
A BILL FOR AN ACT

RELATING TO THE EMPLOYEES' RETIREMENT SYSTEM.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

- 1 SECTION 1. Legislative findings. The legislature finds
2 that:
- 3 (1) On July 23, 2004, the United States Congress declared
4 that "the atrocities unfolding in Darfur, Sudan, are
5 genocide";
- 6 (2) On September 9, 2004, Secretary of State Colin L.
7 Powell told the United States Senate foreign relations
8 committee that "genocide has occurred and may still be
9 occurring in Darfur" and "the Government of Sudan and
10 the Janjaweed bear responsibility";
- 11 (3) On September 21, 2004, addressing the United Nations
12 General Assembly, President George W. Bush affirmed
13 the Secretary of State's finding and stated, "[A]t
14 this hour, the world is witnessing terrible suffering
15 and horrible crimes in the Darfur region of Sudan,
16 crimes my government has concluded are genocide";
- 17 (4) On December 7, 2004, the United States Congress noted
18 that the genocidal policy in Darfur has led to reports



1 of "systematic rape of thousands of women and girls,
2 the abduction of women and children, and the
3 destruction of hundreds of ethnically African
4 villages, including the poisoning of their wells and
5 the plunder of their crops and cattle upon which the
6 people of such villages sustain themselves";

7 (5) Also on December 7, 2004, Congress found that "the
8 Government of Sudan has restricted access by
9 humanitarian and human rights workers to the Darfur
10 area through intimidation by military and security
11 forces, and through bureaucratic and administrative
12 obstruction, in an attempt to inflict the most
13 devastating harm on those individuals displaced from
14 their villages and homes without any means of
15 sustenance or shelter";

16 (6) On September 25, 2006, Congress reaffirmed that "the
17 genocide unfolding in the Darfur region of Sudan is
18 characterized by acts of terrorism and atrocities
19 directed against civilians, including mass murder,
20 rape, and sexual violence committed by the Janjaweed
21 and associated militias with the complicity and



1 support of the National Congress Party-led faction of
2 the Government of Sudan";

3 (7) On September 26, 2006, the United States House of
4 Representatives stated that "an estimated 300,000 to
5 400,000 people have been killed by the Government of
6 Sudan and its Janjaweed allies since the [Darfur]
7 crisis began in 2003, more than 2,000,000 people have
8 been displaced from their homes, and more than 250,000
9 people from Darfur remain in refugee camps in Chad";

10 (8) The Darfur crisis represents the first time the United
11 States government has labeled ongoing atrocities a
12 genocide;

13 (9) The federal government has imposed sanctions against
14 the government of Sudan since 1997. These sanctions
15 are monitored through the United States Treasury
16 Department's office of foreign assets control;

17 (10) According to a former chair of the United States
18 Securities and Exchange Commission, "the fact that a
19 foreign company is doing material business with a
20 country, government, or entity on the sanctions list
21 is, in the view of the Securities and Exchange
22 Commission, substantially likely to be significant to



1 a reasonable investor's decision about whether to
2 invest in that company";

3 (11) Since 1993, the United States Secretary of State has
4 determined that Sudan is a country the government of
5 which has repeatedly provided support for acts of
6 international terrorism, thereby restricting United
7 States assistance, defense exports and sales, and
8 financial and other transactions with the government
9 of Sudan;

10 (12) A 2006 United States House of Representatives report
11 states that "a company's association with sponsors of
12 terrorism and human rights abuses, no matter how large
13 or small, can have a materially adverse result on a
14 public company's operations, financial condition,
15 earnings, and stock prices, all of which can
16 negatively affect the value of an investment";

17 (13) In response to the financial risk posed by investments
18 in companies doing business with a terrorist-
19 sponsoring state, the Securities and Exchange
20 Commission established its office of global security
21 risk to provide for enhanced disclosure of material
22 information regarding such companies;



- 1 (14) The current Sudan divestment movement encompasses
2 nearly one hundred universities, cities, states, and
3 private pension plans;
- 4 (15) Companies facing such widespread divestment present
5 further material risk to remaining investors;
- 6 (16) It is a fundamental responsibility of the State to
7 decide where, how, and by whom financial resources in
8 its control should be invested, taking into account
9 numerous pertinent factors;
- 10 (17) It is the prerogative and desire of the State, in
11 respect to investment resources in its control and to
12 the extent reasonable, with due consideration for,
13 among other things, return on investment, on behalf of
14 itself and its investment beneficiaries, not to
15 participate in an ownership or capital-providing
16 capacity with entities that provide significant
17 practical support for genocide, including certain non-
18 United States companies presently doing business in
19 Sudan;
- 20 (18) It is the judgment of the legislature that this Act
21 should remain in effect only insofar as it continues
22 to be consistent with, and does not unduly interfere



1 with, the foreign policy of the United States as
2 determined by the federal government; and
3 (19) It is the judgment of this legislature that mandatory
4 divestment of public funds from certain companies is a
5 measure that should be employed sparingly and
6 judiciously. A Congressional and presidential
7 declaration of genocide satisfies this high threshold.

8 SECTION 2. Definitions. As used herein, the following
9 definitions shall apply:

10 "Active business operations" means all business operations
11 that are not inactive business operations.

12 "Business operations" means engaging in commerce in any
13 form in Sudan, including by acquiring, developing, maintaining,
14 owning, selling, possessing, leasing, or operating equipment,
15 facilities, personnel, products, services, personal property,
16 real property, or any other apparatus of business or commerce.

17 "Company" means any sole proprietorship, organization,
18 association, corporation, partnership, joint venture, limited
19 partnership, limited liability partnership, limited liability
20 company, or other entity or business association, including all
21 wholly-owned subsidiaries, majority-owned subsidiaries, parent



1 companies, or affiliates of such entities or business
2 associations, that exists for profit-making purposes.

3 "Complicit" means taking actions during any preceding
4 twenty-month period which have directly supported or promoted
5 the genocidal campaign in Darfur, including, but not limited to,
6 preventing Darfur's victimized population from communicating
7 with each other, encouraging Sudanese citizens to speak out
8 against an internationally-approved security force for Darfur,
9 actively working to deny, cover up, or alter the record on human
10 rights abuses in Darfur, or other similar actions.

11 "Direct holdings" in a company means all securities of that
12 company held directly by the public fund or in an account or
13 fund in which the public fund owns all shares or interests.

14 "Government of Sudan" means the government in Khartoum,
15 Sudan, which is led by the National Congress Party (formerly
16 known as the National Islamic Front) or any successor government
17 formed on or after October 13, 2006 (including the coalition
18 National Unity Government agreed upon in the Comprehensive Peace
19 Agreement for Sudan) and does not include the regional
20 government of southern Sudan.

21 "Inactive business operations" means the mere continued
22 holding or renewal of rights to property previously operated for



1 the purpose of generating revenues but not presently deployed
2 for such purpose.

3 "Indirect holdings" in a company means all securities of
4 that company held in an account or fund, such as a mutual fund,
5 managed by one or more persons not employed by the public fund,
6 in which the public fund owns shares or interests together with
7 other investors not subject to this chapter.

8 "Marginalized populations of Sudan" include, but are not
9 limited to, the portion of the population in the Darfur region
10 that has been genocidally victimized; the portion of the
11 population of southern Sudan victimized by Sudan's North-South
12 civil war; the Beja, Rashidiya, and other similarly underserved
13 groups of eastern Sudan; the Nubian and other similarly
14 underserved groups in Sudan's Abyei, Southern Blue Nile, and
15 Nuba Mountain regions; and the Amri, Hamadab, Manasir, and other
16 similarly underserved groups of northern Sudan.

17 "Military equipment" means weapons, arms, military
18 supplies, and equipment that readily may be used for military
19 purposes, including, but not limited to, radar systems or
20 military-grade transport vehicles; or supplies or services sold
21 or provided directly or indirectly to any force actively
22 participating in armed conflict in Sudan.



1 "Mineral extraction activities" include exploring,
2 extracting, processing, transporting, or wholesale selling or
3 trading of elemental minerals or associated metal alloys or
4 oxides (ore), including gold, copper, chromium, chromite,
5 diamonds, iron, iron ore, silver, tungsten, uranium, and zinc,
6 as well as facilitating such activities, including by providing
7 supplies or services in support of such activities.

8 "Oil-related activities" include, but are not limited to,
9 owning rights to oil blocks; exporting, extracting, producing,
10 refining, processing, exploring for, transporting, selling, or
11 trading of oil; constructing, maintaining, or operating a
12 pipeline, refinery, or other oil-field infrastructure; and
13 facilitating such activities, including by providing supplies or
14 services in support of such activities; provided that the mere
15 retail sale of gasoline and related consumer products shall not
16 be considered oil-related activities.

17 "Power production activities" means any business operation
18 that involves a project commissioned by the National Electricity
19 Corporation of Sudan or other similar government of Sudan entity
20 whose purpose is to facilitate power generation and delivery,
21 including, but not limited to, establishing power-generating
22 plants or hydroelectric dams, selling or installing components



1 for the project, providing service contracts related to the
2 installation or maintenance of the project, as well as
3 facilitating such activities, including by providing supplies or
4 services in support of such activities.

5 "Public fund" means the employees' retirement system of the
6 State of Hawaii or the board of trustees in charge of the
7 employees' retirement system.

8 "Scrutinized company" means any company that meets any of
9 the following criteria:

10 (1) The company has business operations that involve
11 contracts with or provision of supplies or services to
12 the government of Sudan; companies in which the
13 government of Sudan has any direct or indirect equity
14 share; government of Sudan-commissioned consortiums or
15 projects; or companies involved in government of
16 Sudan-commissioned consortiums or projects:

17 (A) A material portion of the company's revenues or
18 assets linked to Sudan involve oil-related
19 activities or mineral extraction activities; the
20 company does not contract directly with the
21 regional government of southern Sudan or a
22 project or consortium created exclusively by that



1 regional government; and the company has failed
2 to take substantial action; or

3 (B) A material portion of the company's revenues or
4 assets linked to Sudan involve power production
5 activities; most of such activities do not
6 include projects whose intent is to provide power
7 or electricity to the marginalized populations of
8 Sudan; and the company has failed to take
9 substantial action;

10 (2) The company is complicit in the Darfur genocide; or

11 (3) The company supplies military equipment within Sudan,
12 unless it clearly shows that the military equipment
13 cannot be used to facilitate offensive military
14 actions in Sudan or the company implements rigorous
15 and verifiable safeguards to prevent use of that
16 equipment by forces actively participating in armed
17 conflict, for example, through post-sale tracking of
18 the equipment by the company, certification from a
19 reputable and objective third party that the equipment
20 is not being used by a party participating in armed
21 conflict in Sudan, or sale of the equipment solely to
22 the regional government of southern Sudan or any



1 internationally-recognized peacekeeping force or
2 humanitarian organization.

3 Notwithstanding anything in this chapter to the contrary, a
4 social development company which is not complicit in the Darfur
5 genocide shall not be considered a scrutinized company.

6 "Social development company" means a company whose primary
7 purpose in Sudan is to provide humanitarian goods or services,
8 including medicine or medical equipment, agricultural supplies
9 or infrastructure, educational opportunities, journalism-related
10 activities, information or information materials, spiritual-
11 related activities, services of a purely clerical or reporting
12 nature, food, clothing, or general consumer goods that are
13 unrelated to oil-related activities, mineral extraction
14 activities, or power production activities.

15 "Substantial action" means adopting, publicizing, and
16 implementing a formal plan to cease scrutinized business
17 operations within one year and to refrain from any new business
18 operations; undertaking significant humanitarian efforts on
19 behalf of one or more marginalized populations of Sudan; or
20 through engagement with the government of Sudan, materially
21 improving conditions for the genocidally victimized population
22 in Darfur.



1 SECTION 3. Identification of companies. (a) Within one
2 hundred eighty days following passage of this Act, the public
3 fund shall make its best efforts to identify all scrutinized
4 companies in which the public fund has direct or indirect
5 holdings or could possibly have such holdings in the future.
6 Those efforts shall include, as appropriate:

- 7 (1) Reviewing publicly available information regarding
8 companies with business operations in Sudan. In
9 conducting the review, the public fund may rely on
10 information provided by nonprofit organizations,
11 research firms, international organizations, and
12 government entities;
- 13 (2) Contacting asset managers contracted by the public
14 fund that invest in companies with business operations
15 in Sudan; and
- 16 (3) Contacting other institutional investors that have
17 divested from or engaged with companies that have
18 business operations in Sudan.

19 (b) By the first meeting of the public fund following the
20 one hundred eighty-day period described in subsection (a), the
21 public fund shall assemble all scrutinized companies identified
22 into a "scrutinized companies list".



1 (c) The public fund shall update the scrutinized companies
2 list on a quarterly basis based on evolving information from,
3 among other sources, those listed in subsection (a).

4 SECTION 4. Required actions. (a) The public fund shall
5 adhere to the following procedures for companies on the
6 scrutinized companies list:

7 (1) The public fund shall determine the companies on the
8 scrutinized companies list in which the public fund
9 owns direct or indirect holdings;

10 (2) For each company identified with only inactive
11 business operations, the public fund shall send a
12 written notice informing the company of the provisions
13 of this chapter and encouraging it to continue to
14 refrain from initiating active business operations in
15 Sudan until it is able to avoid scrutinized business
16 operations. The public fund shall continue such
17 correspondence on a semi-annual basis;

18 (3) For each company newly identified with active business
19 operations, the public fund shall send a written
20 notice informing the company of its scrutinized
21 company status and that it may become subject to
22 divestment by the public fund. The notice shall offer



1 the company the opportunity to clarify its Sudan-
2 related activities and shall encourage the company,
3 within ninety days, to either cease its scrutinized
4 business operations or convert such operations to
5 inactive business operations in order to avoid
6 qualifying for divestment by the public fund; and

7 (4) If, within ninety days following the public fund's
8 first engagement with a company, that company ceases
9 scrutinized business operations, the company shall be
10 removed from the scrutinized companies list and this
11 section shall cease to apply to it unless it resumes
12 scrutinized business operations. If, within ninety
13 days following the public fund's first engagement, the
14 company converts its scrutinized active business
15 operations to inactive business operations, the
16 company shall be subject to all provisions relating
17 thereto.

18 (5) If, after ninety days following the public fund's
19 first engagement with a company following the
20 effective date of this Act, that company continues to
21 have scrutinized active business operations, the
22 company shall be subject to subsection (b), unless the



1 board of trustees of the public fund determines that
2 the company has made sufficient progress towards
3 ceasing its scrutinized business operations or
4 converting such operations to inactive business
5 operations. The public fund shall continue to monitor
6 and review the progress of the company on a quarterly
7 basis until that company has ceased its scrutinized
8 business operations or converted such operations to
9 inactive business operations. A company that fails to
10 cease its scrutinized business operations, to convert
11 such operations to inactive business operations, or to
12 continue to make sufficient progress towards cessation
13 or conversion by the next time interval shall be
14 subject to subsection (b).

15 (b) If a company on the scrutinized companies list fails
16 to cease scrutinized active business operations in the time
17 described in subsection (a) (5), the public fund shall sell,
18 redeem, divest, or withdraw all publicly-traded securities of
19 the company, except as provided below, within eighteen months
20 after the company becomes subject to this subsection. The
21 public fund may relax the divestment schedule if the public fund
22 determines divestment from particular companies or funds will



1 likely, in the good faith judgment of the board of trustees of
2 the public fund, result in public fund losses exceeding the
3 99.50 per cent mark described in section 7. If such a
4 circumstance arises, the public fund shall submit a report to
5 the legislature setting forth the reasons and justification,
6 accompanied by supporting documentation that includes objective
7 numerical estimates, for its decision to relax the divestment
8 schedule. The report shall be updated annually thereafter as
9 applicable.

10 (c) At no time shall the public fund acquire securities of
11 companies on the scrutinized companies list that have active
12 business operations, except as provided below.

13 (d) No company which the United States affirmatively
14 declares to be excluded from its present or any future federal
15 sanctions regime relating to Sudan shall be subject to
16 divestment or investment prohibition pursuant to subsections (b)
17 and (c).

18 (e) Notwithstanding anything herein to the contrary,
19 subsections (b) and (c) shall not apply to indirect holdings in
20 actively managed investment funds. The public fund, however,
21 shall submit letters to the managers of such investment funds
22 containing companies with scrutinized active business operations



1 requesting that they consider removing the companies from the
2 fund or create a similar actively managed fund with indirect
3 holdings devoid of such companies. If the manager creates a
4 similar fund, the public fund shall replace all applicable
5 investments with investments in the similar fund in an expedited
6 time frame consistent with prudent investing standards. For the
7 purposes of this section, "private equity" funds shall be deemed
8 to be actively managed investment funds.

9 SECTION 5. Reporting. (a) The public fund shall file a
10 publicly-available report to the legislature that includes the
11 scrutinized companies list within ninety days after the list is
12 created.

13 (b) Annually thereafter, the public fund shall file a
14 publicly-available report to the legislature that includes:

- 15 (1) A summary of correspondence with companies engaged by
16 the public fund under section 4;
- 17 (2) All investments sold, redeemed, divested, or withdrawn
18 in compliance with section 4;
- 19 (3) All prohibited investments under section 4; and
20 (4) Any progress made under section 4.

21 SECTION 6. Other legal obligations. With respect to
22 actions taken in compliance with this chapter, including all



1 good faith determinations regarding companies as required by
2 this chapter, the public fund shall be exempt from any
3 conflicting statutory or common law obligations, including any
4 obligations in respect to choice of asset managers, investment
5 funds, or investments for the public fund's securities
6 portfolios. Nothing in this Act shall require the public fund
7 to take action as described in this Act unless the board of
8 trustees of the public fund determines, in good faith, that the
9 action is consistent with the responsibilities of the board as
10 described in section 88-22.5(a)(1), Hawaii Revised Statutes.

11 SECTION 7. Reinvestment in certain companies with
12 scrutinized active business operations. Notwithstanding
13 anything in this chapter to the contrary, the public fund shall
14 be permitted to cease divesting from certain scrutinized
15 companies pursuant to section 4 and reinvest in certain
16 scrutinized companies from which it divested pursuant to section
17 4 if, in the good faith judgment of the board of trustees of the
18 public fund, the value for all assets under management by the
19 public fund becomes equal to or less than 99.50 per cent (50
20 basis points) of the hypothetical value of all assets under
21 management by the public fund assuming no divestment for any
22 company had occurred under section 4. Cessation of divestment,



1 reinvestment, or any subsequent ongoing investment authorized by
2 this section shall be strictly limited to the minimum steps
3 necessary to avoid the contingency set forth in the preceding
4 sentence. For any cessation of divestment, reinvestment, or
5 subsequent ongoing investment authorized by this section, the
6 public fund shall provide a written report to the legislature,
7 accompanied by supporting documentation that includes objective
8 numerical estimates, for its decisions to cease divestment,
9 reinvest, or remain invested in companies with scrutinized
10 active business operations. The report shall be updated
11 annually thereafter as applicable. This section has no
12 application to reinvestment in companies on the ground that they
13 have ceased to have scrutinized active business operations.

14 SECTION 8. Provisions for expiration of this Act. This
15 Act shall be repealed upon the occurrence of any of the
16 following:

- 17 (1) The Congress or President of the United States
18 declares that the Darfur genocide has been halted for
19 at least twelve months;
- 20 (2) The United States revokes all sanctions imposed
21 against the government of Sudan; or



1 (3) The Congress or President of the United States
2 declares that the government of Sudan has honored its
3 commitments to cease attacks on civilians, demobilize
4 and demilitarize the Janjaweed and associated
5 militias, grant free and unfettered access for
6 deliveries of humanitarian assistance, and allow for
7 the safe and voluntary return of refugees and
8 internally displaced persons; or .

9 (4) The Congress or President of the United States,
10 through legislation or executive order, declares that
11 mandatory divestment of the type provided for in this
12 chapter interferes with the conduct of United States
13 foreign policy."

14 SECTION 9. If any one or more provisions, sections,
15 subsections, sentences, clauses, phrases, or words of this Act or
16 the application to any person or circumstance is found to be
17 invalid, illegal, unenforceable, or unconstitutional, the same is
18 declared to be severable and the balance of this Act shall remain
19 effective and functional notwithstanding the invalidity,
20 illegality, unenforceability, or unconstitutionality.

21 The legislature declares that it would have passed this Act,
22 and each provision, section, subsection, sentence, clause, phrase



1 or word thereof, irrespective of the fact that any one or more
2 provisions, sections, subsections, sentences, clauses, phrases,
3 or words be declared invalid, illegal, unenforceable or
4 unconstitutional, including, but not limited to, each of the
5 engagement, divestment, and prohibition provisions of this Act.

6 SECTION 10. This Act shall take effect upon its approval.



Report Title:

Darfur Divestment; ERS

Description:

Prohibits the employees' retirement system from acquiring securities of companies that have active business operations with Sudan. (SD2)

