United States Senate
WASHINGTON, DC 20510

September 28, 2022

Secretary Gina M. Raimondo
U.S. Department of Commerce
1401 Constitution Ave NW
Washington, DC 20230

Dear Secretary Raimondo,

We write with deep concern that the Commerce Department is not taking sufficient action to ensure that American companies are aware of the criminal, financial, and reputational risks of engaging in unsanctioned boycotts of friendly countries, including Israel. We urge you to more robustly engage such companies to make them aware of the risks, which range federal statutes and state prohibitions.

The Anti-Boycott Act of 2018 (50 USC 58) and Part 760 of the Export Administration Regulations broadly prohibit United States persons from engaging in interstate or foreign commerce to further boycotts of friendly countries. The EAR is explicit that such prohibited boycotts include "not only specific refusals, but also refusals implied by a course or pattern of conduct. There need not be a specific offer and refusal to constitute a refusal to do business; a refusal may occur when a United States person has a financial or commercial opportunity and declines for boycott reasons to consider or accept it" (15 CFR § 760(a)(3)).

Meanwhile, multiple states have also passed laws and implemented regulations in response to such actions, both generally and in the context of Israel, which is subject to economic warfare by an international boycott effort. The definitions of boycotts are by design expansive. For example, Texas government code prohibits investments in and contracts with companies which boycott Israel, and defines such boycotts as "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 specifically with Israel."

In 2020 Morningstar, Inc., a US-based financial services firm, acquired Sustainalytics, an analytics firm that generates ratings and reports evaluating companies' environmental, social, and corporate governance (ESG), and provides those reports to other companies and financial data platforms. Sustainalytics executive has stated that changing a company's status to what they describe as "disengage" is "an indication that the company may not be suitable for investors' portfolios." In recent reports Sustainalytics has echoed and amplified attacks by boycott advocacy groups against companies that do business with Israel.

Advocates of economic warfare against Israel have increasingly sought to use ESG criteria as pretexts for boycott advocacy. Companies that rely on ESG ratings in their business decisions have minimal transparency into the details let alone motivations behind how the ratings were set. The practice introduces exposure to American anti-boycott laws along the entire chain, and most acutely for the firms opaquely designing and setting the ESG criteria.

Last year, Morningstar, Inc. hired an outside law firm to investigate allegations that it had exposure to anti-boycott allegations and statutes. The report found that Sustainalytics relies for its data on groups committed to boycotting Israel, including Who Profits, Human Rights Watch, and Amnesty International. In that context, the report discovered that Sustainalytics "does cite… a company's presence on the UN High Commissioner's list as a source of potential legal and/or reputational risk for that particular issuer." The United States government has regularly and across administrations condemned that list as an antisemitic effort to single out and delegitimize our Israeli allies. The organization's climate was such that it had even been relying on antisemitic advocacy platforms, including Electronic Intifada website, BDSMovement.net, Iran Daily, and the Venezuelan regime-sponsored television network Telesur, which it said it has stopped doing in the aftermath of public reports and criticism.

The law firm conducted a systematic analysis of Sustainalytics's core products "for evidence of comparative bias in research outcomes related to the Israeli/Palestinian conflict." The report threw Sustainalytics's products into an Excel spreadsheet and found that while some now-discontinued products focused disproportionately on Israel, when the targets of current products were all counted up, the focus on Israel "did not substantively differ from the number engagements with companies operating in China, Myanmar, Russia, Saudi Arabia, and Western Sahara."

Many of these countries are among the worst human rights violators in the world. The law firm did not take the next, obvious, step of noting that comparing Israel to for instance the Chinese Communist Party, which is conducting an ongoing genocide against Muslim and other religious minorities, is grotesque and is itself evidence of systemic bias. The report also did not make the equally obvious point that incorporating the advocacy and targets of pro-boycott organizations guarantees the production of pro-boycott bias.

In fact, Morningstar has publicly cited the report as exonerating the company from allegations of anti-Israel bias and boycott advocacy.

We are concerned that confidence is misplaced, and that the Commerce Department is not sufficiently engaging Morningstar and similar companies. The ratings and implicit advocacy from Sustainanalytics come remarkably close to blackletter violations of prohibitions described at the federal level by the EAR and in laws of states such as Texas. The Commerce Department, both generally and as the agency housing the Office of Antiboycott Compliance, is charged with ensuring American companies are aware of these risks and working with them to mitigate and end any exposure. It is also charged with insuring the integrity of those federal prohibitions, as necessary.

As always, we stand ready to provide you with whatever resources you need in these important tasks.

Ted Cruz
United States Senator

Marsha Blackburn
United States Senator