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# 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 crisis  
7 began in 2003, more than 2,000,000 people have been  
8 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 Act.

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 Act to the contrary, a social  
4 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 holdings. Those  
5 efforts shall include, as appropriate:

6 (1) Reviewing publicly available information regarding  
7 companies with business operations in Sudan. In  
8 conducting the review, the public fund may rely on  
9 information provided by nonprofit organizations,  
10 research firms, international organizations, and  
11 government entities;

12 (2) Contacting asset managers contracted by the public  
13 fund that invest in companies with business operations  
14 in Sudan; and

15 (3) Contacting other institutional investors that have  
16 divested from or engaged with companies that have  
17 business operations in Sudan.

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

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 holdings;

10 (2) For each company newly identified with active business  
11 operations in which the public fund owns direct  
12 holdings, the public fund shall send a written notice  
13 informing the company of its scrutinized company  
14 status and that it may become subject to divestment by  
15 the public fund. The notice shall offer the company  
16 the opportunity to clarify its Sudan-related  
17 activities and shall encourage the company, within  
18 ninety days, to either cease its scrutinized business  
19 operations or convert such operations to inactive  
20 business operations to avoid qualifying for divestment  
21 by the public fund;



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

12 (4) If, after ninety days following the public fund's  
13 first engagement with a company following the  
14 effective date of this Act, that company continues to  
15 have scrutinized active business operations, the  
16 company shall be subject to subsection (b), unless the  
17 board of trustees of the public fund determines that  
18 the company has made sufficient progress towards  
19 ceasing its scrutinized business operations or  
20 converting such operations to inactive business  
21 operations. The public fund shall continue to monitor  
22 and review the progress of the company on a quarterly



1 basis until that company has ceased its scrutinized  
2 business operations or converted such operations to  
3 inactive business operations. A company that fails to  
4 cease its scrutinized business operations, to convert  
5 such operations to inactive business operations, or to  
6 continue to make sufficient progress towards cessation  
7 or conversion by the next time interval shall be  
8 subject to subsection (b).

9 (b) If a company on the scrutinized companies list fails  
10 to cease scrutinized active business operations in the time  
11 described in subsection (a)(4), the public fund shall sell,  
12 redeem, divest, or withdraw all publicly-traded securities of  
13 the company, except as provided below, within eighteen months  
14 after the company becomes subject to this subsection. The  
15 public fund may relax the divestment schedule if the public fund  
16 determines divestment from particular companies or funds will  
17 likely, in the good faith judgment of the board of trustees of  
18 the public fund, result in public fund losses exceeding the  
19 99.50 per cent mark described in section 7. If such a  
20 circumstance arises, the public fund shall submit a report to  
21 the legislature setting forth the reasons and justification,  
22 accompanied by supporting documentation that includes objective



1 numerical estimates, for its decision to relax the divestment  
2 schedule. The report shall be updated annually thereafter as  
3 applicable.

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

7 (d) No company which the United States affirmatively  
8 declares to be excluded from its present or any future federal  
9 sanctions regime relating to Sudan shall be subject to  
10 divestment or investment prohibition pursuant to subsections (b)  
11 and (c).

12 (e) Notwithstanding anything herein to the contrary,  
13 subsections (b) and (c) shall not apply to indirect holdings in  
14 actively managed investment funds.

15 SECTION 5. Reporting. (a) The public fund shall file a  
16 publicly-available report to the legislature that includes the  
17 scrutinized companies list within ninety days after the list is  
18 created.

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

21 (1) A summary of correspondence with companies engaged by  
22 the public fund under section 4;



- 1 (2) All investments sold, redeemed, divested, or withdrawn
- 2 in compliance with section 4;
- 3 (3) All prohibited investments under section 4; and
- 4 (4) Any progress made under section 4.

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

17 SECTION 7. Reinvestment in certain companies with  
18 scrutinized active business operations. Notwithstanding  
19 anything in this Act to the contrary, the public fund shall be  
20 permitted to cease divesting from certain scrutinized companies  
21 pursuant to section 4 and reinvest in certain scrutinized  
22 companies from which it divested pursuant to section 4 if, in



1 the good faith judgment of the board of trustees of the public  
2 fund, the value for all assets under management by the public  
3 fund becomes equal to or less than 99.50 per cent (50 basis  
4 points) of the hypothetical value of all assets under management  
5 by the public fund assuming no divestment for any company had  
6 occurred under section 4. Cessation of divestment,  
7 reinvestment, or any subsequent ongoing investment authorized by  
8 this section shall be strictly limited to the minimum steps  
9 necessary to avoid the contingency set forth in the preceding  
10 sentence. For any cessation of divestment, reinvestment, or  
11 subsequent ongoing investment authorized by this section, the  
12 public fund shall provide a written report to the legislature,  
13 accompanied by supporting documentation that includes objective  
14 numerical estimates, for its decisions to cease divestment,  
15 reinvest, or remain invested in companies with scrutinized  
16 active business operations. The report shall be updated  
17 annually thereafter as applicable. This section has no  
18 application to reinvestment in companies on the ground that they  
19 have ceased to have scrutinized active business operations.

20 SECTION 8. Provisions for expiration of this Act. This  
21 Act shall be repealed upon the occurrence of any of the  
22 following:



- 1 (1) The Congress or President of the United States  
2 declares that the Darfur genocide has been halted for  
3 at least twelve months;
- 4 (2) The United States revokes all sanctions imposed  
5 against the government of Sudan;
- 6 (3) The Congress or President of the United States  
7 declares that the government of Sudan has honored its  
8 commitments to cease attacks on civilians, demobilize  
9 and demilitarize the Janjaweed and associated  
10 militias, grant free and unfettered access for  
11 deliveries of humanitarian assistance, and allow for  
12 the safe and voluntary return of refugees and  
13 internally displaced persons; or
- 14 (4) The Congress or President of the United States,  
15 through legislation or executive order, declares that  
16 mandatory divestment of the type provided for in this  
17 chapter interferes with the conduct of United States  
18 foreign policy.

19 SECTION 9. If any one or more provisions, sections,  
20 subsections, sentences, clauses, phrases, or words of this Act or  
21 the application to any person or circumstance is found to be  
22 invalid, illegal, unenforceable, or unconstitutional, the same is



1 declared to be severable and the balance of this Act shall remain  
2 effective and functional notwithstanding the invalidity,  
3 illegality, unenforceability, or unconstitutionality.

4 The legislature declares that it would have passed this Act,  
5 and each provision, section, subsection, sentence, clause, phrase  
6 or word thereof, irrespective of the fact that any one or more  
7 provisions, sections, subsections, sentences, clauses, phrases,  
8 or words be declared invalid, illegal, unenforceable or  
9 unconstitutional, including but not limited to each of the  
10 engagement, divestment, and prohibition provisions of this Act.

11 SECTION 10. This Act shall take effect on July 1, 2007.



**Report Title:**

Darfur Divestment; ERS

**Description:**

Prohibits the employees' retirement system from acquiring securities of companies that have active business operations with Sudan. (HB34 CD1)

