

WEST VIRGINIA LEGISLATURE

2022 REGULAR SESSION

Introduced

Senate Bill 255

BY SENATORS PHILLIPS, GRADY, MARTIN, MAYNARD,

SMITH, AND WOODRUM

[Introduced January 13, 2022; referred
to the Committee on Energy, Industry, and Mining]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
 2 designated §6D-2-1, §6D-2-2, §6D-2-3, §6D-2-4, §6D-2-5, §6D-2-6, §6D-2-7, §6D-2-8,
 3 §6D-2-9, §6D-2-10, §6D-2-11, §6D-2-12, §6D-2-13, §6D-2-14, §6D-2-15, §6D-2-16, and
 4 §6D-2-17, relating to state contracts with and investments in certain companies that
 5 boycott energy companies.

Be it enacted by the Legislature of West Virginia:

**ARTICLE 2. PROHIBITION ON INVESTMENT IN FINANCIAL COMPANIES THAT
 BOYCOTT CERTAIN ENERGY COMPANIES.**

§6D-2-1. Definitions.

1 In this article the following terms are defined as follows:

2 “Boycott energy company” means, without an ordinary business purpose, refusing to
 3 deal with, terminating business activities with, or otherwise taking any action that is intended to
 4 penalize, inflict economic harm on, or limit commercial relations with a company because the
 5 company:

6 (1) Engages in the exploration, production, utilization, transportation, sale, or
 7 manufacturing of fossil fuel-based energy and does not commit or pledge to meet environmental
 8 standards beyond applicable federal and state law; or

9 (2) Does business with a company described by a company which engages in the
 10 exploration, production, utilization, transportation, sale, or manufacturing of fossil fuel-based
 11 energy and does not commit or pledge to meet environmental standards beyond applicable
 12 federal and state law.

13 “Company” means a for-profit sole proprietorship, organization, association, corporation,
 14 partnership, joint venture, limited partnership, limited liability partnership, or limited liability
 15 company, including a wholly owned subsidiary, majority-owned subsidiary, parent company, or
 16 affiliate of those entities or business associations, that exists to make a profit.

17 “Direct holdings” means, with respect to a financial company, all securities of that
 18 financial company held directly by a state governmental entity in an account or fund in which a
 19 state governmental entity owns all shares or interests.

20 “Financial company” means a publicly traded financial service, banking, or investment
 21 company.

22 “Indirect holdings” means, with respect to a financial company, all securities of that
 23 financial company held in an account or fund, such as a mutual fund, managed by one or more
 24 persons not employed by a state governmental entity, in which the state governmental entity
 25 owns shares or interests together with other investors not subject to the provisions of this
 26 chapter.

§6D-2-2. State legal obligations.

1 With respect to actions taken in compliance with this chapter, including all good faith
 2 determinations regarding financial companies as required by this article, a state governmental
 3 entity and the State Auditor are exempt from any conflicting statutory or common law
 4 obligations, including any obligations with respect to making investments, divesting from any
 5 investment, preparing or maintaining any list of financial companies, or choosing asset
 6 managers, investment funds, or investments for the state governmental entity’s securities
 7 portfolios.

§6D-2-3. Indemnification of state governmental entities, employees, and others.

1 In a cause of action based on an action, inaction, decision, divestment, investment,
 2 financial company communication, report, or other determination made or taken in connection
 3 with this chapter, the state shall, without regard to whether the person performed services for
 4 compensation, indemnify and hold harmless for actual damages, court costs, and attorney’s
 5 fees adjudged against, and defend:

6 (1) An employee, a member of the governing body, or any other officer of a state
 7 governmental entity;

8 (2) A contractor of a state governmental entity;

9 (3) A former employee, a former member of the governing body, or any other former
10 officer of a state governmental entity who was an employee, member of the governing body, or
11 other officer when the act or omission on which the damages are based occurred;

12 (4) A former contractor of a state governmental entity who was a contractor when the act
13 or omission on which the damages are based occurred; and

14 (5) A state governmental entity.

§6D-2-4. No private cause of action.

1 (a) A person, including a member, retiree, or beneficiary of a retirement system to which
2 this chapter applies, an association, a research firm, a financial company, or any other person
3 may not sue or pursue a private cause of action against the state, a state governmental entity, a
4 current or former employee, a member of the governing body, or any other officer of a state
5 governmental entity, or a contractor of a state governmental entity, for any claim or cause of
6 action, including breach of fiduciary duty, or for violation of any constitutional, statutory, or
7 regulatory requirement in connection with any action, inaction, decision, divestment, investment,
8 financial company communication, report, or other determination made or taken in connection
9 with this article.

10 (b) A person who files suit against the state, a state governmental entity, an employee, a
11 member of the governing body, or any other officer of a state governmental entity, or a
12 contractor of a state governmental entity, is liable for paying the costs and attorney’s fees of a
13 person sued in violation of this section.

§6D-2-5. Inapplicability of requirements inconsistent with fiduciary responsibilities and related duties.

1 A state governmental entity is not subject to a requirement of this chapter if the state
2 governmental entity determines that the requirement would be inconsistent with its fiduciary
3 responsibility with respect to the investment of entity assets or other duties imposed by law

4 relating to the investment of entity assets.

§6D-2-6. Reliance on financial company response.

1 The State Auditor and a state governmental entity may rely on a financial company's
2 response to a notice or communication made under this article without conducting any further
3 investigation, research, or inquiry.

§6D-2-7. Listed financial companies.

1 (a) The State Auditor shall prepare and maintain, and provide to each state
2 governmental entity, a list of all financial companies that boycott energy companies. In
3 maintaining the list, the comptroller may:

4 (1) Review and rely, as appropriate in the State Auditor's judgment, on publicly available
5 information regarding financial companies, including information provided by the state, nonprofit
6 organizations, research firms, international organizations, and governmental entities; and

7 (2) Request written verification from a financial company that it does not boycott energy
8 companies and rely, as appropriate in the State Auditor's judgment and without conducting
9 further investigation, research, or inquiry, on a financial company's written response to the
10 request.

11 (b) A financial company that fails to provide to the State Auditor a written verification
12 under subsection (a)(2) before the 61st day after receiving the request.

13 (c) The State Auditor shall update the list annually or more often as the State Auditor
14 considers necessary, but not more often than quarterly, based on information from, among other
15 sources, those listed in subsection (a).

16 (d) Not later than the 30th day after the date the list of financial companies that boycott
17 energy companies is first provided or updated, the comptroller shall file the list Joint Committee
18 on Government and Finance and the Attorney General and post the list on a publicly available
19 platform.

§6D-2-8. Identification of investment in listed financial companies.

1 Not later than the 30th day after the date a state governmental entity receives the list
 2 provided under this article the state governmental entity shall notify the State Auditor of the
 3 listed financial companies in which the state governmental entity owns direct holdings or indirect
 4 holdings.

§6D-2-9. Actions relating to listed financial company.

1 (a) For each listed financial company identified under this article, the state governmental
 2 entity shall send a written notice:

3 (1) Informing the financial company of its status as a listed financial company;

4 (2) Warning the financial company that it may become subject to divestment by state
 5 governmental entities after the expiration of the grace period; and

6 (3) Offering the financial company the opportunity to clarify its activities related to
 7 companies described by this article.

8 (b) Not later than the 90th day after the date the financial company receives notice under
 9 subsection (a), the financial company must cease boycotting energy companies in order to
 10 avoid qualifying for divestment by state governmental entities.

11 (c) If, during the time provided by subsection (b), the financial company ceases
 12 boycotting energy companies, the State Auditor shall remove the financial company from the list
 13 maintained under §6D-2-7 of this code and this article will no longer apply to the financial
 14 company unless it resumes boycotting energy companies.

15 (d) If, after the time provided by subsection (b) expires, the financial company continues
 16 to boycott energy companies, the state governmental entity shall sell, redeem, divest, or
 17 withdraw all publicly traded securities of the financial company, except securities described by
 18 §6D-2-10 of this code, according to the schedule provided by §6D-2-9 of this code.

§6D-2-10. Divestment of assets.

1 (a) A state governmental entity required to sell, redeem, divest, or withdraw all publicly
 2 traded securities of a listed financial company shall comply with the following schedule:

3 (1) At least 50 percent of those assets must be removed from the state governmental
4 entity's assets under management not later than the 180th day after the date the financial
5 company receives notice under §6D-2-8 of this code or subsection (b) of this section unless the
6 state governmental entity determines, based on a good faith exercise of its fiduciary discretion
7 and subject to subdivision (2), that a later date is more prudent; and

8 (2) 100 percent of those assets must be removed from the state governmental entity's
9 assets under management not later than the 360th day after the date the financial company
10 receives notice under §6D-2-8 of this code or subsection (b).

11 (b) If a financial company that ceased boycotting energy companies after receiving
12 notice under §6D-2-8 of this code resumes its boycott, the state governmental entity shall send
13 a written notice to the financial company informing it that the state governmental entity will sell,
14 redeem, divest, or withdraw all publicly traded securities of the financial company according to
15 the schedule in subsection (a).

16 (c) Except as provided by subsection (a), a state governmental entity may delay the
17 schedule for divestment under that subsection only to the extent that the state governmental
18 entity determines, in the state governmental entity's good faith judgment, and consistent with
19 the entity's fiduciary duty, that divestment from listed financial companies will likely result in a
20 loss in value or a benchmark deviation. If a state governmental entity delays the schedule for
21 divestment, the state governmental entity shall submit a report to the presiding officer of each
22 house of the Legislature and the Attorney General stating the reasons and justification for the
23 state governmental entity's delay in divestment from listed financial companies. The report must
24 include documentation supporting its determination that the divestment would result in a loss in
25 value or a benchmark deviation, including objective numerical estimates. The state
26 governmental entity shall update the report every six months.

§6D-2-11. Investments exempted from divestment.

1 A state governmental entity is not required to divest from any indirect holdings in actively

2 or passively managed investment funds or private equity funds. The state governmental entity
 3 shall submit letters to the managers of each investment fund containing listed financial
 4 companies requesting that they remove those financial companies from the fund or create a
 5 similar actively or passively managed fund with indirect holdings devoid of listed financial
 6 companies. If a manager creates a similar fund with substantially the same management fees
 7 and same level of investment risk and anticipated return, the state governmental entity may
 8 replace all applicable investments with investments in the similar fund in a time frame consistent
 9 with prudent fiduciary standards but not later than the 450th day after the date the fund is
 10 created.

§6D-2-12. Authorized investment in listed financial companies.

1 (a) A state governmental entity may cease divesting from one or more listed financial
 2 companies only if clear and convincing evidence shows that:

3 (1) The state governmental entity has suffered or will suffer a loss in the hypothetical
 4 value of all assets under management by the state governmental entity as a result of having to
 5 divest from listed financial companies under this chapter; or

6 (2) An individual portfolio that uses a benchmark-aware strategy would be subject to an
 7 aggregate expected deviation from its benchmark as a result of having to divest from listed
 8 financial companies under this chapter.

9 (b) A state governmental entity may cease divesting from a listed financial company as
 10 provided by this section only to the extent necessary to ensure that the state governmental
 11 entity does not suffer a loss in value or deviate from its benchmark as described by subsection
 12 (a).

13 (c) Before a state governmental entity may cease divesting from a listed financial
 14 company under this section, the state governmental entity must provide a written report to the
 15 State Auditor, the presiding officer of each house of the Legislature, and the Attorney General
 16 setting forth the reason and justification, supported by clear and convincing evidence, for

17 deciding to cease divestment or to remain invested in a listed financial company.

18 (d) The state governmental entity shall update the report required by subsection (c)
19 semiannually, as applicable.

20 (e) This section does not apply to reinvestment in a financial company that is no longer a
21 listed financial company.

§6D-2-13. Prohibited investments.

1 Except as provided by the exceptions of this article, a state governmental entity may not
2 acquire securities of a listed financial company.

§6D-2-14. Report.

1 Not later than January 5 of each year, each state governmental entity shall file a publicly
2 available report Joint Committee on Government and Finance and the Attorney General that:

3 (1) Identifies all securities sold, redeemed, divested, or withdrawn in compliance with this
4 article;

5 (2) Identifies all prohibited investments under this article; and

6 (3) Summarizes any changes made under this article.

§6D-2-15. Enforcement.

1 The Attorney General may bring any action necessary to enforce this article.

§6D-2-16. Provisions required in contract.

1 (a) This section applies only to a contract that:

2 (1) Is between a governmental entity and a company with 10 or more full-time
3 employees; and

4 (2) Has a value of \$100,000 or more that is to be paid wholly or partly from public funds
5 of the governmental entity.

6 (b) Except as provided by subsection (c), a governmental entity may not enter into a
7 contract with a company for goods or services unless the contract contains a written verification
8 from the company that it:

- 9 (1) Does not boycott energy companies; and
- 10 (2) Will not boycott energy companies during the term of the contract.
- 11 (c) Subsection (b) does not apply to a governmental entity that determines the
12 requirements of subsection (b) are inconsistent with the governmental entity's constitutional or
13 statutory duties related to the issuance, incurrence, or management of debt obligations or the
14 deposit, custody, management, borrowing, or investment of funds.
- 15 (d) This article applies only to a contract entered into on or after the effective date of this
16 Act. A contract entered into before that date is governed by the law in effect on the date the
17 contract was entered into, and the former law is continued in effect for that purpose.

§6D-2-17. Effective date.

1 This article shall be effective September 1, 2022.

NOTE: The purpose of this bill is to prohibit state contracts or investments with companies who purposefully boycott energy companies.

Strike-throughs indicate language that would be stricken from a heading or the present law, and underscoring indicates new language that would be added.