

118TH CONGRESS
2D SESSION

S. _____

To amend the Employee Retirement Income Security Act of 1974 to clarify the criteria by which fiduciary responsibility is exercised in protecting shareholder rights.

IN THE SENATE OF THE UNITED STATES

_____ introduced the following bill; which was read twice
and referred to the Committee on _____

A BILL

To amend the Employee Retirement Income Security Act of 1974 to clarify the criteria by which fiduciary responsibility is exercised in protecting shareholder rights.

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 “Restoring Integrity
5 in Fiduciary Duty Act”.

6 **SEC. 2. EXERCISE OF FIDUCIARY DUTY.**

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:

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

3 “(A) IN GENERAL.—For the purposes of
4 paragraph (1), a fiduciary—

5 “(i) may evaluate an investment or in-
6 vestment course of action based only on
7 pecuniary factors, except as provided in
8 subparagraph (B);

9 “(ii) may not subordinate the inter-
10 ests of the participants and beneficiaries in
11 their retirement income or financial bene-
12 fits under the plan to other objectives;

13 “(iii) may not sacrifice investment re-
14 turn or take on additional investment risk
15 to promote nonpecuniary benefits or goals;

16 “(iv) shall weight each pecuniary fac-
17 tor in a manner that appropriately reflects
18 a prudent assessment of the impact of the
19 factor on risk and return.

20 “(B) USE OF NONPECUNIARY FACTORS
21 FOR INVESTMENT ALTERNATIVES.—Notwith-
22 standing subparagraph (A), when choosing be-
23 tween or among investment alternatives, if a fi-
24 duciary is unable to distinguish between or
25 among investment alternatives or investment

1 courses of action on the basis of pecuniary fac-
2 tors alone, the fiduciary shall use the capita aut
3 navia standard as the deciding factor in the in-
4 vestment decision, provided that—

5 “(i) the fiduciary documents detail—

6 “(I) why pecuniary factors were
7 not sufficient to select the investment
8 or investment course of action;

9 “(II) how the selected investment
10 compares to the alternative invest-
11 ments with regard to the composition
12 of the portfolio with regard to diver-
13 sification, the liquidity, current return
14 of the portfolio relative to the antici-
15 pated cash flow requirements of the
16 plan, and the projected return of the
17 portfolio relative to the funding objec-
18 tives of the plan; and

19 “(III) how the selected invest-
20 ment is consistent with the interests
21 of the participants and beneficiaries in
22 their retirement income or financial
23 benefits under the plan; and

24 “(ii) the fiduciary demonstrates that
25 it did not expend any resources during the

1 investment course of action on nonpecu-
2 niary factors that place weight between or
3 among investment alternatives for the pur-
4 pose of the investment decision.

5 “(C) INVESTMENT ALTERNATIVES FOR
6 PARTICIPANT-DIRECTED INDIVIDUAL ACCOUNT
7 PLANS.—In selecting or retaining investment
8 options for a pension plan described in sub-
9 section (c)(1)(A), a fiduciary may consider, se-
10 lect, or retain an investment option on the basis
11 that such investment option promotes, seeks, or
12 supports 1 or more nonpecuniary benefits or
13 goals, only if—

14 “(i) the fiduciary satisfies the require-
15 ments of paragraph (1) and subparagraphs
16 (A) and (B) of this paragraph in selecting
17 or retaining any such investment option;
18 and

19 “(ii) such investment option is not
20 added or retained as, or included as a com-
21 ponent of, a default investment described
22 in subsection (c)(5) (or any other default
23 investment alternative).

24 “(D) DEFINITIONS.—For the purposes of
25 this paragraph:

1 “(i) CAPITA AUT NAVIA.—The term
2 ‘capita aut navia’ means a standard by
3 which a fiduciary chooses at random be-
4 tween or among investment alternatives
5 where pecuniary factors are equal and does
6 not give added weight to 1 investment or
7 another, provided that the investment al-
8 ternatives have identical risk and return
9 attributes and choosing among the invest-
10 ment alternatives would have compara-
11 tively negligible impact, not considering li-
12 quidity constraints or transaction costs.

13 “(ii) INVESTMENT COURSE OF AC-
14 TION.—The term ‘investment course of ac-
15 tion’ means any series or program of in-
16 vestments or actions related to a fidu-
17 ciary’s performance of the fiduciary’s in-
18 vestment duties, and includes the selection
19 of an investment fund as a plan invest-
20 ment, or in the case of a plan described in
21 subsection (c)(1)(A), a designated invest-
22 ment alternative under the plan.

23 “(iii) MATERIAL.—The term ‘mate-
24 rial,’ when used to qualify a financial risk
25 or financial return—

1 “(I) means a financial risk or fi-
2 nancial return in which there is a sub-
3 stantial likelihood that a reasonable
4 investor would attach importance
5 when—

6 “(aa) evaluating the poten-
7 tial financial risks or returns of
8 an existing or prospective invest-
9 ment; or

10 “(bb) exercising, or declining
11 to exercise, any rights with re-
12 spect to securities; and

13 “(II) does not include furthering
14 nonpecuniary, environmental, social,
15 political, ideological, or other goals or
16 objectives.

17 “(iv) PECUNIARY FACTOR.—The term
18 ‘pecuniary factor’ means a factor that a fi-
19 duciary prudently determines is expected
20 to have a material effect on the risk or re-
21 turn of an investment based on appro-
22 priate investment horizons consistent with
23 the plan’s investment objectives and the
24 funding policy established pursuant to sec-
25 tion 402(b)(1).”.

1 (b) **EFFECTIVE DATE.**—The amendments made by
2 this section shall apply to actions taken by a fiduciary on
3 or after the date that is 1 year after the date of enactment
4 of this Act.