

ENERGY DISCRIMINATION ELIMINATION ACT

Model Policy

Section 1: The [name of state] finds that:

- 1) fossil fuels currently supply more than 80% of the world's primary energy, and the U.S. Energy Information Administration still projects global consumption of fossil fuels to increase steadily at least through 2050;
- 2) restricting the supply of fossil fuels, without an immediate substitute for those fuels, only serves to raise prices on energy consumers, profoundly impacting the poorest among us;
- 3) denying financing to American and European fossil energy producers, who are among the most socially and environmentally responsible companies in the world, only serves to support hostile nations and less responsible producers;
- 4) banks are increasingly denying financing to creditworthy fossil energy companies solely for the purpose of decarbonizing their lending portfolios and marketing their environmental credentials, to the detriment of potential returns for their shareholders;
- 5) institutional investors are divesting from fossil energy companies and pressuring corporations to commit to the goal of the Paris Agreement to reduce greenhouse gas emissions to zero by 2050;
- 6) large investment firms are colluding to force fossil energy companies to cannibalize their existing businesses and direct time and attention away from increasing shareholder returns;
- 7) corporations are boycotting fossil energy companies by refusing to provide them with products or services; and
- 8) energy producing states, when financially prudent, should avoid doing business with companies that are attacking the industries that substantially contribute to their state budgets.

Section 2. Prohibition on Investment in Financial Companies that Boycott Certain Energy Companies

Subsection A. General Provisions

1) Definitions.

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

i) 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

ii) does business with a company described by Paragraph (i).

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

c) “Comptroller” means the [state comptroller, treasurer, or other regulatory body designated to maintain the list of boycotting companies].

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

e) “Financial company” means a publicly traded financial services, banking, or investment company.

f) “Indirect holdings” means, with respect to a financial company, all securities of that financial company 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 chapter. The term does not include money invested under a plan described by Section 401(k) or 457 of the Internal Revenue Code of 1986.

g) “Listed financial company” means a financial company listed by the comptroller.

h) “State governmental entity” means [list of state pensions to which the law is designed to apply].

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

3) Indemnification of State Governmental Entities, Employees, and Others. In a cause of action based on an action, inaction, decision, divestment, investment, financial company communication, report, or other determination made or taken in connection with this chapter, the state shall indemnify and hold harmless for actual damages, court costs, and attorney's fees adjudged against, and defend **[list of employees, contractors, and entities to be indemnified]**.

4) No Private Cause of Action.

a) A person, including a member, retiree, or beneficiary of a retirement system to which this chapter applies, an association, a research firm, a financial company, or any other person may not sue or pursue a private cause of action against the state, **[list of people and entities to be protected from legal action]** for any claim or cause of action, including breach of fiduciary duty, or for violation of any constitutional, statutory, or regulatory requirement in connection with any action, inaction, decision, divestment, investment, financial company communication, report, or other determination made or taken in connection with this chapter.

b) A person who files suit against the state, **[list of people and entities to be protected from legal action]** is liable for paying the costs and attorney's fees of a person sued in violation of this section.

5) Inapplicability of Requirements Inconsistent with Fiduciary

Responsibilities and Related Duties. A state governmental entity is not subject to a requirement of this chapter if the state governmental entity determines that the requirement would be inconsistent with its fiduciary responsibility with respect to the investment of entity assets or other duties imposed by law relating to the investment of entity assets.

6) [other exceptions for constitutional, statutory, or fiduciary duties]

Subsection B. Duties Regarding Investments

1) Listed Financial Companies.

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

i) review and rely, as appropriate in the comptroller's judgment, on publicly available information regarding financial companies, including information provided by the state, nonprofit organizations, research firms, international organizations, and governmental entities; and

ii) request written verification from a financial company that it does not boycott energy companies and rely, as appropriate in the comptroller's judgment and without conducting further investigation, research, or inquiry, on a financial company's written response to the request.

b) A financial company that fails to provide to the comptroller a written verification under Paragraph (1)(a)(ii) before the 61st day after receiving the request from the comptroller is presumed to be boycotting energy companies.

c) The comptroller shall update the list annually or more often as the comptroller considers necessary, but not more often than quarterly, based on information from, among other sources, those listed in Paragraph (1)(a).

d) Not later than the 30th day after the date the list of financial companies that boycott energy companies is first provided or updated, the comptroller shall file the list with the presiding officer of each house of the legislature and the attorney general and post the list on a publicly available Internet website.

2) Identification of Investment in Listed Financial Companies. Not later than the 30th day after the date a state governmental entity receives the list provided under Paragraph (1)(a), the state governmental entity shall notify the comptroller of the listed financial companies in which the state governmental entity owns direct holdings or indirect holdings.

3) Actions Relating to Listed Financial Company.

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

i) informing the financial company of its status as a listed financial company;

ii) warning the financial company that it may become subject to divestment by state governmental entities after the expiration of the period described by Paragraph (b); and

iii) offering the financial company the opportunity to clarify its activities related to companies described by Subsection A, Paragraphs (1)(a)(i) and (ii).

b) Not later than the 90th day after the date the financial company receives notice under Paragraph (3)(a), the financial company must cease boycotting energy

companies in order to avoid qualifying for divestment by state governmental entities.

c) If, during the time provided by Paragraph (3)(b), the financial company ceases boycotting energy companies, the comptroller shall remove the financial company from the list maintained under Paragraph (1)(a), and this subsection will no longer apply to the financial company unless it resumes boycotting energy companies.

d) If, after the time provided by Paragraph (3)(b) 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 company, except securities described by Paragraph (5), according to the schedule provided by Paragraph (4).

4) **Divestment of Assets.**

a) A state governmental entity required to sell, redeem, divest, or withdraw all publicly traded securities of a listed financial company shall comply with the following schedule **[insert divestment schedule]**.

b) If a financial company that ceased boycotting energy companies after receiving notice under Paragraph (3) resumes its boycott, the state governmental entity shall send a written notice to the financial company informing it that the state governmental entity will sell, redeem, divest, or withdraw all publicly traded securities of the financial company according to the schedule in Paragraph (4)(a).

c) Except as provided by Paragraph (4)(a), a state governmental entity may delay the schedule for divestment under that subsection only to the extent that the state governmental entity determines, in the state governmental entity's good faith judgment, and consistent with the entity's fiduciary duty, that divestment from listed financial companies will likely result in a loss in value or a benchmark deviation described by Paragraph (6)(a).

d) If a state governmental entity delays the schedule for divestment, the state governmental entity shall submit a report to the presiding officer of each house of the legislature and the attorney general stating the reasons and justification for the state governmental entity's delay in divestment from listed financial companies. The report must include documentation supporting its determination that the divestment would result in a loss in value or a benchmark deviation described by Paragraph (6) (a), including objective numerical estimates. **[optional provision for updating the report]**

5) **Investments Exempted from Divestment.** A state governmental entity is not required to divest from any indirect holdings in actively or passively managed investment funds or private equity funds. The state governmental entity shall submit

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

6) Authorized Investment in Listed Financial Companies.

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

- i) the state governmental entity has suffered or will suffer a loss in the hypothetical value of all assets under management by the state governmental entity as a result of having to divest from listed financial companies under this subsection; or
- ii) an individual portfolio that uses a benchmark-aware strategy would be subject to an aggregate expected deviation from its benchmark as a result of having to divest from listed financial companies under this subsection.

b) A state governmental entity may cease divesting from a listed financial company as provided by this section only to the extent necessary to ensure that the state governmental entity does not suffer a loss in value or deviate from its benchmark as described by Paragraph (6)(a).

c) Before a state governmental entity may cease divesting from a listed financial company under this section, the state governmental entity must provide a written report to the comptroller, 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 or to remain invested in a listed financial company. **[optional provision for updating the report]**

d) This section does not apply to reinvestment in a financial company that is no longer a listed financial company.

7) Prohibited Investments.

a) Except as provided by Paragraph (6), a state governmental entity may not acquire securities of a listed financial company.

Subsection C. Report and Enforcement

1) **Report.** Not later than **[insert reporting date]** of each year, each state governmental entity shall file a publicly available report with the presiding officer of each house of the legislature and the attorney general that:

- a) identifies all securities sold, redeemed, divested, or withdrawn in compliance with Subsection B, Paragraph (4);
- b) identifies all prohibited investments under Subsection B, Paragraph (7); and
- c) summarizes any changes made under Subsection B, Paragraph (5).

2) **Enforcement.** The attorney general may bring any action necessary to enforce this chapter.

Section 3. Prohibition on Contracts with Companies Boycotting Certain Energy Companies

1) **Definitions.**

- a) “Boycott energy company” has the meaning assigned by Section 1, Subsection A, Paragraph (1)(a).
- b) “Company” has the meaning assigned by Section 1, Subsection A, Paragraph (1)(b), except that the term does not include a sole proprietorship.
- c) “Governmental entity” means a state agency or political subdivision of this state.

2) **Provision Required in Contract.**

- a) This section applies only to a contract that:
 - i) is between a governmental entity and a company with 10 or more full-time employees; and
 - ii) has a value of **[minimum contract size]** or more that is to be paid wholly or partly from public funds of the governmental entity.
- b) Except as provided by Paragraph (2)(c), a governmental entity may not enter into a contract with a company for goods or services unless the contract contains a written verification from the company that it:
 - i) does not boycott energy companies; and
 - ii) will not boycott energy companies during the term of the contract.
- c) **Subsection (b) does not apply to a governmental entity that determines the requirements of Subsection (b) are inconsistent with the governmental entity’s constitutional or statutory duties related to the issuance, incurrence, or management of debt obligations or the deposit, custody,**

management, borrowing, or investment of funds.

d) [other exceptions for constitutional, statutory, or fiduciary duties]

Section 4. Applicability and Effective Date.

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