

HB 1516-FN – AS INTRODUCED

2008 SESSION

08-2506

10/03

HOUSE BILL *1516-FN*

AN ACT relative to the divestiture of New Hampshire retirement assets relating to Sudan.

SPONSORS: Rep. Fontas, Hills 24; Rep. S. Merrick, Coos 2; Rep. Edwards, Hills 26; Rep. Casey, Rock 11; Rep. Bedrick, Rock 4; Sen. Clegg, Dist 14

COMMITTEE: Executive Departments and Administration

ANALYSIS

This bill requires the retirement system board of trustees and the judicial retirement plan board of trustees to divest assets relating to Sudan.

Explanation: Matter added to current law appears in ***bold italics***.

Matter removed from current law appears [~~in brackets and struck through.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

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STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Eight

AN ACT relative to the divestiture of New Hampshire retirement assets relating to Sudan.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Legislative Findings.

I. On July 23, 2004, Congress declared that “the atrocities unfolding in Darfur, Sudan, are genocide.”

II. On September 9, 2004, Secretary of State Colin L. Powell told the United States Senate Committee on Foreign Relations that “genocide has occurred and may still be occurring in Darfur” and “the Government of Sudan and the Janjaweed bear responsibility.”

III. On September 21, 2004, addressing the United Nations General Assembly, President George W. Bush affirmed the Secretary of State’s finding and stated, “At this hour, the world is witnessing terrible suffering and horrible crimes in the Darfur region of Sudan, crimes my government has concluded are genocide.”

IV. On December 7, 2004, 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.”

V. 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.”

VI. 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.”

VII. 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 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.”

VIII. The Darfur crisis represents the first time the United States government has labeled ongoing atrocities genocide.

IX. 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 (OFAC).

X. 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 OFAC’s sanctions list is, in the SEC staff’s view, substantially likely to be significant to a reasonable investor’s decision about whether to invest in that company.”

XI. 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.

XII. 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.”

XIII. 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.

XIV. The current Sudan divestment movement encompasses nearly 100 universities, cities, states, and private pension plans.

XV. Companies facing such widespread divestment present further material risk to remaining investors.

XVI. It is a fundamental responsibility of the state of New Hampshire to decide where, how, and by whom financial resources in its control should be invested, taking into account numerous pertinent factors.

XVII. It is the prerogative and desire of the state of New Hampshire 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.

XVIII. It is the judgment of the general court 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.

XIX. It is the judgment of the general court 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.

2 New Chapter; Divestiture of Retirement System Assets Relating to Sudan. Amend RSA by inserting after chapter 100-C the following new chapter:

CHAPTER 100-D

DIVESTITURE OF RETIREMENT SYSTEM ASSETS RELATING TO SUDAN

100-D:1 Definitions. In this chapter:

I. “Active business operations” means all business operations that are not inactive business operations.

II. “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.

III. “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.

IV. “Complicit” means taking actions during any preceding 20-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.

V. “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.

VI. “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.

VII. “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.

VIII. “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 the provisions of this chapter.

IX. “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.

X. "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.

XI. "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.

XII. "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.

XIII. "Power production activities" means any business operation that involves a project commissioned by the National Electricity Corporation (NEC) 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.

XIV. "Public fund" means New Hampshire retirement system board of trustees and the judicial retirement plan board of trustees which invest and manage funds held by the state to the credit of the New Hampshire retirement system under RSA 100-A and the New Hampshire judicial retirement plan under RSA 100-C.

XV. "Scrutinized company" means any company that meets the criteria of (a), (b), or (c), as follows:

(a) The company has business operations that involve contracts with and/or provision of supplies or services to:

(1) The government of Sudan;

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

(3) Government-of-Sudan-commissioned consortiums or projects; or

(4) Companies involved in government-of-Sudan-commissioned consortiums or projects; and either (i) more than 10 percent of the company's revenues or assets linked to Sudan involve oil-related activities or mineral extraction activities; less than 75 percent of the company's revenues or assets linked to Sudan involve

contracts with and/or provision of oil-related or mineral extracting products or services to 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 (ii) more than 10 percent of the company's revenues or assets linked to Sudan involve power production activities; less than 75 percent of the company's power production activities 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.

(b) The company is complicit in the Darfur genocide.

(c) 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 such equipment by the company, certification from a reputable and objective third party that such equipment is not being used by a party participating in armed conflict in Sudan, or sale of such equipment solely to the regional government of southern Sudan or any internationally recognized peacekeeping force or humanitarian organization.

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

XVI. "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.

XVII. "Substantial action" means adopting, publicizing, and implementing a formal plan to cease scrutinized business operations within one year and to refrain from any such new business operations; undertaking significant humanitarian efforts in conjunction with an international organization, the government of Sudan, the regional government of southern Sudan, or a nonprofit entity and evaluated and certified by an independent third party to be substantial in relationship to the company's Sudan business operations and of benefit to 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.

100-D:2 Identification of Companies.

I. Within 90 days of this chapter becoming effective, the public fund shall make its best efforts to identify all scrutinized companies in which the public fund has direct or indirect holdings or could possibly have such holdings in the future. Such efforts shall include, as appropriate:

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

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

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

II. By the first meeting of the public fund following the 90-day period described in paragraph I, the public fund shall assemble all scrutinized companies identified into a "scrutinized companies list."

III. The public fund shall update the scrutinized companies list on a quarterly basis based on evolving information from, among other sources, those listed in paragraph I.

100-D:3 Required Actions.

I. General. The public fund shall adhere to the procedure for companies on the scrutinized companies list as provided in this section.

II. Engagement.

(a) The public fund shall immediately determine the companies on the scrutinized companies list in which the public fund owns direct or indirect holdings.

(b) For each company identified in subparagraph (a) with only inactive business operations, the public fund shall send a written notice informing the company of this chapter and encouraging it to continue to refrain from initiating active business operations in Sudan until it is able to avoid scrutinized business operations. The public fund shall continue such correspondence on a semiannual basis.

(c) For each company newly identified in subparagraph (a) with active business operations, 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 90 days, to either cease its scrutinized business operations or convert such operations to inactive business operations in order to avoid qualifying for divestment by the public fund.

(d) If, within 90 days following the public fund's first engagement with a company pursuant to subparagraph (c) that company ceases scrutinized business operations, the company shall be removed from the scrutinized companies list and the provisions of this section shall cease to apply to it unless it resumes scrutinized business operations. If, within 90 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.

III. Divestment.

(a) If, after 90 days following the public fund's first engagement with a company pursuant to subparagraph II(c), the company continues to have scrutinized active business operations, and only while such company continues to have scrutinized active business operations, the public fund shall sell, redeem, divest, or withdraw all publicly traded securities of the company, except as otherwise provided, according to the following schedule:

(1) At least 50 percent of such assets shall be removed from the public fund's assets under management by 9 months after the company's most recent appearance on the scrutinized companies list.

(2) One hundred percent of such assets shall be removed from the public fund's assets under management within 15 months after the company's most recent appearance on the scrutinized companies list.

(b) If a company that ceased scrutinized active business operations following engagement pursuant to subparagraph II(c) resumes such operations, subparagraph (a) shall immediately apply, and the public fund shall send a written notice to the company. The company shall also be immediately reintroduced onto the scrutinized companies list.

IV. Prohibition. At no time shall the public fund acquire securities of companies on the scrutinized companies list that have active business operations, except as provided in paragraph V and VI.

V. Exemption. No company which the United States government 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 paragraphs III and IV.

VI. Excluded Securities. Notwithstanding anything herein to the contrary, paragraphs III and IV shall not apply to indirect holdings in actively managed investment funds. The public fund shall, however, submit letters to the managers of such investment funds containing companies with scrutinized active business operations requesting that they consider removing such companies from the fund or create a similar actively managed fund with indirect holdings devoid of such companies. If the manager creates a similar fund, the public fund shall replace all applicable investments with investments in the similar fund in an expedited time frame consistent with prudent investing standards. For the purposes of this section, "private equity" funds shall be deemed to be actively managed investment funds.

100-D:4 Reporting.

I. The public fund shall file a publicly available report to the general court that includes the scrutinized companies list within 30 days after the list is created.

II. Annually thereafter, the public fund shall file a publicly available report to the general court and send a copy of that report to the United States Presidential Special Envoy to Sudan (or an appropriate designee or successor) that includes:

(a) A summary of correspondence with companies engaged by the public fund under RSA 100-D:3, II(b) and (c).

(b) All investments sold, redeemed, divested, or withdrawn in compliance with RSA 100-D:3, III.

(c) All prohibited investments under RSA 100-D:3, IV; and

(d) Any progress made under RSA 100-D:3, VI.

100-D:5 Provisions for Expiration of Requirements. The requirements in this chapter shall expire upon the occurrence of any of the following:

I. The Congress or President of the United States declaring that the Darfur genocide has been halted for at least 12 months.

II. The United States revoking all sanctions imposed against the government of Sudan.

III. The Congress or President of the United States declaring 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.

IV. The Congress or President of the United States, through legislation or executive order, declaring that mandatory divestment of the type provided for in this chapter interferes with the conduct of United States foreign policy.

100-D:6 Other Legal Obligations. With respect to actions taken in compliance with this chapter, including all good faith determinations regarding companies as required by this chapter, the public fund shall be exempt from any conflicting statutory or common law obligations, including any such obligations in respect to choice of asset managers, investment funds, or investments for the public fund's securities portfolios.

100-D:7 Reinvestment In Certain Companies With Scrutinized Active Business Operations. Notwithstanding any other provision of this chapter, the public fund is permitted to cease divesting from certain scrutinized companies pursuant to RSA 100-D:3, III and/or reinvest in certain scrutinized companies from which it divested pursuant to RSA 100-D:3, III if clear and convincing evidence shows that the value for all assets under management by the public fund becomes equal to or less than 99.50 percent (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 RSA 100-D:3, III. Cessation of divestment, reinvestment, and/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, and/or subsequent ongoing investment authorized by this section, the public fund shall provide a written report to the general court in advance of initial reinvestment, updated semiannually thereafter as applicable, setting forth the reasons and justification, supported by clear and convincing evidence, for its decisions to cease divestment, reinvest, and/or remain invested in companies with scrutinized active business operations. This section has no application to reinvestment in companies on the ground that they have ceased to have scrutinized active business operations.

100-D:8 Enforcement. The attorney general is charged with enforcing the provisions of this chapter and, through any lawful designee, may bring such actions in court as are necessary to do so.

3 Severability. If any one or more provision, section, subsection, sentence, clause, phrase, or word of this act or the application thereof to any person or circumstance is found to be invalid, illegal, unenforceable, or unconstitutional, the same is hereby declared to be severable and the balance of this act shall remain effective and functional notwithstanding such invalidity, illegality, unenforceability, or unconstitutionality. The general court 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 provision, section, subsection, sentence, clause, phrase, or word be declared invalid, illegal, unenforceable, or unconstitutional, including, but not limited to, each of the engagement, divestment, and prohibition provisions of this act.

4 Effective Date. This act shall take effect July 1, 2008.

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08-2506

12/03/07

HB 1516-FN - FISCAL NOTE

AN ACT relative to the divestiture of New Hampshire retirement assets relating to Sudan.

FISCAL IMPACT:

The New Hampshire Retirement System and the New Hampshire Judicial Retirement Plan state this bill may increase state, county, and local expenditures by an indeterminable amount in FY 2009 and each year thereafter. There will be no fiscal impact on state, county, and local revenue.

METHODOLOGY:

The New Hampshire Retirement System and the New Hampshire Judicial Retirement Plan state this bill requires the divestiture of assets relating to Sudan. The New Hampshire Retirement System states the System will have costs associated with retaining a consultant to identify impacted securities, staff time associated with coordinating efforts of the consultant and investment managers and staff time to ensure and report compliance with the law. Additionally, the System will have divestment trading commission costs and execution costs. The System estimates the increased expenditures for the administration of the divestment statute will exceed \$100,000 in FY 2009 and each year thereafter. The System assumes state, county, and local employer contribution rates may need to increase to support the increased administrative costs. Additionally, if forced divestiture results in a lower funding ratio for the System, state, county, and local contribution rates may need to be increased.

The Judicial Retirement Plan states this bill will increase administrative costs to the Plan. The Plan will need to hire staff to review publicly available information, contact asset managers, and other contact other institutional investors to determine if assets are invested in business operations located in Sudan and maintain a scrutinized companies list. The Plan states it uses index funds which increases the difficulty of identifying if assets are invested in a prohibited area. The increased cost may require an increase in state contributions to the Plan.