

118TH CONGRESS  
1ST SESSION

# S. 189

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

JANUARY 31, 2023

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 2023”.

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 the  
24 charters and bylaws of the corporations, and does  
25 not—

1 (A) establish fiduciary duties of boards of  
2 directors or other corporate actors to corpora-  
3 tions and their stockholders under Federal law;  
4 or

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

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

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

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

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

1 (A) generally invest corporate resources to  
2 increase the long-term value of the corporation  
3 as a business rather than as an agent of social  
4 change;

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

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

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

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

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

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

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

1 receive adverse treatment solely or partly be-  
2 cause of his or her race or sex, and meritocracy  
3 or traits such as a hard work ethic are racist  
4 or sexist, or were created by a particular race  
5 to oppress another race; and

6 (D) openly coordinate with political actors  
7 to pursue such actions, including—

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

22 (ii) conceding to the demands of the  
23 political actors without undertaking due  
24 care.

1           (8) The prominent, open, and public facial vio-  
2           lation of these norms by large corporate issuers that  
3           are significant to the national economy undermine  
4           the commercial purpose and nationwide availability  
5           of the national market system for securities by  
6           spending corporate resources on noncommercial and  
7           divisive, political and partisan causes.

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

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

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

1 **SEC. 3. LISTING REQUIREMENT RELATING TO PROCE-**  
 2 **DURAL PRIVILEGES FOR CERTAIN SHARE-**  
 3 **HOLDER CLAIMS.**

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

7 **“SEC. 10E. PROCEDURAL PRIVILEGES FOR CERTAIN**  
 8 **SHAREHOLDER CLAIMS.**

9 “(a) DEFINITIONS.—In this section:

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

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

12 or

13 “(B) if a covered claim is brought as a  
 14 class action, the representative of the class in  
 15 that action.

16 “(2) CONTROLLER.—The term ‘controller’  
 17 means any person or entity that has control, directly  
 18 or indirectly, by any means (as those terms are de-  
 19 fined under applicable State law), over the board of  
 20 directors of an issuer—

21 “(A) generally; or

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

24 “(3) COVERED CLAIM.—The term ‘covered  
 25 claim’—



1           “(A) means any single cause of action  
2           that—

3                   “(i) asserts a claim for breach of fidu-  
4                   ciary duty owed by any corporate defend-  
5                   ant to the applicable issuer (or the share-  
6                   holders of the applicable issuer) resulting  
7                   from material action by any covered cor-  
8                   porate actor with respect to the applicable  
9                   issuer—

10                           “(I) that is taken primarily in re-  
11                           sponse to a law (including a regula-  
12                           tion) that is enacted by a State, or a  
13                           bill that is introduced in the legisla-  
14                           ture of a State or policy otherwise  
15                           publicly proposed by an elected official  
16                           of a State, which shall include if such  
17                           action includes any prohibition of  
18                           business within that State by an  
19                           issuer, whether with respect to busi-  
20                           ness services or travel to, or major  
21                           events in, that State, that is facially  
22                           unrelated to the pecuniary interest of  
23                           the applicable issuer, which shall pre-  
24                           sumptively include if the law bill, or

1 policy would modify, establish, or cre-  
2 ate a law relating to—

3 “(aa) the manner in which  
4 elections are conducted in the  
5 State;

6 “(bb) protecting religious  
7 freedom; or

8 “(cc) limiting the availability  
9 of services that include the abor-  
10 tion of unborn children;

11 “(II) to prohibit the sale of goods  
12 or services by any covered corporate  
13 actor with respect to the applicable  
14 issuer to customers who operate in an  
15 industry with which the issuer en-  
16 gages in such business primarily on  
17 the basis of a characteristic of that in-  
18 dustry that is facially unrelated to the  
19 pecuniary interest of the applicable  
20 issuer;

21 “(III) to promote a covered divi-  
22 sive concept; or

23 “(IV) for which the reasoning  
24 publicly presented by any covered cor-

1 corporate actor with respect to the appli-  
2 cable issuer as—

3 “(aa) any basis for such ac-  
4 tion promotes a covered divisive  
5 concept; or

6 “(bb) the primary basis for  
7 such action is facially unrelated  
8 to the pecuniary interest of the  
9 applicable issuer, which shall pre-  
10 sumptively include any reference  
11 to diversity, equity, or inclusion  
12 with respect to the composition  
13 of the workforce, management, or  
14 board of directors of the issuer or  
15 society in general; and

16 “(ii) is brought by a covered share-  
17 holder as—

18 “(I) a direct action; or

19 “(II) a derivative action or pro-  
20 ceeding brought on behalf of the ap-  
21 plicable issuer; and

22 “(B) does not include a cause of action  
23 that asserts a claim for the breach of fiduciary  
24 duty owed by any corporate defendant to the

1 applicable issuer (or the shareholders of that  
2 issuer) resulting from—

3 “(i) a charitable contribution by any  
4 covered corporate actor with respect to the  
5 applicable issuer;

6 “(ii) the exercise of religion by any  
7 covered corporate actor with respect to the  
8 applicable issuer;

9 “(iii) business activity by any covered  
10 corporate actor in connection with the na-  
11 tional security of the United States, the  
12 Armed Forces, or veterans of the Armed  
13 Forces; or

14 “(iv) the limitation of business by any  
15 covered corporate actor with respect to the  
16 applicable issuer—

17 “(I) occurring in the jurisdiction  
18 of, or with an agent of the People’s  
19 Republic of China, the Russian Fed-  
20 eration, North Korea, Iran, Syria,  
21 Sudan, Venezuela, or Cuba;

22 “(II) in connection with pre-  
23 venting the abuse of internationally  
24 recognized worker rights, as defined

1 in section 507 of the Trade Act of  
2 1974 (19 U.S.C. 2467);

3 “(III) with any entity that de-  
4 rives directly or indirectly more than  
5 de minimis gross revenue through the  
6 sale of products or services, or the  
7 presentation of any depictions or dis-  
8 plays, of a prurient sexual nature;

9 “(IV) with any entity that en-  
10 engages in a commerce- or investment-  
11 related boycott, divestment, or sanc-  
12 tions activity that targets Israel; or

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

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

20 “(A) a public float of more than  
21 \$20,000,000,000; or

22 “(B) annual revenues of more than  
23 \$5,000,000,000.

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

1           “(A) an issuer;

2           “(B) a director, officer, or affiliate of an  
3 issuer;

4           “(C) a controller with respect to an issuer;  
5 or

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

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

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

12           “(B) may be named as a defendant in a  
13 cause of action for breach of fiduciary duty  
14 under applicable State law.

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

20           “(8) COVERED SHAREHOLDER.—

21           “(A) IN GENERAL.—The term ‘covered  
22 shareholder’ means a shareholder that, as of  
23 the date on which a covered claim with respect  
24 to the issuer is filed and at all times during  
25 which the covered claim described in subpara-

1 graph (A) is pending, has continuously owned  
2 not less than—

3 “(i) \$2,000 in market value of the se-  
4 curities of the issuer for at least 3 years;

5 “(ii) \$15,000 in market value of the  
6 securities of the issuer for at least 2 years;

7 or

8 “(iii) \$25,000 in market value of the  
9 securities of the issuer for at least 1 year.

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

13 “(10) INVESTMENT ADVISER; PRIVATE FUND.—  
14 The terms ‘investment adviser’ and ‘private fund’  
15 have the meanings given the terms in section 202 of  
16 the Investment Advisers Act of 1940 (15 U.S.C.  
17 80b–2).

18 “(11) INVESTMENT COMPANY.—The term ‘in-  
19 vestment company’ has the meaning given the term  
20 in section 3 of the Investment Company Act of 1940  
21 (15 U.S.C. 80a–3).

22 “(12) ISSUER.—The term ‘issuer’ means an  
23 issuer with a class of securities registered pursuant  
24 to section 12.

1           “(13) NONPECUNIARY INVESTMENT ENTITY.—

2           The term ‘nonpecuniary investment entity’ means—

3                   “(A) any investment company or private  
4                   fund that invests, reinvests, or trades, or pro-  
5                   poses to invest, reinvest, or trade in, or that ex-  
6                   ercises any control right with respect to any se-  
7                   curity primarily on a basis that is facially unre-  
8                   lated to the pecuniary interest of any bene-  
9                   ficiary of the company or fund for which the ac-  
10                  tivity occurs with respect to the security;

11                  “(B) any investment advisor that provides  
12                  any advice that is not a charitable contribu-  
13                  tion—

14                          “(i) that is for compensation; and

15                          “(ii) the basis for which is primarily  
16                          unrelated to the pecuniary interest of the  
17                          party receiving the advice;

18                  “(C) any entity that engages in activism  
19                  with respect to issuers to which section 14 ap-  
20                  plies for which the primary basis of the activism  
21                  is facially unrelated to the pecuniary interest of  
22                  the issuers to which the activism is directed, in-  
23                  cluding—

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



1                   “(ii) making shareholder proposals  
2                   pursuant to that section; and

3                   “(D) any labor organization, as defined in  
4                   section 2 of the National Labor Relations Act  
5                   (29 U.S.C. 152), or pension fund affiliated with  
6                   a labor organization.

7                   “(b) REQUIREMENTS.—

8                   “(1) RULES.—Not later than 1 year after the  
9                   date of enactment of the Mind Your Own Business  
10                  Act of 2023, the Commission shall, by rule, direct  
11                  the national securities exchanges and national secu-  
12                  rities associations to prohibit the listing of any secu-  
13                  rity of any covered company that is not in compli-  
14                  ance with the requirements of this section.

15                  “(2) ISSUER REQUIREMENTS.—The rules issued  
16                  under paragraph (1) shall require each issuer, to the  
17                  maximum extent permitted by State law, in the arti-  
18                  cles of incorporation or bylaws of the issuer, to pro-  
19                  vide, with respect to any covered claim, that any cor-  
20                  porate defendant with respect to the issuer that is  
21                  named as a defendant in the covered claim shall—

22                         “(A) be bound by the presumptions estab-  
23                         lished under subsection (c) with respect to any  
24                         factual representation made in connection with  
25                         the covered claim, including any factual rep-

1           resentation relating to whether a claim asserted  
2           is a covered claim;

3           “(B) have the burden of proof with respect  
4           to any determination of independent business  
5           judgment;

6           “(C) if the claimant obtains a judgment on  
7           the merits in the covered claim, be jointly and  
8           severally liable for money damages to the claim-  
9           ant in an amount that is not less than the  
10          greater of—

11                   “(i) treble damages; or

12                   “(ii) 2 times the total compensation  
13                  paid by the issuer to all directors of the  
14                  issuer for the year in which the primary  
15                  action alleged in the covered claim sub-  
16                  stantially occurred, including the market  
17                  value of all securities issued as compensa-  
18                  tion to those directors in that year;

19           “(D) if the claimant obtains all or some of  
20           the relief sought in the covered claim, whether  
21           by court order, settlement, voluntary change in  
22           the conduct of the defendant, or otherwise, re-  
23           imburse the claimant for the greatest amount  
24           permitted by law with respect to all fees, costs,  
25           and expenses of every kind and description (in-

1 including all reasonable attorney's fees and other  
2 litigation expenses) that the claimant may ob-  
3 tain in connection with the covered claim; and

4 “(E) not be indemnified by the issuer for  
5 any liability, loss (including attorney's fees,  
6 judgments, fines, or amounts paid in settle-  
7 ment) incurred or suffered in connection with  
8 the covered claim.

9 “(c) PRESUMPTIONS.—For the purposes of this sec-  
10 tion, the following presumptions shall apply with respect  
11 to any covered claim, including with respect to any factual  
12 representation relating to whether a claim asserted is a  
13 covered claim:

14 “(1) PECUNIARY INTEREST.—There shall be a  
15 presumption that the pecuniary interest of an issuer,  
16 including the best interest of the issuer to the extent  
17 that such interest is substantially similar to the pe-  
18 cuniary interest of the issuer, does not include—

19 “(A) the morale of, or ability of the issuer  
20 to hire or retain, supervisory employees in gen-  
21 eral;

22 “(B) the diversity of the board of direc-  
23 tors, management, or workforce in general with  
24 respect to any characteristic protected by sec-

1           tion 703 of the Civil Rights Act of 1964 (42  
2           2000e-2);

3           “(C) the public relations, image, value of  
4           marketing, or coverage by the news media of  
5           the issuer; or

6           “(D) any financial benefit or reduction in  
7           cost, including the cost of capital to the issuer,  
8           to the extent the pecuniary benefit of or to such  
9           benefit or reduction in cost is caused by the—

10           “(i) investment in the securities of the  
11           issuer by a nonpecuniary investment enti-  
12           ty; or

13           “(ii) inclusion of the securities of the  
14           issuer in indexes created by index pro-  
15           viders that select those indexes on a pri-  
16           marily nonpecuniary basis or that include  
17           such securities in any index on a primarily  
18           nonpecuniary basis.

19           “(2) DEMAND EXCUSED.—For the purpose of  
20           determining whether demand is excused with respect  
21           to a covered claim, there shall be a presumption that  
22           a director is not independent if the director is em-  
23           ployed, controlled, or nominated by, or otherwise has  
24           a history of affiliation with a nonpecuniary invest-

1       ment entity or any affiliate of a nonpecuniary invest-  
2       ment entity.

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

5           “(1) to limit the exercise of religion, as defined  
6       in section 5 of the Religious Freedom Restoration  
7       Act of 1993 (42 U.S.C. 2000bb–2) of any issuer or  
8       any director, officer, or affiliate of an issuer; or

9           “(2) as establishing a fiduciary duty by any  
10       corporate defendant or corporate actor.”.

○