

117TH CONGRESS
1ST SESSION

S. 2829

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

SEPTEMBER 23, 2021

Mr. RUBIO introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

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.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Mind Your Own Busi-
3 ness Act of 2021”.

4 **SEC. 2. FINDINGS.**

5 Congress finds the following:

6 (1) The fiduciary duties of boards of directors
7 and other corporate actors to corporations and their
8 stockholders are generally established by and en-
9 forceable under State law.

10 (2) State law generally permits corporations
11 discretion with respect to altering the rights of
12 stockholders, including the process by which stock-
13 holders assert claims for breach of fiduciary duties
14 by the board of directors or other corporate actors,
15 limited by State law governing these fiduciary du-
16 ties.

17 (3) The regulation of corporations as issuers of
18 securities authorized by Congress in the Securities
19 Exchange Act of 1934 (15 U.S.C. 78a et seq.) gen-
20 erally regulates corporate behavior in connection
21 with the issuance of securities, including with re-
22 spect to contractual arrangements between corpora-
23 tions and their stockholders via provisions in cor-
24 porations’ charters and bylaws, and does not—

25 (A) establish fiduciary duties of boards of
26 directors or other corporate actors to corpora-

1 tions and their stockholders under Federal law;
2 or

3 (B) regulate the fiduciary duties of boards
4 of directors or other corporate actors to cor-
5 porations and their stockholders under State
6 law.

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

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

14 (B) the behavior of corporations as issuers
15 of securities will generally conform to these fi-
16 duciary duties, to the benefit of the protection
17 of investors and the public interest.

18 (5) Other norms related to the public interest
19 have historically provided critical bases upon which
20 the national market system for securities has histori-
21 cally relied, including norms that large corporate
22 issuers that are significant to the national econ-
23 omy—

24 (A) generally invest corporate resources to
25 increase the long-term value of the corporation

1 as a business rather than as an agent of social
2 change;

3 (B) do not use corporate resources to ad-
4 vance narrowly political or partisan agendas;
5 and

6 (C) do not use corporate resources to pro-
7 mote socialism, Marxism, critical race theory, or
8 other un-American ideologies among their
9 workforces or customers.

10 (6) Though these norms are not enforceable
11 legal duties of boards of directors or other corporate
12 actors under Federal law, they substantially con-
13 tribute to the commercial purpose and nationwide
14 availability of the national market system for securi-
15 ties, which are recognized by section 2 of the Securi-
16 ties Exchange Act of 1934 (15 U.S.C. 78b) as prin-
17 cipal bases for the regulation authorized by that Act.

18 (7) Certain large corporate issuers that are sig-
19 nificant to the national economy have recently un-
20 dertaken actions which facially violate these norms
21 on account of apparent political bias. Examples of
22 such actions include the use of corporate resources
23 to—

24 (A) deny goods and services to States and
25 their political subdivisions, and private entities

1 within such States and their political subdivi-
2 sions, in response to the social policies proposed
3 or enacted in such States and their political
4 subdivisions, including those related to election
5 procedures, restrictions on abortion, protections
6 for religious freedom, and enforcement of immi-
7 gration law;

8 (B) deny goods and services to industries
9 and other classes of entities on the basis of
10 characteristics of those industries and classes
11 related to social policy, including industries in-
12 volved in the sale or manufacture of firearms,
13 operation of border security or criminal deten-
14 tion facilities, and performance of services for
15 the United States military, and classes of enti-
16 ties based on religious belief or identity;

17 (C) promote race and sex stereotyping,
18 such as those described in section 2(a) of Exec-
19 utive Order 13950 (5 U.S.C. 4103 note; relat-
20 ing to combating race and sex stereotyping),
21 which include such destructive concepts that the
22 United States is fundamentally racist or sexist,
23 an individual should be discriminated against or
24 receive adverse treatment solely or partly be-
25 cause of his or her race or sex, and meritocracy

1 or traits such as a hard work ethic are racist
2 or sexist, or were created by a particular race
3 to oppress another race; and

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

6 (i) undertaking such actions upon the
7 action (or inaction) of boards of directors
8 and other corporate actors that are not
9 sufficiently independent from conflicts of
10 interest with political actors, including
11 elected officials, political parties, news
12 media, labor unions, nonprofit or non-gov-
13 ernmental organizations which advocate for
14 changes political or social policy through
15 issuers, other activists affiliated with such
16 actors, and activist investors which advo-
17 cate for changes in corporate policy pri-
18 marily unrelated to the pecuniary interest
19 of the issuer; and

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

23 (8) The prominent, open, and public facial vio-
24 lation of these norms by large corporate issuers that
25 are significant to the national economy undermine

1 the commercial purpose and nationwide availability
 2 of the national market system for securities by
 3 spending corporate resources on non-commercial and
 4 divisive, political and partisan causes.

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

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

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

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

22 The Securities Exchange Act of 1934 (15 U.S.C. 78a
 23 et seq.) is amended by inserting after section 10D (15
 24 U.S.C. 78j–4) the following:

1 **“SEC. 10E. PROCEDURAL PRIVILEGES FOR CERTAIN**
 2 **SHAREHOLDER CLAIMS.**

3 “(a) DEFINITIONS.—In this section:

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

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

6 or

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

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

15 “(A) generally; or

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

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

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

22 “(i) asserts a claim for breach of fidu-
 23 ciary duty owed by any corporate defend-
 24 ant to the applicable issuer (or the share-
 25 holders of the applicable issuer) resulting
 26 from material action by any covered cor-

1 porate actor with respect to the applicable
2 issuer—

3 “(I) that is taken primarily in re-
4 sponse to a law (including a regula-
5 tion) that is enacted by a State, or a
6 bill that is introduced in the legisla-
7 ture of a State or policy otherwise
8 publicly proposed by an elected official
9 of a State, which shall include if such
10 action includes any prohibition of
11 business within that State by an
12 issuer, whether with respect to busi-
13 ness services or travel to, or major
14 events in, that State, that is facially
15 unrelated to the pecuniary interest of
16 the applicable issuer, which shall pre-
17 sumptively include if the law bill, or
18 policy would modify, establish, or cre-
19 ate a law relating to—

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

23 “(bb) protecting religious
24 freedom; or

1 “(cc) limiting the availability
2 of services that include the abor-
3 tion of unborn children;

4 “(II) to prohibit the sale of goods
5 or services by any covered corporate
6 actor with respect to the applicable
7 issuer to customers who operate in an
8 industry with which the issuer en-
9 gages in such business primarily on
10 the basis of a characteristic of that in-
11 dustry that is facially unrelated to the
12 pecuniary interest of the applicable
13 issuer;

14 “(III) to promote a covered divi-
15 sive concept; or

16 “(IV) for which the reasoning
17 publicly presented by any covered cor-
18 porate actor with respect to the appli-
19 cable issuer as—

20 “(aa) any basis for such ac-
21 tion promotes a covered divisive
22 concept; or

23 “(bb) the primary basis for
24 such action is facially unrelated
25 to the pecuniary interest of the

1 applicable issuer, which shall pre-
2 sumptively include any reference
3 to diversity, equity, or inclusion
4 with respect to the composition
5 of the workforce, management, or
6 board of directors of the issuer or
7 society in general; and

8 “(ii) is brought by a covered share-
9 holder as—

10 “(I) a direct action; or

11 “(II) a derivative action or pro-
12 ceeding brought on behalf of the ap-
13 plicable issuer; and

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

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

22 “(ii) the exercise of religion by any
23 covered corporate actor with respect to the
24 applicable issuer;

1 “(iii) business activity by any covered
2 corporate actor in connection with the na-
3 tional security of the United States, the
4 Armed Forces, or veterans of the Armed
5 Forces; or

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

9 “(I) occurring in the jurisdiction
10 of, or with an agent of the People’s
11 Republic of China, the Russian Fed-
12 eration, North Korea, Iran, Syria,
13 Sudan, Venezuela, or Cuba;

14 “(II) in connection with pre-
15 venting the abuse of internationally
16 recognized worker rights, as defined
17 in section 507 of the Trade Act of
18 1974 (19 U.S.C. 2467);

19 “(III) with any entity that de-
20 rives directly or indirectly more than
21 de minimis gross revenue through the
22 sale of products or services, or the
23 presentation of any depictions or dis-
24 plays, of a prurient sexual nature;

1 “(IV) with any entity that en-
 2 gages in a commerce- or investment-
 3 related boycott, divestment, or sanc-
 4 tions activity that targets Israel; or

5 “(V) that is required under Fed-
 6 eral, State, or local law.

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

12 “(A) a public float of more than
 13 \$20,000,000,000; or

14 “(B) annual revenues of more than
 15 \$5,000,000,000.

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

18 “(A) an issuer;

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

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

23 “(D) any person acting in the capacity of
 24 an officer or agent of an issuer.

1 “(6) CORPORATE DEFENDANT.—The term ‘cor-
2 porate defendant’ means any individual who—

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

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

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

13 “(8) COVERED SHAREHOLDER.—

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

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

23 “(ii) \$15,000 in market value of the
24 issuer’s securities for at least two years; or

1 “(iii) \$25,000 in market value of the
2 issuer’s securities for at least one year.

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

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

11 “(11) INVESTMENT COMPANY.—The term ‘in-
12 vestment company’ has the meaning given the term
13 in section 3 of the Investment Company Act of 1940
14 (15 U.S.C. 80a–3).

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

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

20 “(A) any investment company or private
21 fund that invests, reinvests, or trades, or pro-
22 poses to invest, reinvest, or trade in, or that ex-
23 ercises any control right with respect to any se-
24 curity primarily on a basis that is facially unre-
25 lated to the pecuniary interest of any bene-

1 ficiary of such company or fund for which such
2 activity occurs with respect to such security;

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

6 “(i) that is for compensation; and

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

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

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

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

20 “(D) any labor organization, as defined in
21 section 2 of the National Labor Relations Act
22 (29 U.S.C. 152), or pension fund affiliated with
23 a labor organization.

24 “(b) REQUIREMENTS.—

1 “(1) RULES.—Not later than 1 year after the
2 date of enactment of the Mind Your Own Business
3 Act of 2021, the Commission shall, by rule, direct
4 the national securities exchanges and national secu-
5 rities associations to prohibit the listing of any secu-
6 rity of any covered company that is not in compli-
7 ance with the requirements of this section.

8 “(2) ISSUER REQUIREMENTS.—The rules issued
9 under paragraph (1) shall require each issuer, to the
10 maximum extent permitted by State law, in the arti-
11 cles of incorporation or bylaws of the issuer, to pro-
12 vide, with respect to any covered claim, that any cor-
13 porate defendant with respect to the issuer that is
14 named as a defendant in the covered claim shall—

15 “(A) be bound by the presumptions estab-
16 lished under subsection (c) with respect to any
17 factual representation made in connection with
18 the covered claim, including any factual rep-
19 resentation relating to whether a claim asserted
20 is a covered claim;

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

24 “(C) if the claimant obtains a judgment on
25 the merits in the covered claim, be jointly and

1 severally liable for money damages to the claim-
2 ant in an amount that is not less than the
3 greater of—

4 “(i) treble damages; or

5 “(ii) 2 times the total compensation
6 paid by the issuer to all directors of the
7 issuer for the year in which the primary
8 action alleged in the covered claim sub-
9 stantially occurred, which shall include the
10 market value of all securities issued as
11 compensation to those directors in that
12 year;

13 “(D) if the claimant obtains all or some of
14 the relief sought in the covered claim, whether
15 by court order, settlement, voluntary change in
16 the conduct of the defendant, or otherwise, re-
17 imburse the claimant for the greatest amount
18 permitted by law with respect to all fees, costs,
19 and expenses of every kind and description (in-
20 cluding all reasonable attorney’s fees and other
21 litigation expenses) that the claimant may ob-
22 tain in connection with the covered claim; and

23 “(E) not be indemnified by the issuer for
24 any liability, loss (including attorney’s fees,
25 judgments, fines, or amounts paid in settle-

1 ment) incurred or suffered in connection with
2 the covered claim.

3 “(c) PRESUMPTIONS.—For the purposes of this sec-
4 tion, the following presumptions shall apply with respect
5 to any covered claim, including with respect to any factual
6 representation relating to whether a claim asserted is a
7 covered claim:

8 “(1) PECUNIARY INTEREST.—There shall be a
9 presumption that the pecuniary interest of an issuer,
10 which shall include the best interest of the issuer to
11 the extent that such interest is substantially similar
12 to the pecuniary interest of the issuer, does not in-
13 clude—

14 “(A) the morale of, or ability of the issuer
15 to hire or retain, supervisory employees in gen-
16 eral;

17 “(B) the diversity of the board of direc-
18 tors, management, or workforce in general with
19 respect to any characteristic protected by sec-
20 tion 703 of the Civil Rights Act of 1964 (42
21 2000e-2);

22 “(C) the public relations, image, value of
23 marketing, or coverage by the news media of
24 the issuer; or

1 “(D) any financial benefit or reduction in
 2 cost, including the cost of capital to the issuer,
 3 to the extent the pecuniary benefit of or to such
 4 benefit or reduction in cost is caused by the—

5 “(i) investment in the securities of the
 6 issuer by a non-pecuniary investment enti-
 7 ty; or

8 “(ii) inclusion of the securities of the
 9 issuer in indexes created by index pro-
 10 viders that select those indexes on a pri-
 11 marily non-pecuniary basis or that include
 12 such securities in any index on a primarily
 13 non-pecuniary basis.

14 “(2) DEMAND EXCUSED.—For the purpose of
 15 determining whether demand is excused with respect
 16 to a covered claim, there shall be a presumption that
 17 a director is not independent if the director is em-
 18 ployed, controlled, or nominated by, or otherwise has
 19 a history of affiliation with a non-pecuniary invest-
 20 ment entity or any affiliate of a non-pecuniary in-
 21 vestment entity.

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

24 “(1) to limit the exercise of religion, as defined
 25 in section 5 of the Religious Freedom Restoration

1 Act of 1993 (42 U.S.C. 2000bb–2) of any issuer or
2 any director, officer, or affiliate of an issuer; or
3 “(2) as establishing a fiduciary duty by any
4 corporate defendant or corporate actor.”.

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