

RESOLUTION 02-01-2017 (REVISED)

DIGEST

Public Employee Retirement Funds: Divestment from Businesses Supporting Border Wall
Adds Government Code section 7513.73 to require public employment retirement funds to divest from investment in businesses contributing to the construction of a wall along the United States' border with Mexico.

RESOLUTIONS COMMITTEE ANALYSIS

History:

No similar resolutions found.

Reasons:

This resolution adds Government Code section 7513.73 to require public employment retirement funds to divest from investment in businesses contributing to the construction of a wall along the United States' border with Mexico. This resolution should be approved in principle because the wall is a bad idea socially and economically, and divestment by the two largest pension funds in the country would send a powerful message to the Trump administration and to construction businesses to that effect.

This resolution seeks to require the California Public Employees' Retirement Fund ("CalPERS") and the California Teachers' Retirement Fund ("CalSTRS") to cease investing, and liquidate existing investment, in any business contributing to the building of a wall along the United States' southern border. It essentially mirrors Assembly Bill 946, introduced earlier this year but since withdrawn. (Assem. Bill 946, Reg. Sess. 2017.)

The proposed border wall would do little to deter illegal immigration. A growing share of the undocumented population did not enter by sneaking over the border; rather they traveled to the United States with valid visas and simply stayed. Nor will a wall stop border crossings. Traffickers will find other routes, dig tunnels, and use drones to avoid border patrols. Cost estimates for the wall vary widely, with some opining it would cost as much as \$285 billion. The White House's proposal to pay for the wall by imposing a tax on imports from Mexico would hurt United States retailers and, through them, United States taxpayers. (Why the Border Wall's Costs Far Outweigh Its Benefits, Brookings, <https://www.brookings.edu/blog/order-from-chaos/2017/01/30/why-the-border-walls-costs-far-outweigh-its-benefits/>.)

Divestment of investments in wall construction companies by CalPERS and CalSTRS—the nation's largest and second largest pension funds with nearly \$312 billion and \$202 billion, respectively (California Shouldn't Invest in Companies That Build President Trump's Border Wall, Lawmakers Say, Los Angeles Times, <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-shouldn-t-invest-in-1490034477-htmstory.html>) would clearly signal California's opposition to the wall, thereby discouraging many of the companies around the country that have already expressed interest in participating in the wall construction.

The Resolutions Committee initially recommended disapproval of this resolution. The full Conference voted to approve.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Government Code section 7513.73 to read as follows:

- 1 § 7513.73
2 (a) As used in this section:
3 (1) “Board” means the Board of Administration of the Public Employees’ Retirement
4 System or the Teachers’ Retirement Board of the State Teachers’ Retirement System, as
5 applicable.
6 (2) “Company” means a sole proprietorship, organization, association, corporation,
7 partnership, venture, or other entity, or its subsidiary or affiliate, that exists for profit-making
8 purposes or to otherwise secure economic advantage.
9 (3) “The wall” means a physical wall along the United States’ southern border.
10 (4) “Investment” means the purchase, ownership, or control of publicly issued stock,
11 corporate bonds, or other debt instruments issued by a company.
12 (5) “Public employee retirement funds” means the Public Employees’ Retirement Fund
13 described in Section 20062 of this code and the Teachers’ Retirement Fund described in Section
14 22167 of the Education Code.
15 (b) On and after January 1, 2018, the board shall not make additional investments or
16 renew existing investments of public employee retirement funds in in any company contributing
17 to the construction of a wall along the United States’ southern border.
18 (c) On or before July 1, 2018, the board shall liquidate its investments in any company
19 contributing to the construction of a wall along the United States’ southern border.
20 (d) Nothing in this section shall require a board to take action as described in this section
21 unless the board determines in good faith that the action described in this section is consistent
22 with the fiduciary responsibilities of the board described in Section 17 of Article XVI of the
23 California Constitution.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: Existing law does not address any aspect of the wall’s construction.

The Solution: This resolution would require California’s two public employee pension funds to divest any holdings in companies involved in the creation of the anticipated wall between the southern border of the United States and Mexico.

The construction of a wall between the southern border of the United States and Mexico has been one component of the Trump Administration’s attempt to restrict the arrival of immigrants from

Mexico and other Latin American countries. Symbolically, the construction of the wall expresses a national commitment to xenophobia, racism and Eurocentric nationalism. By constructing the wall on the southern border, the Trump administration has effectively targeted immigrants from Latin America, forcing them to go great lengths to come to the United States—often as a means of escaping dangerous conditions, reuniting with one’s family, or seeking economic stability. In doing so, the construction of the wall itself expresses a national preference for non-Latino immigrants. Californians have no interest in such bigotry.

The projected goals of the wall—as described by the Trump Administration—are also largely unrealistic. Take, for example, the Administration’s claim that the wall will reduce criminal activity both in the United States and surrounding the border. Immigration and security experts have shown that, the more difficult it becomes to cross the border, the more likely undocumented migrants are to turn to smugglers for help traveling into the United States, a cycle that fuels illegal activity, props up networks of organized crime.

Additionally, any effort to seal off the border will also make conditions more dangerous for the undocumented immigrants who still try to make it over—either through the help of dangerous smugglers, or by their own means—putting their health and safety at an increased risk. From an environmental perspective, the consequences are devastating. The construction of the wall is likely to result in significant amounts of pollution for cities and neighborhoods in close proximity to the southern border, resulting in substantial health concerns. As of 2010, there were approximately 15 million people living in border counties on both sides of the Mexico-U.S. border, according to the Wilson Center's State of the Border Report, a majority of which are populated by some of the most marginalized communities. Therefore, the construction of a wall on the southern border would threaten living conditions for California’s and the nation’s most vulnerable individuals.

Scientists and environmentalists have also been warning about the additional negative effects, like restricted animal movement and plant pollination, of a border wall for over a decade. For example, in September 2016, Sergio Avila-Villegas, a conservation scientist at the Arizona-Sonora Desert Museum, told BBC's Science in Action team that "Border infrastructure not only blocks the movement of wildlife, but... destroys the habitats, fragments the habitats and the connectivity that these animals use to move from one place to another."

In early 2017, the Trump Administration submitted a presolicitation notice to the Federal Business Opportunities’ website in an attempt to solicit construction and engineering firms interested in constructing a wall on the United States’ border with Mexico. In order to fulfill the Trump administration’s goals with respect to the construction of a wall, the structure will require the assistance of numerous construction and engineering organizations. Currently, approximately 350 construction and engineering firms have expressed interest in contributing to the construction of a wall along the southern border of the United States. The construction of a wall will result in significant economic, social, and psychological harm for Californians. The construction of a wall is projected to have serious environmental consequences for Californians and individuals throughout the nation. Those living closest to the United States’ border with Mexico—many of whom are members of the United States’ most marginalized communities—are expected to endure most of the environmental ramifications of a wall’s construction, given

their close proximity to the construction sites. As Californians, we must hold ourselves to a high standard of conduct, including how we invest our pension funds. Both morally and fiscally, the millions of dollars that the Public Employees' Retirement System and the State Teachers' Retirement System have invested in companies actively contributing to the construction of this type of detrimental project can be better spent elsewhere.

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

This resolution uses language from previous divestment bills either passed or introduced in the California legislature. Such resolutions include AB 20 and SB185.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

SACRAMENTO COUNTY BAR ASSOCIATION

This resolution requires that the government divest public employment retirement funds from businesses supporting the creation of a wall along the United States' border with Mexico. The resolution should be opposed because it shifts the focus of CalPERS away from its stated mission, which is to provide responsible and efficient stewardship of the system to deliver promised retirement and health benefits, while promoting wellness and retirement security for members and beneficiaries.

It is bad policy to over-politicize the investment mission of PERS, STRS, or any other government retirement system by requiring it to engage in social investing without approval from the beneficiaries, or to divest from any legal company conducting legal activities that may be offensive to some people. For example, last year CalPERS issued a report that concluded that the requirement that it not invest in tobacco stocks cost the fund, and by extension the men and women who rely on the fund for their retirement benefits, \$3 billion between 2001, when the stocks were required to be sold, and June 2016. Complicating matters, the resolution would require divestment in any entity that supports the construction of the wall, but "support" is undefined. Are the transit agencies that bring raw materials and supplies to be boycotted? Are the companies that produce raw materials that are purchased by the federal government for use in the wall's construction?

The issue of the wall notwithstanding, public employment retirement fund managers should be able to use their financial and investment expertise to recommend which companies to invest in.

They should also be allowed to develop and follow their own divestment policies. For example, CalPERS has a divestment policy approach that engages shareowners, senior managers and the board of directors of the companies it invests in. This direct engagement approach is generally more effective in bringing about change in a corporation than avoiding investment entirely. Moreover, forcing divestment for differing, and potentially competing political causes may interfere with the funds' fiduciary responsibilities to their members, while having a negative impact on portfolio performance and on the overall health of the funds and could have the bizarre unintended consequence of not allowing the funds to invest in properties that will benefit the people who depend upon it for their retirements.

It is well documented that California's unfunded pension liabilities have grown exponentially since the Great Recession of the early 2000s. CalPERS had a 0.61 investment return for 2015-16. (<https://www.calpers.ca.gov/page/newsroom/calpers-news/2016/preliminary-investment-returns>) In 2015, PERS and STRS had only 74 percent of what was needed to meet pension obligations. (Pew Charitable Trusts, "The State Pension Funding Gap: 2015," April 2017.) Forcing public pension funds to divest from legal companies engaged in activities that may be politically unpopular places extra pressure on those retirement systems to outperform in other areas, which they haven't been able to do. Unfortunately, it will be taxpayers who will ultimately be responsible if retirement funds fail to cover retiree benefits.

SAN DIEGO COUNTY BAR ASSOCIATION

The SDCBA Delegation urges Disapproval of Resolution 02-01-2017 because it interferes with the fiduciary duties of the Board of Administration of the Public Employee Retirement System to make sound investment choices for the benefit of public employees who are investing in and eligible to receive PERS benefits. The duty to provide a sound return on investments necessitates the Board not have purely political dictates imposed on its investment choices. Rather, the Board should be left to exercise its sound discretion to determine whether public sentiment against a border wall makes prudent fiscal sense to withdraw investments in companies whose stock value may be adversely affected by market forces. Also, PERS may have invested in corporate debentures where it stands in a creditor position rather than as an investor in a Corporation – the forced sale of such debentures makes no sense because it only harms the investment and not the Corporation doing business with the federal government concerning the building of a border wall.

This Resolution is also overbroad as to the term "*contributing* to the construction of a wall along the United States' southern border." While the intent of the Resolution appears to be directed towards business entities directly contracting with the federal government for building of "the" border wall, this language extends much further. Under this language, a second tier or further down the line service provider or material supplier could be deemed to have "contributed" to the construction of the border wall by providing support services or materials to those directly or indirectly contracting for construction of the border wall. Also, the term "along the United States' southern border" potentially extends to include any wall constructed in the vicinity of the United States' southern border regardless of whether its intended function is to protect against illegal immigration.