117TH CONGRESS
1ST SESSION

S._____

To amend the Securities Exchange Act of 1934 to require the Securities and Exchange Commission to require the contractual provision by large issuers of procedural privileges with respect to certain shareholder claims relating to board and management accountability for “woke” social policy actions as a condition of listing on a national securities exchange, and for other purposes.

IN THE SENATE OF THE UNITED STATES

Mr. RUBIO introduced the following bill; which was read twice and referred to the Committee on ________________

A BILL

To amend the Securities Exchange Act of 1934 to require the Securities and Exchange Commission to require the contractual provision by large issuers of procedural privileges with respect to certain shareholder claims relating to board and management accountability for “woke” social policy actions as a condition of listing on a national securities exchange, and for other purposes.

Be it enacted by the Senate and House of Representa-

tives of the United States of America in Congress assembled,
SECTION 1. SHORT TITLE.

This Act may be cited as the “Mind Your Own Business Act of 2021”.

SEC. 2. FINDINGS.

Congress finds the following:

(1) The fiduciary duties of boards of directors and other corporate actors to corporations and their stockholders are generally established by and enforceable under State law.

(2) State law generally permits corporations discretion with respect to altering the rights of stockholders, including the process by which stockholders assert claims for breach of fiduciary duties by the board of directors or other corporate actors, limited by State law governing these fiduciary duties.

(3) The regulation of corporations as issuers of securities authorized by Congress in the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) generally regulates corporate behavior in connection with the issuance of securities, including with respect to contractual arrangements between corporations and their stockholders via provisions in corporations’ charters and bylaws, and does not—

(A) establish fiduciary duties of boards of directors or other corporate actors to corpora-
tions and their stockholders under Federal law; or

(B) regulate the fiduciary duties of boards of directors or other corporate actors to corporations and their stockholders under State law.

(4) The State law fiduciary duties of boards of directors and other corporate actors establish certain norms upon which the national market system for securities has historically relied, including—

(A) boards of directors and other corporate actors generally have fiduciary duties to their respective corporations and stockholders; and

(B) the behavior of corporations as issuers of securities will generally conform to these fiduciary duties, to the benefit of the protection of investors and the public interest.

(5) Other norms related to the public interest have historically provided critical bases upon which the national market system for securities has historically relied, including norms that large corporate issuers that are significant to the national economy—

(A) generally invest corporate resources to increase the long-term value of the corporation
as a business rather than as an agent of social change;

(B) do not use corporate resources to advance narrowly political or partisan agendas; and

(C) do not use corporate resources to promote socialism, Marxism, critical race theory, or other un-American ideologies among their workforces or customers;

(6) Though these norms are not enforceable legal duties of boards of directors or other corporate actors under Federal law, they substantially contribute to the commercial purpose and nationwide availability of the national market system for securities, which are recognized by section 2 of the Securities Exchange Act of 1934 (15 U.S.C. 78b) as principal bases for the regulation authorized by that Act.

(7) Certain large corporate issuers that are significant to the national economy have recently undertaken actions which facially violate these norms on account of apparent political bias. Examples of such actions include the use of corporate resources to—

(A) deny goods and services to States and their political subdivisions, and private entities
within such States and their political subdivisions, in response to the social policies proposed or enacted in such States and their political subdivisions, including those related to election procedures, restrictions on abortion, protections for religious freedom, and enforcement of immigration law;

(B) deny goods and services to industries and other classes of entities on the basis of characteristics of those industries and classes related to social policy, including industries involved in the sale or manufacture of firearms, operation of border security or criminal detention facilities, and performance of services for the United States military, and classes of entities based on religious belief or identity; and

(C) promote race and sex stereotyping, such as those described in section 2(a) of Executive Order 13950 (5 U.S.C. 4103 note; relating to combating race and sex stereotyping), which include such destructive concepts that the United States is fundamentally racist or sexist, an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex, and meritocracy
or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race; and

(D) openly coordinate with political actors to pursue such actions, including—

(i) undertaking such actions upon the action (or inaction) of boards of directors and other corporate actors that are not sufficiently independent from conflicts of interest with political actors, including elected officials, political parties, news media, labor unions, nonprofit or non-governmental organizations which advocate for changes political or social policy through issuers, other activists affiliated with such actors, and activist investors which advocate for changes in corporate policy primarily unrelated to the pecuniary interest of the issuer; and

(ii) conceding to the demands of such political actors without undertaking due care.

(8) The prominent, open, and public facial violation of these norms by large corporate issuers that are significant to the national economy undermine
the commercial purpose and nationwide availability
of the national market system for securities by
spending corporate resources on non-commercial and
divisive, political and partisan causes.

(9) The threat these actions pose to the na-
tional market system for securities establishes a
public interest in ensuring large corporate issuers
that are significant to the national economy—

(A) have adequate internal procedural
mechanisms to ensure the accountability of
boards of directors and other corporate actors
with respect to their adherence with the norms
described in this section; and

(B) do not unduly burden the ability of
stockholders to assert claims for breach of fidu-
ciary duty under State law where the actions at
issue in such claims facially violates those
norms.

SEC. 3. LISTING REQUIREMENT RELATING TO PROCE-
DURAL PRIVILEGES FOR CERTAIN SHARE-
HOLDER CLAIMS.

et seq.) is amended by inserting after section 10D (15
U.S.C. 78j–4) the following:
“SEC. 10E. PROCEDURAL PRIVILEGES FOR CERTAIN
SHAREHOLDER CLAIMS.

“(a) DEFINITIONS.—In this section:

“(1) CLAIMANT.—The term ‘claimant’ means—

“(A) a person that brings a covered claim; or

“(B) if a covered claim is brought as a class action, the representative of the class in that action.

“(2) CONTROLLER.—The term ‘controller’ means any person or entity that has control, directly or indirectly, by any means (as those terms are defined under applicable State law), over the board of directors of an issuer, either—

“(A) generally; or

“(B) with respect to an action at issue in a covered claim.

“(3) COVERED CLAIM.—The term ‘covered claim’—

“(A) means any single cause of action that—

“(i) asserts a claim for breach of fiduciary duty owed by any corporate defendant to the applicable issuer (or the shareholders of the applicable issuer) resulting from material action by any covered cor-
porate actor with respect to the applicable issuer—

“(I) that is taken primarily in response to a law (including a regulation) that is enacted by a State, or a bill that is introduced in the legislature of a State or policy otherwise publicly proposed by an elected official of a State, which shall include if such action includes any prohibition of business within that State by an issuer, whether with respect to business services or travel to, or major events in, that State, that is facially unrelated to the pecuniary interest of the applicable issuer, which shall presumptively include if the law bill, or policy would modify, establish, or create a law relating to—

“(aa) the manner in which elections are conducted in the State;

“(bb) protecting religious freedom; or
“(cc) limiting the availability of services that include the abortion of unborn children;

“(II) to prohibit the sale of goods or services by any covered corporate actor with respect to the applicable issuer to customers who operate in an industry with which the issuer engages in such business primarily on the basis of a characteristic of that industry that is facially unrelated to the pecuniary interest of the applicable issuer;

“(III) to promote a covered divisive concept; or

“(IV) for which the reasoning publicly presented by any covered corporate actor with respect to the applicable issuer as—

“(aa) any basis for such action promotes a covered divisive concept; or

“(bb) the primary basis for such action is facially unrelated to the pecuniary interest of the
applicable issuer, which shall presumptively include any reference to diversity, equity, or inclusion with respect to the composition of the workforce, management, or board of directors of the issuer or society in general; and

“(ii) is brought by a covered shareholder as—

“(I) a direct action; or

“(II) a derivative action or proceeding brought on behalf of the applicable issuer; and

“(B) does not include a cause of action that asserts a claim for the breach of fiduciary duty owed by any corporate defendant to the applicable issuer (or the shareholders of that issuer) resulting from—

“(i) a charitable contribution by any covered corporate actor with respect to the applicable issuer;

“(ii) the exercise of religion by any covered corporate actor with respect to the applicable issuer;
“(iii) business activity by any covered corporate actor in connection with the national security of the United States, the Armed Forces, or veterans of the Armed Forces; or

“(iv) the limitation of business by any covered corporate actor with respect to the applicable issuer—

“(I) occurring in the jurisdiction of, or with an agent of the People’s Republic of China, the Russian Federation, North Korea, Iran, Syria, Sudan, Venezuela, or Cuba;

“(II) in connection with preventing the abuse of internationally recognized worker rights, as defined in section 507 of the Trade Act of 1974 (19 U.S.C. 2467);

“(III) with any entity that derives directly or indirectly more than de minimis gross revenue through the sale of products or services, or the presentation of any depictions or displays, of a prurient sexual nature;
“(IV) with any entity that engages in a commerce- or investment-related boycott, divestment, or sanctions activity that targets Israel; or

“(V) that is required under Federal, State, or local law.

“(4) COVERED COMPANY.—The term ‘covered company’ means an issuer that has, as calculated in accordance with section 240.12b–2 of title 17, Code of Federal Regulations, or any successor regulation—

“(A) a public float of more than $20,000,000,000; or

“(B) annual revenues of more than $5,000,000,000.

“(5) COVERED CORPORATE ACTOR.—The term ‘covered corporate actor’ means—

“(A) an issuer;

“(B) a director, officer, or affiliate of an issuer;

“(C) a controller with respect to an issuer; or

“(D) any person acting in the capacity of an officer or agent of an issuer.
“(6) CORPORATE DEFENDANT.—The term ‘corporate defendant’ means any individual who—

“(A) is a director, officer, affiliate of an issuer, or controller; and

“(B) may be named as a defendant in a cause of action for breach of fiduciary duty under applicable State law.

“(7) COVERED DIVISIVE CONCEPT.—The term ‘covered divisive concept’ means any concept described in section 2(a) of Executive Order 13950 (5 U.S.C. 4103 note; relating to combating race and sex stereotyping).

“(8) COVERED SHAREHOLDER.—

“(A) IN GENERAL.—The term ‘covered shareholder’ means a shareholder that as of the date on which a covered claim with respect to the issuer is filed and at all times during which the covered claim described in subparagraph (A) is pending have continuously owned not less than—

“(i) $2,000 in market value of the issuer’s securities for at least three years; or

“(ii) $15,000 in market value of the issuer’s securities for at least two years; or
“(iii) $25,000 in market value of the issuer’s securities for at least one year;

“(9) DIRECTOR.—The term ‘director’ means, with respect to an issuer, a member of the board of directors of the issuer.

“(10) INVESTMENT ADVISER; PRIVATE FUND.—The terms ‘investment adviser’ and ‘private fund’ have the meanings given the terms in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2).

“(11) INVESTMENT COMPANY.—The term ‘investment company’ has the meaning given the term in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3).

“(12) ISSUER.—The term ‘issuer’ means an issuer with a class of securities registered pursuant to section 12.

“(13) NON-PECUNIARY INVESTMENT ENTITY.—The term ‘non-pecuniary investment entity’ means—

“(A) any investment company or private fund that invests, reinvests, or trades, or proposes to invest, reinvest, or trade in, or that exercises any control right with respect to any security primarily on a basis that is facially unrelated to the pecuniary interest of any bene-
ficiary of such company or fund for which such activity occurs with respect to such security;

“(B) any investment advisor that provides any advice that is not a charitable contribu-
tion—

“(i) that is for compensation; and

“(ii) the basis for which is primarily unrelated to the pecuniary interest of the party receiving the advice;

“(C) any entity that engages in activism with respect to issuers to which section 14 ap-
plies for which the primary basis of such activ-
ism is facially unrelated to the pecuniary inter-
est of the issuers to which such activism is di-
rected, including—

“(i) nominating candidates for elec-
tion as directors of those issuers; or

“(ii) making shareholder proposals pursuant to that section; and

“(D) any labor organization, as defined in section 2 of the National Labor Relations Act (29 U.S.C. 152), or pension fund affiliated with a labor organization.

“(b) REQUIREMENTS.—
“(1) Rules.—Not later than 1 year after the date of enactment of the Mind Your Own Business Act of 2021, the Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of any covered company that is not in compliance with the requirements of this section.

“(2) Issuer Requirements.—The rules issued under paragraph (1) shall require each issuer, to the maximum extent permitted by State law, in the articles of incorporation or bylaws of the issuer, to provide, with respect to any covered claim, that any corporate defendant with respect to the issuer that is named as a defendant in the covered claim shall—

“(A) be bound by the presumptions established under subsection (c) with respect to any factual representation made in connection with the covered claim, including any factual representation relating to whether a claim asserted is a covered claim;

“(B) have the burden of proof with respect to any determination of independent business judgment;

“(C) if the claimant obtains a judgment on the merits in the covered claim, be jointly and
severally liable for money damages to the claimant in an amount that is not less than the greater of—

“(i) treble damages; or
“(ii) 2 times the total compensation paid by the issuer to all directors of the issuer for the year in which the primary action alleged in the covered claim substantially occurred, which shall include the market value of all securities issued as compensation to those directors in that year;
“(D) if the claimant obtains all or some of the relief sought in the covered claim, whether by court order, settlement, voluntary change in the conduct of the defendant, or otherwise, reimburse the claimant for the greatest amount permitted by law with respect to all fees, costs, and expenses of every kind and description (including all reasonable attorney’s fees and other litigation expenses) that the claimant may obtain in connection with the covered claim; and
“(E) not be indemnified by the issuer for any liability, loss (including attorney’s fees, judgments, fines, or amounts paid in settle-
(c) Presumptions.—For the purposes of this section, the following presumptions shall apply with respect to any covered claim, including with respect to any factual representation relating to whether a claim asserted is a covered claim:

“(1) Pecuniary Interest.—There shall be a presumption that the pecuniary interest of an issuer, which shall include the best interest of the issuer to the extent that such interest is substantially similar to the pecuniary interest of the issuer, does not include—

“(A) the morale of, or ability of the issuer to hire or retain, supervisory employees in general;

“(B) the diversity of the board of directors, management, or workforce in general with respect to any characteristic protected by section 703 of the Civil Rights Act of 1964 (42000e–2);

“(C) the public relations, image, value of marketing, or coverage by the news media of the issuer; or
“(D) any financial benefit or reduction in cost, including the cost of capital to the issuer, to the extent the pecuniary benefit of or to such benefit or reduction in cost is caused by the—

“(i) investment in the securities of the issuer by a non-pecuniary investment entity; or

“(ii) inclusion of the securities of the issuer in indexes created by index providers that select those indexes on a primarily non-pecuniary basis or that include such securities in any index on a primarily non-pecuniary basis.

“(2) DEMAND EXCUSED.—For the purpose of determining whether demand is excused with respect to a covered claim, there shall be a presumption that a director is not independent if the director is employed, controlled, or nominated by, or otherwise has a history of affiliation with a non-pecuniary investment entity or any affiliate of a non-pecuniary investment entity.

“(d) RULES OF CONSTRUCTION.—Nothing in this section may be construed—

“(1) to limit the exercise of religion, as defined in section 5 of the Religious Freedom Restoration
Act of 1993 (42 U.S.C. 2000bb–2) of any issuer or any director, officer, or affiliate of an issuer; or

“(2) as establishing a fiduciary duty by any corporate defendant or corporate actor.”.