
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. The Hawaii Revised Statutes is amended by
9 adding a new chapter to be appropriately designated and to read
10 as follows:

11 "CHAPTER

12 SUDAN DIVESTMENT

13 § -1 Definitions. As used in this chapter, the
14 following definitions shall apply:

15 "Active business operations" means all business operations
16 that are not inactive business operations.

17 "Business operations" means engaging in commerce in any
18 form in Sudan, including by acquiring, developing, maintaining,
19 owning, selling, possessing, leasing, or operating equipment,
20 facilities, personnel, products, services, personal property,
21 real property, or any other apparatus of business or commerce.



1 "Company" means any sole proprietorship, organization,
2 association, corporation, partnership, joint venture, limited
3 partnership, limited liability partnership, limited liability
4 company, or other entity or business association, including all
5 wholly-owned subsidiaries, majority-owned subsidiaries, parent
6 companies, or affiliates of such entities or business
7 associations, that exists for profit-making purposes.

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

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

19 "Government of Sudan" means the government in Khartoum,
20 Sudan, which is led by the National Congress Party (formerly
21 known as the National Islamic Front) or any successor government
22 formed on or after October 13, 2006 (including the coalition



1 National Unity Government agreed upon in the Comprehensive Peace
2 Agreement for Sudan) and does not include the regional
3 government of southern Sudan.

4 "Inactive business operations" means the mere continued
5 holding or renewal of rights to property previously operated for
6 the purpose of generating revenues but not presently deployed
7 for such purpose.

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

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



1 "Military equipment" means weapons, arms, military
2 supplies, and equipment that readily may be used for military
3 purposes, including, but not limited to, radar systems or
4 military-grade transport vehicles; or supplies or services sold
5 or provided directly or indirectly to any force actively
6 participating in armed conflict in Sudan.

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

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



1 "Power production activities" means any business operation
2 that involves a project commissioned by the National Electricity
3 Corporation of Sudan or other similar government of Sudan entity
4 whose purpose is to facilitate power generation and delivery,
5 including, but not limited to, establishing power-generating
6 plants or hydroelectric dams, selling or installing components
7 for the project, providing service contracts related to the
8 installation or maintenance of the project, as well as
9 facilitating such activities, including by providing supplies or
10 services in support of such activities.

11 "Public fund" means the employees' retirement system of the
12 State of Hawaii or the board of trustees in charge of the
13 employees' retirement system.

14 "Scrutinized company" means any company that meets any of
15 the following criteria:

16 (1) The company has business operations that involve
17 contracts with or provision of supplies or services to
18 the government of Sudan; companies in which the
19 government of Sudan has any direct or indirect equity
20 share; government of Sudan-commissioned consortiums or
21 projects; or companies involved in government of
22 Sudan-commissioned consortiums or projects:



- 1 (A) More than ten per cent of the company's revenues
2 or assets linked to Sudan involve oil-related
3 activities or mineral extraction activities; less
4 than seventy-five per cent of the company's
5 revenues or assets linked to Sudan involve
6 contracts with or provision of oil-related or
7 mineral extracting products or services to the
8 regional government of southern Sudan or a
9 project or consortium created exclusively by that
10 regional government; and the company has failed
11 to take substantial action; or
- 12 (B) More than ten per cent of the company's revenues
13 or assets linked to Sudan involve power
14 production activities; less than seventy-five per
15 cent of the company's power production activities
16 include projects whose intent is to provide power
17 or electricity to the marginalized populations of
18 Sudan; and the company has failed to take
19 substantial action;
- 20 (2) The company is complicit in the Darfur genocide; or
- 21 (3) The company supplies military equipment within Sudan,
22 unless it clearly shows that the military equipment



1 cannot be used to facilitate offensive military
2 actions in Sudan or the company implements rigorous
3 and verifiable safeguards to prevent use of that
4 equipment by forces actively participating in armed
5 conflict, for example, through post-sale tracking of
6 the equipment by the company, certification from a
7 reputable and objective third party that the equipment
8 is not being used by a party participating in armed
9 conflict in Sudan, or sale of the equipment solely to
10 the regional government of southern Sudan or any
11 internationally-recognized peacekeeping force or
12 humanitarian organization.

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

16 "Social development company" means a company whose primary
17 purpose in Sudan is to provide humanitarian goods or services,
18 including medicine or medical equipment, agricultural supplies
19 or infrastructure, educational opportunities, journalism-related
20 activities, information or information materials, spiritual-
21 related activities, services of a purely clerical or reporting
22 nature, food, clothing, or general consumer goods that are



1 unrelated to oil-related activities, mineral extraction
2 activities, or power production activities.

3 "Substantial action" means adopting, publicizing, and
4 implementing a formal plan to cease scrutinized business
5 operations within one year and to refrain from any new business
6 operations; undertaking significant humanitarian efforts on
7 behalf of one or more marginalized populations of Sudan; or
8 through engagement with the government of Sudan, materially
9 improving conditions for the genocidally victimized population
10 in Darfur.

11 § -2 Identification of companies. (a) Within ninety
12 days following passage of this Act, the public fund shall make
13 its best efforts to identify all scrutinized companies in which
14 the public fund has direct or indirect holdings or could
15 possibly have such holdings in the future. Those efforts shall
16 include, as appropriate:

- 17 (1) Reviewing and relying, as appropriate in the public
18 fund's judgment, on publicly available information
19 regarding companies with business operations in Sudan,
20 including information provided by nonprofit
21 organizations, research firms, international
22 organizations, and government entities;



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

4 (3) Contacting other institutional investors that have
5 divested from or engaged with companies that have
6 business operations in Sudan.

7 (b) By the first meeting of the public fund following the
8 ninety-day period described in subsection (a), the public fund
9 shall assemble all scrutinized companies identified into a
10 "scrutinized companies list".

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

14 § -3 **Required actions.** (a) The public fund shall
15 adhere to the following procedures for companies on the
16 scrutinized companies list:

17 (1) The public fund shall immediately determine the
18 companies on the scrutinized companies list in which
19 the public fund owns direct or indirect holdings;

20 (2) For each company identified with only inactive
21 business operations, the public fund shall send a
22 written notice informing the company of the provisions



1 of this chapter and encouraging it to continue to
2 refrain from initiating active business operations in
3 Sudan until it is able to avoid scrutinized business
4 operations. The public fund shall continue such
5 correspondence on a semi-annual basis;

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

17 (4) If, within ninety days following the public fund's
18 first engagement with a company, that company ceases
19 scrutinized business operations, the company shall be
20 removed from the scrutinized companies list and this
21 section shall cease to apply to it unless it resumes
22 scrutinized business operations. If, within ninety



1 days following the public fund's first engagement, the
2 company converts its scrutinized active business
3 operations to inactive business operations, the
4 company shall be subject to all provisions relating
5 thereto.

6 (b) The public fund shall adhere to the following
7 procedures for companies on the scrutinized companies list:

8 (1) If, after ninety days following the public fund's
9 first engagement with a company, the company continues
10 to have scrutinized active business operations, and
11 only while the company continues to have scrutinized
12 active business operations, the public fund shall
13 sell, redeem, divest, or withdraw all publicly-traded
14 securities of the company, except as provided below,
15 according to the following schedule:

16 (A) At least fifty per cent of the assets shall be
17 removed from the public fund's assets under
18 management by nine months after the company's
19 most recent appearance on the scrutinized
20 companies list; and

21 (B) One hundred per cent of the assets shall be
22 removed from the public fund's assets under



1 management within fifteen months after the
2 company's most recent appearance on the
3 scrutinized companies list; and

4 (2) If a company that ceased scrutinized active business
5 operations following engagement pursuant to subsection
6 (a)(3) resumes such operations, paragraph (1) shall
7 immediately apply, and the public fund shall send a
8 written notice to the company. The company shall also
9 be immediately reintroduced onto the scrutinized
10 companies list.

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

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

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



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

10 **§ -4 Reporting.** (a) The public fund shall file a
11 publicly-available report to the legislature that includes the
12 scrutinized companies list within ninety days after the list is
13 created.

14 (b) Annually thereafter, the public fund shall file a
15 publicly-available report to the legislature and send a copy of
16 that report to the United States presidential special envoy to
17 Sudan (or an appropriate designee or successor) that includes:

- 18 (1) A summary of correspondence with companies engaged by
19 the public fund under section -3;
- 20 (2) All investments sold, redeemed, divested, or withdrawn
21 in compliance with section -3;
- 22 (3) All prohibited investments under section -3; and



1 (4) Any progress made under section -3.

2 § -5 Other legal obligations. With respect to actions
3 taken in compliance with this chapter, including all good faith
4 determinations regarding companies as required by this chapter,
5 the public fund shall be exempt from any conflicting statutory
6 or common law obligations, including any obligations in respect
7 to choice of asset managers, investment funds, or investments
8 for the public fund's securities portfolios.

9 § -6 Reinvestment in certain companies with scrutinized
10 active business operations. Notwithstanding anything in this
11 chapter to the contrary, the public fund shall be permitted to
12 cease divesting from certain scrutinized companies pursuant to
13 section -3 and reinvest in certain scrutinized companies from
14 which it divested pursuant to section -3 if clear and
15 convincing evidence shows that the value for all assets under
16 management by the public fund becomes equal to or less than
17 99.50 per cent (50 basis points) of the hypothetical value of
18 all assets under management by the public fund assuming no
19 divestment for any company had occurred under section -3.
20 Cessation of divestment, reinvestment, or any subsequent ongoing
21 investment authorized by this section shall be strictly limited
22 to the minimum steps necessary to avoid the contingency set



1 forth in the preceding sentence. For any cessation of
2 divestment, reinvestment, or subsequent ongoing investment
3 authorized by this section, the public fund shall provide a
4 written report to the legislature in advance of initial
5 reinvestment, updated semi-annually thereafter as applicable,
6 setting forth the reasons and justification, supported by clear
7 and convincing evidence, for its decisions to cease divestment,
8 reinvest, or remain invested in companies with scrutinized
9 active business operations. This section has no application to
10 reinvestment in companies on the ground that they have ceased to
11 have scrutinized active business operations.

12 **§ -7 Enforcement.** The attorney general shall enforce
13 this chapter and, through any lawful designee, may bring such
14 actions in court as are necessary to do so.

15 **§ -8 Provisions for expiration of chapter.** This chapter
16 shall expire upon the occurrence of any of the 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 3. If any one or more provision, section,
 15 subsection, sentence, clause, phrase, or word of this legislation
 16 or 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 legislation
 19 shall remain effective and functional notwithstanding the
 20 invalidity, illegality, unenforceability, or unconstitutionality.

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



1 clause, phrase or word thereof, irrespective of the fact that any
2 one or more provision, section, subsection, sentence, clause,
3 phrase, or word be declared invalid, illegal, unenforceable or
4 unconstitutional, including, but not limited to, each of the
5 engagement, divestment, and prohibition provisions of this
6 legislation.

7 SECTION 4. 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. (SD1)

