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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. The legislature finds that on July 23, 2004,  
2 the United States (U.S.) Congress declared that "the atrocities  
3 unfolding in Darfur, Sudan, are genocide." On September 9,  
4 2004, Secretary of State Colin L. Powell told the U.S. Senate  
5 Foreign Relations Committee that "genocide has occurred and may  
6 still be occurring in Darfur" and "the Government of Sudan and  
7 the Janjaweed bear responsibility." On September 21, 2004,  
8 addressing the United Nations General Assembly, President George  
9 W. Bush affirmed the Secretary of State's finding and stated,  
10 "[A]t this hour, the world is witnessing terrible suffering and  
11 horrible crimes in the Darfur region of Sudan, crimes my  
12 government has concluded are genocide."

13           On December 7, 2004, the U.S. Congress noted that the  
14 genocidal policy in Darfur has led to reports of "systematic  
15 rape of thousands of women and girls, the abduction of women and  
16 children, and the destruction of hundreds of ethnically African  
17 villages, including the poisoning of their wells and the plunder  
18 of their crops and cattle upon which the people of such villages



1 sustain themselves." Also on December 7, 2004, Congress found  
2 that "the Government of Sudan has restricted access by  
3 humanitarian and human rights workers to the Darfur area through  
4 intimidation by military and security forces, and through  
5 bureaucratic and administrative obstruction, in an attempt to  
6 inflict the most devastating harm on those individuals displaced  
7 from their villages and homes without any means of sustenance or  
8 shelter."

9 On September 25, 2006, Congress reaffirmed that "the  
10 genocide unfolding in the Darfur region of Sudan is  
11 characterized by acts of terrorism and atrocities directed  
12 against civilians, including mass murder, rape, and sexual  
13 violence committed by the Janjaweed and associated militias with  
14 the complicity and support of the National Congress Party-led  
15 faction of the Government of Sudan." On September 26, 2006, the  
16 U.S. House of Representatives stated that "an estimated 300,000  
17 to 400,000 people have been killed by the Government of Sudan  
18 and its Janjaweed allies since the [Darfur] crisis began in  
19 2003, more than 2,000,000 people have been displaced from their  
20 homes, and more than 250,000 people from Darfur remain in  
21 refugee camps in Chad."



1           The legislature finds that the Darfur crisis represents the  
2 first time the U.S. government has labeled ongoing atrocities a  
3 genocide. The U.S. government has imposed sanctions against the  
4 government of Sudan since 1997. These sanctions are monitored  
5 through the U.S. Treasury Department's Office of Foreign Assets  
6 Control (OFAC). Since 1993, the U.S. Secretary of State has  
7 determined that the government of Sudan has repeatedly provided  
8 support for acts of international terrorism, thereby restricting  
9 U.S. assistance, defense exports and sales, and financial and  
10 other transactions with the government of Sudan.

11           According to a former chair of the U.S. Securities and  
12 Exchange Commission, "the fact that a foreign company is doing  
13 material business with a country, government, or entity on  
14 OFAC's sanctions list is, in the SEC staff's view, substantially  
15 likely to be significant to a reasonable investor's decision  
16 about whether to invest in that company." A 2006 U.S. House of  
17 Representatives report states that "a company's association with  
18 sponsors of terrorism and human rights abuses, no matter how  
19 large or small, can have a materially adverse result on a public  
20 company's operations, financial condition, earnings, and stock  
21 prices, all of which can negatively affect the value of an  
22 investment." In response to the financial risk posed by



1 investments in companies doing business with a terrorist-  
2 sponsoring state, the Securities and Exchange Commission  
3 established its Office of Global Security Risk to provide for  
4 enhanced disclosure of material information regarding such  
5 companies.

6 The current Sudan divestment movement encompasses nearly  
7 one hundred universities, cities, states, and private pension  
8 plans. Companies facing such widespread divestment present  
9 further material risk to remaining investors.

10 The legislature finds that it is a fundamental  
11 responsibility of the State of Hawaii to decide where, how, and  
12 by whom financial resources in its control should be invested,  
13 taking into account numerous pertinent factors. It is the  
14 desire of the legislature, with respect to investment resources  
15 in its control and to the extent reasonable, with due  
16 consideration for, among other things, return on investment, on  
17 behalf of itself and its investment beneficiaries, not to  
18 participate in an ownership or capital-providing capacity with  
19 entities that provide significant practical support for  
20 genocide, including certain non-U.S. companies presently doing  
21 business in Sudan.



1           The legislature finds that this Act should remain in effect  
2 only insofar as it continues to be consistent with, and does not  
3 unduly interfere with, the foreign policy of the U.S. as  
4 determined by the Federal Government. Mandatory divestment of  
5 public funds from certain companies is a measure that should be  
6 employed sparingly and judiciously, and a congressional and  
7 presidential declaration of genocide satisfies this high  
8 threshold.

9           SECTION 2. Definitions. As used in this Act:

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 exist for profit-making purposes.

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

11 "Darfur genocide" means the deliberate and systematic  
12 destruction of a racial, political, or cultural group occurring  
13 in Darfur, Sudan, since 2003 as a result of the actions of the  
14 government of Sudan or its Janjaweed allies.

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

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



1 Agreement for Sudan, and does not include the regional  
2 government of southern Sudan.

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

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

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

21 "Military equipment" means weapons, arms, military  
22 supplies, and equipment that readily may be used for military



1 purposes, including but not limited to radar systems, military-  
2 grade transport vehicles, supplies, and services sold or  
3 provided directly or indirectly to any force actively  
4 participating in armed conflict in Sudan.

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

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

21 "Power production activities" means any business operation  
22 that involves a project commissioned by the National Electricity





1 Corporation of Sudan or other similar entity of the government  
2 of Sudan whose purpose is to facilitate power generation and  
3 delivery, including establishing power-generating plants or  
4 hydroelectric dams; selling or installing components for the  
5 project; providing service contracts related to the installation  
6 or maintenance of the project; or facilitating such activities,  
7 including the provision of supplies or services in support of  
8 such activities.

9 "Public fund" means the employees' retirement system of the  
10 State or the board of trustees of the employees' retirement  
11 system of the State.

12 "Scrutinized company" means any company that meets the  
13 criteria in paragraph (1), (2), or (3) below:

14 (1) The company has the following characteristics:

15 (A) Its business operations involve contracts with  
16 and/or provision of supplies or services to:

17 (i) The government of Sudan;

18 (ii) Companies in which the government of Sudan  
19 has any direct or indirect equity share;

20 (iii) Government of Sudan-commissioned consortiums  
21 or projects, or



- 1 (iv) Companies involved in government of Sudan-  
2 commissioned consortiums or projects;  
3 and  
4 (B) More than ten per cent of the company's revenues  
5 or assets linked to Sudan:  
6 (i) Involve oil-related activities or mineral  
7 extraction activities; less than seventy-  
8 five per cent of the company's revenues or  
9 assets linked to Sudan involve contracts  
10 with and/or provision of oil-related or  
11 mineral extracting products or services to  
12 the regional government of southern Sudan or  
13 a project or consortium created exclusively  
14 by that regional government; and the company  
15 has failed to take substantial action; or  
16 (ii) Involve power production activities; less  
17 than seventy-five per cent of the company's  
18 power production activities include projects  
19 whose intent is to provide power or  
20 electricity to the marginalized populations  
21 of Sudan; and the company has failed to take  
22 substantial action.



1 (2) The company is complicit in the Darfur genocide.

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

16 Notwithstanding anything herein to the contrary, a social  
17 development company that is not complicit in the Darfur genocide  
18 is not a scrutinized company.

19 "Social development company" means a company whose primary  
20 purpose in Sudan is to provide:

21 (1) Humanitarian goods or services, including medicine or  
22 medical equipment, agricultural supplies or



1 infrastructure, educational opportunities, journalism-  
2 related activities, information or information  
3 materials, spiritual-related activities, services of a  
4 purely clerical or reporting nature, food, clothing;  
5 or

6 (2) General consumer goods that are unrelated to oil-  
7 related activities, mineral extraction activities, or  
8 power production activities.

9 "Substantial action" means:

10 (1) Adopting, publicizing, and implementing a formal plan  
11 to cease scrutinized business operations within one  
12 year and to refrain from any such new business  
13 operations;

14 (2) Undertaking significant humanitarian efforts on behalf  
15 of one or more marginalized populations of Sudan; or

16 (3) Through engagement with the Government of Sudan,  
17 materially improving conditions for the genocidally  
18 victimized population in Darfur.

19 SECTION 3. Identification of Companies. (a) Within ninety  
20 days following passage of this Act, the public fund shall make  
21 its best efforts to identify all scrutinized companies in which  
22 the public fund has direct or indirect holdings or could



1 possibly have such holdings in the future. Such efforts shall  
2 include any of the following, as appropriate:

3 (1) Reviewing and relying, as appropriate in the public  
4 fund's judgment, on publicly available information  
5 regarding companies with business operations in Sudan,  
6 including information provided by non-profit  
7 organizations, research firms, international  
8 organizations, and government entities;

9 (2) Contacting asset managers contracted by the public  
10 fund that invest in companies with business operations  
11 in Sudan; or

12 (3) Contacting other institutional investors that have  
13 divested from and/or engaged with companies that have  
14 business operations in Sudan.

15 (b) By the first meeting of the public fund following the  
16 ninety day period described in subsection (a), the public fund  
17 shall assemble a list of all scrutinized companies identified.

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



1 SECTION 4. Required actions. The public fund shall adhere  
2 to the following procedure for companies on the scrutinized  
3 companies list:

4 (a) Engagement.

5 (1) The public fund shall immediately identify the  
6 companies on the scrutinized companies list in which  
7 the public fund owns direct or indirect holdings.

8 (2) For each company identified in paragraph (1) with only  
9 inactive business operations in Sudan, the public fund  
10 shall send a written notice informing the company of  
11 this Act and encouraging the company to continue to  
12 refrain from initiating active business operations in  
13 Sudan until it is able to avoid business operations as  
14 a scrutinized company. The public fund shall continue  
15 such correspondence on a semi-annual basis. If the  
16 company converts its operations to active business  
17 operations, paragraph (3) shall apply.

18 (3) For each company newly identified in paragraph (1)  
19 with active business operations, or that has converted  
20 from inactive to active business operations under  
21 paragraph (2), the public fund shall send a written  
22 notice informing the company of its scrutinized



1           company status and that it may become subject to  
2           divestment by the public fund. The notice shall offer  
3           the company the opportunity to clarify its Sudan-  
4           related activities and shall encourage the company,  
5           within ninety days, to either cease its scrutinized  
6           business operations or convert such operations to  
7           inactive business operations to avoid qualifying for  
8           divestment by the public fund; and

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

21          (b) Divestment.



- 1           (1) Except as provided in subsections (d) and (e), after  
2           ninety days following the public fund's first  
3           engagement with a company pursuant to subsection  
4           (a) (3), the company continues to have scrutinized  
5           active business operations, and only while such  
6           company continues to have scrutinized active business  
7           operations, the public fund shall sell, redeem,  
8           divest, or withdraw all publicly-traded securities of  
9           the company according to the following schedule:
- 10           (A) At least fifty per cent of such assets shall be  
11           removed from the public fund's assets under  
12           management by nine months after the company's  
13           most recent appearance on the scrutinized  
14           companies list; and
- 15           (B) One hundred per cent of such assets shall be  
16           removed from the public fund's assets under  
17           management within fifteen months after the  
18           company's most recent appearance on the  
19           scrutinized companies list; and
- 20           (2) If a company that ceased scrutinized active business  
21           operations following engagement pursuant to subsection  
22           (a) (3) resumes such operations, or following





1 engagement converts scrutinized active business  
2 operations to inactive business operations pursuant to  
3 subsection (a)(4), then resumes scrutinized active  
4 business operations, paragraph (1) shall immediately  
5 apply and the public fund shall send a written notice  
6 to the company. If applicable, the company shall also  
7 be immediately reintroduced onto the scrutinized  
8 companies list.

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

13 (d) No company which the United States government  
14 affirmatively declares to be excluded from its present or any  
15 future federal sanctions regime relating to Sudan shall be  
16 subject to divestment or investment prohibition pursuant to  
17 subsections (b) 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; provided that the public fund  
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 such 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 timeframe 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. Reinvestment in certain companies with  
10 scrutinized active business operations. (a) Notwithstanding  
11 anything herein to the contrary, the public fund shall be  
12 permitted to cease divesting from certain scrutinized companies  
13 pursuant to section 4(b) and to reinvest in certain scrutinized  
14 companies from which it divested pursuant to section 4(b) if  
15 clear and convincing evidence shows that the value of all assets  
16 under management by the public fund becomes equal to or less  
17 than ninety-nine and one-half per cent (fifty basis points) of  
18 the hypothetical value of all assets under management by the  
19 public fund assuming no divestment for any company had occurred  
20 under section 4(b). Cessation of divestment, reinvestment,  
21 and/or any subsequent ongoing investment authorized by this



1 section shall be strictly limited to the minimum steps necessary  
2 to avoid the contingency set forth in the preceding sentence.

3 (b) For any cessation of divestment, reinvestment, or  
4 subsequent ongoing investment authorized by this section, the  
5 public fund shall provide a written report to the legislature  
6 and Attorney General in advance of initial reinvestment, updated  
7 semi-annually thereafter as applicable, setting forth the  
8 reasons and justification, supported by clear and convincing  
9 evidence, for its decisions to cease divestment, reinvest, or  
10 remain invested in companies with scrutinized active business  
11 operations.

12 (c) This section shall have no application to reinvestment  
13 in companies on the grounds that they have ceased to have  
14 scrutinized active business operations.

15 SECTION 6. Reporting. (a) The public fund shall file a  
16 publicly-available report to the legislature and Attorney  
17 General that includes the scrutinized companies list within  
18 thirty days after the list is created.

19 (b) Annually thereafter, the public fund shall file and  
20 make available to the public a report to the legislature and  
21 Attorney General and send a copy of that report to the United



1 States Presidential Special Envoy to Sudan, or an appropriate  
2 designee or successor, which includes:

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

9 SECTION 7. Enforcement. The Attorney General shall  
10 enforce this Act and through any lawful designee may bring such  
11 actions in court as are necessary to do so.

12 SECTION 8. Other legal obligations of the public fund.  
13 With respect to actions taken in compliance with this Act,  
14 including all good faith determinations regarding companies as  
15 required by this Act, the public fund shall be exempt from any  
16 conflicting statutory or common law obligations, including any  
17 such obligations in respect to choice of asset managers,  
18 investment funds, or investments for the public fund's  
19 securities portfolios.

20 SECTION 9. If any provision of this Act, or the  
21 application thereof to any person or circumstance is held  
22 invalid, the invalidity does not affect other provisions or



1 applications of the Act, which can be given effect without the  
2 invalid provision or application, and to this end the provisions  
3 of this Act are severable.

4 Section 10. This Act shall take effect upon its approval  
5 and shall be repealed upon the occurrence of any of the  
6 following:

7 (1) The Congress or President of the United States  
8 declares that the Darfur genocide has been halted for  
9 at least twelve months;

10 (2) The United States revokes all sanctions imposed  
11 against the government of Sudan;

12 (3) The Congress or President of the United States  
13 declares that the government of Sudan has honored its  
14 commitments to cease attacks on civilians, demobilize  
15 and demilitarize the Janjaweed and associated  
16 militias, grant free and unfettered access for  
17 deliveries of humanitarian assistance, and allow for  
18 the safe and voluntary return of refugees and  
19 internally displaced persons; or

20 (4) The Congress or President of the United States,  
21 through legislation or executive order, declares that  
22 mandatory divestment of the type provided for in this



1 Act interferes with the conduct of United States  
2 foreign policy.  
3

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JAN 22 2007



**Report Title:**

ERS Divestment; Companies in Sudan

**Description:**

Requires ERS to divest itself of investments in companies that provide significant support for genocide in Sudan; allows reinvestment; provides exemptions; requires reporting; authorizes enforcement by AG; sunsets when the Darfur genocide ends or divestment interferes with U.S. foreign policy.

