

BILL ANALYSIS

Senate Research Center
80R7707 MCK-F

C.S.S.B. 247
By: Ellis et al.
Government Organization
3/13/2007
Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Current law does not place any restriction on the ability of the Employees Retirement System of Texas (ERS) to invest in companies that are beneficial to the Sudanese government and are indirectly facilitating the genocide occurring in Sudan. ERS may be investing in these companies and this bill restricts ERS from doing business with certain companies associated with the Sudanese government.

This bill differs in very significant ways from Sudan divestment legislation passed in states like Illinois and New Jersey since the proposed Texas legislation targets only the small subset of companies operating in Sudan that have problematic behavior (so called "scrutinized companies" – less than 15 percent of multinational corporations operating in Sudan).

C.S.S.B. 247 mandates engagement with scrutinized companies before any divestment action is taken. The state pension funds will have very little administrative expense associated with this bill because all material for researching and engaging problematic companies is publicly available and free of charge to ERS. C.S.S.B. 247 protects ERS by excluding certain "hard to target" investments and providing an opt-out if a pension fund can objectively demonstrate that divestment has had a negative impact on its portfolio.

C.S.S.B. 247 requires ERS to engage and possibly divest from certain companies doing business in Sudan. Only those companies that substantially benefit the central government, provide little benefit to Sudanese citizens, and who have failed to address their role in indirectly facilitating Sudan's genocidal capacity are covered in this bill.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. LEGISLATIVE FINDINGS. Sets forth findings and declarations relating to the genocide in the Darfur region of Sudan. Provides that because the situation in Sudan poses a risk to companies operating in Sudan a divestment movement was begun. Provides that this Act does not intend to interfere with the performance of the fiduciary duties of a manager or funds subject to this Act. Provides that the genocide in Sudan is grounds for mandatory divestment of public funds.

SECTION 2. Amends Subtitle A, Title 8, Government Code, by adding Chapter 806, to read as follows:

CHAPTER 806. PROHIBITION ON INVESTMENT IN SUDAN

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 806.001. DEFINITIONS. Defines "active business operations," "business operations," "company," "complicit," "direct holdings in a company," "Government of Sudan," "inactive business operations," "indirect holdings in a company," "listed company," "marginalized populations of Sudan," "military equipment," "mineral extraction activities," "oil-related activities," "power production activities," "scrutinized

company," "social development company," "state governmental entity," and "substantial action."

Sec. 806.002. SCRUTINIZED BUSINESS OPERATIONS. Sets forth conditions which constitute participation in scrutinized business operations.

Sec. 806.003. SOCIAL DEVELOPMENT COMPANY. Provides that a social development company not complicit in the Darfur genocide is not a scrutinized company, notwithstanding other law.

Sec. 806.004. EXCEPTION. Provides that any company excluded from the United States (U.S.) government's sanctions against Sudan is exempt from the divestment or investment prohibitions under this chapter.

Sec. 806.005. OTHER LEGAL OBLIGATIONS. Exempts a state government entity (entity) attempting to comply with this chapter from conflicting statutory or common law obligations, including certain investment and securities portfolio choices.

Sec. 806.006. FIDUCIARY RESPONSIBILITIES. Provides that an entity is not required to take any action prescribed by this chapter if the entity makes a good faith determination that the action would be inconsistent with the entity's fiduciary responsibilities and obligations under Section 67, Article XVI, Texas Constitution.

Sec. 806.007. INDEMNIFICATION OF STATE GOVERNMENTAL ENTITIES, EMPLOYEES, AND OTHERS. Requires the state, without regard to whether the person performed services for compensation, in a cause of action based on certain factors, to indemnify and hold harmless for actual damages, court costs, and attorney's fees adjudged against, and defend certain persons.

Sec. 806.008. NO PRIVATE CAUSE OF ACTION. (a) Prohibits certain persons and organizations to which this chapter applies from suing or pursuing a private cause of action against the state and certain state bodies and employees, for any claim or cause of action made or taken in connection with this chapter.

(b) Provides that a person who files suit against the state and certain state bodies and employees is liable for paying the costs and attorney's fees of a person sued in violation of this section.

Sec. 806.009. RELIANCE ON COMPANY RESPONSE. Entitles an entity to rely on a company's response to a notice or communication provided by the entity under this chapter without any further investigation, research, or inquiry.

[Reserves Sections 806.010–806.050 for expansion.]

SUBCHAPTER B. DUTIES REGARDING INVESTMENTS

Sec. 806.051. LISTED COMPANIES. (a) Requires the comptroller of public accounts (comptroller) to prepare and maintain, and provide to each state governmental entity, a list of all scrutinized companies (list). Authorizes the comptroller, in maintaining the list, to review and rely on publicly available information regarding companies with business operations in Sudan, including information provided by certain bodies, as the comptroller deems appropriate.

(b) Requires the comptroller to 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 Subsection (a).

(c) Requires the comptroller to file the list with the presiding officer of each house of the legislature and the attorney general within 30 days of first providing or updating the list.

Sec. 806.052. INDENTIFICATION OF INVESTMENT IN LISTED COMPANIES. Requires each entity to notify the comptroller of the listed companies in which the entity owns direct or indirect holdings within 14 days of receiving the list provided under Section 806.051(c).

Sec. 806.053. NOTICE TO LISTED COMPANY ENGAGED IN INACTIVE BUSINESS OPERATIONS. Requires an entity to send written notice to each listed company with which it is associated that is engaged in inactive scrutinized activities. Sets forth that the written notice should advise the company of this chapter and urge the company to continue to refrain from initiating active business operations in Sudan. Requires the entity to continue correspondence as it considers necessary, but provides that the entity is not required to initiate correspondence more often than semiannually.

Sec. 806.054. ACTIONS RELATING TO LISTED COMPANY ENGAGED IN ACTIVE BUSINESS OPERATIONS. (a) Requires each entity to send a written notice to each listed company in which the entity has holdings that notifies the company of its listed company status and that it may become subject to divestment by entities.

(b) Requires this notice to allow a company to clarify its activities in relation to Sudan and encourage the company to end or convert to inactivate status its scrutinized operations within 90 days to avert qualifying for divestment by entities.

(c) Requires the comptroller to remove the company from the list upon cessation of scrutinized business operations if such cessation occurs during the 90 day period under Subsection (b). Sets forth that upon such occurrence this chapter no longer applies to the company unless scrutinized operations are resumed.

(d) Provides that if a company converts its scrutinized operations to inactive within 90 days of receiving notice the company is subject to all provisions in this chapter relating to inactive business operations.

(e) Requires an entity to sell, redeem, divest, or withdraw all publicly traded securities of a company, except securities described by Section 806.057, if the company continues to have scrutinized active business operations after the time provided by Subsection (b) expires, according to the schedule provided by Section 806.056.

Sec. 806.055. ACTIONS RELATING TO LISTED COMPANY COMPLICIT IN GENOCIDE. (a) Requires an entity to send written notice to each company on the list informing the company of its listed company status and that it may be subject to divestment by the entity.

(b) Requires this notice to require the company to refrain from further action making it complicit.

(c) Requires an entity to sell, redeem, divest, or withdraw all publicly traded securities in a listed company, except securities described by Section 806.057, that continues to take action making it complicit after receiving notice, and according to the schedule provided by Section 806.056.

Sec. 806.056. DIVESTMENT OF ASSETS. (a) Requires an entity selling, redeeming, divesting, or withdrawing assets in a listed company to comply with a certain schedule.

(b) Requires an entity to send written notice informing a company resuming once scrutinized active business operations that the entity will sell, redeem, divest, or withdraw all publicly traded securities in the company pursuant to that schedule.

(c) Authorizes an entity to delay the schedule for divestment under Subsection (a) to the extent that the entity determines, in good faith judgment, that divestment

from listed companies will likely result in a loss in value described by Section 806.058(a). Requires an entity delaying the schedule for divestment to submit a report to the presiding officer of each house of the legislature and the attorney general stating the reasons and justification for the delay in divestment. Requires the report to include supporting documentation that the divestment would result in a loss in value, including objective numerical estimates. Requires the entity to update the report every six months.

Sec. 806.057. INVESTMENTS EXEMPTED FROM DIVESTMENT. Exempts indirect holdings in actively managed investment funds (funds) or private equity funds from being subject to divestment by an entity. Requires an entity to submit letters to managers of funds containing listed companies requesting that listed companies be removed from the fund or that a fund excluding listed companies be created. Requires an entity to relocate all of its applicable investments in an expedited time frame consistent with prudent investment standards if a similar fund with substantially the same management fees and level of investment risk is created.

Sec. 806.058. AUTHORIZED INVESTMENT IN LISTED COMPANIES. (a) Authorizes an entity to cease divesting from or to reinvest in one or more listed companies if clear and convincing evidence shows that the value for all assets under management by the entity becomes equal to or less than 99.7 percent of the hypothetical value of all assets under management by the entity had the entity not divested from any scrutinized company under this chapter.

(b) Authorizes an entity to invest in a listed company to the extent necessary to ensure the value of the entity's managed assets does not fall below the value described by Subsection (a).

(c) Requires an entity to submit a written report to the presiding officer of each legislative house and the attorney general setting forth the reason and justification supported by clear and convincing evidence of its decisions to stop divestment, reinvest, or continue investment in a listed company.

(d) Requires that this report be updated semiannually, as applicable.

(e) Exempts reinvestment in a company that has ceased to be a listed company.

Sec. 806.059. PROHIBITED INVESTMENTS. Prohibits an entity from attaining securities in a listed company on the list except as allowed by Sections 806.004 and 806.058.

[Reserves Sections 806.060–806.100 for expansion.]

SUBCHAPTER C. EXPIRATION; REPORT; ENFORCEMENT

Sec. 806.101. EXPIRATION OF CHAPTER. Sets forth that this chapter expires on the date the U.S. Congress or president of the U.S. declares the Darfur genocide has been halted for a minimum of one year, the U.S. revokes its sanctions against the Sudanese government, or the U.S. Congress or president through legislation or an executive order declares that mandatory divestment of the type provided for in this chapter interferes with the conduct of U.S. foreign policy.

Sec. 806.102. REPORT. Requires each entity to file a publicly available report with the presiding officer of each legislative house, the attorney general, and the U.S. presidential special envoy to Sudan by December 31st of each year that contains certain information.

Sec. 806.103. ENFORCEMENT. Authorizes the attorney general to initiate any action necessary to enforce this chapter.

SECTION 3. Requires the comptroller to prepare and provide to each entity, as defined by Section 806.001, Government Code, as added by this Act, the list required by Section 806.051, Government Code, as added by this Act, not later than January 1, 2008.

SECTION 4. Effective date: January 1, 2008.