

BILL ANALYSIS

C.S.H.B. 2189
By: King, Phil
State Affairs
Committee Report (Substituted)

BACKGROUND AND PURPOSE

The oil and gas sector has comprised between 30 and 40 percent of the state's economic activity over the past decade. In recent years, a number of corporations have begun to prioritize their involvement in social issues, such as environmentalism, instead of focusing solely on their fiduciary responsibility. When state agencies contract with or invest funds in companies that boycott fossil fuel-based energy companies, it has a direct and adverse effect on the Texas economy. C.S.H.B. 2189 seeks to ensure that taxpayer dollars are not being used to promote an agenda that hurts the state's energy sector and economy as a whole by prohibiting investments by certain state entities in companies that boycott these energy companies.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 2189 amends the Government Code to prohibit a state agency or political subdivision from entering into an applicable contract with a company for goods and services unless the contract contains a written verification from the company that it does not and will not during the contract term boycott energy companies. That prohibition applies only to a contract with a minimum value of \$100,000 that is between such a governmental entity and a company with 10 or more full-time employees and that is to be paid at least in part from the entity's public funds.

C.S.H.B. 2189 defines, among other terms, "boycott energy company" as refusing to deal with, terminating business activities with, or otherwise taking any action that is, solely or primarily, intended to penalize, inflict economic harm on, or limit commercial relations specifically with a company because the company 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 with a company that does business with such a company.

C.S.H.B. 2189 requires the comptroller of public accounts to prepare and maintain a list of all publicly traded financial services, banking, or investment companies that boycott energy companies and to provide that list to the following state governmental entities:

- the Employees Retirement System of Texas (ERS), including a retirement system administered by ERS;
- the Teacher Retirement System of Texas;

- the Texas Municipal Retirement System;
- the Texas County and District Retirement System;
- the Texas Emergency Services Retirement System; and
- the permanent school fund.

The bill sets out provisions relating to maintaining and updating that list, including an authorization for the comptroller to request written verification from a company that it does not boycott energy companies and rely on the company's written response without further investigation. The bill establishes that a financial company that fails to provide the written verification before the 61st day after receiving the request from the comptroller is presumed to be boycotting energy companies. The bill requires the comptroller, not later than the 30th day after the date the list is first provided or updated, to post the list on a publicly available website and to file the list with the presiding officer of each house of the legislature and the attorney general.

C.S.H.B. 2189 requires each applicable state governmental entity, not later than the 30th day after the date the entity receives the list, to notify the comptroller of the listed financial companies in which the entity owns direct holdings or indirect holdings. The bill provides the following:

- the entity, for each listed company, must send a written notice informing the company of its status as a listed company, warning the company that it may become subject to divestment by state governmental entities, and offering the company the opportunity to clarify its activities related to energy companies;
- not later than the 90th day after receiving the notice, such a company must cease boycotting energy companies in order to avoid qualifying for divestment; and
- the comptroller must remove from its list a company that ceases boycotting energy companies during the time provided and, in such a circumstance, the bill's provisions prohibiting investment in the company no longer apply to the company unless it resumes boycotting energy companies.

C.S.H.B. 2189 requires an applicable state governmental entity to sell, redeem, divest, or withdraw all publicly traded securities of a listed financial company that continues to boycott energy companies after the time provided expires according to a prescribed schedule. The bill expressly does not require divestment from any indirect holdings in actively or passively managed investment funds or private equity funds but requires an entity to submit letters to the managers of each investment fund containing listed companies requesting that they remove those companies from the fund or create a similar actively or passively managed fund with indirect holdings devoid of listed 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.

C.S.H.B. 2189 authorizes an applicable state governmental entity to cease divesting from one or more listed financial companies if clear and convincing evidence shows that either of the following are true:

- the entity has suffered or will suffer a loss in the hypothetical value of all assets under management by the entity as a result of having to divest from listed companies; or
- 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 companies.

The bill sets out related provisions, including a limitation on the extent to which such an entity may cease divestment and a requirement that an applicable state governmental entity provide a report to the comptroller, the presiding officer of each house of the legislature, and the attorney general relating to a decision to cease divestment or to remain invested in a listed company.

C.S.H.B. 2189 does the following:

- sets out exemptions for an applicable state governmental entity and the comptroller from certain conflicting statutory or common law obligations and the conditions under which the state is required to indemnify and hold harmless for actual damages certain people and entities;
- sets out prohibitions against suit or pursuit of a private cause of action for any claim or cause of action in connection with actions made or taken for purposes of the bill's provisions prohibiting investment in companies that boycott energy companies;
- exempts an applicable state governmental entity from a requirement of those bill provisions if the 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, including the duty of care established under the Texas Constitution; and
- authorizes the comptroller and an applicable state governmental entity to rely on a financial company's response to a notice or communication made in relation to the investment prohibition without conducting any further investigation, research, or inquiry.

C.S.H.B. 2189 requires each applicable state governmental entity, not later than January 5 of each year, to file a publicly available report with the presiding officer of each house of the legislature and the attorney general that does the following:

- identifies all securities of a listed financial company sold, redeemed, divested, or withdrawn;
- identifies all prohibited investments of a listed financial company; and
- summarizes any changes made under the bill's provisions relating to investments exempted from divestment.

The bill authorizes the attorney general to bring any action necessary to enforce the bill's provisions prohibiting investment in financial companies that boycott energy companies.

EFFECTIVE DATE

September 1, 2021.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 2189 may differ from the original in minor or nonsubstantive ways, the following summarizes the substantial differences between the introduced and committee substitute versions of the bill.

The substitute revises the actions that constitute the meaning of "boycott energy company" to do the following:

- remove the specification that an action in question was taken without an ordinary business purpose and specifies instead that the action is taken solely or primarily to penalize, inflict economic harm on, or limit commercial relations with an energy company; and
- limit the energy companies against whom taking such an action constitutes a boycott to those that do not commit or pledge to meet environmental standards beyond applicable federal and state law.

The substitute includes provisions that do the following:

- define "financial company" as a publicly traded financial services, banking, or investment company; and
- limit to such a company application of its provisions relating to being subject to the comptroller's list as boycotting an energy company.

The substitute includes an authorization for the comptroller to request written verification from a financial company that it does not boycott energy companies and to rely on the company's written response without further investigation. The substitute includes a provision establishing

that a company that fails to respond to such a request within the prescribed time frame is presumed to be boycotting energy companies.

The substitute includes a procedural provision establishing that the bill's provisions prohibiting the investing in financial companies that boycott certain energy companies apply only to a contract entered into on or after the bill's effective date.