

118TH CONGRESS  
1ST SESSION

# S. 1637

To provide for nonpreemption of measures by State and local governments to divest from entities that engage in certain boycott, divestment, or sanctions activities targeting Israel or persons doing business in Israel or Israeli-controlled territories, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

MAY 17, 2023

Mr. RUBIO (for himself, Mr. CASSIDY, Mr. BRAUN, Mr. SCOTT of Florida, Mr. DAINES, and Mr. HAGERTY) 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 provide for nonpreemption of measures by State and local governments to divest from entities that engage in certain boycott, divestment, or sanctions activities targeting Israel or persons doing business in Israel or Israeli-controlled territories, 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 “Combating BDS Act  
5 of 2023”.

1 **SEC. 2. NONPREEMPTION OF MEASURES BY STATE AND**  
 2 **LOCAL GOVERNMENTS TO DIVEST FROM EN-**  
 3 **TITIES THAT ENGAGE IN CERTAIN BOYCOTT,**  
 4 **DIVESTMENT, OR SANCTIONS ACTIVITIES**  
 5 **TARGETING ISRAEL OR PERSONS DOING**  
 6 **BUSINESS IN ISRAEL OR ISRAELI-CON-**  
 7 **TROLLED TERRITORIES.**

8 (a) STATE AND LOCAL MEASURES.—Notwith-  
 9 standing any other provision of law, a State or local gov-  
 10 ernment may adopt and enforce measures that meet the  
 11 requirements of subsection (c) to divest the assets of the  
 12 State or local government from, prohibit investment of the  
 13 assets of the State or local government in, or restrict con-  
 14 tracting by the State or local government for goods and  
 15 services with—

16 (1) an entity that the State or local government  
 17 determines, using credible information available to  
 18 the public, knowingly engages in an activity de-  
 19 scribed in subsection (b);

20 (2) a successor entity or subunit of an entity  
 21 described in paragraph (1); or

22 (3) an entity that owns or controls or is owned  
 23 or controlled by an entity described in paragraph  
 24 (1).

25 (b) ACTIVITIES DESCRIBED.—An activity described  
 26 in this subsection is a commerce-related or investment-re-

1 lated boycott, divestment, or sanctions activity in the  
2 course of interstate or international commerce that is in-  
3 tended to penalize, inflict economic harm on, or otherwise  
4 limit commercial relations with Israel or persons doing  
5 business in Israel or Israeli-controlled territories for pur-  
6 poses of coercing political action by, or imposing policy  
7 positions on, the Government of Israel.

8 (c) REQUIREMENTS.—A State or local government  
9 that seeks to adopt or enforce a measure under subsection  
10 (a) shall meet the following requirements:

11 (1) NOTICE.—The State or local government  
12 shall provide written notice—

13 (A) in the case of a measure relating to di-  
14 vestment or investment, to each entity to which  
15 the measure is to be applied; and

16 (B) in the case of a measure relating to  
17 contracting, of the restrictions imposed by the  
18 measure to each prospective contractor before  
19 entering into a contract.

20 (2) TIMING.—A measure relating to divestment  
21 or investment shall apply to an entity not earlier  
22 than the date that is 90 days after the date on  
23 which written notice is provided to the entity under  
24 paragraph (1).

1           (3) OPPORTUNITY FOR COMMENT.—In the case  
2 of a measure relating to divestment or investment,  
3 the State or local government shall provide an op-  
4 portunity to comment in writing to each entity to  
5 which the measure is to be applied. If the entity  
6 demonstrates to the State or local government that  
7 neither the entity nor any entity related to the entity  
8 as described in paragraph (2) or (3) of subsection  
9 (a) has knowingly engaged in an activity described  
10 in subsection (b), the measure shall not apply to the  
11 entity.

12           (4) DISCLOSURE IN CONTRACTING MEAS-  
13 URES.—The State or local government may require,  
14 in a measure relating to contracting, that a prospec-  
15 tive contractor disclose whether the prospective con-  
16 tractor or any entity related to the prospective con-  
17 tractor as described in paragraph (2) or (3) of sub-  
18 section (a) knowingly engages in any activity de-  
19 scribed in subsection (b) before entering into a con-  
20 tract.

21           (5) SENSE OF CONGRESS ON AVOIDING ERRO-  
22 NEOUS TARGETING.—It is the sense of Congress  
23 that a State or local government should not adopt  
24 a measure under subsection (a) with respect to an  
25 entity unless the State or local government has

1       made every effort to avoid erroneously targeting the  
2       entity and has verified that the entity engages in an  
3       activity described in subsection (b).

4       (d) NOTICE TO DEPARTMENT OF JUSTICE.—

5           (1) IN GENERAL.—Except as provided in para-  
6       graph (2), not later than 30 days after adopting a  
7       measure described in subsection (a), the State or  
8       local government that adopted the measure shall  
9       submit written notice to the Attorney General de-  
10      scribing the measure.

11          (2) EXISTING MEASURES.—With respect to  
12      measures described in subsection (a) adopted before  
13      the date of the enactment of this Act, the State or  
14      local government that adopted the measure shall  
15      submit written notice to the Attorney General de-  
16      scribing the measure not later than 30 days after  
17      the date of the enactment of this Act.

18      (e) NONPREEMPTION.—A measure of a State or local  
19      government that is consistent with subsection (a) is not  
20      preempted by any Federal law.

21      (f) PRIOR ENACTED MEASURES.—

22          (1) IN GENERAL.—Notwithstanding any other  
23      provision of this section or any other provision of  
24      law, and except as provided in paragraph (2), a  
25      State or local government may enforce a measure

1 described in subsection (a) adopted by the State or  
2 local government before the date of the enactment of  
3 this Act without regard to the requirements of sub-  
4 section (c).

5 (2) APPLICATION OF NOTICE AND OPPOR-  
6 TUNITY FOR COMMENT.—Enforcement of a measure  
7 described in paragraph (1) shall be subject to the re-  
8 quirements of subsection (c) on and after the date  
9 that is 2 years after the date of the enactment of  
10 this Act.

11 (g) RULES OF CONSTRUCTION.—

12 (1) AUTHORITY OF STATES.—Nothing in this  
13 section shall be construed to abridge the authority of  
14 a State to issue and enforce rules governing the  
15 safety, soundness, and solvency of a financial insti-  
16 tution subject to its jurisdiction or the business of  
17 insurance pursuant to the Act of March 9, 1945 (59  
18 Stat. 33, chapter 20; 15 U.S.C. 1011 et seq.) (com-  
19 monly known as the “McCarran-Ferguson Act”).

20 (2) POLICY OF THE UNITED STATES.—Nothing  
21 in this section shall be construed to alter the estab-  
22 lished policy of the United States concerning final  
23 status issues associated with the Palestinian-Israeli  
24 conflict, including border delineation, that can only

1 be resolved through direct negotiations between the  
2 parties.

3 (h) DEFINITIONS.—In this section:

4 (1) ASSETS.—

5 (A) IN GENERAL.—Except as provided in  
6 subparagraph (B), the term “assets” means  
7 any pension, retirement, annuity, or endowment  
8 fund, or similar instrument, that is controlled  
9 by a State or local government.

10 (B) EXCEPTION.—The term “assets” does  
11 not include employee benefit plans covered by  
12 title I of the Employee Retirement Income Se-  
13 curity Act of 1974 (29 U.S.C. 1001 et seq.).

14 (2) ENTITY.—The term “entity” includes—

15 (A) any corporation, company, business as-  
16 sociation, partnership, or trust; and

17 (B) any governmental entity or instrumen-  
18 tality of a government, including a multilateral  
19 development institution (as defined in section  
20 1701(c)(3) of the International Financial Insti-  
21 tutions Act (22 U.S.C. 262r(c)(3))).

22 (3) INVESTMENT.—The term “investment” in-  
23 cludes—

24 (A) a commitment or contribution of funds  
25 or property;

1 (B) a loan or other extension of credit; and

2 (C) the entry into or renewal of a contract  
3 for goods or services.

4 (4) KNOWINGLY.—The term “knowingly”, with  
5 respect to conduct, a circumstance, or a result,  
6 means that a person has actual knowledge, or should  
7 have known, of the conduct, the circumstance, or the  
8 result.

9 (5) STATE.—The term “State” means each of  
10 the several States, the District of Columbia, the  
11 Commonwealth of Puerto Rico, the Commonwealth  
12 of the Northern Mariana Islands, American Samoa,  
13 Guam, the United States Virgin Islands, and any  
14 other territory or possession of the United States.

15 (6) STATE OR LOCAL GOVERNMENT.—The term  
16 “State or local government” includes—

17 (A) any State and any agency or instru-  
18 mentality thereof;

19 (B) any local government within a State  
20 and any agency or instrumentality thereof; and

21 (C) any other governmental instrumen-  
22 tality of a State or locality.



1 **SEC. 3. SAFE HARBOR FOR CHANGES OF INVESTMENT**  
2 **POLICIES BY ASSET MANAGERS.**

3 Section 13(c)(1) of the Investment Company Act of  
4 1940 (15 U.S.C. 80a-13(c)(1)) is amended—

5 (1) in subparagraph (A), by striking “; or” and  
6 inserting a semicolon;

7 (2) in subparagraph (B), by striking the period  
8 at the end and inserting “; or”; and

9 (3) by adding at the end the following:

10 “(C) knowingly engage in any activity de-  
11 scribed in section 2(b) of the Combating BDS  
12 Act of 2023.”.

13 **SEC. 4. SENSE OF CONGRESS REGARDING CERTAIN ERISA**  
14 **PLAN INVESTMENTS.**

15 It is the sense of Congress that—

16 (1) a fiduciary of an employee benefit plan, as  
17 defined in section 3(3) of the Employee Retirement  
18 Income Security Act of 1974 (29 U.S.C. 1002(3)),  
19 may divest plan assets from, or avoid investing plan  
20 assets in, any person the fiduciary determines know-  
21 ingly engages in any activity described in section  
22 2(b), if—

23 (A) the fiduciary makes that determination  
24 using credible information that is available to  
25 the public; and

1 (B) the fiduciary prudently determines  
2 that the result of that divestment or avoidance  
3 of investment would not be expected to provide  
4 the employee benefit plan with—

5 (i) a lower rate of return than alter-  
6 native investments with commensurate de-  
7 grees of risk; or

8 (ii) a higher degree of risk than alter-  
9 native investments with commensurate  
10 rates of return; and

11 (2) by divesting assets or avoiding the invest-  
12 ment of assets as described in paragraph (1), the fi-  
13 duciary is not breaching the responsibilities, obliga-  
14 tions, or duties imposed upon the fiduciary by sub-  
15 paragraph (A) or (B) of section 404(a)(1) of the  
16 Employee Retirement Income Security Act of 1974  
17 (29 U.S.C. 1104(a)(1)).

18 **SEC. 5. RULE OF CONSTRUCTION.**

19 Nothing in this Act shall be construed to infringe  
20 upon any right protected under the First Amendment to  
21 the Constitution of the United States.

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