

LEGISLATURE OF NEBRASKA

ONE HUNDRED FIRST LEGISLATURE

FIRST SESSION

LEGISLATIVE BILL 140

Introduced by Avery, 28.

Read first time January 09, 2009

Committee: Nebraska Retirement Systems

A BILL

1 FOR AN ACT relating to state funds; to amend sections 72-1260
2 and 84-1309.01, Reissue Revised Statutes of Nebraska; to
3 provide duties and responsibilities relating to public
4 funds invested in Sudan-related companies; to harmonize
5 provisions; and to repeal the original sections.
6 Be it enacted by the people of the State of Nebraska,

1 Section 1. The Legislature finds and declares that:

2 (1) On July 23, 2004, the United States Congress declared
3 that "the atrocities unfolding in Darfur, Sudan, are genocide";

4 (2) On September 9, 2004, the United States Secretary of
5 State told the United States Senate Foreign Relations Committee
6 that "genocide has occurred and may still be occurring in
7 Darfur" and "the Government of Sudan and the Janjaweed bear
8 responsibility";

9 (3) On September 21, 2004, addressing the United Nations
10 General Assembly, the President of the United States affirmed the
11 Secretary of State's finding and stated, "[A]t this hour, the world
12 is witnessing terrible suffering and horrible crimes in the Darfur
13 region of Sudan, crimes my government has concluded are genocide";

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

21 (5) Also on December 7, 2004, the Congress found that
22 "the Government of Sudan has restricted access by humanitarian
23 and human rights workers to the Darfur area through intimidation
24 by military and security forces, and through bureaucratic and
25 administrative obstruction, in an attempt to inflict the most

1 devastating harm on those individuals displaced from their villages
2 and homes without any means of sustenance or shelter";

3 (6) On September 25, 2006, the Congress reaffirmed
4 that "the genocide unfolding in the Darfur region of Sudan
5 is characterized by acts of terrorism and atrocities directed
6 against civilians, including mass murder, rape, and sexual violence
7 committed by the Janjaweed and associated militias with the
8 complicity and support of the National Congress Party-led faction
9 of the Government of Sudan";

10 (7) On September 26, 2006, the United States House of
11 Representatives stated that "an estimated 300,000 to 400,000 people
12 have been killed by the Government of Sudan and its Janjaweed
13 allies since the [Darfur] crisis began in 2003, more than 2,000,000
14 people have been displaced from their homes, and more than 250,000
15 people from Darfur remain in refugee camps in Chad";

16 (8) The Darfur crisis represents the first time the
17 United States Government has labeled ongoing atrocities as
18 genocide;

19 (9) The United States Government has imposed sanctions
20 against the Government of Sudan since 1997. These sanctions are
21 monitored through the United States Treasury Department's Office of
22 Foreign Assets Control (OFAC);

23 (10) According to a former chair of the United States
24 Securities and Exchange Commission (SEC), "the fact that a foreign
25 company is doing material business with a country, government,

1 or entity on OFAC's sanctions list is, in the SEC staff's view,
2 substantially likely to be significant to a reasonable investor's
3 decision about whether to invest in that company";

4 (11) Since 1993, the Secretary of State has determined
5 that Sudan is a country the government of which has repeatedly
6 provided support for acts of international terrorism, thereby
7 restricting United States assistance, defense exports and sales,
8 and financial and other transactions with the Government of Sudan;

9 (12) A 2006 House of Representatives report states
10 that "a company's association with sponsors of terrorism and
11 human rights abuses, no matter how large or small, can have
12 a materially adverse result on a public company's operations,
13 financial condition, earnings, and stock prices, all of which can
14 negatively affect the value of an investment";

15 (13) In response to the financial risk posed by
16 investments in companies doing business with a terrorist-sponsoring
17 state, the Securities and Exchange Commission established its
18 Office of Global Security Risk to provide for enhanced disclosure
19 of material information regarding such companies;

20 (14) The current Sudan divestment movement encompasses
21 nearly one hundred universities, cities, states, and private
22 pension plans;

23 (15) Companies facing such widespread divestment present
24 further material risk to remaining investors;

25 (16) It is a fundamental responsibility of the State of

1 Nebraska to decide where, how, and by whom financial resources
2 in its control should be invested, taking into account numerous
3 pertinent factors;

4 (17) It is the prerogative and desire of the State of
5 Nebraska, with respect to investment resources in its control
6 and to the extent reasonable, with due consideration for, among
7 other things, return on investment, on behalf of itself and its
8 investment beneficiaries, not to participate in an ownership or
9 capital-providing capacity with entities that provide significant
10 practical support for genocide, including non-United States
11 companies doing business in Sudan;

12 (18) It is the judgment of the Legislature that sections
13 1 to 25 of this act should remain in effect only insofar as they
14 continue to be consistent with, and do not unduly interfere with,
15 the foreign policy of the United States as determined by the United
16 States Government; and

17 (19) It is the judgment of the Legislature that mandatory
18 divestment of state funds from certain companies is a measure that
19 should be employed sparingly and judiciously. A congressional and
20 presidential declaration of genocide satisfies this high threshold.

21 Sec. 2. For purposes of sections 1 to 25 of this act, the
22 definitions in sections 3 to 18 of this act apply.

23 Sec. 3. Active business operations means all business
24 operations that are not inactive business operations.

25 Sec. 4. Business operations means engaging in commerce in

1 any form in Sudan, including by acquiring, developing, maintaining,
2 owning, selling, possessing, leasing, or operating equipment,
3 facilities, personnel, products, services, personal property, real
4 property, or any other apparatus of business or commerce.

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

12 Sec. 6. Complicit means taking actions during any
13 preceding twenty-month period which have supported or promoted
14 the genocidal campaign in Darfur, including, but not limited to,
15 preventing Darfur's victimized population from communicating with
16 each other, encouraging Sudanese citizens to speak out against
17 an internationally approved security force for Darfur, actively
18 working to deny, cover up, or alter the record on human rights
19 abuses in Darfur, or other similar actions.

20 Sec. 7. Direct holdings in a company means all securities
21 of that company held directly by the state.

22 Sec. 8. Government of Sudan means the government in
23 Khartoum, Sudan, which is led by the National Congress Party,
24 formerly known as the National Islamic Front, or any successor
25 government formed on or after October 13, 2006, including

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

4 Sec. 9. Inactive business operations means the mere
5 continued holding or renewal of rights to property previously
6 operated for the purpose of generating revenue but not presently
7 deployed for such purpose.

8 Sec. 10. Indirect holdings in a company means all
9 securities of that company held in an account or fund, such
10 as a mutual fund, managed by one or more persons not employed by
11 the state, in which the state owns shares or interests together
12 with other investors not subject to the provisions of sections 1 to
13 25 of this act.

14 Sec. 11. Marginalized populations of Sudan include, but
15 are not limited to: The portion of the population in the Darfur
16 region that has been genocidally victimized; the portion of the
17 population of southern Sudan victimized by Sudan's North-South
18 civil war; the Beja, Rashidiya, and other similarly underserved
19 groups of eastern Sudan; the Nubian and other similarly underserved
20 groups in Sudan's Abyei, Southern Blue Nile, and Nuba Mountain
21 regions; and the Amri, Hamadab, Manasir, and other similarly
22 underserved groups of northern Sudan.

23 Sec. 12. Military equipment means weapons, arms, military
24 supplies, and equipment that readily may be used for military
25 purposes, including, but not limited to, radar systems or

1 military-grade transport vehicles, or supplies or services sold or
2 provided directly or indirectly to any force actively participating
3 in armed conflict in Sudan.

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

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

20 Sec. 15. Power production activities means any business
21 operation that involves a project commissioned by the National
22 Electricity Corporation of Sudan or other similar Government of
23 Sudan entity whose purpose is to facilitate power generation
24 and delivery, including, but not limited to, establishing
25 power-generating plants or hydroelectric dams, selling or

1 installing components for the project, providing service contracts
2 related to the installation or maintenance of the project, as well
3 as facilitating such activities, including by providing supplies or
4 services in support of such activities.

5 Sec. 16. Scrutinized company means any company:

6 (1) That has business operations that involve contracts
7 with or the provision of supplies or services to (a) the
8 Government of Sudan, (b) companies in which the Government of
9 Sudan has any direct or indirect equity share, (c) Government
10 of Sudan-commissioned consortiums or projects, or (d) companies
11 involved in Government of Sudan-commissioned consortiums or
12 projects; and

13 (i) Of which more than ten percent of its revenue or
14 assets linked to Sudan involve oil-related activities or mineral
15 extraction activities, of which less than seventy-five percent of
16 the company's revenue or assets linked to Sudan involve contracts
17 with or provision of oil-related or mineral extracting products or
18 services to the regional government of southern Sudan or a project
19 or consortium created exclusively by that regional government, and
20 which has failed to take substantial action; or

21 (ii) Of which more than ten percent of its revenue
22 or assets linked to Sudan involve power production activities,
23 of which less than seventy-five percent of the company's power
24 production activities include projects whose intent is to provide
25 power or electricity to the marginalized populations of Sudan, and

1 which has failed to take substantial action;

2 (2) That is complicit in the Darfur genocide; or

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

15 A social development company which is not complicit in
16 the Darfur genocide shall not be considered a scrutinized company.

17 Sec. 17. Social development company means a company
18 whose primary purpose in Sudan is to provide humanitarian
19 goods or services, including medicine or medical equipment,
20 agricultural supplies or infrastructure, educational opportunities,
21 journalism-related activities, information or informational
22 materials, spiritual-related activities, services of a purely
23 clerical or reporting nature, food, clothing, or general consumer
24 goods that are unrelated to oil-related activities, mineral
25 extraction activities, or power production activities.

1 Sec. 18. Substantial action means (1) adopting,
2 publicizing, and implementing a formal plan to cease scrutinized
3 business operations within one year and to refrain from any such
4 new business operations, (2) undertaking significant humanitarian
5 efforts, in conjunction with an international organization, the
6 Government of Sudan, the regional government of southern Sudan, or
7 a nonprofit entity, evaluated and certified by an independent third
8 party to be substantial in relationship to the company's Sudan
9 business operations and of benefit to one or more marginalized
10 populations of Sudan, or (3) through engagement with the Government
11 of Sudan, materially improving conditions for the genocidally
12 victimized population in Darfur.

13 Sec. 19. (1) Within ninety days after the effective
14 date of this act, the state investment officer shall make his
15 or her best efforts to identify all scrutinized companies in
16 which the state has direct holdings or indirect holdings or could
17 possibly have such holdings in the future. The identification
18 of scrutinized companies shall be the responsibility of an
19 independent, third-party research firm or reputable nonprofit
20 organization, as identified by the state investment officer, that
21 is making such determinations based on the criteria in section 16
22 of this act.

23 (2) By the first meeting of the Nebraska Investment
24 Council following the ninety-day period described in subsection (1)
25 of this section, the state investment officer shall assemble all

1 scrutinized companies identified by the third-party research firm
2 or reputable nonprofit organization into a scrutinized companies
3 list.

4 (3) The state investment officer shall update the
5 scrutinized companies list on a quarterly basis based on evolving
6 information provided by the third-party research firm or reputable
7 nonprofit organization.

8 Sec. 20. The state investment officer shall adhere to
9 the following procedure for companies on the scrutinized companies
10 list:

11 (1) The state investment officer shall immediately
12 determine the companies on the scrutinized companies list in which
13 the state has direct holdings or indirect holdings;

14 (2) For each company identified in subdivision (1) of
15 this section with only inactive business operations, the state
16 investment officer shall send a written notice informing the
17 company of the provisions of sections 1 to 25 of this act and
18 encouraging it to continue to refrain from initiating active
19 business operations in Sudan until it is able to avoid scrutinized
20 business operations. The state investment officer shall continue
21 such correspondence on a semiannual basis. For this correspondence,
22 the state investment officer may use template letters provided by
23 the independent third-party research firm or reputable nonprofit
24 organization described in section 19 of this act or by another
25 credible organization selected by the state investment officer;

1 (3) For each company newly identified in subdivision
2 (1) of this section with active business operations, the state
3 investment officer shall send a written notice informing the
4 company of its scrutinized company status and that it may
5 become subject to divestment by the state. The notice shall
6 offer the company the opportunity to clarify its Sudan-related
7 activities and shall encourage the company, within ninety days
8 after the date notice was sent, to either cease its scrutinized
9 business operations or convert such operations to inactive business
10 operations in order to avoid qualifying for divestment. For this
11 correspondence, the state investment officer may use template
12 letters provided by the independent third-party research firm or
13 reputable nonprofit organization described in section 19 of this
14 act or by another credible organization selected by the state
15 investment officer;

16 (4) If, within ninety days after the state investment
17 officer's first engagement with a company pursuant to subdivision
18 (3) of this section, the independent third-party research firm or
19 reputable nonprofit organization described in section 19 of this
20 act determines that the company has ceased scrutinized business
21 operations, the company shall be removed from the scrutinized
22 companies list and the provisions of this section shall cease to
23 apply to it unless it resumes scrutinized business operations,
24 as determined by the independent third-party research firm or
25 reputable nonprofit organization. If, within ninety days after

1 the state investment officer's first engagement under subdivision
2 (3) of this section, the company converts its scrutinized active
3 business operations to inactive business operations, as determined
4 by the independent third-party research firm or reputable nonprofit
5 organization, the company shall be subject to all provisions
6 relating to such operations;

7 (5) If the company continues to have scrutinized
8 active business operations ninety days after the state investment
9 officer's first engagement with a company pursuant to subdivision
10 (3) of this section, and only while such company continues to
11 have scrutinized active business operations, as determined by
12 the independent third-party research firm or reputable nonprofit
13 organization described in section 19 of this act, the state
14 investment officer shall sell, redeem, divest, or withdraw all
15 publicly traded securities of the company, except as provided in
16 this section, according to the following schedule:

17 (i) At least fifty percent of such securities shall
18 be removed within nine months after the company's most recent
19 appearance on the scrutinized companies list; and

20 (ii) One hundred percent of such securities shall be
21 removed within fifteen months after the company's most recent
22 appearance on the scrutinized companies list; and

23 (6) If a company that ceased scrutinized active business
24 operations after engagement pursuant to subdivision (3) of this
25 section resumes such operations, as determined by the independent

1 third-party research firm or reputable nonprofit organization
2 described in section 19 of this act, subdivision (1) of this
3 section shall immediately apply, and the state investment officer
4 shall send a written notice to the company. The company shall also
5 be immediately reintroduced onto the scrutinized companies list.

6 At no time shall the state acquire direct holdings in
7 securities of companies on the scrutinized companies list that have
8 active business operations.

9 For investment vehicles or funds in which indirect
10 holdings in scrutinized companies were previously identified in
11 subdivision (1) of this section, the state shall not make any
12 future acquisition of holdings in securities of companies on the
13 scrutinized companies list that have active business operations.

14 For investment vehicles or funds in which no indirect
15 holdings in scrutinized companies were identified in subdivision
16 (1) of this section, the state investment officer shall, on a
17 quarterly basis, screen such funds to determine whether companies
18 on the scrutinized companies list are held. For any such holdings
19 in scrutinized companies that are identified, the state shall take
20 the actions described in subdivisions (2) through (5) of this
21 section and shall not make any future acquisition of indirect
22 holdings in securities of companies on the scrutinized companies
23 list that have active business operations with respect to the
24 applicable investment vehicle or fund.

25 No company which the United States Government

1 affirmatively declares to be excluded from its present or future
2 sanctions relating to Sudan shall be subject to divestment or
3 investment prohibition pursuant to this section.

4 This section does not apply to indirect holdings in
5 actively managed investment funds. The state investment officer
6 shall submit letters to the managers of such investment funds
7 containing companies with scrutinized active business operations
8 requesting that they consider removing such companies from the
9 fund or create a similar actively managed fund with indirect
10 holdings devoid of such companies. If the manager creates a similar
11 fund, the state investment officer shall replace all applicable
12 investments with investments in the similar fund in an expedited
13 timeframe consistent with prudent investing standards. For purposes
14 of this section, private equity funds shall be deemed to be
15 actively managed investment funds.

16 Sec. 21. (1) The state investment officer shall file
17 a publicly available report with the Clerk of the Legislature
18 and Attorney General that includes the scrutinized companies list
19 within thirty days after the list is initially created.

20 (2) Annually thereafter, the state investment officer
21 shall file a publicly available report with the Clerk of the
22 Legislature and Attorney General and send a copy of the report
23 to the United States Presidential Special Envoy to Sudan, or an
24 appropriate designee or successor, that includes;

25 (a) A summary of correspondence with companies engaged by

1 the state investment officer under section 20 of this act;

2 (b) All investments sold, redeemed, divested, or
3 withdrawn in compliance with section 20 of this act;

4 (c) All prohibited investments under section 20 of this
5 act; and

6 (d) Progress made under section 20 of this act.

7 Sec. 22. Sections 1 to 25 of this act shall terminate
8 upon the occurrence of:

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

12 (2) The United States revoking all sanctions imposed
13 against the Government of Sudan;

14 (3) Congress or the President declaring that the
15 Government of Sudan has honored its commitments to cease attacks
16 on civilians, demobilized and demilitarized the Janjaweed and
17 associated militias, granted free and unfettered access for
18 deliveries of humanitarian assistance, and allowed for the safe and
19 voluntary return of refugees and internally displaced persons; or

20 (4) Congress or the President, through legislation or
21 executive order, declaring that mandatory divestment of the type
22 provided for in such sections interferes with the conduct of United
23 States foreign policy.

24 Sec. 23. Sections 1 to 25 of this act apply to state
25 funds administered by the State of Nebraska and invested by

1 the Nebraska Investment Council and the state investment officer
2 pursuant to the Nebraska State Funds Investment Act except for:

3 (1) Those funds in which investment and asset allocation
4 decisions are made by the plan participant, rather than by the
5 Nebraska Investment Council, including assets of (a) the Nebraska
6 educational savings plan trust created pursuant to sections 85-1801
7 to 85-1814 and (b) the retirement systems administered by the
8 Public Employees Retirement Board; and

9 (2) The assets of the University Trust Fund created
10 pursuant to section 85-123.01.

11 With respect to actions taken in compliance with sections
12 1 to 25 of this act, including all good-faith determinations
13 regarding companies as required by such sections, the state
14 investment officer and members of the Nebraska Investment Council
15 and its employees and agents shall be exempt from any conflicting
16 statutory or common-law obligations, including, but not limited to,
17 obligations under the Nebraska State Funds Investment Act and any
18 other applicable act, and any other such obligations with respect
19 to choice of asset managers, investment funds, or investments for
20 state funds. Present, future, and former council members, officers,
21 and employees of any state fund described in this act, including
22 the state investment officer and members of the Nebraska Investment
23 Council and contract professionals retained by the state shall
24 be indemnified from the General Fund and held harmless by the
25 state from all claims, demands, suits, actions, damages, judgments,

1 costs, charges, and expenses, including court costs and attorney's
2 fees, and against all liability, losses, and damages of any nature
3 whatsoever that these present, future, or former council members,
4 officers, employees, or contract professionals shall or may at
5 any time sustain by reason of any action, or failure to take
6 any action, pursuant to sections 1 to 25 of this act, including,
7 but not limited to, decisions to restrict, reduce, or eliminate
8 investments pursuant to this section.

9 Sec. 24. The state investment officer shall be permitted
10 to cease divesting from scrutinized companies or reinvest in
11 scrutinized companies from which he or she divested if clear and
12 convincing evidence shows that the value for all assets under
13 management by the state investment officer becomes equal to or
14 less than 99.95 percent of the hypothetical value of all assets
15 under management by the state investment officer assuming no
16 divestment for any company had occurred. Cessation of divestment,
17 reinvestment, or any subsequent ongoing investment authorized by
18 this section shall be strictly limited to the minimum steps
19 necessary to avoid the contingency set forth in this section. For
20 any cessation of divestment, reinvestment, or subsequent ongoing
21 investment authorized by this section, the state investment officer
22 shall provide a written report to the Clerk of the Legislature
23 and Attorney General in advance of initial reinvestment, updated
24 semiannually thereafter as applicable, setting forth the reasons
25 and justification, supported by clear and convincing evidence, for

1 its decisions to cease divestment, reinvest, or remain invested in
2 companies with scrutinized active business operations. This section
3 has no application to reinvestment in companies on the ground that
4 they have ceased to have scrutinized active business operations.

5 Sec. 25. The Attorney General shall enforce the
6 provisions of sections 1 to 25 of this act and may bring such
7 actions in court as are necessary to do so.

8 Sec. 26. Section 72-1260, Reissue Revised Statutes of
9 Nebraska, is amended to read:

10 72-1260 Sections 72-1237 to 72-1260 and sections 1 to 25
11 of this act shall be known and may be cited as the Nebraska State
12 Funds Investment Act.

13 Sec. 27. Section 84-1309.01, Reissue Revised Statutes of
14 Nebraska, is amended to read:

15 84-1309.01 The board shall provide benefit liability
16 information and other assistance to the Nebraska Investment Council
17 for the establishment of policy portfolio objectives for the
18 investing and reinvesting of the assets of the retirement system.
19 The board shall verify that the investments of the assets of the
20 retirement system by the council and the state investment officer
21 are invested and reinvested for the exclusive purposes of providing
22 benefits to members and members' beneficiaries and that the assets
23 of the retirement system are not invested with the sole or primary
24 investment objective of economic development or social purposes or
25 objectives except as provided in sections 1 to 25 of this act.

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1 Such verification shall be included in the written plan of action
2 pursuant to subsection (3) of section 84-1503.

3 Sec. 28. Original sections 72-1260 and 84-1309.01,
4 Reissue Revised Statutes of Nebraska, are repealed.