HB 949

Department of Legislative Services

Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
First Reader - Revised

House Bill 949 (Delegate Kramer, *et al.*)

Health and Government Operations and Appropriations

Procurement and Pensions - State Sanctions - Discriminatory Boycott of Israel

This bill prohibits persons who participate in a boycott of Israel from participating in a procurement with a public body in the State and makes those persons subject to divestment by the State Retirement and Pension System (SRPS).

The bill takes effect July 1, 2017.

Fiscal Summary

State Effect: Potential increase in State procurement costs (all funds), to the extent that persons participating in a boycott of Israel are prohibited from bidding on or participating in State contracts and, therefore, diminish competition for those contracts. The overall effect on State procurement costs is expected to be negligible. Similarly, any divestiture actions by SRPS are expected to have only a negligible, if any, effect on State pension liabilities and contribution rates. Special fund expenditures by the State Retirement Agency (SRA) increase by between $6,000 and $10,000 beginning in FY 2018 to hire a consultant to assist in the development and subsequent updating of the required list. The Board of Public Works (BPW) can implement the bill with existing budgeted resources. No effect on revenues.

(in dollars)	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
Revenues	$0	$0	$0	$0	$0
SF Expenditure	8,000	8,000	8,000	8,000	8,000
Net Effect	($8,000)	($8,000)	($8,000)	($8,000)	($8,000)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: Potential increase in local governmental procurement costs, to the extent that persons participating in a boycott of Israel are prohibited from bidding on or participating in local contracts and, therefore, diminish competition for those contracts. The overall effect on local procurement costs is expected to be negligible, but the effect on any single contract may be greater. **This bill may impose a mandate on a unit of local government.**

Small Business Effect: Minimal. Very few, if any, small businesses in the State are expected to be affected by the bill's provisions.

Analysis

Bill Summary: "Participating in a boycott of Israel" means refusal to transact, termination of business activities, or other actions carried out in a discriminatory manner that are intended to limit commercial relations with the State of Israel, persons doing business in or with Israel, or in Israeli-controlled territories. It does not include foreign boycotts preempted by federal law.

Provisions in current law that prohibit persons engaged in investment activities in Iran from participating in procurement with public bodies in the State and that make those persons subject to debarment are applied to persons that participate in a boycott of Israel. These provisions are described in the Current Law section below. Similarly, provisions in current law that make persons who do business in Iran or Sudan subject to divestment by SRPS are applied to persons that participate in a boycott of Israel. These provisions are also summarized below.

Current Law:

Procurement: Chapters 446 and 447 of 2012 prohibited any person engaged in investment activities in Iran from participating in procurement with any public body in the State and made those persons subject to debarment under State procurement law. These same provisions, as described below, apply to persons who participate in a boycott of Israel under the bill.

"Persons" includes individuals, corporations, companies, limited liability companies, business associations, partnerships, societies, trusts, or any other nongovernmental entity, organization, or group. The term also includes governmental entities or instrumentalities of a government as defined in federal law, and any parent or successor of any of these entities.

"Public body" includes the State; a county, municipality, or other political subdivision; a public instrumentality; or any governmental unit authorized to award a procurement contract.

BPW must use credible information available to the public to develop a list of persons engaged in investment activities in Iran and update the list every 180 days. Ninety days before adding a person to the list, BPW must provide notice to the person of its intention to add the person to the list and that inclusion on the list prohibits the person from contracting with public bodies in the State. During the 90-day period, the person may provide written documentation demonstrating that the person is not engaged in investment activities in Iran. BPW must make every effort to avoid erroneously including a person on the list and must publish the list on the Internet.

Certification by a person to a State or local governmental procurement unit that the person is not on the BPW list and is not engaged in investment activities in Iran must be made at the time a bid or proposal is submitted or a contract is renewed.

Penalties for falsely certifying that a person is not engaged in investment activities in Iran include:

- a civil penalty equal to the greater of $1 million or twice the amount of the contract for which the false certification was made; and
- ineligibility to bid on a contract for three years.

In addition, any existing contracts may be terminated, and the person is responsible for any reasonable costs and fees incurred by the Attorney General in bringing the action and any costs incurred by the public body for the investigation that led to the finding of false certification. A procurement contract may not be awarded to a person that submits a false certification. Chapters 446 and 447 do not create a private right of action.

Divestment/Sanctions: Chapter 342 of 2008 requires the SRPS Board of Trustees to notify any company whose shares are held in an actively traded separate account in its portfolio that is doing business in either Iran or Sudan that the board will divest all holdings in the company unless the company releases a plan to cease its business with Iran or Sudan within one year. These same provisions, as described below, apply to any person that participates in a boycott of Israel under the bill.

Chapter 342 exempts from the divestment requirement any company whose divestment cannot be executed for fair market value or greater. It requires the board to act in good faith and in a manner consistent with its fiduciary responsibilities in carrying out the divestment requirement.

Within 30 days of completing a review of its holdings to identify eligible businesses doing business in either Iran or Sudan, the board must provide written notice to those companies that they will be subject to divestment unless they respond within 90 days and:

- can demonstrate that they do not do business in either country; or
- state that, within 60 days, they will produce a plan to end doing business in Iran or Sudan within one year.

The board must divest from any notified company that does not abide by these conditions, and from any notified company that does not cease doing business in Iran or Sudan within one year.

Federal Law: Federal law prohibits any person from participating in any boycott fostered or imposed by a foreign country against another foreign country that is friendly to the United States and which is not itself the object of any boycott under U.S. law. The federal law preempts any state law that pertains to participation in, compliance with, implementation of, or the furnishing of information regarding restrictive trade practices or boycotts fostered by foreign countries.

Background: "Boycott, divest, and sanction" (BDS) is a Palestinian-led movement that purportedly began in 2005 as a response to Israel's continued occupation of the West Bank territory, which BDS supporters often compare to South Africa's apartheid policies. Opponents of the BDS movement have characterized it as an anti-Semitic effort to isolate Israel and undermine its existence. The BDS movements calls for:

- boycotts of Israel and Israeli and international companies involved in the West Bank as well as Israeli sporting, cultural, and academic institutions;
- divestment from all Israeli companies and from international companies involved in violating Palestinian rights; and
- sanctions against Israel, including ending military trade, free trade agreements, and Israeli membership in the United Nations and other international organizations.

Since 2015, a number of states have taken steps to counter the BDS movement through resolutions, statutes, and executive orders. The Tennessee General Assembly adopted a joint resolution that "condemns the international Boycott, Divestment, and Sanctions movement…for seeking to undermine the Jewish people's right to self-determination…." South Carolina enacted legislation prohibiting the state from entering into contracts with companies that participate in certain boycotts, but the law did not reference either BDS or Israel directly.

In 2015, Illinois became the first state to enact legislation prohibiting all of the state's pension funds from investing in companies participating in a boycott of Israel. The legislation instructed the existing Illinois Investment Policy Board (IIPB), which was already charged with implementing divestment policies related to Iran and Sudan, with assembling a list of companies that boycott Israel. It required each retirement system to instruct its investment managers to sell, redeem, divest, or withdraw all direct holdings from the identified companies "in an orderly and fiduciarily responsible manner" within one year; the bill did not apply to indirect holdings or private market funds. The subsequent list of 14 companies issued by IIPB, which was gathered largely from Internet searches of BDS-related stories, has drawn scrutiny because several of the companies on the list are disputing their status. A note attached to the list on IIPB's website states that it is "in communication with these companies regarding ascertaining compliance with the statute."

Since Illinois enacted legislation, numerous other states, including Alabama, California, Michigan, and New Jersey, have enacted legislation that divests pension funds from companies engaged in a boycott of Israel, prohibits state agencies from contracting with companies engaged in a boycott of Israel, or both.

State Fiscal Effect: SRA retains MSCI ESG Research to provide it with a list of persons doing business with Iran or Sudan. Based on MSCI ESG Research's work, the agency retains a list of about 20 to 30 firms, mostly based in other countries, in which it may not invest directly. In recent years, however, it has not identified any countries from which it had to divest. SRA advises that an initial search by MSCI ESG Research did not find any countries participating in a boycott of Israel from which SRA would have to divest. However, using a list of companies provided by the Israel Project, SRPS identified one company, Danske Bank, that is held directly by the system and may be subject to divestment under the bill. Total SRPS holdings in Danske Bank are less than $3.5 million, or 0.08% of total holdings by SRPS.

Moreover, as the anti-BDS legislation is a relatively recent occurrence, shareholder services firms like MSCI ESG Research have not developed fully reliable methodologies for identifying companies that participate in a boycott of Israel. SRPS notes that at least one company on the IIPB list is not on the Israel Project list, and that Danske Bank did not appear on the MSCI ESG Research search, further illuminating that the process of identifying firms participating in a boycott of Israel is currently an imperfect one. SRA estimates that contracting with an entity who could provide it with a list of companies participating in a boycott of Israel would cost between $6,000 and $10,000 annually. BPW advises that it would likely use the same list obtained by SRA, or potentially use lists developed by other states, to determine which companies were barred from participating in procurement with public bodies in the State. Therefore, BPW can implement the bill with existing resources.

Given the limited number of companies that are likely barred from doing business with a public body in the State and that most such companies are based abroad, the bill is expected to have only a negligible, if any, effect on State procurement costs. It is possible, however, that any given contract could be affected.

Additional Information

Prior Introductions: None.

Cross File: SB 739 (Senator Zirkin, *et al.*) - Budget and Taxation and Education, Health, and Environmental Affairs.

Information Source(s): Board of Public Works; State Retirement Agency; Forward.com; BDSmovement.net; Jewish Virtual Library; Illinois Investment Policy Board; Department of Legislative Services

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