SUBJECT: Restricting state investment in companies that boycott Israel

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 10 ayes — Cook, Craddick, Farrar, Geren, K. King, Kuempel, Meyer, Paddie, E. Rodriguez, Smithee

0 nays

3 absent — Giddings, Guillen, Oliveira

WITNESSES: For — Kimberly Kamen, AJC; Charles Kaufman, B'nai B'rith International; Sandra Hagee Parker, Christians United for Israel Action Fund; Dillon Hosier, Israeli-American Coalition for Action; Jesse Stock, StandWithUs; Jackie King; Ruth Sherman; (*Registered, but did not testify*: Ann Hettinger, Center for the Preservation of American Ideals; Michael Goldman, Texas Conservative Coalition; Lisa Kaufman, Texas Public Employees Association; William Franklin; CJ Grisham; Rochelle Kraus; Mark Vane; Cecilia Wood)

Against — Katherine Pace, Austin Jewish Voice for Peace; Michael Shirk, Austin Mennonite Church; and seven individuals; (*Registered, but did not testify*: Benjamin Goodman; Sacha Jacobson; Matt Oliver; Charles L. Rand; Masar Sakr)

On — (*Registered, but did not testify*: Paul Ballard, Treasury Safekeeping Trust Co.)

DIGEST: CSHB 89 would prohibit government contracts with companies that boycott Israel and would restrict certain state investments in those companies.

Contracting. The bill would define "boycott Israel" as refusing to deal with, terminating business activities with, or otherwise taking any action intended to penalize, inflict economic harm on, or limit commercial relations with Israel or with a person or entity doing business in Israel or in an Israeli-controlled territory. The definition would not include an action made for ordinary business purposes.

The bill defines "company" to include several different business structures including a corporation, partnership, sole proprietorship, organization, association, or affiliate of any of these entities that exists to make a profit.

The bill would prohibit a state agency or political subdivision from entering into a contract for goods or services unless the contract included written verification from the company that it does not boycott Israel and would not boycott Israel during the term of the contract.

Investments. The bill would require certain state governmental entities to divest assets of a company that boycotts Israel. The affected entities would be:

- the Employees Retirement System of Texas, 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 comptroller would be required to prepare, maintain, and provide a list of all companies that boycott Israel to each governmental entity. The comptroller could rely on publicly available information regarding companies, including information provided by the state, nonprofit organizations, research firms, international organizations, and governmental entities. The list would have to be updated at least annually but no more often than quarterly.

The state governmental entities would be prohibited from acquiring securities of a listed company.

Not later than 30 days after the list was first provided or updated, the comptroller would have to file the list with the presiding officer of each legislative chamber and the attorney general and post the list on a publicly available website.

Within 30 days of state governmental entities receiving the list, the entities would be required to notify the comptroller of any listed companies in which the entity owns direct or indirect holdings. Direct holdings would include all securities of a company held directly by a state governmental entity in an account or fund in which the entity owns all shares or interest. Indirect holdings would include all securities of a company held in an account such as a mutual fund that is not managed by a state governmental entity in which the entity owns shares or interests together with private investors not subject to the provisions of the bill. The term does not include money invested in a 401(k) or 457 plan under the Internal Revenue Code.

The state governmental entities would be required to send a written notice to each listed company warning that it may become subject to divestment within 90 days and offering the company the opportunity to clarify its Israel-related activities. If the company ceased boycotting Israel, the comptroller would remove it from the list. If after 90 days the company continued to boycott Israel, the state governmental entity would be required to sell, redeem, divest, or withdraw all publicly traded securities.

A state governmental entity could cease divesting from a listed company only if:

- clear and convincing evidence showed that the entity had suffered or would suffer a loss in the hypothetical value of all assets under management by the entity as a result of the divestment; or
- an individual portfolio that used a benchmark strategy would be subject to an aggregate expected deviation from its benchmark as a result of the divestment.

The state governmental entity would be allowed to cease divesting only to the extent necessary to ensure the entity did not suffer a loss in value or deviate from its benchmarks.

Before ceasing divestment in a listed company, a governmental entity would have to provide a written report to the comptroller, the presiding officer of each legislative chamber, and the attorney general stating the justification and evidence for deciding to cease divestment or to remain invested in a listed company. The divestment of assets would need to be completed in accordance with a schedule described in the bill.

Exceptions. A governmental entity would not be subject to the bill's requirements if it determined that the requirement would be inconsistent with its fiduciary responsibility concerning the investment of assets or other duties imposed by the Texas Constitution on state and local retirement systems.

A state governmental entity would not be required to divest from indirect holdings in actively or passively managed investment funds or private equity funds. For those funds, the state governmental entity would be required to submit letters to the fund managers requesting that they remove listed companies from the fund or create a similar fund with indirect holdings devoid of listed companies. If a similar fund were created with similar management fees, risk levels, and anticipated return, the state governmental entity could replace all applicable investments with investments in that fund.

Other provisions. The bill would exempt a state governmental entity and the comptroller from any conflicting statutory or common law obligations with respect to investment and divestiture decisions. It would indemnify the entities, their governing bodies, employees, and contractors from legal claims related to those decisions.

The bill would not create a private cause of action against a governmental entity, employee, or contractor for breach of fiduciary duty or other claims made in connection with the bill's requirements. A person who filed such a lawsuit would be liable for paying costs and attorney's fees.

Report. The bill would require that no later than January 5 of each year, each state governmental entity file a publicly available report with the presiding officer of each legislative chamber and the attorney general identifying all securities sold, redeemed, divested, or withdrawn; identifying all prohibited investments; and summarizing any changes in investments exempt from divestment.

Enforcement. The attorney general would be authorized to bring any necessary action to enforce the bill's provisions.

This bill would take effect September 1, 2017.

SUPPORTERS SAY:

CSHB 89 would support Israel, a key U.S. ally and Texas trading partner, from efforts by some companies to boycott Israel by prohibiting certain government pension funds and the Permanent School Fund from investing in those companies. It also would bar state agencies and political subdivisions from contracting with companies that do not verify in writing that they do not boycott Israel.

The bill is an appropriate response to the Boycott, Divestment and Sanctions (BDS) movement, an international effort to use economic sanctions to influence Israeli policy. It would not prevent private companies from participating in BDS but would help ensure that the dollars of Texas taxpayers were not used to discriminate on the basis of national origin.

At least 14 other states have by legislation or executive order approved anti-boycott measures. Similar measures have enjoyed bipartisan support in states including Arizona, California, Florida, Illinois, Michigan, and New York. Opposition to BDS is reflected in the national platforms of both the Democratic and Republican parties.

Texas shares common democratic values with Israel and the bill would help protect that bond. Israel is a significant trading partner for Texas and provides important technological support to Texas industries that are involved in water desalination, aerospace, defense, and cybersecurity.

While supporters of the BDS movement say it is an appropriate way to express concern about the treatment of Palestinians, pressure against certain companies actually has resulted in Palestinians losing their jobs. Opponents of the bill say it would violate constitutional rights but there has been no successful court action to prevent similar laws in other states from going into effect.

OPPONENTS SAY:

CSHB 89 would violate the constitutional rights of business owners to use economic pressure to express their concerns about Israeli-Palestinian relations. The state of Texas does not have a right to protect business interests by means that violate Texans' free speech rights. Boycotting is a commonly used non-violent method for concerned citizens to express their views and work for change. The state should not take away this fundamental human right by enacting restrictions on businesses that contract with the state and provide important financial investment returns for state entities.

NOTES:

Depending on the number of governmental entities that contract with or invest in companies that boycott Israel, CSHB 89 could have an indeterminate fiscal impact to the state, according to the Legislative Budget Board's fiscal note.

A companion bill, SB 29 by Creighton, passed the Senate on March 22 and was referred to the House State Affairs Committee on April 18.

Compared to the original bill, the committee substitute would:

- remove The University of Texas Investment Management Company from the list of state governmental entities;
- add an exception for state governmental entities if the divestiture requirements would be inconsistent with the entity's fiduciary responsibility; and
- remove language requiring a state governmental entity to encourage a company to cease boycotting Israel.