

By: Ellis

S.B. No. 247

A BILL TO BE ENTITLED

AN ACT

1
2 relating to prohibiting the investment of state funds in certain
3 private business entities doing business in Sudan.

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

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

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

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

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

24 (e) Also on December 7, 2004, the congress found that "the

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

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

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

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

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

26 (j) According to a former chair of the United States
27 Securities and Exchange Commission, "the fact that a foreign

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

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

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

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

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

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

26 (p) It is a fundamental responsibility of the state to
27 decide where, how, and by whom financial resources in its control

1 should be invested, taking into account numerous pertinent factors.

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

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

15 (s) It is the judgment of the legislature that mandatory
16 divestment of public funds from certain companies is a measure that
17 should be employed sparingly and judiciously. A congressional and
18 presidential declaration of genocide satisfies this high
19 threshold.

20 SECTION 2. Subtitle F, Title 10, Government Code, is
21 amended by adding Chapter 2264 to read as follows:

22 CHAPTER 2264. PROHIBITION ON INVESTMENT IN SUDAN

23 SUBCHAPTER A. GENERAL PROVISIONS

24 Sec. 2264.001. DEFINITIONS. In this chapter:

25 (1) "Active business operations" means all business
26 operations that are not inactive business operations.

27 (2) "Business operations" means engaging in commerce

1 in any form in Sudan, including by acquiring, developing,
2 maintaining, owning, selling, possessing, leasing, or operating
3 equipment, facilities, personnel, products, services, personal
4 property, real property, or any other apparatus of business or
5 commerce.

6 (3) "Company" means a sole proprietorship,
7 organization, association, corporation, partnership, joint
8 venture, limited partnership, limited liability partnership,
9 limited liability company, or other entity or business association,
10 including a wholly owned subsidiary, majority-owned subsidiary,
11 parent company, or affiliate of such entities or business
12 associations, that exists for profit-making purposes.

13 (4) "Complicit" means taking actions that have
14 directly supported or promoted the genocidal campaign in Darfur,
15 including:

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

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

20 (C) actively working to deny, cover up, or alter
21 the record on human rights abuses in Darfur.

22 (5) "Direct holdings in a company" means all
23 securities of that company held directly by the state in an account
24 or fund in which the state owns all shares or interests.

25 (6) "Government of Sudan" means the government in
26 Khartoum, Sudan, which is led by the National Congress Party
27 (formerly known as the National Islamic Front) or any successor

1 government formed on or after October 13, 2006 (including the
2 coalition National Unity Government agreed upon in the
3 Comprehensive Peace Agreement for Sudan). The term does not
4 include the regional government of southern Sudan.

5 (7) "Inactive business operations" means the mere
6 continued holding or renewal of rights to property previously
7 operated for the purpose of generating revenues but not presently
8 deployed for such purpose.

9 (8) "Indirect holdings in a company" means all
10 securities of that company held in an account or fund, such as a
11 mutual fund, managed by one or more persons not employed by a state
12 governmental entity, in which the state governmental entity owns
13 shares or interests together with other investors not subject to
14 the provisions of this chapter.

15 (9) "Marginalized populations of Sudan" includes:

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

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

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

22 (D) the Nubian and other similarly underserved
23 groups in Sudan's Abyei, Southern Blue Nile, and Nuba Mountain
24 regions; and

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

27 (10) "Military equipment" means weapons, arms,

1 military supplies, and equipment that readily may be used for
2 military purposes, including radar systems or military-grade
3 transport vehicles or supplies or services sold or provided
4 directly or indirectly to any force actively participating in armed
5 conflict in Sudan.

6 (11) "Mineral extraction activities" includes
7 exploring, extracting, processing, transporting, or wholesale
8 selling or trading of elemental minerals or associated metal alloys
9 or oxides (ore), including gold, copper, chromium, chromite,
10 diamonds, iron, iron ore, silver, tungsten, uranium, and zinc, as
11 well as facilitating such activities, including by providing
12 supplies or services in support of such activities.

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

14 (A) owning rights to oil blocks;

15 (B) exporting, extracting, producing, refining,
16 processing, exploring for, transporting, selling, or trading of
17 oil;

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

20 (D) facilitating such activities, including by
21 providing supplies or services in support of such activities,
22 except that the mere retail sale of gasoline and related consumer
23 products are not oil-related activities.

24 (13) "Power production activities" means any business
25 operation that involves a project commissioned by the National
26 Electricity Corporation of Sudan or another similar Government of
27 Sudan entity whose purpose is to facilitate power generation and

1 delivery, including establishing power-generating plants or
2 hydroelectric dams, selling or installing components for the
3 project, and providing service contracts related to the
4 installation or maintenance of the project, as well as facilitating
5 such activities, including by providing supplies or services in
6 support of such activities.

7 (14) "Scrutinized company" means a company that:

8 (A) engages in scrutinized business operations
9 described by Section 2264.002; or

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

12 (15) "Social development company" means a company
13 whose primary purpose in Sudan is to provide humanitarian goods or
14 services, including medicine or medical equipment, agricultural
15 supplies or infrastructure, educational opportunities,
16 journalism-related activities, information or information
17 materials, spiritual-related activities, services of a purely
18 clerical or reporting nature, food, clothing, or general consumer
19 goods that are unrelated to oil-related activities, mineral
20 extraction activities, or power production activities.

21 (16) "Substantial action" means adopting,
22 publicizing, and implementing a formal plan to cease scrutinized
23 business operations within one year and to refrain from any such new
24 business operations, undertaking significant humanitarian efforts
25 on behalf of one or more marginalized populations of Sudan, or,
26 through engagement with the Government of Sudan, materially
27 improving conditions for the genocidally victimized population in

1 Darfur.

2 Sec. 2264.002. SCRUTINIZED BUSINESS OPERATIONS. A company
3 engages in scrutinized business operations if:

4 (1) the company has business operations that involve
5 contracts with or providing supplies or services to the Government
6 of Sudan, a company in which the Government of Sudan has any direct
7 or indirect equity share, a Government of Sudan-commissioned
8 consortium or project, or a company involved in a Government of
9 Sudan-commissioned consortium or project, and:

10 (A) more than 10 percent of the company's
11 revenues or assets linked to Sudan involve oil-related activities
12 or mineral extraction activities, less than 75 percent of the
13 company's revenues or assets linked to Sudan involve contracts with
14 or provision of oil-related or mineral extracting products or
15 services to the regional government of southern Sudan or a project
16 or consortium created exclusively by that regional government, and
17 the company has failed to take substantial action; or

18 (B) more than 10 percent of the company's
19 revenues or assets linked to Sudan involve power production
20 activities, less than 75 percent of the company's power production
21 activities include projects whose intent is to provide power or
22 electricity to the marginalized populations of Sudan, and the
23 company has failed to take substantial action; or

24 (2) the company supplies military equipment within
25 Sudan, unless:

26 (A) the company clearly shows that the military
27 equipment cannot be used to facilitate offensive military actions

1 in Sudan; or

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

5 (i) using post-sale tracking of such
6 equipment by the company;

7 (ii) certification from a reputable and
8 objective third party that such equipment is not being used by a
9 party participating in armed conflict in Sudan; or

10 (iii) selling such equipment solely to the
11 regional government of southern Sudan or any internationally
12 recognized peacekeeping force or humanitarian organization.

13 Sec. 2264.003. SOCIAL DEVELOPMENT COMPANY.
14 Notwithstanding any other law, a social development company that is
15 not complicit in the Darfur genocide may not be considered a
16 scrutinized company.

17 Sec. 2264.004. EXCEPTION. Notwithstanding any other law, a
18 company that the United States government affirmatively declares to
19 be excluded from its federal sanctions regime relating to Sudan is
20 not subject to divestment or investment prohibition under this
21 chapter.

22 Sec. 2264.005. OTHER LEGAL OBLIGATIONS. With respect to
23 actions taken in compliance with this chapter, including all good
24 faith determinations regarding companies as required by this
25 chapter, a state governmental entity is exempt from any conflicting
26 statutory or common law obligations, including any obligations with
27 respect to choice of asset managers, investment funds, or

1 investments for the state governmental entity's securities
2 portfolios.

3 [Sections 2264.006-2264.050 reserved for expansion]

4 SUBCHAPTER B. DUTIES REGARDING INVESTMENTS

5 Sec. 2264.051. LIST OF SCRUTINIZED COMPANIES. (a) In this
6 section, "system" means the Employees Retirement System of Texas.

7 (b) The system shall maintain a list of all scrutinized
8 companies. In preparing the list of scrutinized companies, the
9 system shall:

10 (1) review and rely, as appropriate in the system's
11 judgment, on publicly available information regarding companies
12 with business operations in Sudan, including information provided
13 by nonprofit organizations, research firms, international
14 organizations, and governmental entities;

15 (2) contact asset managers under contract with the
16 system or another state governmental entity that invests in
17 companies with business operations in Sudan; and

18 (3) contact other institutional investors that have
19 divested from or engaged with companies that have business
20 operations in Sudan.

21 (c) The system shall update the scrutinized companies list
22 on a quarterly basis based on evolving information from, among
23 other sources, those listed in Subsection (b).

24 (d) Not later than the 30th day after the date the list of
25 scrutinized companies is created or updated, the system shall file
26 the list of scrutinized companies with the presiding officer of
27 each house of the legislature and the attorney general.

1 Sec. 2264.052. IDENTIFICATION OF INVESTMENT IN SCRUTINIZED
2 COMPANIES. Each state governmental entity shall immediately
3 identify the companies on the list of scrutinized companies in
4 which the state governmental entity owns direct or indirect
5 holdings.

6 Sec. 2264.053. NOTICE TO SCRUTINIZED COMPANY ENGAGED IN
7 INACTIVE BUSINESS OPERATIONS. For each company identified under
8 Section 2264.052 that is engaged in only inactive scrutinized
9 business operations, the state governmental entity shall send a
10 written notice informing the company of this chapter and
11 encouraging the company to continue to refrain from initiating
12 active business operations in Sudan until it is able to avoid being
13 considered a scrutinized company. The state governmental entity
14 shall continue such correspondence on a semiannual basis.

15 Sec. 2264.054. ACTIONS RELATING TO SCRUTINIZED COMPANY
16 ENGAGED IN ACTIVE BUSINESS OPERATIONS. (a) For each company
17 identified under Section 2264.052 that is engaged in active
18 scrutinized business operations, the state governmental entity
19 shall send a written notice informing the company of its
20 scrutinized company status and warning the company that it may
21 become subject to divestment by the state governmental entity.

22 (b) The notice shall offer the company the opportunity to
23 clarify its Sudan-related activities and shall encourage the
24 company, not later than the 90th day after the date the company
25 receives notice under this section, to either cease its scrutinized
26 business operations or convert such operations to inactive business
27 operations in order to avoid qualifying for divestment by the state

1 governmental entity.

2 (c) If, during the time provided by Subsection (b), the
3 company ceases scrutinized business operations, the state
4 governmental entity shall remove the company from the scrutinized
5 companies list and this chapter will no longer apply to the company
6 unless it resumes scrutinized business operations.

7 (d) If, during the time provided by Subsection (b), the
8 company converts its scrutinized active business operations to
9 inactive business operations, the company is subject to all
10 provisions of this chapter relating to inactive business
11 operations.

12 (e) If, after the time provided by Subsection (b) expires,
13 the company continues to have scrutinized active business
14 operations, the state governmental entity shall sell, redeem,
15 divest, or withdraw all publicly traded securities of the company,
16 except securities described by Section 2264.057, according to the
17 timetable provided by Section 2264.056.

18 Sec. 2264.055. ACTIONS RELATING TO SCRUTINIZED COMPANY
19 COMPLICIT IN GENOCIDE. (a) For each company identified under
20 Section 2264.052 that has been complicit, the state governmental
21 entity shall send a written notice informing the company of its
22 scrutinized company status and warning the company that it may
23 become subject to divestment by the state governmental entity.

24 (b) The notice shall require the scrutinized company to
25 refrain from taking any further action that would make it
26 complicit.

27 (c) If, after receiving the notice under Subsection (a), the

1 scrutinized company takes additional action that makes the company
2 complicit, the state governmental entity shall sell, redeem,
3 divest, or withdraw all publicly traded securities of the company,
4 except securities described by Section 2264.057, according to the
5 timetable provided by Section 2264.056.

6 Sec. 2264.056. DIVESTMENT OF ASSETS. (a) A state
7 governmental entity required to sell, redeem, divest, or withdraw
8 all publicly traded securities of a scrutinized company shall
9 comply with the following schedule:

10 (1) at least 50 percent of those assets shall be
11 removed from the state governmental entity's assets under
12 management not later than the 270th day after the date the company
13 receives notice under Section 2264.054 or 2264.055 or Subsection
14 (b); and

15 (2) 100 percent of those assets shall be removed from
16 the state governmental entity's assets under management not later
17 than the 450th day after the date the company receives notice under
18 Section 2264.054 or 2264.055 or Subsection (b).

19 (b) If a company that ceased scrutinized active business
20 operations after receiving notice under Section 2264.054 resumes
21 scrutinized active business operations, the state governmental
22 entity shall send a written notice to the company informing it that
23 the state governmental entity will sell, redeem, divest, or
24 withdraw all publicly traded securities of the scrutinized company
25 according to the schedule in Subsection (a).

26 Sec. 2264.057. INVESTMENTS EXEMPTED FROM DIVESTMENT. A
27 state governmental entity is not required to divest from any

1 indirect holdings in actively managed investment funds or private
2 equity funds. The state governmental entity shall submit letters
3 to the managers of investment funds containing scrutinized
4 companies with scrutinized active business operations requesting
5 that they consider removing those companies from the fund or create
6 a similar actively managed fund with indirect holdings devoid of
7 scrutinized companies. If the manager creates a similar fund, the
8 state governmental entity shall replace all applicable investments
9 with investments in the similar fund in an expedited time frame
10 consistent with prudent investing standards.

11 Sec. 2264.058. AUTHORIZED INVESTMENT IN COMPANIES WITH
12 SCRUTINIZED ACTIVE BUSINESS OPERATIONS. (a) A state governmental
13 entity may cease divesting from or may reinvest in a scrutinized
14 company if clear and convincing evidence shows that the value for
15 all assets under management by the state governmental entity
16 becomes equal to or less than 99.5 percent of the hypothetical value
17 of all assets under management by the state governmental entity had
18 the state governmental entity not divested from any scrutinized
19 company under Section 2264.055.

20 (b) A state governmental entity may invest in a scrutinized
21 company as provided by this section only to the extent necessary to
22 ensure that the value of the assets managed by the state
23 governmental entity does not fall below the value described by
24 Subsection (a).

25 (c) Before a state governmental entity may invest in a
26 scrutinized company under this section, the state governmental
27 entity must provide a written report to the presiding officer of

1 each house of the legislature and the attorney general setting
2 forth the reason and justification, supported by clear and
3 convincing evidence, for its decisions to cease divestment, to
4 reinvest, or to remain invested in a company engaged in scrutinized
5 active business operations.

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

8 (e) This section does not apply to reinvestment in a company
9 that has ceased to have scrutinized active business operations.

10 Sec. 2264.059. PROHIBITED INVESTMENTS. Except as provided
11 by Sections 2264.004 and 2264.058, a state governmental entity may
12 not acquire securities of a company on the list of scrutinized
13 companies that has active scrutinized business operations.

14 [Sections 2264.060-2264.100 reserved for expansion]

15 SUBCHAPTER C. EXPIRATION; REPORT; ENFORCEMENT

16 Sec. 2264.101. EXPIRATION OF CHAPTER. This chapter expires
17 on the earliest of:

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

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

23 (3) the date on which the United States Congress or the
24 president of the United States, through legislation or executive
25 order, declares that mandatory divestment of the type provided for
26 in this chapter interferes with the conduct of United States
27 foreign policy.

1 Sec. 2264.102. REPORT. Not later than December 31 of each
2 year, each state governmental entity shall file a publicly
3 available report with the presiding officer of each house of the
4 legislature, the attorney general, and the United States
5 presidential special envoy to Sudan that:

6 (1) summarizes the correspondence with scrutinized
7 companies under Subchapter B;

8 (2) identifies all investments sold, redeemed,
9 divested, or withdrawn in compliance with Section 2264.056;

10 (3) identifies all prohibited investments under
11 Section 2264.059; and

12 (4) summarizes any changes made under Section
13 2264.057.

14 Sec. 2264.103. ENFORCEMENT. The attorney general may bring
15 any action necessary to enforce this chapter.

16 SECTION 3. Not later than the 90th day after the effective
17 date of this Act, the Employees Retirement System of Texas shall
18 prepare the list of scrutinized companies required by Section
19 2264.051, Government Code, as added by this Act.

20 SECTION 4. This Act takes effect immediately if it receives
21 a vote of two-thirds of all the members elected to each house, as
22 provided by Section 39, Article III, Texas Constitution. If this
23 Act does not receive the vote necessary for immediate effect, this
24 Act takes effect September 1, 2007.