

118TH CONGRESS
1ST SESSION

S. 2282

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, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 12, 2023

Mr. COTTON (for himself, Mr. BRAUN, Mr. BUDD, Mr. RISCH, Mrs. BLACKBURN, Mr. CRAMER, and Mr. SCOTT of Florida) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

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, 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 “Ensuring Sound Guid-
5 ance Act”.

1 **SEC. 2. DEFINITIONS.**

2 In this Act:

3 (1) **COMMISSION.**—The term “Commission”
4 means the Securities and Exchange Commission.

5 (2) **MUNICIPAL SECURITIES.**—The term “mu-
6 nicipal securities” has the meaning given the term in
7 section 3(a) of the Securities Exchange Act of 1934
8 (15 U.S.C. 78c(a)).

9 **SEC. 3. INVESTMENT ADVISORS ACT OF 1940 AMENDMENT.**

10 (a) **IN GENERAL.**—Section 211(g) of the Investment
11 Advisers Act of 1940 (15 U.S.C. 80b–11(g)) is amended—

12 (1) by redesignating paragraph (2) as para-
13 graph (3); and

14 (2) by inserting after paragraph (1) the fol-
15 lowing:

16 “(2) **BEST INTEREST BASED ON PECUNIARY**
17 **FACTORS.**—

18 “(A) **DEFINITION.**—In this paragraph, the
19 term ‘pecuniary factor’ has the meaning given
20 the term in paragraph (3) of section 404(a) of
21 the Employment Retirement Income Security
22 Act of 1974 (29 U.S.C. 1104(a)).

23 “(B) **DETERMINATION.**—For purposes of
24 paragraph (1), the best interest of a customer
25 shall be determined using pecuniary factors,
26 which may not be subordinated to or limited by

1 non-pecuniary factors, unless the customer pro-
2 vides informed consent, in writing, that such
3 non-pecuniary factors be so considered.

4 “(C) DISCLOSURE OF PECUNIARY FAC-
5 TORS.—If a customer provides a broker, dealer,
6 or investment adviser with the informed consent
7 to consider non-pecuniary factors described in
8 subparagraph (B), the broker, dealer, or invest-
9 ment adviser shall also—

10 “(i) disclose the expected pecuniary
11 effects to the customer over a time period
12 selected by the customer and not to exceed
13 3 years; and

14 “(ii) at the end of the time period de-
15 scribed in clause (i), disclose, by compari-
16 son to a reasonably comparable index or
17 basket of securities selected by the cus-
18 tomer, the actual pecuniary effects of that
19 time period, including all fees, costs, and
20 other expenses incurred to so consider non-
21 pecuniary factors.”.

22 (b) RULEMAKING.—Not later than 1 year after the
23 date of enactment of this Act, the Commission shall revise
24 or issue such rules as may be necessary to implement the
25 amendment made by subsection (a).

1 (c) EFFECTIVE DATE.—The amendment made by
2 subsection (a) shall apply to actions taken by a broker,
3 dealer, or investment adviser on or after the date that is
4 1 year after the date of enactment of this Act.

5 **SEC. 4. EMPLOYEE RETIREMENT INCOME SECURITY ACT**
6 **OF 1974 AMENDMENT.**

7 (a) IN GENERAL.—Section 404(a) of the Employee
8 Retirement Income Security Act of 1974 (29 U.S.C.
9 1104(a)) is amended by adding at the end the following:

10 “(3) INTEREST BASED ON PECUNIARY FACTORS.—

11 “(A) IN GENERAL.—For purposes of paragraph
12 (1), a fiduciary of a plan shall be considered to act
13 solely in the interest of the participants and bene-
14 ficiaries of the plan with respect to an investment or
15 investment course of action only if the fiduciary’s ac-
16 tion with respect to such investment or investment
17 course of action is based, except as provided in sub-
18 paragraph (B), only on pecuniary factors. The
19 weight given to any such pecuniary factors by a fi-
20 duciary shall appropriately reflect a prudent assess-
21 ment of the impact of such factor on the risk and
22 return of the investment or investment course of ac-
23 tion. The duties under paragraph (1) shall include
24 the duty to not subordinate the interests of the par-
25 ticipants and beneficiaries in retirement income or

1 financial benefits under a plan to other objectives
2 and the duty to not sacrifice investment return or
3 take on additional investment risk to promote non-
4 pecuniary benefits or goals.

5 “(B) USE OF NON-PECUNIARY FACTORS FOR
6 INVESTMENT ALTERNATIVES.—Notwithstanding
7 paragraph (A), if a fiduciary is unable to distinguish
8 between or among investment alternatives or invest-
9 ment courses of action on the basis of pecuniary fac-
10 tors alone, the fiduciary may use non-pecuniary fac-
11 tors as the deciding factor in the selection or reten-
12 tion of an investment if the fiduciary documents—

13 “(i) why pecuniary factors were not suffi-
14 cient to select or retain a plan investment or in-
15 vestment course of action;

16 “(ii) how the selected investment compares
17 to the alternative investments with regard to
18 the composition of the portfolio with regard to
19 diversification, the liquidity and current return
20 of the portfolio relative to the anticipated cash
21 flow requirements of the plan, and the projected
22 return of the portfolio relative to the funding
23 objectives of the plan; and

24 “(iii) how the selected non-pecuniary factor
25 is consistent with the interests of the partici-

1 pants and beneficiaries in their retirement in-
 2 come or financial benefits under the plan.

3 “(C) INVESTMENT ALTERNATIVES FOR PARTICI-
 4 PANT-DIRECTED INDIVIDUAL ACCOUNT PLANS.—The
 5 consideration, selection, or retention by a fiduciary
 6 of an investment option for a pension plan described
 7 in subsection (c)(1)(A) that promotes, seeks, or sup-
 8 ports a non-pecuniary benefit or goal shall not con-
 9 stitute a breach of fiduciary duties under paragraph
 10 (1) if—

11 “(i) the fiduciary satisfies the requirements
 12 of subparagraph (A) and paragraph (1) in se-
 13 lecting, considering, or retaining any such in-
 14 vestment option; and

15 “(ii) in the case of such an investment op-
 16 tion in which the investment objectives or goals
 17 or principal investment strategy of the invest-
 18 ment option include, consider, or indicate the
 19 use of a non-pecuniary factor, such investment
 20 option is not selected or retained as, or included
 21 as a component of, a default investment under
 22 subsection (c)(5) (or any other default invest-
 23 ment alternative).

24 “(D) PECUNIARY FACTOR DEFINED.—For the
 25 purposes of this paragraph, the term ‘pecuniary fac-

1 tor' means a factor that a fiduciary prudently deter-
 2 mines is expected to have a material effect on the
 3 risk or return of an investment based on appropriate
 4 investment horizons consistent with the plan's in-
 5 vestment objectives and the funding policy estab-
 6 lished pursuant to section 402(b)(1).”.

7 (b) EFFECTIVE DATE.—The amendments made by
 8 this section shall apply to actions taken by a fiduciary on
 9 or after the date that is 12 months after the date of enact-
 10 ment of this Act.

11 **SEC. 5. STUDY OF STATE AND LOCAL PENSION PLANS.**

12 (a) STUDY.—The Comptroller General of the United
 13 States shall conduct a study on the potential impact of
 14 underfunded State and local pension plans on the Federal
 15 Government, including—

16 (1) the extent to which such pension plans sub-
 17 ordinate the pecuniary interests of participants and
 18 beneficiaries to environmental, social, governance, or
 19 other objectives; and

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

1 (b) REPORT.—Not later than 12 months after the
 2 date of enactment of this Act, the Comptroller General
 3 submit to Congress a report containing the results of the
 4 study.

5 **SEC. 6. STUDY ON CLIMATE CHANGE AND OTHER ENVIRON-**
 6 **MENTAL DISCLOSURES IN MUNICIPAL BOND**
 7 **MARKET.**

8 (a) IN GENERAL.—The Commission shall solicit pub-
 9 lic comment and thereafter conduct a study to determine
 10 the extent to which issuers of municipal securities make
 11 disclosures to investors regarding climate change and
 12 other environmental matters (referred to in this section
 13 as “covered disclosures”).

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

- 16 (1) the frequency of covered disclosures;
- 17 (2) whether covered disclosures made by issuers
 18 of municipal securities in connection with offerings
 19 of securities align with covered disclosures made by
 20 issuers of municipal securities in other contexts or to
 21 other audiences other than investors;
- 22 (3) any voluntary or mandatory disclosure
 23 standards observed by issuers of municipal securities
 24 in the course of making covered disclosures; and

1 (4) the degree to which investors consider cov-
2 ered disclosures in connection with making an in-
3 vestment decision.

4 (c) REPORT.—

5 (1) IN GENERAL.—Not later than 1 year after
6 the date of enactment of this Act, the Commission
7 shall submit to the Committee on Banking, Housing,
8 and Urban Affairs of the Senate and the Committee
9 on Financial Services of the House of Representa-
10 tives a report on the study required under this sec-
11 tion.

12 (2) CONTENTS.—The report required under
13 paragraph (1) shall include—

14 (A) a detailed discussion of—

15 (i) the financial risks to investors
16 from investments in municipal securities;
17 and

18 (ii) whether the risks described in
19 clause (i) are being adequately disclosed;
20 and

21 (B) a discussion of regulatory or legislative
22 steps that are recommended, or that may be
23 necessary, to address any concerns identified in
24 the study required under this section.

1 **SEC. 7. STUDY ON SOLICITATION OF MUNICIPAL SECURI-**
2 **TIES BUSINESS.**

3 (a) DEFINITION.—In this section, the term “covered
4 rules” means—

5 (1) Rule G–38 of the Municipal Securities Rule-
6 making Board; and

7 (2) section 275.206(4)–5 of title 17, Code of
8 Federal Regulations, or any successor regulation.

9 (b) STUDY.—The Commission shall solicit public
10 comment and thereafter conduct a study to determine the
11 effectiveness of the covered rules in preventing the pay-
12 ment of funds to elected officials or candidates for elected
13 office in exchange for the receipt of government business
14 in connection with the offer or sale of municipal securities.

15 (c) CONTENTS.—The study under subsection (b)
16 shall consider and analyze, among other things—

17 (1) whether the covered rules have had their in-
18 tended effects and any unintended adverse effects;

19 (2) the frequency and scope of enforcement ac-
20 tions undertaken under the covered rules;

21 (3) the degree to which persons subject to the
22 covered rules have put in place policies and proce-
23 dures intended to ensure compliance with the cov-
24 ered rules;

1 (4) the degree to which State and Federal regu-
2 lations, other than the covered rules, impact the so-
3 licitation of municipal securities business; and

4 (5) the degree to which persons subject to the
5 covered rules are disadvantaged from participating
6 in the political process, both as a general matter and
7 relative to persons that solicit or receive government
8 business or government licenses, permits, and ap-
9 provals other than in connection with the offer or
10 sale of municipal securities.

11 (d) REPORT.—

12 (1) IN GENERAL.—Not later than 1 year after
13 the date of enactment of this Act, the Commission
14 shall submit to the Committee on Banking, Housing,
15 and Urban Affairs of the Senate and the Committee
16 on Financial Services of the House of Representa-
17 tives a report on the study required under this sec-
18 tion.

19 (2) CONTENTS.—The report required under
20 paragraph (1) shall include—

21 (A) a discussion of the extent to which per-
22 sons affiliated with small businesses, and per-
23 sons affiliated with minority- and women-
24 opened businesses, have been affected by the
25 covered rules; and

1 (B) a discussion of regulatory or legislative
2 steps that are recommended, or that may be
3 necessary, to address any concerns identified in
4 the study required under this section.

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