Protecting Free Enterprise and Investments Act (2023) - Model Bill

(A) Short title. This Act shall be known and may be cited as the “Protecting Free Enterprise and Investments Act of 2023.”

(B) Purpose. The purpose of this Act is to ensure that all state contracts, investments, and private business transactions in the state are protected from political influence detrimental to the financial health of the state and its citizens and will promote the state legislature’s goal of protecting free enterprise.

(C) Definitions.

1. “Banking contract” means a contract entered into by the Treasurer and a financial institution pursuant to this chapter, to provide banking goods or services to a spending unit.

2. “Boycott of energy companies” means without a reasonable business purpose, refusal to deal with a company, termination of business activities with a company, or another action that is intended to penalize, inflict economic harm on, or limit commercial relations with a company because the company:

   a) Engages in the exploration, production, utilization, transportation, sale, or manufacturing of fossil fuel-based energy;

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

   c) Does business with a company that engages in the exploration, production, utilization, transportation, sale, or manufacturing of fossil fuel-based energy.

3. “Company” means any sole proprietorship, organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, limited liability company, proxy advisers, proxy advisory firms, or other entity or business association, including all wholly owned subsidiaries, majority owned subsidiaries, parent companies, or affiliates of those entities or business associations, that exist for the purpose of making a profit.

4. “Financial institution” means a bank, national banking association, non-bank financial institution, a financial services company, an investment company, a bank and trust company, a trust company, a savings and loan association, a building and loan association, a mutual savings bank, a credit union, or a savings bank.

5. “Reasonable business purpose” includes any purpose directly related to:

   a) Promoting the financial success or stability of a financial institution or company;
b) Mitigating risk to a financial institution or company;

c) Complying with legal or regulatory requirements; or

d) Limiting liability of a financial institution or company.

6. “Restricted financial institution or company” means a financial institution or company included in the most recently updated restricted financial institution list.

7. “Restricted financial institution and company list” means the list of financial institutions and companies prepared, maintained, and published pursuant to this article.

8. “Person” means any individual, corporation, firm, partnership, limited partnership, incorporated or unincorporated association, professional association, or other legal, commercial, or government body, including the [state], its departments, agencies, political subdivisions, and units of government.

9. “Trade or commerce” means any economic activity of any type whatsoever involving any commodity or service whatsoever.

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

11. “Indirect holdings” means, with respect to a financial institution, all securities of that financial institution held in an account or fund, such as a mutual fund, managed by one or more persons not employed by a state governmental entity, in which the state governmental entity owns shares or interests together with other investors not subject to the provisions of this act. The term does not include money invested under a plan described by Section 401(k) or 457 of the Internal Revenue Code of 1986;

12. “State governmental entity” means all state retirement systems.

13. “Fiduciary” includes any person acting on behalf of a state governmental entity as an investment manager, or proxy adviser.

14. "Pecuniary" means having been prudently determined by a fiduciary to have a material effect on the financial risk or the financial return of an investment.

   a) “Pecuniary” does not include any action taken, or factor considered, by a fiduciary with any purpose whatsoever to further social, political, or ideological interests.
b) A fiduciary may reasonably be determined to have taken an action, or considered a factor, with a purpose to further social, political, or ideological interests based upon evidence indicating such a purpose, including, but not limited to, any Fiduciary Commitment to further, through portfolio company engagement, board or shareholder votes, or otherwise as a fiduciary, any of the following beyond what controlling federal or state law requires:

   i. eliminating, reducing, offsetting, or disclosing greenhouse gas emissions;

15. “Treasurer” refers to the [State] State Treasurer.


(D) **Restricted Financial Institutions and Company List.** The Treasurer is authorized to prepare and maintain a list of financial institutions and companies that are engaged in a boycott of energy companies. The Treasurer must publicly post the restricted financial institution list on the Treasurer’s website and submit a copy of the list to the Governor, the Attorney General, the state legislature, and all state governmental entities. The Treasurer must update the restricted financial institution list annually, or more often as the Treasurer considers necessary.

(E) **Sources of Information.** In determining whether to include a financial institution or company on the restricted financial institution and companies list, the Treasurer shall consider and may rely upon the following information:

1. A financial institution or company’s certification that it is not engaged in a boycott of energy companies;

2. Publicly available statements or information made by the financial institution or company, including statements by a member of a financial institution or company’s governing body, an executive director of a financial institution or company, or any other officer or employee of the financial institution or company with the authority to issue policy statements on behalf of the financial institution or company; or

3. Information published by the state or federal government.

   a) In determining whether to include a financial institution or company on the restricted financial institution list, the Treasurer may not rely solely on the following information:

      i. Statements or complaints by an energy company; or

      ii. Media reports of a financial institution or company’s boycott of energy companies.
b) A financial institution or company may not be compelled to produce or disclose any data or information deemed confidential, privileged, or otherwise protected from disclosure by state or federal law.

(F) **Restricted Financial Institutions and Companies.** In selecting a financial institution or company to enter into a banking contract, the Treasurer is authorized to disqualify restricted financial institutions and companies from the competitive bidding process or from any other official selection process. The Treasurer is authorized to refuse to enter into a banking contract with a restricted financial institution or company based on its restricted financial institution and company status. The Treasurer is authorized to require, as a term of any banking contract, an agreement by the financial institution not to engage in a boycott of energy companies for the duration of the contract.

(G) **Anti-trust Violations.** Every contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful. The attorney general is authorized to investigate any person, company, or financial institution found to be engaging in a contract, combination, or conspiracy to restrain the trade or commerce of energy companies under [the anti-trust statutes in the state]. Any person who shall be injured in his or her business or property by reason of any violation of [the anti-trust statutes in the state] may sue therefore in the circuit courts of this state as the injuries pertain to contracts, combinations, or conspiracies to restrain the trade or commerce of energy companies.

(H) **State and Local Pensions.** Not later than the thirtieth day after the date a state governmental entity receives the list provided under section (D), the state governmental entity shall notify the Treasurer of the listed financial institutions in which the state governmental entity owns direct holdings or indirect holdings.

1. For each listed financial company identified under section (D), the state governmental entity shall send a written notice:

   a) informing the financial institution of its status as a listed financial company,

   b) warning the financial institution that it may become subject to divestment by state governmental entities after the expiration of the period described by paragraph b of this section, and

   c) offering the financial institution the opportunity to clarify its activities related to companies described by paragraph b of section (C).

2. Not later than the ninetieth day after the date the financial institution receives notice under paragraph a of this section, the financial institution shall cease boycotting energy companies to avoid qualifying for divestment by state governmental entities.

3. If, during the time provided by paragraph 2 of this section, the financial institution ceases boycotting energy companies, the Treasurer shall remove the financial
institution from the list maintained under section (D), and this section will no longer apply to the financial institution unless it resumes boycotting energy companies.

4. If, after the time provided by paragraph 2 of this section expires, the financial company continues to boycott energy companies, the state governmental entity shall sell, redeem, divest, or withdraw all publicly traded securities of the financial institution.

5. Before a state governmental entity may cease divesting from a listed financial institution under this section, the state governmental entity shall provide a written report to the Treasurer, the presiding officer of each house of the Legislature, and the Attorney General setting forth the reason and justification, supported by clear and convincing evidence, for deciding to cease divestment from a listed financial institution. The state governmental entity shall update the report required by this subsection semiannually, as applicable.

(I) Proxy Voting Guidance. All shares held directly or indirectly by or on behalf of a governmental entity and/or the participants and their beneficiaries shall be voted solely in the pecuniary interest of plan participants and their beneficiaries.

1. A governmental entity may not rely on any voting decision guidance from any company listed on the restricted financial institutions and companies list maintained under section (D).

2. Unless no economically practicable alternative is available, a governmental entity may not grant proxy voting authority to any person who is not a part of the governmental entity, unless that person has a practice of, and in writing commits to, following guidelines that match the governmental entity’s obligation to act solely upon pecuniary factors.

3. Unless no economically practicable alternative is available, public retirement system assets shall not be entrusted to a fiduciary, unless that fiduciary has a practice of, and in writing commits to, follow guidelines, when engaging with portfolio companies and voting shares or proxies, that match the governmental entity’s obligation to act solely upon pecuniary factors.

4. Unless no economically practicable alternative is available, an [investment manager] [fiduciary] or [governmental entity] may not adopt a practice of following the recommendations of a proxy adviser or other service provider, unless such adviser or service provider has a practice of, and in writing commits to, follow proxy voting guidelines that match the governmental entity’s obligation to act solely upon pecuniary factors.

5. All proxy votes shall be tabulated and reported annually to the Treasurer. For each vote, the report shall contain a vote caption, the plan’s vote, the recommendation of
company management, and, if applicable, the proxy adviser’s recommendation. These reports shall be posted on a publicly available webpage on the Treasurer’s website.

(J) Revocation, denial, or suspension of registration of dealer, investment adviser, intermediary, or associated person. Registration under [state securities statute] may be denied or any registration granted may be revoked, restricted, or suspended by the office if the office determines that such applicant or registrant; any member, principal, or director of the applicant or registrant or any person having a similar status or performing similar functions; or any person directly or indirectly controlling the applicant or registrant:

1. Has been guilty of a fraudulent act in connection with rendering investment advice or in connection with any sale of securities, has been or is engaged or is about to engage in making fictitious or pretended sales or purchases of any such securities or in any practice involving the rendering of investment advice or the sale of securities which is fraudulent or in violation of the law;

2. Has made a misrepresentation or false statement to, or concealed any essential or material fact from, any person in the rendering of investment advice or the sale of a security to such person.

   a) Misrepresentation or false statement to, or concealment of any essential or material fact includes the rendering of investment advice on the primary basis of reasons other than pecuniary factors.

(K) Rulemaking. The [state] department of the treasury shall promulgate any necessary rules and regulations to implement this act.

(L) Effective date. The requirements of this Act shall be effective no later than January 1, 2024.