

BILL ANALYSIS

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S.B. 1158
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Background

Social media sites are the modern public square, and while almost all speech is protected from governmental censorship, private digital spaces that host public speech present a novel challenge. These sites are privately owned and regulation is difficult under the First Amendment. However, this does not mean taxpayer dollars are required to be invested in companies that have practices to censor political speech.

S.B. 1158 targets the state investment in social media companies rather than trying to regulate the business practices of social media companies. Just like similar legislation has passed to divest from companies that boycott Israel, the State of Texas can leverage its large investment portfolio to encourage companies to embrace free political thought.

Under this bill, a social media site that censors political speech is added to a list maintained by the attorney general. Once on this list, social media sites are given a certain timeframe in which to cease censoring political speech. If they do not comply, they are then subject to divestment by state governmental entities.

Key Provisions

- Requires the attorney general to prepare and maintain a list of companies that own a social media website that censors political speech by:
 - removing, banning, or demonetizing a user on the basis that the user posted, uploaded, transmitted, or published political speech; or
 - otherwise restricting a user's ability to post, upload, transmit, or publish political speech.
- Requires that listed companies be informed that the company is a listed company, warn the company that it may become subject to divestment by state governmental entities, and offer the company the opportunity to clarify its activities related to censorship of political speech.
- Requires the company to cease censoring political speech within 90 days of receiving notice in order to avoid qualifying for divestment by state governmental entities.
- If the company continues to censor political speech, the state governmental entity shall sell, redeem, divest, or withdraw all publicly traded securities of the company, if actuarially sound.
- The attorney general may bring any action necessary to enforce this chapter.

As proposed, S.B. 1158 amends current law relating to state contracts with and investments in social media companies that censor political speech.

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. Amends Subtitle A, Title 8, Government Code, by adding Chapter 809, as follows:

CHAPTER 809. PROHIBITION ON INVESTMENT IN SOCIAL MEDIA COMPANIES
THAT CENSOR POLITICAL SPEECH

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 809.001. DEFINITIONS. Defines "company," "direct holdings," "indirect holdings," "listed company," "political speech," "social media website," "state governmental entity," and "user."

Sec. 809.002. OTHER LEGAL OBLIGATIONS. Provides that, with respect to actions taken in compliance with this chapter, including all good faith determinations regarding companies as required by this chapter, a state governmental entity and the Comptroller of Public Accounts of the State of Texas (comptroller) are exempt from any conflicting statutory or common law obligations, including any obligations with respect to making investments, divesting from any investment, preparing or maintaining any list of companies, or choosing asset managers, investment funds, or investments for the state governmental entity's securities portfolios.

Sec. 809.003. INDEMNIFICATION OF STATE GOVERNMENTAL ENTITIES, EMPLOYEES, AND OTHERS. Requires the state, in a cause of action based on an action, inaction, decision, divestment, investment, company communication, report, or other determination made or taken in connection with this chapter, to, without regard to whether the person performed services for compensation, indemnify and hold harmless for actual damages, court costs, and attorney's fees adjudged against, and defend:

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

Sec. 809.004. NO PRIVATE CAUSE OF ACTION. (a) Prohibits a person, including a member, retiree, or beneficiary of a retirement system to which this chapter applies, an association, a research firm, a company, or any other person from suing or pursuing a private cause of action against the state, a state governmental entity, a current or former employee, a member of the governing body, or any other officer of a state governmental entity, or a contractor of a state governmental entity, for any claim or cause of action, including breach of fiduciary duty, or for violation of any constitutional, statutory, or regulatory requirement in connection with any action, inaction, decision, divestment, investment, company communication, report, or other determination made or taken in connection with this chapter.

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

Sec. 809.005. **INAPPLICABILITY OF REQUIREMENTS INCONSISTENT WITH FIDUCIARY RESPONSIBILITIES AND RELATED DUTIES.** Provides that a state governmental entity is not subject to a requirement of this chapter if the state governmental 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 Section 67 (State and Local Retirement Systems), Article XVI (General Provisions), Texas Constitution.

SUBCHAPTER B. DUTIES REGARDING INVESTMENTS

Sec. 809.051. **LISTED COMPANIES.** (a) Requires the attorney general to prepare and maintain, and provide to each state governmental entity, a list of companies that own a social media website that censors political speech by removing, banning, or demonetizing a user on the basis that the user posted, uploaded, transmitted, or published political speech or that otherwise restricts a user's ability to post, upload, transmit, or publish political speech.

(b) Authorizes the attorney general, in maintaining the list, to review and rely, as appropriate in the attorney general's judgment, on publicly available information regarding companies that own a social media website, including information provided by the state, nonprofit organizations, research firms, international organizations, and governmental entities.

(c) Requires the attorney general to update the list annually or more often as the attorney general considers necessary, but not more often than quarterly, based on information from, among other sources, those listed in Subsection (b).

(d) Requires the attorney general, not later than the 30th day after the date the list of companies is first provided or updated, to file the list with the presiding officer of each house of the legislature and post the list on a publicly available website.

Sec. 809.052. **IDENTIFICATION OF INVESTMENT IN LISTED COMPANIES.** Requires the state governmental entity, not later than the 30th day after the date a state governmental entity receives the list provided under Section 809.051, to notify the attorney general of the listed companies in which the state governmental entity owns direct holdings or indirect holdings.

Sec. 809.053. **ACTIONS RELATING TO LISTED COMPANY.** (a) Requires the state governmental entity, for each listed company identified under Section 809.052, to 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 after the expiration of the period described by Subsection (b), and offering the company the opportunity to clarify its activities related to censorship of political speech.

(b) Requires the company, not later than the 90th day after the date the company receives notice under Subsection (a), to cease censoring political speech in order to avoid qualifying for divestment by state governmental entities.

(c) Provides that, if, during the time provided by Subsection (b), the company ceases censoring political speech, the attorney general is required to remove the company from the list maintained under Section 809.051 and that this chapter will no longer apply to the company unless it resumes censoring political speech.

(d) Requires the state governmental entity, if, after the time provided by Subsection (b) expires, the company continues to censor political speech, to sell, redeem, divest, or withdraw all publicly traded securities of the company, except securities described by Section 809.055, according to the schedule provided by Section 809.054.

Sec. 809.054. DIVESTMENT OF ASSETS. (a) Requires a state governmental entity required to sell, redeem, divest, or withdraw all publicly traded securities of a listed company to comply with the following schedule:

(1) at least 50 percent of those assets are required to be removed from the state governmental entity's assets under management not later than the 180th day after the date the company receives notice under Section 809.053 or Subsection (b) unless the state governmental entity determines, based on a good faith exercise of its fiduciary discretion and subject to Subdivision (2), that a later date is more prudent; and

(2) 100 percent of those assets are required to be removed from the state governmental entity's assets under management not later than the 360th day after the date the company receives notice under Section 809.053 or Subsection (b).

(b) Requires the state governmental entity, if a company that ceased censoring political speech after receiving notice under Section 809.053 resumes censoring political speech, to send a written notice to the company informing it that the state governmental entity will sell, redeem, divest, or withdraw all publicly traded securities of the company according to the schedule in Subsection (a).

(c) Authorizes a state governmental entity, except as provided by Subsection (a), to delay the schedule for divestment under that subsection only to the extent that the state governmental entity determines, in the state governmental entity's good faith judgment, and consistent with the entity's fiduciary duty, that divestment from listed companies will likely result in a loss in value or a benchmark deviation described by Section 809.056(a). Requires the state governmental entity, if a state governmental entity delays 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 state governmental entity's delay in divestment from listed companies. Requires that the report include documentation supporting its determination that the divestment would result in a loss in value or a benchmark deviation described by Section 809.056(a), including objective numerical estimates. Requires the state governmental entity to update the report every six months.

Sec. 809.055. INVESTMENTS EXEMPTED FROM DIVESTMENT. Provides that a state governmental entity is not required to divest from any indirect holdings in actively or passively managed investment funds or private equity funds. Requires the state governmental 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. Authorizes the state governmental entity, if a manager creates a similar fund with substantially the same management fees and same level of investment risk and anticipated return, to 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.

Sec. 809.056. AUTHORIZED INVESTMENT IN LISTED COMPANIES. (a) Authorizes a state governmental entity to cease divesting from one or more listed companies only if clear and convincing evidence shows that:

(1) the state governmental entity has suffered or will suffer a loss in the hypothetical value of all assets under management by the state governmental entity as a result of having to divest from listed companies under this chapter; or

(2) 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 under this chapter.

(b) Authorizes a state governmental entity to cease divesting from a listed company as provided by this section only to the extent necessary to ensure that the state governmental entity does not suffer a loss in value or deviate from its benchmark as described by Subsection (a).

(c) Requires a state governmental entity, before the state governmental entity is authorized to cease divesting from a listed company under this section, to provide a written report to the comptroller, the presiding officer of each house of the legislature, and the attorney general setting forth the reason and justification, supported by clear and convincing evidence, for deciding to cease divestment or to remain invested in a listed company.

(d) Requires the state governmental entity to update the report required by Subsection (c) semiannually, as applicable.

(e) Provides that this section does not apply to reinvestment in a company that is no longer a listed company.

Sec. 809.057. PROHIBITED INVESTMENTS. Prohibits a state governmental entity, except as provided by Section 809.056, from acquiring securities of a listed company.

SUBCHAPTER C. REPORT; ENFORCEMENT

Sec. 809.101. REPORT. Requires each state governmental entity, not later than January 15 of each year, to file a publicly available report with the presiding officer of each house of the legislature and the attorney general that:

- (1) identifies all securities sold, redeemed, divested, or withdrawn in compliance with Section 809.054;
- (2) identifies all prohibited investments under Section 809.057; and
- (3) summarizes any changes made under Section 809.055.

Sec. 809.102. ENFORCEMENT. Authorizes the attorney general to bring any action necessary to enforce this chapter.

SECTION 2. Effective date: September 1, 2021.