

By: Ellis, et al.

S.B. No. 247

A BILL TO BE ENTITLED

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AN ACT

relating to prohibiting the investment of state funds in certain private business entities doing business in Sudan.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. LEGISLATIVE FINDINGS. (a) On July 23, 2004, the United States Congress declared that "the atrocities unfolding in Darfur, Sudan, are genocide."

(b) On September 9, 2004, Secretary of State Colin L. Powell told the United States Senate Committee on Foreign Relations that "genocide has occurred and may still be occurring in Darfur" and "the Government of Sudan and the Janjaweed bear responsibility."

(c) On September 21, 2004, addressing the United Nations General Assembly, President George W. Bush affirmed the secretary of state's finding and stated, "At this hour, the world is witnessing terrible suffering and horrible crimes in the Darfur region of Sudan, crimes my government has concluded are genocide."

(d) On December 7, 2004, the United States Congress noted that the genocidal policy in Darfur has led to reports of "systematic rape of thousands of women and girls, the abduction of women and children, and the destruction of hundreds of ethnically African villages, including the poisoning of their wells and the plunder of their crops and cattle upon which the people of such villages sustain themselves."

(e) Also on December 7, 2004, the United States Congress

1 found that "the Government of Sudan has restricted access by
2 humanitarian and human rights workers to the Darfur area through
3 intimidation by military and security forces, and through
4 bureaucratic and administrative obstruction, in an attempt to
5 inflict the most devastating harm on those individuals displaced
6 from their villages and homes without any means of sustenance or
7 shelter."

8 (f) On September 25, 2006, the United States Congress
9 reaffirmed that "the genocide unfolding in the Darfur region of
10 Sudan is characterized by acts of terrorism and atrocities directed
11 against civilians, including mass murder, rape, and sexual violence
12 committed by the Janjaweed and associated militias with the
13 complicity and support of the National Congress Party-led faction
14 of the Government of Sudan."

15 (g) On September 26, 2006, the United States House of
16 Representatives stated that "an estimated 300,000 to 400,000 people
17 have been killed by the Government of Sudan and its Janjaweed allies
18 since the Darfur crisis began in 2003, more than 2,000,000 people
19 have been displaced from their homes, and more than 250,000 people
20 from Darfur remain in refugee camps in Chad."

21 (h) The Darfur crisis represents the first time the United
22 States government has labeled ongoing atrocities a genocide.

23 (i) The United States government has imposed sanctions
24 against the Government of Sudan since 1997. These sanctions are
25 monitored through the United States Treasury Department's Office of
26 Foreign Assets Control (OFAC).

27 (j) According to a former chair of the United States

1 Securities and Exchange Commission, "the fact that a foreign
2 company is doing material business with a country, government, or
3 entity on OFAC's sanctions list is, in the SEC staff's view,
4 substantially likely to be significant to a reasonable investor's
5 decision about whether to invest in that company."

6 (k) Since 1993, the United States secretary of state has
7 determined that Sudan is a country the government of which has
8 repeatedly provided support for acts of international terrorism,
9 thereby incurring restrictions of United States assistance,
10 defense exports and sales, and financial and other transactions
11 with the Government of Sudan.

12 (l) A 2006 United States House of Representatives report
13 states that "a company's association with sponsors of terrorism and
14 human rights abuses, no matter how large or small, can have a
15 materially adverse result on a public company's operations,
16 financial condition, earnings, and stock prices, all of which can
17 negatively affect the value of an investment."

18 (m) In response to the financial risk posed by investments
19 in companies doing business with a terrorist-sponsoring state, the
20 Securities and Exchange Commission established its Office of Global
21 Security Risk to provide for enhanced disclosure of material
22 information regarding such companies.

23 (n) The current Sudan divestment movement encompasses
24 nearly 100 universities, cities, states, and private pension plans.

25 (o) Companies facing such widespread divestment present
26 further material risk to remaining investors.

27 (p) It is a fundamental responsibility of the state to

1 decide where, how, and by whom financial resources in its control
2 should be invested, taking into account numerous pertinent factors.

3 (q) It is the prerogative and desire of the state, in
4 respect to investment resources in its control and to the extent
5 reasonable, with due consideration for, among other things,
6 fiduciary standards imposed by law, on behalf of itself and its
7 investment beneficiaries, not to participate in an ownership or
8 capital-providing capacity with entities that provide significant
9 practical support for genocide, including certain non-United
10 States companies presently doing business in Sudan.

11 (r) It is the judgment of the legislature that this Act
12 should remain in effect only insofar as it continues to be
13 consistent with, and does not unduly interfere with, the foreign
14 policy of the United States as determined by the United States
15 government.

16 (s) This Act is not intended to interfere with the
17 performance of the fiduciary duties of a manager of funds subject to
18 this Act.

19 (t) It is the judgment of the legislature that mandatory
20 divestment of public funds from certain companies is a measure that
21 should be employed sparingly and judiciously. A congressional and
22 presidential declaration of genocide satisfies this high
23 threshold.

24 SECTION 2. Subtitle A, Title 8, Government Code, is amended
25 by adding Chapter 806 to read as follows:

1 CHAPTER 806. PROHIBITION ON INVESTMENT IN SUDAN

2 SUBCHAPTER A. GENERAL PROVISIONS

3 Sec. 806.001. DEFINITIONS. In this chapter:

4 (1) "Active business operations" means all business
5 operations that are not inactive business operations.

6 (2) "Business operations" means engaging in commerce
7 in any form in Sudan, including by acquiring, developing,
8 maintaining, owning, selling, possessing, leasing, or operating
9 equipment, facilities, personnel, products, services, personal
10 property, real property, or any other apparatus of business or
11 commerce.

12 (3) "Company" means a sole proprietorship,
13 organization, association, corporation, partnership, joint
14 venture, limited partnership, limited liability partnership,
15 limited liability company, or other entity or business association
16 whose securities are publicly traded, including a wholly owned
17 subsidiary, majority-owned subsidiary, parent company, or
18 affiliate of those entities or business associations, that exists
19 to make a profit.

20 (4) "Complicit" means taking actions that have
21 directly supported or promoted the genocidal campaign in Darfur,
22 including:

23 (A) preventing members of Darfur's victimized
24 population from communicating with each other;

25 (B) encouraging Sudanese citizens to speak out
26 against an internationally approved security force for Darfur; or

27 (C) actively working to deny, cover up, or alter

1 the record on human rights abuses in Darfur.

2 (5) "Direct holdings in a company" means all
3 securities of that company held directly by a state governmental
4 entity in an account or fund in which a state governmental entity
5 owns all shares or interests.

6 (6) "Government of Sudan" means the government in
7 Khartoum, Sudan, which is led by the National Congress Party,
8 formerly known as the National Islamic Front, or any successor
9 government formed on or after October 13, 2006, including the
10 coalition National Unity Government agreed upon in the
11 Comprehensive Peace Agreement for Sudan. The term does not include
12 the regional government of southern Sudan.

13 (7) "Inactive business operations" means the mere
14 continued holding or renewal of rights to property previously
15 operated to generate revenue but not presently deployed to generate
16 revenue.

17 (8) "Indirect holdings in a company" means all
18 securities of that company held in an account or fund, such as a
19 mutual fund, managed by one or more persons not employed by a state
20 governmental entity, in which the state governmental entity owns
21 shares or interests together with other investors not subject to
22 this chapter. The term does not include money invested under a plan
23 described by Section 401(k) or 457 of the Internal Revenue Code of
24 1986.

25 (9) "Listed company" means a company listed by the
26 comptroller under Section 806.051.

27 (10) "Marginalized populations of Sudan" includes:

1 (A) the portion of the population in the Darfur
2 region that has been genocidally victimized;

3 (B) the portion of the population of southern
4 Sudan victimized by Sudan's North-South civil war;

5 (C) the Beja, Rashidiya, and other similarly
6 underserved groups of eastern Sudan;

7 (D) the Nubian and other similarly underserved
8 groups in Sudan's Abyei, Southern Blue Nile, and Nuba Mountain
9 regions; and

10 (E) the Amri, Hamadab, Manasir, and other
11 similarly underserved groups of northern Sudan.

12 (11) "Military equipment" means weapons, arms,
13 military supplies, and equipment that readily may be used for
14 military purposes, including radar systems or military-grade
15 transport vehicles or supplies or services sold or provided
16 directly or indirectly to any force actively participating in armed
17 conflict in Sudan.

18 (12) "Mineral extraction activities" includes
19 exploring, extracting, processing, transporting, or wholesale
20 selling or trading of elemental minerals or associated metal alloys
21 or oxides (ore), including gold, copper, chromium, chromite,
22 diamonds, iron, iron ore, silver, tungsten, uranium, and zinc, as
23 well as facilitating those activities, including by providing
24 supplies or services in support of those activities.

25 (13) "Oil-related activities" includes:

26 (A) owning rights to oil blocks;

27 (B) exporting, extracting, producing, refining,

1 processing, exploring for, transporting, selling, or trading of
2 oil;

3 (C) constructing, maintaining, or operating a
4 pipeline, refinery, or other oil-field infrastructure; or

5 (D) facilitating oil-related activities,
6 including by providing supplies or services in support of the
7 activities, except that the mere retail sale of gasoline and
8 related consumer products is not an oil-related activity.

9 (14) "Power production activities" means any business
10 operation that involves a project commissioned by the National
11 Electricity Corporation of Sudan or another similar Government of
12 Sudan entity whose purpose is to facilitate power generation and
13 delivery, including establishing power-generating plants or
14 hydroelectric dams, selling or installing components for the
15 project, and providing service contracts related to the
16 installation or maintenance of the project, as well as facilitating
17 those activities, including by providing supplies or services in
18 support of those activities.

19 (15) "Scrutinized company" means a company that:

20 (A) engages in scrutinized business operations
21 described by Section 806.002; or

22 (B) has been complicit in the Darfur genocide
23 during any preceding 20-month period.

24 (16) "Social development company" means a company
25 whose primary purpose in Sudan is to provide humanitarian goods or
26 services, including medicine or medical equipment, agricultural
27 supplies or infrastructure, educational opportunities,

1 journalism-related activities, information or information
2 materials, spiritual-related activities, services of a purely
3 clerical or reporting nature, food, clothing, or general consumer
4 goods that are unrelated to oil-related activities, mineral
5 extraction activities, or power production activities.

6 (17) "State governmental entity" means the Employees
7 Retirement System of Texas or the Teacher Retirement System of
8 Texas.

9 (18) "Substantial action" means adopting,
10 publicizing, and implementing a formal plan to cease scrutinized
11 business operations within one year and to refrain from any such new
12 business operations, undertaking significant humanitarian efforts
13 on behalf of one or more marginalized populations of Sudan, or,
14 through engagement with the Government of Sudan, materially
15 improving conditions for the genocidally victimized population in
16 Darfur.

17 Sec. 806.002. SCRUTINIZED BUSINESS OPERATIONS. A company
18 engages in scrutinized business operations if:

19 (1) the company has business operations that involve
20 contracts with or providing supplies or services to the Government
21 of Sudan, a company in which the Government of Sudan has any direct
22 or indirect equity share, a Government of Sudan-commissioned
23 consortium or project, or a company involved in a Government of
24 Sudan-commissioned consortium or project, and:

25 (A) more than 10 percent of the company's
26 revenues or assets linked to Sudan involve oil-related activities
27 or mineral extraction activities, less than 75 percent of the

1 company's revenue or assets linked to Sudan involve contracts with
2 or provision of oil-related or mineral extracting products or
3 services to the regional government of southern Sudan or a project
4 or consortium created exclusively by that regional government, and
5 the company has failed to take substantial action; or

6 (B) more than 10 percent of the company's revenue
7 or assets linked to Sudan involve power production activities, less
8 than 75 percent of the company's power production activities
9 include projects whose intent is to provide power or electricity to
10 the marginalized populations of Sudan, and the company has failed
11 to take substantial action; or

12 (2) the company supplies military equipment in Sudan,
13 unless:

14 (A) the company clearly shows that the military
15 equipment cannot be used to facilitate offensive military actions
16 in Sudan; or

17 (B) the company implements rigorous and
18 verifiable safeguards to prevent use of that equipment by forces
19 actively participating in armed conflict, including:

20 (i) using post-sale tracking of the
21 equipment by the company;

22 (ii) obtaining certification from a
23 reputable and objective third party that the equipment is not being
24 used by a party participating in armed conflict in Sudan; or

25 (iii) selling the equipment solely to the
26 regional government of southern Sudan or any internationally
27 recognized peacekeeping force or humanitarian organization.

1 Sec. 806.003. SOCIAL DEVELOPMENT COMPANY. Notwithstanding
2 any other law, a social development company that is not complicit in
3 the Darfur genocide is not a scrutinized company.

4 Sec. 806.004. EXCEPTION. Notwithstanding any other law, a
5 company that the United States government affirmatively declares to
6 be excluded from its federal sanctions regime relating to Sudan is
7 not subject to divestment or investment prohibition under this
8 chapter.

9 Sec. 806.005. OTHER LEGAL OBLIGATIONS. With respect to
10 actions taken in compliance with this chapter, including all good
11 faith determinations regarding companies as required by this
12 chapter, a state governmental entity is exempt from any conflicting
13 statutory or common law obligations, including any obligations with
14 respect to making investments, divesting from any investment,
15 preparing or maintaining any list of companies, or choosing asset
16 managers, investment funds, or investments for the state
17 governmental entity's securities portfolios.

18 Sec. 806.006. INDEMNIFICATION OF STATE GOVERNMENTAL
19 ENTITIES, EMPLOYEES, AND OTHERS. In a cause of action based on an
20 action, inaction, decision, divestment, investment, company
21 communication, report, or other determination made or taken in
22 connection with this chapter, the state shall, without regard to
23 whether the person performed services for compensation, indemnify
24 and hold harmless for actual damages, court costs, and attorney's
25 fees adjudged against, and defend:

26 (1) an employee, a member of the governing body, or any
27 other officer of a state governmental entity;

1 (2) a contractor of a state governmental entity;

2 (3) a former employee, former member of the governing
3 body, or any other former officer of a state governmental entity who
4 was an employee or officer when the act or omission on which the
5 damages are based occurred; and

6 (4) a former contractor of a state governmental entity
7 who was a contractor when the act or omission on which the damages
8 are based occurred.

9 Sec. 806.007. NO PRIVATE CAUSE OF ACTION. (a) A person,
10 including a member, retiree, and beneficiary of a retirement system
11 to which this chapter applies, an association, a research firm, a
12 company, or any other person may not sue or pursue a private cause
13 of action against the state, a state governmental entity, an
14 employee, a member of the governing body, or any other officer of a
15 state governmental entity, or a contractor of a state governmental
16 entity, for any claim or cause of action, including breach of
17 fiduciary duty, or for violation of any constitutional, statutory,
18 or regulatory requirement in connection with any action, inaction,
19 decision, divestment, investment, company communication, report,
20 or other determination made or taken in connection with this
21 chapter.

22 (b) A person who files suit against the state, a state
23 governmental entity, an employee, a member of the governing body,
24 or any other officer of a state governmental entity, or a contractor
25 of a state governmental entity, is liable for paying the costs and
26 attorney's fees of a person sued in violation of this section.

27 [Sections 806.008-806.050 reserved for expansion]

1 SUBCHAPTER B. DUTIES REGARDING INVESTMENTS

2 Sec. 806.051. LISTED COMPANIES. (a) The comptroller shall
3 prepare and maintain, and provide to each state governmental
4 entity, a list of all scrutinized companies. In maintaining the
5 list of scrutinized companies, the comptroller may review and rely,
6 as appropriate in the comptroller's judgment, on publicly available
7 information regarding companies with business operations in Sudan,
8 including information provided by the state, nonprofit
9 organizations, research firms, international organizations, and
10 governmental entities.

11 (b) The comptroller shall update the list of scrutinized
12 companies annually or more often as the comptroller considers
13 necessary, but not more often than quarterly, based on information
14 from, among other sources, those listed in Subsection (a).

15 (c) Not later than the 30th day after the date the list of
16 scrutinized companies is first provided or updated, the comptroller
17 shall file the list of scrutinized companies with the presiding
18 officer of each house of the legislature and the attorney general.

19 Sec. 806.052. IDENTIFICATION OF INVESTMENT IN LISTED
20 COMPANIES. Not later than the 14th day after the date a state
21 governmental entity receives the list provided under Section
22 806.051(c), the state governmental entity shall notify the
23 comptroller of the listed companies in which the state governmental
24 entity owns direct or indirect holdings.

25 Sec. 806.053. NOTICE TO LISTED COMPANY ENGAGED IN INACTIVE
26 BUSINESS OPERATIONS. For each listed company identified under
27 Section 806.052 that is engaged in only inactive scrutinized

1 business operations, the state governmental entity shall send a
2 written notice informing the company of this chapter and
3 encouraging the company to continue to refrain from initiating
4 active business operations in Sudan until it is able to avoid being
5 considered a listed company. The state governmental entity shall
6 continue the correspondence as the entity considers necessary, but
7 is not required to initiate correspondence more often than
8 semiannually.

9 Sec. 806.054. ACTIONS RELATING TO LISTED COMPANY ENGAGED IN
10 ACTIVE BUSINESS OPERATIONS. (a) For each listed company
11 identified under Section 806.052 that is engaged in scrutinized
12 active business operations, the state governmental entity shall
13 send a written notice informing the company of its listed company
14 status and warning the company that it may become subject to
15 divestment by state governmental entities.

16 (b) The notice shall offer the company the opportunity to
17 clarify its Sudan-related activities and shall encourage the
18 company, not later than the 90th day after the date the company
19 receives notice under this section, to either cease its scrutinized
20 business operations or convert such operations to inactive business
21 operations in order to avoid qualifying for divestment by state
22 governmental entities.

23 (c) If, during the time provided by Subsection (b), the
24 company ceases scrutinized business operations, the comptroller
25 shall remove the company from the list of scrutinized companies and
26 this chapter will no longer apply to the company unless it resumes
27 scrutinized business operations.

1 (d) If, during the time provided by Subsection (b), the
2 company converts its scrutinized active business operations to
3 inactive business operations, the company is subject to all
4 provisions of this chapter relating to inactive business
5 operations.

6 (e) If, after the time provided by Subsection (b) expires,
7 the listed company continues to have scrutinized active business
8 operations, the state governmental entity shall sell, redeem,
9 divest, or withdraw all publicly traded securities of the company,
10 except securities described by Section 806.057, according to the
11 schedule provided by Section 806.056.

12 Sec. 806.055. ACTIONS RELATING TO LISTED COMPANY COMPLICIT
13 IN GENOCIDE. (a) For each company identified under Section
14 806.052 that has been complicit, the state governmental entity
15 shall send a written notice informing the company of its listed
16 company status and warning the company that it may become subject to
17 divestment by the state governmental entity.

18 (b) The notice must require the listed company to refrain
19 from taking any further action that would make it complicit.

20 (c) If, after receiving the notice under Subsection (a), the
21 listed company takes additional action that makes the company
22 complicit, the state governmental entity shall sell, redeem,
23 divest, or withdraw all publicly traded securities of the company,
24 except securities described by Section 806.057, according to the
25 schedule provided by Section 806.056.

26 Sec. 806.056. DIVESTMENT OF ASSETS. (a) A state
27 governmental entity required to sell, redeem, divest, or withdraw

1 all publicly traded securities of a listed company shall comply
2 with the following schedule:

3 (1) at least 50 percent of those assets shall be
4 removed from the state governmental entity's assets under
5 management not later than the 270th day after the date the company
6 receives notice under Section 806.054 or 806.055 or Subsection (b);
7 and

8 (2) 100 percent of those assets shall be removed from
9 the state governmental entity's assets under management not later
10 than the 450th day after the date the company receives notice under
11 Section 806.054 or 806.055 or Subsection (b).

12 (b) If a company that ceased scrutinized active business
13 operations after receiving notice under Section 806.054 resumes
14 scrutinized active business operations, the state governmental
15 entity shall send a written notice to the company informing it that
16 the state governmental entity will sell, redeem, divest, or
17 withdraw all publicly traded securities of the scrutinized company
18 according to the schedule in Subsection (a).

19 (c) A state governmental entity may delay the schedule for
20 divestment under Subsection (a) only to the extent that the state
21 governmental entity determines, in the state governmental entity's
22 good faith judgment, that divestment from listed companies will
23 likely result in a loss in value described by Section 806.058(a).
24 If a state governmental entity delays the schedule for divestment,
25 the state governmental entity shall submit a report to the
26 presiding officer of each house of the legislature and the attorney
27 general stating the reasons and justification for the state

1 governmental entity's delay in divestment from listed companies.
2 The report must include documentation supporting its determination
3 that the divestment would result in a loss in value described by
4 Section 806.058(a), including objective numerical estimates. The
5 state governmental entity shall update the report every six months.

6 Sec. 806.057. INVESTMENTS EXEMPTED FROM DIVESTMENT. A
7 state governmental entity is not required to divest from any
8 indirect holdings in actively managed investment funds or private
9 equity funds. The state governmental entity shall submit letters
10 to the managers of investment funds containing listed companies
11 requesting that they consider removing those companies from the
12 fund or create a similar actively managed fund with indirect
13 holdings devoid of listed companies. If the manager creates a
14 similar fund with substantially the same management fees and same
15 level of investment risk, the state governmental entity shall
16 replace all applicable investments with investments in the similar
17 fund in an expedited time frame consistent with prudent fiduciary
18 standards.

19 Sec. 806.058. AUTHORIZED INVESTMENT IN LISTED COMPANIES.

20 (a) A state governmental entity may cease divesting from or may
21 reinvest in one or more listed companies if clear and convincing
22 evidence shows that the value for all assets under management by the
23 state governmental entity becomes equal to or less than 99.7
24 percent of the hypothetical value of all assets under management by
25 the state governmental entity had the state governmental entity not
26 divested from listed companies under this chapter.

27 (b) A state governmental entity may invest in a listed

1 company as provided by this section only to the extent necessary to
2 ensure that the value of the assets managed by the state
3 governmental entity does not fall below the value described by
4 Subsection (a).

5 (c) Before a state governmental entity may invest in a
6 listed company under this section, the state governmental entity
7 must provide a written report to the presiding officer of each house
8 of the legislature and the attorney general setting forth the
9 reason and justification, supported by clear and convincing
10 evidence, for its decisions to cease divestment, to reinvest, or to
11 remain invested in a listed company.

12 (d) The state governmental entity shall update the report
13 required by Subsection (c) semiannually, as applicable.

14 (e) This section does not apply to reinvestment in a company
15 that has ceased to be a listed company.

16 Sec. 806.059. PROHIBITED INVESTMENTS. Except as provided
17 by Sections 806.004 and 806.058, a state governmental entity may
18 not acquire securities of a listed company.

19 [Sections 806.060-806.100 reserved for expansion]

20 SUBCHAPTER C. EXPIRATION; REPORT; ENFORCEMENT

21 Sec. 806.101. EXPIRATION OF CHAPTER. This chapter expires
22 on the earliest of:

23 (1) the date on which the United States Congress or the
24 president of the United States declares that the Darfur genocide
25 has been halted for at least 12 months;

26 (2) the date on which the United States revokes its
27 sanctions against the Government of Sudan; or

1 (3) the date on which the United States Congress or the
2 president of the United States, through legislation or executive
3 order, declares that mandatory divestment of the type provided for
4 in this chapter interferes with the conduct of United States
5 foreign policy.

6 Sec. 806.102. REPORT. Not later than December 31 of each
7 year, each state governmental entity shall file a publicly
8 available report with the presiding officer of each house of the
9 legislature, the attorney general, and the United States
10 presidential special envoy to Sudan that:

11 (1) identifies all investments sold, redeemed,
12 divested, or withdrawn in compliance with Section 806.056;

13 (2) identifies all prohibited investments under
14 Section 806.059; and

15 (3) summarizes any changes made under Section 806.057.

16 Sec. 806.103. ENFORCEMENT. The attorney general may bring
17 any action necessary to enforce this chapter.

18 SECTION 3. Not later than January 1, 2008, the comptroller
19 of public accounts shall prepare and provide to each state
20 governmental entity, as defined by Section 806.001, Government
21 Code, as added by this Act, the list of scrutinized companies
22 required by Section 806.051, Government Code, as added by this Act.

23 SECTION 4. This Act takes effect January 1, 2008.