

ACT 192

H.B. NO. 34

A Bill for an Act Relating to the Employees' Retirement System.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Legislative findings. The legislature finds that:

- (1) On July 23, 2004, the United States Congress declared that "the atrocities unfolding in Darfur, Sudan, are genocide";
- (2) On September 9, 2004, Secretary of State Colin L. Powell told the United States Senate foreign relations committee that "genocide has occurred and may still be occurring in Darfur" and "the Government of Sudan and the Janjaweed bear responsibility";
- (3) On September 21, 2004, addressing the United Nations General Assembly, President George W. Bush affirmed the Secretary of State's finding and stated, "[A]t this hour, the world is witnessing terrible suffering and horrible crimes in the Darfur region of Sudan, crimes my government has concluded are genocide";
- (4) On December 7, 2004, the United States Congress noted that the genocidal policy in Darfur has led to reports of "systematic rape of thousands of women and girls, the abduction of women and children, and the destruction of hundreds of ethnically African villages, including the poisoning of their wells and the plunder of their crops and cattle upon which the people of such villages sustain themselves";
- (5) Also on December 7, 2004, Congress found that "the Government of Sudan has restricted access by humanitarian and human rights workers to the Darfur area through intimidation by military and security forces, and through bureaucratic and administrative obstruction, in an attempt to inflict the most devastating harm on those individuals displaced from their villages and homes without any means of sustenance or shelter";
- (6) On September 25, 2006, Congress reaffirmed that "the genocide unfolding in the Darfur region of Sudan is characterized by acts of terrorism and atrocities directed against civilians, including mass murder, rape, and sexual violence committed by the Janjaweed and associated militias with the complicity and support of the National Congress Party-led faction of the Government of Sudan";
- (7) On September 26, 2006, the United States House of Representatives stated that "an estimated 300,000 to 400,000 people have been killed by the Government of Sudan and its Janjaweed allies since the Darfur crisis began in 2003, more than 2,000,000 people have been displaced from their homes, and more than 250,000 people from Darfur remain in refugee camps in Chad";
- (8) The Darfur crisis represents the first time the United States government has labeled ongoing atrocities a genocide;

- (9) The federal government has imposed sanctions against the government of Sudan since 1997. These sanctions are monitored through the United States Treasury Department's office of foreign assets control;
- (10) According to a former chair of the United States Securities and Exchange Commission, "the fact that a foreign company is doing material business with a country, government, or entity on the sanctions list is, in the view of the Securities and Exchange Commission, substantially likely to be significant to a reasonable investor's decision about whether to invest in that company";
- (11) Since 1993, the United States Secretary of State has determined that Sudan is a country the government of which has repeatedly provided support for acts of international terrorism, thereby restricting United States assistance, defense exports and sales, and financial and other transactions with the government of Sudan;
- (12) A 2006 United States House of Representatives report states that "a company's association with sponsors of terrorism and human rights abuses, no matter how large or small, can have a materially adverse result on a public company's operations, financial condition, earnings, and stock prices, all of which can negatively affect the value of an investment";
- (13) In response to the financial risk posed by investments in companies doing business with a terrorist-sponsoring state, the Securities and Exchange Commission established its office of global security risk to provide for enhanced disclosure of material information regarding such companies;
- (14) The current Sudan divestment movement encompasses nearly one hundred universities, cities, states, and private pension plans;
- (15) Companies facing such widespread divestment present further material risk to remaining investors;
- (16) It is a fundamental responsibility of the State to decide where, how, and by whom financial resources in its control should be invested, taking into account numerous pertinent factors;
- (17) It is the prerogative and desire of the State, in respect to investment resources in its control and to the extent reasonable, with due consideration for, among other things, return on investment, on behalf of itself and its investment beneficiaries, not to participate in an ownership or capital-providing capacity with entities that provide significant practical support for genocide, including certain non-United States companies presently doing business in Sudan;
- (18) It is the judgment of the legislature that this Act should remain in effect only insofar as it continues to be consistent with, and does not unduly interfere with, the foreign policy of the United States as determined by the federal government; and
- (19) It is the judgment of this legislature that mandatory divestment of public funds from certain companies is a measure that should be employed sparingly and judiciously. A Congressional and presidential declaration of genocide satisfies this high threshold.

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

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

"Business operations" means engaging in commerce in any form in Sudan, including by acquiring, developing, maintaining, owning, selling, possessing,

leasing, or operating equipment, facilities, personnel, products, services, personal property, real property, or any other apparatus of business or commerce.

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

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

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

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

“Inactive business operations” means the mere continued holding or renewal of rights to property previously operated for the purpose of generating revenues but not presently deployed for such purpose.

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

“Marginalized populations of Sudan” include but are not limited to the portion of the population in the Darfur region that has been genocidally victimized; the portion of the population of southern Sudan victimized by Sudan’s North-South civil war; the Beja, Rashidiya, and other similarly underserved groups of eastern Sudan; the Nubian and other similarly underserved groups in Sudan’s Abyei, Southern Blue Nile, and Nuba Mountain regions; and the Amri, Hamadab, Manasir, and other similarly underserved groups of northern Sudan.

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

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

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

“Power production activities” means any business operation that involves a project commissioned by the National Electricity Corporation of Sudan or other

similar government of Sudan entity whose purpose is to facilitate power generation and delivery, including but not limited to establishing power-generating plants or hydroelectric dams, selling or installing components for the project, providing service contracts related to the installation or maintenance of the project, as well as facilitating such activities, including by providing supplies or services in support of such activities.

“Public fund” means the employees’ retirement system of the State of Hawaii or the board of trustees in charge of the employees’ retirement system.

“Scrutinized company” means any company that meets any of the following criteria:

- (1) The company has business operations that involve contracts with or provision of supplies or services to the government of Sudan; companies in which the government of Sudan has any direct or indirect equity share; government of Sudan-commissioned consortiums or projects; or companies involved in government of Sudan-commissioned consortiums or projects:
 - (A) A material portion of the company’s revenues or assets linked to Sudan involve oil-related activities or mineral extraction activities; the company does not contract directly with the regional government of southern Sudan or a project or consortium created exclusively by that regional government; and the company has failed to take substantial action; or
 - (B) A material portion of the company’s revenues or assets linked to Sudan involve power production activities; most of such activities do not include projects whose intent is to provide power or electricity to the marginalized populations of Sudan; and the company has failed to take substantial action;
- (2) The company is complicit in the Darfur genocide; or
- (3) The company supplies military equipment within Sudan, unless it clearly shows that the military equipment cannot be used to facilitate offensive military actions in Sudan or the company implements rigorous and verifiable safeguards to prevent use of that equipment by forces actively participating in armed conflict, for example, through post-sale tracking of the equipment by the company, certification from a reputable and objective third party that the equipment is not being used by a party participating in armed conflict in Sudan, or sale of the equipment solely to the regional government of southern Sudan or any internationally-recognized peacekeeping force or humanitarian organization.

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

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

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

SECTION 3. Identification of companies. (a) Within one hundred eighty days following passage of this Act, the public fund shall make its best efforts to identify all scrutinized companies in which the public fund has direct holdings. Those efforts shall include, as appropriate:

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

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

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

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

- (1) The public fund shall determine the companies on the scrutinized companies list in which the public fund owns direct holdings;
- (2) For each company newly identified with active business operations in which the public fund owns direct holdings, the public fund shall send a written notice informing the company of its scrutinized company status and that it may become subject to divestment by the public fund. The notice shall offer the company the opportunity to clarify its Sudan-related activities and shall encourage the company, within ninety days, to either cease its scrutinized business operations or convert such operations to inactive business operations to avoid qualifying for divestment by the public fund;
- (3) If, within ninety days following the public fund's first engagement with a company, that company ceases scrutinized business operations, the company shall be removed from the scrutinized companies list and this section shall cease to apply to it unless it resumes scrutinized business operations. If, within ninety days following the public fund's first engagement, the company converts its scrutinized active business operations to inactive business operations, the company shall be subject to all provisions relating thereto; and
- (4) If, after ninety days following the public fund's first engagement with a company following the effective date of this Act, that company continues to have scrutinized active business operations, the company shall be subject to subsection (b), unless the board of trustees of the public fund determines that the company has made sufficient progress towards ceasing its scrutinized business operations or converting such operations to inactive business operations. The public fund shall continue to monitor and review the progress of the company on a quarterly basis until that company has ceased its scrutinized business operations or converted such operations to inactive business operations. A company that fails to cease its scrutinized business operations, to convert such operations to inactive business operations, or to continue to make

sufficient progress towards cessation or conversion by the next time interval shall be subject to subsection (b).

(b) If a company on the scrutinized companies list fails to cease scrutinized active business operations in the time described in subsection (a)(4), the public fund shall sell, redeem, divest, or withdraw all publicly-traded securities of the company, except as provided below, within eighteen months after the company becomes subject to this subsection. The public fund may relax the divestment schedule if the public fund determines divestment from particular companies or funds will likely, in the good faith judgment of the board of trustees of the public fund, result in public fund losses exceeding the 99.50 per cent mark described in section 7. If such a circumstance arises, the public fund shall submit a report to the legislature setting forth the reasons and justification, accompanied by supporting documentation that includes objective numerical estimates, for its decision to relax the divestment schedule. The report shall be updated annually thereafter as applicable.

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

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

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

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

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

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

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

SECTION 7. Reinvestment in certain companies with scrutinized active business operations. Notwithstanding anything in this Act to the contrary, the public fund shall be permitted to cease divesting from certain scrutinized companies pursuant to section 4 and reinvest in certain scrutinized companies from which it divested pursuant to section 4 if, in the good faith judgment of the board of trustees of the public fund, the value for all assets under management by the public fund becomes equal to or less than 99.50 per cent (50 basis points) of the hypothetical value of all assets under management by the public fund assuming no divestment for

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

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

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

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

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

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

(Approved June 18, 2007.)