority to vote a  
19                 proxy solicited pursuant to section 14 of the Securi-  
20                 ties Exchange Act of 1934 (15 U.S.C. 78n) in con-  
21                 nection with any vote of covered securities held by  
22                 a passively managed fund, and the voting authority  
23                 held by that investment adviser with respect to those  
24                 covered securities (when combined with the voting  
25                 authority of other persons controlled by, or under

1 common control with, that investment adviser) is  
2 more than 1 percent of the voting authority of the  
3 outstanding securities of the registrant subject to  
4 the vote, the investment adviser shall vote propor-  
5 tionate amounts of those covered securities in ac-  
6 cordance with the voting instructions of—

7 “(A) in the case of a passively managed  
8 fund that issues securities, persons holding se-  
9 curities in the passively managed fund, such  
10 that, solely for the purposes of that vote, the  
11 percentage of securities held by such a person  
12 shall be deemed to be the percentage of the cov-  
13 ered securities beneficially owned by that per-  
14 son; and

15 “(B) in all cases other than a case de-  
16 scribed in subparagraph (A), persons holding  
17 economic interests in the passively managed  
18 fund, such that, solely for purposes of that vote,  
19 the percentage of economic interests held by  
20 such a person shall be deemed to be the per-  
21 centage of the covered securities beneficially  
22 owned by that person.

23 “(2) PROHIBITION.—If paragraph (1) applies  
24 with respect to any vote of covered securities and the  
25 investment adviser to which that paragraph applies

1 does not receiving voting instructions from all per-  
2 sons described in subparagraphs (A) and (B) of that  
3 paragraph, the investment adviser may not vote the  
4 proportion of the shares of the covered securities for  
5 which the investment adviser does not receive voting  
6 instructions.

7 “(c) PASSIVELY MANAGED FUND AS SECURITY  
8 HOLDER OF ANOTHER PASSIVELY MANAGED FUND.—If  
9 a passively managed fund (referred to in this subsection  
10 as the ‘holding fund’) holds securities of another passively  
11 managed fund (referred to in this subsection as the ‘held  
12 fund’), and there is a vote with respect to covered securi-  
13 ties held by the held fund, the investment adviser of the  
14 holding fund shall obtain voting instructions from persons  
15 holding securities in the holding fund, or to persons hold-  
16 ing economic interests in the holding fund, as applicable,  
17 with respect to that vote in the manner described in sub-  
18 section (b).

19 “(d) PROHIBITIONS.—

20 “(1) REIMBURSEMENT.—No person may seek  
21 reimbursement from a registrant, or require any ex-  
22 penses incurred to be paid by a registrant, with re-  
23 spect to the obligations imposed under this section.

24 “(2) PARTIAL COMPLIANCE.—An investment  
25 adviser may not solicit voting instructions from

1 some, but not all, voting persons under subsection  
2 (b)(1) or (c), as applicable.

3 “(e) EXCEPTIONS.—

4 “(1) VOTING ON ROUTINE MATTERS.—Notwith-  
5 standing subsections (b)(1), (b)(2), and (d)(2), if an  
6 investment adviser chooses not to solicit voting in-  
7 structions with respect to a vote described in sub-  
8 section (b)(1) or (c), or, as of the date that is 10  
9 days before such a vote, the investment adviser has  
10 not received voting instructions from a person de-  
11 scribed in subparagraph (A) or (B) of subsection  
12 (b)(1) or subsection (c), as applicable, the invest-  
13 ment adviser may vote the covered securities for  
14 which the investment adviser has not received voting  
15 instructions with respect to a routine matter.

16 “(2) MIRROR VOTING EXCEPTION FOR MATTERS  
17 REQUIRING APPROVAL OF A MAJORITY OF OUT-  
18 STANDING SECURITIES.—Notwithstanding sub-  
19 sections (b)(1), (b)(2), and (d)(2), if a matter to be  
20 considered at a meeting of a registrant requires the  
21 approval of a majority of the outstanding securities  
22 of the registrant entitled to vote on the matter, an  
23 investment adviser to which any such provision ap-  
24 plies may, with respect to any covered securities for  
25 which voting instructions have not been received, as

1 of the date that is 10 days before that vote, vote the  
2 uninstructed covered securities in a manner that is  
3 proportionate to the votes submitted on the matter  
4 by all other security holders of the registrant.

5 “(f) DISSEMINATION OF INFORMATION.—

6 “(1) IN GENERAL.—Any investment adviser  
7 subject to the requirements of subsection (b) or (c)  
8 shall, with respect to the dissemination of informa-  
9 tion and other materials to a voting person, comply  
10 with the following requirements, unless the voting  
11 person affirmatively declines to receive that informa-  
12 tion and other materials:

13 “(A) Provide to the voting person—

14 “(i) a proxy statement, other proxy  
15 soliciting material, or an information state-  
16 ment;

17 “(ii) an annual report from the appli-  
18 cable registrant;

19 “(iii) a form of voting instruction to  
20 return to the investment adviser; and

21 “(iv) any control or identification  
22 number that the voting person needs to re-  
23 turn to the investment adviser the voting  
24 instruction provided under subparagraph  
25 (B).

1           “(B) Provide the voting person with not  
2           less than 5 business days after the date on  
3           which the voting person receives the materials  
4           provided under paragraph (1) to return those  
5           materials to the investment adviser.

6           “(2) ELECTRONIC DELIVERY.—All, or any por-  
7           tion, of the materials that an investment adviser is  
8           required to provide under paragraph (1)(A) may be  
9           provided electronically, including an internet web  
10          site address provided by the applicable registrant or  
11          a third party.

12          “(3) OPTION FOR INVESTMENT ADVISERS.—An  
13          investment adviser may provide recommendations to  
14          voting persons with the material provided under  
15          paragraph (1)(A), or after providing the material  
16          under that paragraph, if the investment adviser per-  
17          mits voting recommendations to be provided to vot-  
18          ing persons by third parties on a nondiscriminatory  
19          basis and on a wide range of views.

20          “(4) SATISFACTION OF REQUIREMENTS BY PAS-  
21          SIVELY MANAGED FUND.—With respect to any re-  
22          quirement applicable to an investment adviser under  
23          this subsection, the requirement may be satisfied by  
24          the applicable passively managed fund, which may

1 cover any expenses, direct or indirect, incurred in  
 2 carrying out that requirement.

3 “(g) SAFE HARBOR AND RULE OF CONSTRUCTION  
 4 REGARDING DUTIES.—An investment adviser—

5 “(1) with respect to a matter that is not a rou-  
 6 tine matter, may choose not to solicit voting instruc-  
 7 tions from any person under subsection (b)(1) or (c),  
 8 subject to subsections (d)(2) and (e); and

9 “(2) if the investment adviser chooses not to so-  
 10 licit voting instructions under subparagraph (A),  
 11 shall not be considered to be in violation of any duty  
 12 under any Federal or State law for failing to vote  
 13 the applicable securities.”.

14 (b) EFFECTIVE DATE.—Section 208A of the Invest-  
 15 ment Advisers Act of 1940, as added by subsection (a),  
 16 shall take effect on the first August 1 that occurs after  
 17 the date that is 2 years after the date of enactment of  
 18 this Act.

19 **SEC. 3. VOTING INSTRUCTIONS FROM CUSTOMERS.**

20 Section 14(b)(1) of the Securities Exchange Act of  
 21 1934 (15 U.S.C. 78n(b)(1)) is amended by inserting “vot-  
 22 ing instruction,” after “consent,”.

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