



Combating BDS Act of 2016

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June 6, 2016

On Monday, June 6 the Senate began consideration of the FY 2017 Defense Authorization bill, **S2943**. Senators are expected to consider nearly 100 amendments to the bill, including an amendment on Boycott, Divestment and Sanctions movement (BDS), entitled “Combating BDS Act.”

The amendment in question, Amendment 4172, is being offered by Senators Mark Kirk (R-Illinois), Joe Manchin (D-West Virginia), Pat Roberts (R-Kansas), Bob Menendez (D-New Jersey), Lisa Murkowski (R-Alaska), Ben Cardin (D-Maryland), Marco Rubio (R-Florida), David Vitter (R-Louisiana), Thom Tillis (R-North Carolina), Ted Cruz (R-Texas), Rob Portman (R-Ohio), Kelly Ayotte (R-New Hampshire), Orrin Hatch (R-Utah) and Bill Nelson (D-Florida).

The amendment is identical to the bill **S2531** introduced by Senator Kirk and 28 cosponsors last February. The amendment authorizes a state or local government to adopt and enforce measures to divest its assets from, or prohibit investment of its assets in: (1) an entity that such government determines, using credible information available to the public, engages in a commerce or investment-related boycott, divestment, or sanctions activity targeting Israel; or (2) an entity that owns or controls, is owned or controlled by, or is under common ownership or control with, such an entity. The state or local government shall provide written notice to any targeted entity before applying such a measure.

These measures by a state or local government are not preempted by any federal law. The bill applies to any measure adopted by a state or local government before, on, or after the date of this Act's enactment.

The amendment amends the Investment Company Act of 1940 to prohibit any person from bringing any civil, criminal, or administrative action against any registered investment company, or any officer or employee thereof, based solely upon such company divesting from, or avoiding investing in, securities issued by persons that such company determines, using credible information available to the public, engage in any commerce or investment-related boycotts, divestments, or sanctions activities targeting Israel. The text of the amendment appears at the end of this document.

It is not yet known when the amendment will be offered or if it will pass. The Senate bill currently has 29 cosponsors, which is about one-quarter of the Senate. The Administration opposes the amendment. If adopted, it is highly unlikely the President would veto the Defense Authorization bill over the BDS amendment. He could, however, issue a signing statement indicating he will not implement the provision. The Administration actually took such action in February when Congress presented the Customs bill, **HR644**, to President Obama for signature



into law, which included a provision regarding countering the BDS movement against Israel. The provision in effect conflates Israel and “Israeli-controlled territories” as one entity. In signing the bill into law, the President issued a statement observing that the provision contradicts longstanding bipartisan United States policy and violates the Executive’s constitutional foreign policy prerogative to conduct diplomacy; therefore the provision would not be implemented.

Text of Amendment:

Appendix I

At the end of title XII, add the following:

Subtitle I--Matters Relating to Israel

SEC. 1281. Short Title

This subtitle may be cited as the “Combating BDS Act of 2016”.

SEC. 1282. Authority of State and Local Governments to Divest from Entities that Engage in Certain Boycott Divestment, or Sanctions Activities Targeting Israel.

(a) *Authority To Divest.*--Notwithstanding any other provision of law, a State or local government may adopt and enforce measures that meet the notice requirement of subsection (b) to divest the assets of the State or local government from, or prohibit investment of the assets of the State or local government in--

(1) An entity that the State or local government determines, using credible information available to the public, engages in a commerce-related or investment-related boycott, divestment, or sanctions activity targeting Israel;

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

(3) an entity that owns or controls, is owned or controlled by, or is under common ownership or control with, an entity described in paragraph (1).

(b) *Notice Requirement.*--

(1) **In General** --A State or local government shall provide written notice to each entity to which a measure taken by the State or local government under subsection (a) is to be applied before applying the measure with respect to the entity.

(2) **Rule of Construction.**--Paragraph (1) shall not be construed to prohibit a State or local government from taking additional steps to provide due process with respect to an entity to which a measure is to be applied under subsection (a).



(c) *Nonpreemption.*--A measure of a State or local government authorized under subsection (a) is not preempted by any Federal law.

(d) *Effective Date.*--This section applies to any measure adopted by a State or local government before, on, or after the date of the enactment of this Act.

(e) *Rule of Construction.*--Nothing in this section shall be construed to abridge the authority of a State to issue and enforce rules governing the safety, soundness, and solvency of a financial institution subject to its jurisdiction or the business of insurance pursuant to the Act of March 9, 1945 (59 Stat. 33, chapter 20; 15 U.S.C. 1011 et seq.) (commonly known as the "McCarran-Ferguson Act").

(f) *Definitions.*--In this section:

(1) **Assets.**--

(A) **In General.**--Except as provided in subparagraph (B), the term "assets" means any pension, retirement, annuity, or endowment fund, or similar instrument, that is controlled by a State or local government.

(B) **Exception.**--The term "assets" does not include employee benefit plans covered by title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.).

(2) **Boycott, Divestment, or Sanctions Activity Targeting Israel.** --The term "boycott, divestment, or sanctions activity targeting Israel" means any activity that is intended to penalize, inflict economic harm on, or otherwise limit commercial relations with Israel or persons doing business in Israel or in Israeli-controlled territories for purposes of coercing political action by, or imposing policy positions on, the Government of Israel.

(3) **Entity.**--The term "entity" includes--

(A) any corporation, company, business association, partnership, or trust; and

(B) any governmental entity or instrumentality of a government, including a multilateral development institution (as defined in section 1701(c)(3) of the International Financial Institutions Act (22 U.S.C. 262r(c)(3))).

(4) **Investment.**--The term "investment" includes--

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

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

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



(5) **State.**--The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the United States Virgin Islands, and any other territory or possession of the United States.

(6) **State or Local Government.** --The term "State or local government" includes--

(A) any State and any agency or instrumentality thereof;

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

(C) any other governmental instrumentality of a State or locality.

SEC. 1283. Safe Harbor or Changes of Investment Policies by Asset Managers.

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

(1) in subparagraph (A), by striking "; or" and inserting a semicolon;

(2) in subparagraph (B), by striking the period at the end and inserting "; or"; and

(3) by adding at the end the following:

"(C) engage in any boycott, divestment, or sanctions activity targeting Israel described in section 1282 of the Combating BDS Act of 2016."