



January 18, 2008

File number S7-27-07

Securities and Exchange Commission (SEC)
Attention: Nancy M. Morris, Secretary
100 F Street, NE.
Washington, DC 20549

Dear Ms. Morris:

On behalf of the National Foreign Trade Council (NFTC) and USA*Engage, I am writing to comment on whether the Commission should develop mechanisms to facilitate greater access to companies' disclosures concerning their business activities in or with countries designated as state sponsors of terrorism.

NFTC is a trade association representing some 300 corporations in support of an open, rules-based global trading system. USA*Engage is a coalition of small and large businesses, agriculture groups and trade associations which promotes responsible alternatives to unilateral economic sanctions. These organizations support multilateral cooperation and economic, humanitarian and diplomatic engagement as the most effective means of advancing U.S. foreign policy interests and American values.

Please find our responses to the Commission's requests for comment below.

II. Disclosure of business activities in or with countries designated as state sponsors of terrorism

1. The Commission should not provide enhanced access to disclosures regarding business in or with countries designated as state sponsors of terrorism, and should accord disclosures made in this area the same weight as other subject areas. Providing additional access or according enhanced importance to this issue is arbitrary and discriminatory and no doubt would foster calls for the Commission to provide enhanced access in other areas.

The list of countries cited by the Commission is only one of many categories by which it might choose to classify companies doing business internationally. It would be arbitrary for the Commission to provide enhanced access to information in this case but to ignore requests for the same enhanced access for companies doing business in countries on the State Department's list of "Countries of Particular Concern" contained in its Annual Report on International Religious

Freedom, Tier 3 Countries named in the Department's annual Trafficking in Persons Report, or countries where torture or extrajudicial killings are common as reported in the Department's annual Country Reports on Human Rights Practices, countries subject to enhanced U.S. export controls for reasons of weapons proliferation, or in the case of Sudan or future situations where the U.S. Government has declared that genocide is taking place.

Indeed, the Commission's focus on business in or with state sponsors of terror seems misplaced, given the preponderance of requests for information and actions taken by universities and State governments and pension funds. The major thrust of the movement that the Commission cites in its concept paper has been in response to the genocide that is occurring in Sudan, rather than its inclusion on the list of state sponsors of terrorism.

The very letter that the Commission cites as evidence of institutional investors seeking information on the subject of business with state sponsors ("Letter from 50 trustees of state treasurers to the State Department...") makes that clear: "Sudan is not only a federally designated terrorist sponsoring country, but is also embroiled in domestic conflicts in which the Sudanese government has engaged in activities that the U.S. government has identified as 'genocide.'" With respect to state actions, all but two of the nearly two-dozen laws that have been enacted on divestment for foreign policy reasons are focused solely on the genocide in Sudan, rather than more broadly on state sponsors of terror.

We believe the information requests are more nuanced than the Commission has suggested, and require more nuance than the Commission can provide.

Further, as the concept paper notes, the Commission does not provide enhanced access to disclosures concerning other subject areas. There are numerous other issues – from tobacco to guns to family-planning – where State legislatures have attempted to limit investments and for which States might request enhanced access to information. Providing enhanced access in response to the desire of State governments, universities, pension funds and other institutional investors for increased information in this particular case is selective and ignores the fact that there are a multitude of other social and political issues that do not receive similar treatment.

2 & 3. Enhanced access would place undue emphasis on the issue and has the potential for serious unintended consequences. Most importantly, the Commission threatens to create risk where none existed before.

Regardless of the intent or method of enhanced access that the Commission would provide, the inevitable result of any disproportionate access would be to suggest a bias against companies that are highlighted. Given the inevitability of such a bias, our member companies are concerned about the potential harm to their reputations.

Our members have provided anecdotal evidence that highlighting otherwise *de minimis* and immaterial business, such as the Commission did in the summer through its web tool and over time through its Office of Global Security Risk, has resulted in their precipitous exit from legitimate sales, distribution and service relationships out of a desire on the part of management to disassociate themselves with whatever business caused the additional attention, even when

that business was legitimate and legal under local and international law, immaterial to the company's operations and, in some cases, carried out under authorizations issued by the U.S. government. These precipitous exits expose these companies to penalties and lawsuits by business partners for breaches of obligations.

(This is not to say that we believe that doing business with a country on the State Sponsors list is necessarily material or that disclosure of such activities has an appreciable effect on share price. It is only to point out that managements have reacted, in some cases, in ways that create risk for a company based upon actions undertaken by the Commission.)

In addition, such a designation may erroneously suggest to the public that the company may be doing something illegal or improper, neither of which may be true.

6. The Commission's interpretation of materiality arises from a long history that has been guided by U.S. court decisions, and we support it in its current form. It would be a mistake to expand the definition of materiality to fit narrow political criteria.

To suggest that any level of business of any kind with a country identified on the State Department's list of state sponsors of terrorism is material is inaccurate and would improperly widen the scope of disclosures for companies. As Chairman of the House Financial Services Committee Barney Frank indicated in a letter to the Commission, some companies on the initial list "apparently have investments that are so negligible they could not reasonably be considered material either to investors or the economy of the terrorist-financing state."¹ To compel reporting of all investments in particular countries would significantly erode the standards of materiality that currently govern disclosures.

7. Public companies have been guided by longstanding Commission guidance, laws and court decisions. Unless the Commission wishes to change its guidance on company disclosures, then the information available in public company filings is sufficient. It would be inappropriate and unworkable to compel disclosures on a country-by-country basis for any reason, since such a requirement would necessitate reporting activities that are far beyond what is material to a company's operations. Compelling additional disclosure based on ties with state sponsors would raise similar concerns of discrimination and selectivity which we enumerated in Item 1.

8. A survey of statements by large investors indicates that many do not find information about the business activities in or with State Sponsors of Terrorism important in making investment decisions. In fact, many major institutional investors are opposed to according additional weight to company activities in those countries. Trustees of pension funds in some of the largest States, from California to Texas to Massachusetts, have expressed fierce opposition in the face of calls by politicians, activists and other non-investors to divest. Consider the following:

- In California, Calpers, the nation's largest public pension fund, voted to oppose State legislation that would require it to divest of companies doing business in Iran, saying that the legislation would "limit the decision-making authority of the pension fund's Board by

¹ Norris, Floyd. "S.E.C. Rethinks Lists Linking Companies and Terrorist States." New York Times. 21 July 2007: <http://www.nytimes.com/2007/07/21/business/21sec.html>

prohibiting investments in Iran.” As Rob Feckner, President of the Board of Administration, noted, “We hold pension dollars in trust, and it is our obligation to invest those dollars for the exclusive purpose of paying benefits for our members.”²

- In Texas, Trustees of the State’s Employees Retirement System have indicated opposition to the Governor’s call to divest from companies doing business in Iran. One trustee, Craig Hester, called the divestment process “an exercise in futility.” Another trustee, Cydney Donnell, “said selling off investments in certain countries opens the door to demands from interest groups that the fund make investment decisions on different criteria. ‘We’ll get various requests forever,’ said Donnell... ‘We need to determine whether these will have negative consequences for our beneficiaries.’”³
- In Massachusetts, responding to calls to divest from companies doing business in Iran, the Executive Director of the Massachusetts Pension Reserves Investment Trust, Michael Travaglini, said, “You hire us to make you money, and when you restrict our ability to pick stocks, you likely will restrict our ability to get returns.” He continues, “If it was tobacco yesterday and Sudan today, what is it going to be tomorrow and the day after that?... This fund makes money on a lot of investments that some people might question... That’s the slippery slope we fear.”⁴
- Cody Ferguson, a former trustee of the Los Angeles County Employees Retirement Association, notes the risk to portfolios from mandatory divestment and points out that the push comes primarily from those who do not have any responsibility for investing – rather than from investors. According to Ferguson, “There is... the issue of fiduciary responsibility and the dilemma faced by trustees who are directed to arbitrarily divest regardless of the financial consequences. Interestingly enough, that matter seems to only be of interest to those who are, in fact, fiduciaries. Proponents of divestment who have no responsibility or liability seem perfectly happy to see actual fiduciaries expose themselves to risk.”⁵

The above statements by pension fund managers and trustees – which are representative, not exhaustive – cast additional doubt on the assertion by the Commission that large institutional investors are increasingly interested in broad information “to ensure that their invested funds do not directly or indirectly support terrorism.”

It is also instructive to look at a related case in which shareholders in Berkshire Hathaway voted 97.5% of total shares against divesting from holdings of PetroChina. The move was sparked by an investor resolution attacking PetroChina’s parent company’s involvement in Sudan. In a recommendation to shareholders to oppose the proposed resolution to divest, the board of

² “CalPERS Opposes Iran Divestment Legislation.” 14 May 2007:

<http://www.calpers.ca.gov/index.jsp?bc=/about/press/pr-2007/may/oppose-iran-divestment.xml>

³ “Perry’s Iran divestment push runs into opposition.” *Austin-American Statesman*. 28 November 2007:

<http://www.statesman.com/business/content/business/stories/other/11/28/1128divest.html>

⁴ “State pension fund has ties to firms operating in Sudan.” *Boston Globe*. 8 July 2006:

http://www.boston.com/news/local/massachusetts/articles/2006/07/08/state_pension_fund_has_ties_to_firms_operating_in_sudan/

⁵ Ferguson, Cody. “Fallacies on divestment.” *Pensions and Investments*. 7 January 2008:

<http://www.pionline.com/apps/pbcs.dll/article?AID=/20080107/PRINTSUB/241283606>

Berkshire Hathaway indicated that it does not “believe that Berkshire should automatically divest shares of an investee because it disagrees with a specific activity of that investee.”⁶

III. Means of providing easier access to existing company disclosures

Comments on Improvements to the web tool

9. The recommendations suggested by the Commission to improve the web tool fundamentally fail to address the fact that such a tool inevitably creates a negative impression and could lead to reputational harm for a company that is targeted. No amount of qualifiers or links to additional information or other improvements could reasonably change that negative connotation or potential harm to the company.

10. The web tool should not be reinstated for the above reason. Furthermore, reinstating the web tool would create incentives for companies to disclose less information to investors. (As the Commission acknowledges in its concept paper, “A company might disclose more than is required under the securities laws.”) Companies which were previously inclined to disclose business that was immaterial to investors in countries such as Cuba or Iran would surely think twice about making such disclosures if they knew it would lead to their identification on a list that is perceived to have negative connotations. It is also foreseeable that such a list could discourage disclosures that a company was limiting or terminating business with various countries for the same reason. This is particularly noteworthy given that at least one company was identified by the prior SEC tool for indicating that they were ceasing business in one of the targeted countries.

11. An accurate system would require as near to real-time updates as is possible, which would “require a significant and indefinite commitment of agency personnel,” as the Commission notes in its concept paper.

12. It is very likely that the implementation of a web-based tool would have adverse consequences by potentially reducing the amount of information which a company chooses to make available to investors. As we note above in Item 10, “Reinstating the web tool would create incentives for companies to disclose less information to investors...Companies who were previously inclined to disclose business that was immaterial to investors...would surely think twice about making such revelations if they knew it would lead to their identification on a list that is perceived to have negative connotations.”

13. For all of the reasons given above, we believe the concept of a web tool that begins with a Commission-generated list of companies is inherently flawed. A web tool based on company disclosures is further flawed because there is no standard by which to report the nature or extent of business on a country-by-country basis across companies. As a result, companies with more robust reporting mechanisms would be penalized for voluntarily disclosing additional information in excess of their obligations to the Commission.

⁶ Shareholder Proposal Regarding Berkshire's Investment in PetroChina:
<http://www.berkshirehathaway.com/sudan.pdf>

Comments on Data tagging by companies themselves

14. Data tagging suffers fundamentally because there is no standard requirement to report activities on a country-specific basis across companies, which is an inherent obstacle to accurate comparisons. Whether the Commission were to require or make voluntary data tags for the purpose of highlighting business with particular countries, the result would be to provide the same incentives as described above for companies to limit disclosure to very narrow activities that are required under existing securities law. Data tagging would also target the most responsive and transparent companies for negative publicity.

15, 16 & 17. The creation of categories would put the Commission or its designated representative in the awkward position of making a value judgment. For example, the Commission asks if a category should be created for activities “that are perceived as benign.” What standard would the Commission use to consider benign? News gathering and humanitarian work, as suggested in the concept paper? For-profit sales of food and medicine? Sales of consumer goods? Sales of ordinary gasoline to consumers? Licensing payments by airlines to governments?

Activists and State legislators have sought to define “benign” in ways that vary widely. What is considered benign by some is considered support for terrorism by others.

It is impossible to create categories without passing judgment on the business the Commission would seek to highlight. Abdicating maintenance of a program to facilitate enhanced access to the companies themselves – as data tagging would seek to do – does not make the Commission any less responsible for imposing a selective and discriminatory value-laden judgment on legitimate business in or with the countries in question.

19. The Commission should not consider other options for this purpose.

IV. General requests for comment

In the concept release, the Commission raised the concern that, “We also question whether a company’s disclosure of legitimate or immaterial business activity should lead to its being identified through a web tool that highlights connections to State Sponsors of Terrorism.”

We submit that it is inappropriate for such a company to be identified by a tool of the Commission when it is conducting legitimate business.

The net result of employing a mechanism, whether it is a tool or data tagging, likely would be to harm investors by limiting the information that was disclosed voluntarily for fear that it would place companies on a list with negative connotations.

Overall, developing a tool of the kind described in the concept paper would be a selective political exercise that would unduly and unevenly highlight business in one particular issue area

and unfairly cast companies with the most robust reporting mechanisms in a negative light. It would be both unusual and inappropriate for the Commission to pursue this matter further.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "W. A. Reinsch". The signature is fluid and cursive, with a large initial "W" and a long, sweeping underline.

William A. Reinsch
President