

JAN 22 2007

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 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

INTRODUCED BY

Francis J. Hoopes

John

Ray L. Hoan

Paul L.

Walter Egel

Chromas A. Smith

Wm. H.

Erzanne Chun Calland

Carl Furumaga

Mike Gottland



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.

