



August 31, 2015

Governor Nikki Haley
1205 Pendleton Street
Columbia, SC 29201

Dear Governor Haley,

In coordination with Russia, China, France, Germany, and the United Kingdom, President Obama has proposed an executive agreement with Iran in which Iran agrees to gradually limit its nuclear program in exchange for the lifting of economic sanctions against its regime. The deal welcomes Iran as a participant in the world community conditioned only on marginal changes to its nuclear program, allowing Iran to maintain technology that would lead to a nuclear weapon, and allowing Iran to continue its human rights abuses, sponsoring of terrorism, imprisoning of American hostages, and threats to close American allies, including Israel.

President Obama chose to pursue this major international accord as an executive agreement, rather than as a treaty, in order to circumvent the Constitution's requirement of two-thirds approval by the U.S. Senate for enactment. U.S. CONST. Art. II, § 2. However, because the Constitution clearly contemplates that such agreements, fundamentally reordering the relations between the United States and a foreign country, shall be concluded as treaties, the Iran agreement does not constitute the "Supreme Law of the Land," U.S. CONST. Art. VI, binding upon the States. Indeed, in *Medellin v. Texas*, the Supreme Court reaffirmed that even treaties are not binding upon the States unless they are self-executing or are accompanied by implementing legislation enacted by Congress. 552 U.S. 491, 504-06 (2008).

Thus, President Obama's executive agreement, which is inferior in legal force to a treaty, and which lacks the congressional approval required by the Constitution, cannot bind the States. The consequence of President Obama's decision to skirt the People's representatives in Congress is that the People, through the States, may come to their own decisions regarding sanctions on Iran.

The authority of the States in this regard is recognized not only in legal precedents, but also in the agreement with Iran itself—which requires only that the federal government "actively encourage" States to implement the deal, by Secretary of State Kerry, who confirmed in his July 28, 2015, testimony before the House Foreign Affairs Committee that the deal does not affect the States'

ability to impose sanctions on Iran,⁹⁸ and by Congress. Congress in fact explicitly authorized state-level sanctions against in the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, finding “that the United States should support the decision of any State or local government that for moral, prudential, or reputational reasons divests from, or prohibits the investment of assets of the State or local government in, a person that engages in investment activities in the energy sector of Iran,” and specifying that sanctions imposed by States in accordance with the Act would not be preempted by any federal law or regulation.

The States certainly have numerous moral and reputational reasons to prohibit investment of public assets into companies doing business with Iran and other countries that sponsor terrorism. Even if it is true that Iran has relinquished its ambitions for a nuclear weapon and that its deal with President Obama will prevent such an acquisition—both of which are highly questionable—Iran engages in a range of other reprehensible activities.

First, Iran engages in some of the world’s most severe human rights abuses, oppressing women, and persecuting people of nearly all faiths, including Baha’is, Jews, and Christians.

Second, Iran continues to be the world’s foremost state sponsor of terrorism, providing weapons to terrorists, functioning as the central bank for terror, and sheltering members of the world’s most notorious terrorist groups.

Third, Iran continues to hold American hostages, including a journalist, a Marine, and a Christian pastor jailed for sharing his faith. A fourth hostage holds the unfortunate record of being the longest-held hostage in American history.

Finally, the controlling regime in Iran remains dedicated to the total destruction of our ally Israel and the complete genocide of its people. Regardless of political affiliation, people from all States can agree that none of these stances should be tolerated, much less supported by funds flowing through and from the States.

In addition to those moral and reputational reasons, there are prudential reasons to avoid investment of public funds into Iran and other countries that sponsor terrorism. As stewards of public funds, including pension funds, the inherent risks of investment into a country like Iran counsel strongly against any state policy of investing public funds in such a manner as to assume those risks. If there is one thing of which we can be certain, it is that the current situation in Iran is sure to remain *uncertain*. Given the fluidity of the current political climate, and the potential for this deal to either unravel or be disapproved by Congress, prudence counsels in favor of investing public funds in a manner that avoids these obvious risks.

⁹⁸ Rep. Ron DeSantis (R-FL)87: Because this is not going to be ratified as a treaty, there are a lot of states—and Florida, particularly—where state legislatures have enacted sanctions against Iran in various capacities. Do you acknowledge that this deal will not affect states’ ability to do it—since it’s not going to be approved as a treaty, it’s not going to be considered the supreme law of the land, it’s going to be more of an executive-to-executive agreement?

Kerry: That’s accurate, but we would urge those states, if Iran is fully complying with this agreement, we will take steps to urge them not to interfere with that.

Because of these moral, reputational, and prudential reasons—and pursuant to their sovereign and congressionally recognized rights to refuse to do business with an enterprise engaged in terror, oppression, and international belligerence—dozens of States, from New York to Florida and Texas to California, currently have in place state-level sanctions against Iran. These sanctions were bipartisan accomplishments, and were passed as expressions of those States' disapproval of a regime that holds American citizens in darkened cells and American allies under threat of annihilation.

As the officials selected by your people to enforce the laws of your States and to ensure good stewardship of public funds, we encourage you to strictly and aggressively enforce any existing sanctions imposed by your State against Iran. If your State has not yet imposed sanctions, or if your existing sanctions could be strengthened, we urge you to take two actions: (1) have your executive branch take all appropriate measures to ensure that State agencies are not engaged in any business dealings connected to Iran, and (2) work with your legislative branch to enact strong, statutory sanctions at the earliest possible date. Attached you will find a working draft bill/executive order imposing robust sanctions on Iran, which can be appropriately revised to suit your State's particular situation.

If our offices can be of any assistance to you as you take these important actions, do not hesitate to ask.

Sincerely,



E. Scott Pruitt
Oklahoma Attorney General



Bill Schuette
Michigan Attorney General

Enclosure

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sanctions by the United States may materially harm the share value of foreign companies. Shares in these foreign companies may be held in the portfolio of public retirement systems in this state.

(b) Publicly traded companies in the United States are substantially restricted in doing business in or with foreign states such as Iran that the United States Department of State has identified as sponsoring terrorism.

(c) Public retirement systems in this state currently invest on behalf of the citizens of _____ in publicly traded companies that may be at risk due to business ties with foreign states such as Iran that sponsor terrorism and are involved in the proliferation of weapons of mass destruction.

(d) Investments in publicly traded companies that have business operations in or with foreign states such as Iran may be liable for sanctions under United States law and risk the pensions of the dedicated public employees of this state.

(e) Excluding companies with business activities in foreign states such as Iran that sponsor terrorism and divesting from public portfolios will help protect the public retirement systems in this state from investment losses related to these business activities and may improve the investment performance of the public retirement systems.

(f) Public Law 111-195, The Comprehensive Iran Sanctions Accountability, and Divestment Act of 2010, specifically acknowledges the authority of states to divest or prohibit the investment of state assets in entities engaged in certain investment activities in Iran.

(g) It is unconscionable for this state to invest in companies with business activities benefiting foreign states such as Iran that commit egregious violations

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[BILL/EXECUTIVE ORDER NO. _____]

This [bill/executive order] would require the divestment of certain state funds from Iran and additionally would prohibit the [state employee/teacher retirement/pension systems] from investing public employee/teacher retirement funds in a company with business operations in Iran, that is invested in or engaged in business operations with entities in the defense or nuclear sectors of Iran, or the company is invested or engaged in business operations with entities involved in the development of petroleum or natural gas resources of Iran, and that company is subject to sanctions under federal law, or the company is engaged in business operations with an Iranian organization that has been labeled as a terrorist organization by the United States government. The [bill/executive order] would require the responsible authorities/fund managers to sell or transfer any investments in a company with business operations in Iran, until Iran is removed from the United States Department of State's list of countries that have been determined to repeatedly provide support for acts of international terrorism and the President of the United States determines and certifies that Iran has ceased its efforts to design, develop, manufacture, or acquire a nuclear explosive device or related materials and technology, as specified. The [bill/executive order] would make related findings and declarations.

[BILL/EXECUTIVE ORDER] TEXT

SECTION 1.

The [Legislature/Governor] finds and declares as follows:

(a) The Securities and Exchange Commission has determined that business activities in foreign states such as Iran sponsoring terrorism and that are subject to

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of human rights and sponsor terrorism, or to procure goods and/or services for state use from such companies.

SEC. 2.

Section _____ is added to the [state legislative code], to read:

(a) As used in this section, the following definitions shall apply:

(1) “Business operations” means maintaining, selling, or leasing equipment, facilities, personnel, or any other apparatus of business or commerce in Iran, including the ownership or possession of real or personal property located in Iran.

(2) “Company” means a sole proprietorship, organization, association, corporation, partnership, venture, or other entity, its subsidiary or affiliate that exists for profitmaking purposes or to otherwise secure economic advantage. “Company” also means a company owned or controlled, either directly or indirectly, by the government of Iran, or that is established or organized under the laws of or has its principal place of business in the Islamic Republic of Iran.

(3) “Government of Iran” means the government of Iran or its instrumentalities or political subdivisions. “Government of Iran” also means an individual, company, or public agency located in Iran that provides material or financial support to the Islamic Republic of Iran.

(4) “Invest” or “investment” means the purchase, ownership, or control of stock of a company, association, or corporation, the capital stock of a mutual water company or corporation, bonds issued by the government or a political subdivision of Iran, corporate bonds or other debt instruments issued by a company, or the commitment of funds or other assets to a company, including a loan or extension of credit to that company.

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(5) "Investment Manager" means the individual, board, panel, or other entity responsible for making investment decisions relative to the Public Employees' Retirement Funds.

(6) "Iran" means the Islamic Republic of Iran or a territory under the administration or control of Iran.

(7) "Military equipment" means weapons, arms, or military defense supplies.

(8) "Public Employee Retirement Funds" means the [state public employees'/ teacher retirement/pension funds described in sections _____].

(9) "Substantial action" means a boycott of the government of Iran, curtailing business in Iran until that time described in subdivision (m), or selling company assets, equipment, or real and personal property located in Iran.

(b) The investment managers shall not invest Public Employee Retirement Funds in a company which has business operations in Iran as identified by the investment managers through, as they deem appropriate, publicly available information including, but not limited to, information provided by nonprofit and other organizations and government entities, that meets either of the following criteria:

(1) The company (A) is invested in or engaged in business operations with entities in the defense or nuclear sectors of Iran or (B) is invested in or engaged in business operations with entities involved in the development of petroleum or natural gas resources of Iran.

(2) The company has demonstrated complicity with an Iranian organization that has been labeled as a terrorist organization by the United States government.

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(c) On or before January 1, 2016, the investment managers shall determine which companies are subject to divestment.

(d) After the determination described in subdivision (c), the investment managers shall determine if a company meets the criteria described in subdivision (b). If the investment managers plan to invest or have investments in a company that meets the criteria described in subdivision (b), that planned or existing investment shall be subject to subdivisions (g) and (h).

(e) Investments in a company that does not meet the criteria described in subdivision (b) are not subject to subdivision (h) if the company does not subsequently meet the criteria described in subdivision (b). The investment managers shall identify the reasons why that company does not satisfy the criteria described in subdivision (b) in the report to the Legislature described in subdivision (i).

(f) (1) Notwithstanding subdivisions (d) and (e), if the investment manager's investment in a company described in subdivision (b) is limited to investment via an externally and actively managed commingled fund, the investment managers shall contact that fund manager in writing and request that the fund manager remove that company from the fund as described in subdivision (h). On or before January 1, 2016, if the fund or account manager creates a fund or account devoid of companies described in subdivision (b), the transfer of investments from the prior fund or account to the fund or account devoid of companies with business operations in Iran shall be deemed to satisfy subdivision (h).

(2) If the investment manager's investment in a company described in subdivision (b) is limited to an alternative fund or account, the alternative fund or account manager creates an actively managed commingled fund that excludes companies described in subdivision (b), and the new fund or account is deemed to be

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financially equivalent to the existing fund or account, the transfer of investments from the existing fund or account to the new fund or account shall be deemed to satisfy subdivision (h). If the investment managers determine that the new fund or account is not financially equivalent to the existing fund, the investment managers shall include the reasons for that determination in the report described in subdivision (i).

(3) The investment managers shall make a good faith effort to identify any private equity investments that involve companies described in subdivision (b), or are linked to the government of Iran. If the investment managers determine that a private equity investment clearly involves a company described in subdivision (b), or is linked to the government of Iran, they shall consider if those private equity investments shall be subject to subdivision (h). If the investment managers determine that a private equity investment clearly involves a company described in subdivision (b), or is linked to the government of Iran and they do not take action as described in subdivision (h), they shall include the reasons for that decision in the report described in subdivision (i).

(g) Except as described in subdivisions (e) and (f), the investment managers, in their capacity as shareholder or investor, shall notify any company described in subdivision (d) that the company is subject to subdivision (h) and permit that company to respond to the investment managers. The investment managers shall request that the company take substantial action no later than 90 days from the date they notified the company under this subdivision. If the investment managers determine that a company has taken substantial action or has made sufficient progress towards substantial action before the expiration of that 90-day period, that company shall not be subject to subdivision (h). The investment managers shall, at intervals not to exceed 90 days, continue to monitor and review the progress of the company until that company has taken substantial action in Iran. A company that fails to complete substantial action within one year from the date of the initial notice by the investment managers shall be subject to subdivision (h).

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(h) If a company described in subdivision (d) fails to complete substantial action by the time described in subdivision (g), the investment managers shall take the following actions:

(1) They shall not make additional or new investments or renew existing investments in that company.

(2) They shall liquidate the investments in that company no later than 18 months after this subdivision applies to that company. The investment managers shall liquidate those investments in a manner to address the need for companies to take substantial action in Iran and consistent with their fiduciary responsibilities.

(i) On or before January 1, 2016, and every year thereafter, the investment managers shall file a report with the Legislature/[Governor]. The report shall describe the following:

(1) A list of investments they have in companies with business operations that satisfy the criteria in subdivision (b), including, but not limited to, the issuer, by name, of the stock, bonds, securities, and other evidence of indebtedness.

(2) A detailed summary of the business operations a company described in paragraph (1) has in Iran.

(3) Whether they have reduced investments in a company that satisfies the criteria in subdivision (b).

(4) If they have not completely reduced investments in a company that satisfies the criteria in subdivision (b), when they anticipate that they will reduce all investments in that company or the reasons why a sale or transfer of investments is inconsistent with their fiduciary responsibilities.

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(5) Any information described in subdivisions (d) and (e).

(6) A detailed summary of investments that were transferred to funds or accounts devoid of companies with business operations in Iran as described in subdivision (f).

(7) An annual calculation of any costs or investment losses or other financial results incurred in compliance with the provisions of this section.

(j) If the investment managers voluntarily sell or transfer all investments in a company with business operations in Iran, this section shall not apply except that they shall file a report with the Legislature/[Governor] related to that company as described in subdivision (i).

(k) Nothing in this section shall require the investment managers to take action as described in this section unless they determine, in good faith, that the action described in this section is consistent with their fiduciary responsibilities.

(l) Subdivision (h) shall not apply to any of the following:

(1) Investments in a company that is primarily engaged in supplying goods or services intended to relieve human suffering in Iran.

(2) Investments in a company that promotes health, education, or journalistic, religious, or welfare activities in Iran.

(3) Investments in a United States company that is licensed by the federal government to have business operations in Iran.

(m) This section shall cease to be operative if both of the following apply:

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(1) Iran is removed from the United States Department of State's list of countries that have been determined to repeatedly provide support for acts of international terrorism.

(2) The President of the United States determines and certifies to the appropriate committee of the Congress of the United States that Iran has ceased its efforts to design, develop, manufacture, or acquire a nuclear explosive device or related materials and technology.

(n) This section shall be known and may be cited as the [_____] Public Divest from Iran Act.

SEC. 3.

Section _____ of the _____ Code is amended to read:

(a) As used in this section, the following definitions shall apply:

(1) "Doing business with Iran" means

(A) having a principal place of business, place of incorporation or corporate headquarters in Iran or having any operations, leases, franchises, subsidiaries, distribution agreements, or any other similar agreements in Iran, or being a subsidiary, affiliate, licensee, franchisee or having any other contractual relationship with such a person;

(B) providing financial services to the government of Iran, including providing direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage services, acting as a trustee or escrow agent, or otherwise acting as an agent pursuant to a contractual agreement;

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(C) promoting the development and/or export of petroleum or natural gas resources in or from Iran;

(D) providing any goods or services to the government of Iran.

(2) “Essential” means necessary in order that a state agency may perform its mission, there being no substitute, to avoid irreparable harm to agency or authority programs.

(3) “Government of Iran” means the government of Iran or its instrumentalities or political subdivisions. “Government of Iran” also means an individual, company, or public agency located in Iran that provides material or financial support to the Islamic Republic of Iran.

(4) “Person” means any individual and any partnership, firm, association, corporation, or other entity, or their subsidiaries.

(5) “Secretary” means the secretary of [appropriate state authority].

(6) “State agency” means all awarding authorities of the state, including, but not limited to, all executive offices, agencies, departments, commissions, and public institutions of higher education, and any office, department or division of the judiciary.

(b) Except as otherwise provided in this section, a state agency may not procure goods or services from any person listed on the restricted purchase list maintained by the secretary, or who is determined through affidavit or through other reliable methods to meet the criteria for so being listed.

(c) A state agency may procure goods or services from a person who is on or who is so determined to meet the criteria of the restricted purchase list only after

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certifying in writing to the secretary or, in the case of a state authority, to the chief operating officer that:

- (1) the procurement is essential; and
- (2) compliance with paragraph (b) would eliminate the only bid or offer, or would result in inadequate competition.

(d) In any solicitation, a state agency shall provide notice of the requirements of this section. Prior to reviewing responses to bid documents for any procurements, or, if there are none, prior to entering into any contractual arrangement, the awarding authority shall obtain from such person seeking a contract a certification, under penalty of perjury, declaring the nature and extent to which said person is engaging in activities which would subject said person to inclusion on the restricted purchase list.

(e) A person with operations in Iran for the sole purpose of reporting the news, or solely for the purpose of providing goods or services for the provision of international telecommunications shall not be subject to the provisions of this section.

(f) Notwithstanding the provisions of this section, a state agency may purchase medical supplies, including hospital, nutritional, diagnostic, pharmaceutical and non-prescription products specifically manufactured to satisfy identified health care needs, or for which there is no medical substitute. The determination of whether no medical substitute exists shall be made by the state agency requiring the supply.

(g) The secretary shall establish and maintain a restricted purchase list of persons doing business with Iran. This list shall be updated at least once every three months and shall be provided to all state agencies. The secretary is hereby authorized and directed to promulgate regulations to assure the timely and effective implementation of this section.

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(h) Any contract entered into in violation of this section shall be void.

(m) This section shall cease to be operative if both of the following apply:

(1) Iran is removed from the United States Department of State's list of countries that have been determined to repeatedly provide support for acts of international terrorism.

(2) The President of the United States determines and certifies to the appropriate committee of the Congress of the United States that Iran has ceased its efforts to design, develop, manufacture, or acquire a nuclear explosive device or related materials and technology.

SEC. 4.

The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.