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SUDAN DIVESTMENT ACT

2008 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: David Litvack

Senate Sponsor: _____

LONG TITLE

General Description:

This bill modifies the Utah State Retirement and Insurance Benefit Act by restricting investment of Retirement System funds in certain entities.

Highlighted Provisions:

This bill:

- ▶ provides definitions;
- ▶ requires the Utah State Retirement Board to ensure that the monies of the Utah State Retirement Investment Fund are not invested in any business operations with companies that have certain business operations with the Khartoum government of the Republic of the Sudan, which is perpetuating the conflict in Darfur;
- ▶ requires the board to identify scrutinized companies, provide notice of potential investment withdrawal, and divest from certain entities;
- ▶ puts certain limits on divestment;
- ▶ exempts the board from certain conflicting statutes or common law obligations that conflict with divestment requirements;
- ▶ requires the board to make reports to the Legislature and the attorney general; and
- ▶ requires the Office of Legislative Research and General Counsel to send notice of passage of the bill in order to comply with federal law.

Monies Appropriated in this Bill:

None



28 **Other Special Clauses:**

29 None

30 **Utah Code Sections Affected:**

31 ENACTS:

32 **49-11-306**, Utah Code Annotated 1953

33 **Uncodified Material Affected:**

34 ENACTS UNCODIFIED MATERIAL



36 *Be it enacted by the Legislature of the state of Utah:*

37 Section 1. Section **49-11-306** is enacted to read:

38 **49-11-306. Definitions -- Investment prohibitions -- Rules -- Exceptions -- Annual**
39 **report -- Expiration.**

40 (1) As used in this section:

41 (a) "Active business operations" means all business operations that are not inactive
42 business operations.

43 (b) "Actively managed investment funds" includes private equity funds.

44 (c) (i) "Business operations" means engaging in commerce in any form, including
45 acquiring, developing, maintaining, owning, selling, possessing, leasing or operating any
46 apparatus of business or commerce, which includes equipment, facilities, personnel, products,
47 services, personal property, and real property.

48 (ii) "Business operations" does not include providing humanitarian aid.

49 (d) "Marginalized populations of Sudan" include:

50 (i) the portion of the population in the Darfur region that has been genocidally
51 victimized;

52 (ii) the portion of the population of southern Sudan victimized by Sudan's North-South
53 civil war;

54 (iii) the Beja, Rashidiya, and other similarly underserved groups of eastern Sudan;

55 (iv) the Nubian and other similarly underserved groups in Sudan's Abyei, Southern
56 Blue Nile, and Nuba Mountain regions; and

57 (v) the Amri, Hamadab, Manasir, and other similarly underserved groups of northern
58 Sudan.

59 (e) "Company" means any sole proprietorship, organization, association, corporation,
60 partnership, joint venture, limited partnership, limited liability partnership, limited liability
61 company, or other entity or business association, including any wholly-owned subsidiary,
62 majority-owned subsidiary, parent company, or affiliate that exists for profit-making purposes.

63 (f) "Complicit in the Darfur genocide" means taking actions during any preceding 20
64 month period that have directly supported or promoted the genocidal campaign in Darfur,
65 including:

66 (i) preventing the marginalized populations of Sudan from communicating with each
67 other;

68 (ii) encouraging Sudanese citizens to speak out against an internationally approved
69 security force for Darfur; or

70 (iii) actively working to deny, cover up, or alter the record on human rights abuses in
71 Darfur.

72 (g) "Direct holdings" means all securities of a company that are held directly by the
73 public fund or in an account or fund in which the public fund owns all shares or interests.

74 (h) (i) "Government of Sudan" means the government in Khartoum, Sudan, which is
75 led by the National Congress Party (formerly known as the National Islamic Front) or any
76 successor government formed on or after October 13, 2006, including the coalition National
77 Unity Government agreed upon in the Comprehensive Peace Agreement for Sudan.

78 (ii) "Government of Sudan" does not mean the regional government of southern Sudan.

79 (i) "Inactive business operations" means the continued holding or renewal of rights to
80 property previously operated solely for the purpose of generating revenues but not presently
81 deployed for such purpose.

82 (j) "Indirect holdings" means all securities of a company held in an account or fund,
83 such as a mutual fund, managed by one or more persons not employed by the public fund, in
84 which the public fund owns shares or interests together with other investors not subject to the
85 provisions of this section.

86 (k) "Military equipment" means weapons, arms, military supplies, and equipment that
87 readily may be used for military purposes, including radar systems, military-grade transport
88 vehicles, or supplies or services sold or provided directly or indirectly to any force actively
89 participating in armed conflict in Sudan.

90 (l) "Mineral extraction activities" include the exploring, extracting, processing,
91 transporting, or wholesale selling or trading of elemental minerals or associated metal alloys,
92 oxides, or ore, including gold, copper, chromium, chromite, diamonds, iron, iron ore, silver,
93 tungsten, uranium, and zinc, as well as facilitating the activities, including providing supplies
94 or services in support of the activities.

95 (m) (i) "Oil-related activities" include:

96 (A) owning rights to oil blocks, exporting, extracting, producing, refining, processing,
97 exploring for, transporting, selling, or trading of oil;

98 (B) constructing, maintaining, or operating a pipeline, refinery, or other oil-field
99 infrastructure; and

100 (C) facilitating the activities like those described in Subsections (1)(l)(i)(A) and
101 (1)(l)(i)(B), including providing supplies or services in support of the activities.

102 (ii) "Oil-related activities" does not mean the mere retail sale of gasoline and related
103 consumer products.

104 (n) "Power production activities" means any business operation that involves a project
105 commissioned by the National Electricity Corporation of Sudan or other similar government of
106 Sudan entity whose purpose is to facilitate power generation and delivery, including:

107 (i) establishing power-generating plants or hydroelectric dams, selling or installing
108 components for the project, providing service contracts related to the installation or
109 maintenance of the project; or

110 (ii) facilitating activities like those described in Subsection (1)(m)(i), including
111 providing supplies or services in support of those activities.

112 (o) "Public fund" means:

113 (i) the Utah State Retirement Investment Fund; or

114 (ii) the Utah State Retirement Board in charge of the Utah State Retirement Investment
115 Fund.

116 (p) "Scrutinized company" means a company that:

117 (i) has business operations that involve contracts with or provision of supplies or
118 services to the government of Sudan, companies in which the government of Sudan has any
119 direct or indirect equity share, consortiums or projects commissioned by the government of
120 Sudan, or companies involved in consortiums or projects commissioned by the government of

121 Sudan and had:

122 (A) (I) more than 10% of the company's revenues or assets linked to Sudan involve
123 oil-related activities or mineral-extraction activities;

124 (II) less than 75% of the company's revenues or assets linked to Sudan involve
125 contracts with or provision of oil-related or mineral-extracting products or services to the
126 regional government of southern Sudan or a project or consortium created exclusively by that
127 regional government; and

128 (III) failed to take substantial action; or

129 (B) (I) more than 10% of the company's revenues or assets linked to Sudan involve
130 power-production activities;

131 (II) less than 75% of the company's power-production activities include projects whose
132 intent is to provide power or electricity to the marginalized populations of Sudan; and

133 (III) failed to take substantial action;

134 (ii) the company supplies military equipment within Sudan, unless:

135 (A) the company clearly shows that the military equipment cannot be used to facilitate
136 offensive military actions in Sudan; or

137 (B) the company implements rigorous and verifiable safeguards to prevent use of the
138 military equipment by forces actively participating in armed conflict, which safeguards may
139 include post-sale tracking of such equipment by the company, certification from a reputable
140 and objective third party that such equipment is not being used by a party participating in
141 armed conflict in Sudan, or sale of such equipment solely to the regional government of
142 southern Sudan or any internationally recognized peacekeeping force or humanitarian
143 organization; or

144 (iii) the company is complicit in the Darfur genocide.

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

151 (r) "Substantial action" means:

152 (i) adopting, publicizing, and implementing a formal plan to cease scrutinized business
153 operations within one year and to refrain from any new scrutinized business operations;

154 (ii) undertaking significant humanitarian efforts in conjunction with an international
155 organization, the government of Sudan, the regional government of southern Sudan, or a
156 non-profit entity, provided that the efforts are evaluated and certified by an independent third
157 party to be substantial in relationship to the company's Sudan business operations and of
158 benefit to one or more marginalized populations of Sudan; or

159 (iii) through engagement with the government of Sudan, materially improving
160 conditions for the genocidally victimized population in Darfur.

161 (2) (a) (i) By no later than August 5, 2008, the public fund shall make its best efforts to
162 identify all scrutinized companies in which the public fund has direct holdings or indirect
163 holdings or could possibly have direct or indirect holdings in the future.

164 (ii) The identification process required by Subsection (2)(a)(i) may include, as
165 considered appropriate by the public fund:

166 (A) reviewing and relying on publicly available information regarding companies with
167 business operations in Sudan, including information provided by non-profit organizations,
168 research firms, international organizations, and government entities;

169 (B) contacting asset managers that are contracted by the public fund that invest in
170 companies with business operations in Sudan; and

171 (C) contacting other institutional investors that have divested from or engaged with
172 companies that have business operations in Sudan.

173 (b) By the first meeting of the public fund that is held after August 5, 2008, the public
174 fund shall assemble the names of all scrutinized companies identified into a scrutinized
175 companies list.

176 (c) The public fund shall update the scrutinized companies list on a quarterly basis by
177 using evolving information from, among other sources, those listed in Subsection (2)(a)(ii).

178 (d) Within 30 days after the initial creation of the scrutinized companies list, the public
179 fund shall provide a copy of the list to:

180 (i) the Legislature; and

181 (ii) the attorney general.

182 (3) The public fund shall adhere to the following procedures in relation to companies

183 listed on the scrutinized companies list required under Subsection (2):

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

186 (ii) For each company identified in Subsection (3)(a)(i) that has only inactive business
187 operations, the public fund shall:

188 (A) send the company a written notice that:

189 (I) informs the company of the requirements of this section; and

190 (II) encourages the company to continue to refrain from initiating active business

191 operations in Sudan until it is able to avoid scrutinized business operations; and

192 (B) continue the correspondence required by Subsection (3)(a)(ii)(A) on a semi-annual
193 basis.

194 (iii) For each company that is newly identified in Subsection (3)(a)(i) as having active
195 business operations, the public fund shall send a written notice that informs the company that:

196 (A) it has been identified as a scrutinized company;

197 (B) it may become subject to divestment by the public fund;

198 (C) offers the company the opportunity to clarify its Sudan-related activities; and

199 (D) encourages the company, within 90 days, to either:

200 (I) cease its scrutinized business operations; or

201 (II) convert its scrutinized business operations to inactive business operations in order
202 to avoid qualifying for divestment by the public fund.

203 (iv) (A) If the company ceases scrutinized business operations within 90 days
204 following the public fund's first notice to a company according to the requirements of
205 Subsection (3)(a)(iii):

206 (I) the company shall be removed from the scrutinized companies list; and

207 (II) the provisions of this section shall cease to apply to the company unless the
208 company resumes scrutinized business operations.

209 (B) If the company converts its scrutinized active business operations to inactive
210 business operations within 90 days following the public fund's first notice to a company under
211 Subsection (3)(a)(iii), the company shall be subject to the requirements of Subsection (3)(a)(ii).

212 (b) (i) If the company continues to have scrutinized active business operations more
213 than 90 days following the public fund's first notice to a company according to the

214 requirements of Subsection (3)(a)(iii), and only while the company continues to have
215 scrutinized active business operations, the public fund shall sell, redeem, divest, or withdraw
216 all publicly-traded securities of the company as follows:

217 (A) No later than nine months after the company's most recent appearance on the
218 scrutinized companies list, at least 33% of the company's assets shall be removed from the
219 public fund's assets under management.

220 (B) No later than 12 months after the company's most recent appearance on the
221 scrutinized companies list, at least 66% of the company's assets shall be removed from the
222 public fund's assets under management.

223 (C) No later than 15 months after the company's most recent appearance on the
224 scrutinized companies list, all of the company's assets shall be removed from the public fund's
225 assets under management.

226 (ii) If a company that ceased scrutinized active business operations following notice
227 provided under Subsection (3)(a)(iii), resumes scrutinized active business operations:

228 (A) the requirements of Subsection (3)(b)(i) shall immediately apply;

229 (B) the public fund shall immediately send a written notice to the company in the form
230 required under Subsection (3)(a)(iii); and

231 (C) the company shall be immediately included on the scrutinized companies list.

232 (c) The public fund may not acquire securities of companies on the scrutinized
233 companies list that have active business operations, except as follows:

234 (i) a company that the United States government affirmatively declares to be excluded
235 from its present federal sanctions regime relating to Sudan or any future federal sanctions
236 regime relating to Sudan shall not be subject to the requirements of this section; and

237 (ii) except as otherwise specifically provided in this section, the requirements of this
238 section do not apply to indirect holdings in an actively managed investment fund, except that
239 the public fund shall be required to:

240 (A) submit a letter to each manager of each actively managed investment fund
241 containing companies with scrutinized active business operations that requests that the
242 managers consider:

243 (I) removing the companies from the fund; or

244 (II) creating a similar actively managed investment fund with indirect holdings devoid

245 of companies with scrutinized business operations; and

246 (B) if a manager creates a similar actively managed investment fund as described in
247 Subsection (3)(c)(ii)(A)(II), the public fund shall replace all applicable investments with
248 investments in the similar fund in an expedited time frame consistent with prudent investing
249 standards.

250 (d) (i) On an annual basis, the public fund shall provide a publicly-available report to
251 the Legislature that includes:

252 (A) a summary of correspondence with companies to whom the public fund has
253 provided notice under Subsection (3)(a)(iii);

254 (B) a listing of all investments sold, redeemed, divested, or withdrawn in accordance
255 with Subsection (3)(b);

256 (C) a listing of all investments that were prohibited under Subsection (3)(c); and

257 (D) a description of any replacement investments made under Subsection (3)(c)(ii)(B).

258 (ii) Copies of the report shall be sent to:

259 (A) the attorney general;

260 (B) the attorney general of the United States; and

261 (C) the United States Presidential Envoy to Sudan, or an appropriate designee or
262 successor.

263 (4) With respect to actions taken in compliance with this section, including all good
264 faith determinations regarding companies as required by this section, the public fund shall be
265 exempt from any conflicting statutory or common law obligations, including obligations in
266 respect to choice of asset managers, investment funds, or investments for the public fund's
267 securities portfolios.

268 (5) (a) Notwithstanding any provision of law to the contrary, the public fund shall be
269 permitted to cease divesting from certain scrutinized companies under Subsection (3)(b)(i) or
270 to reinvest in certain scrutinized companies from which it divested under Subsection (3)(b)(i) if
271 clear and convincing evidence shows that the value for all assets under management by the
272 public fund becomes equal to or less than 99.50% (50 basis points) of the hypothetical value of
273 all assets under management by the public fund assuming no divestment for any company had
274 occurred under this section.

275 (b) Cessation of divestment, reinvestment, or any subsequent ongoing investment

276 authorized by this section shall be strictly limited to the minimum steps necessary to avoid the
277 contingency set forth in Subsection (5)(a).

278 (c) Before ceasing divestment, reinvesting, or maintaining a subsequent ongoing
279 investment based upon an authorization provided by Subsection (5)(a), the public fund shall
280 provide a written report to the Legislature, which report shall be updated semi-annually
281 thereafter as applicable, that provides:

282 (i) the reasons and justification for the public fund's decision to cease divestment,
283 reinvest, or remain invested in companies with scrutinized active business operations; and

284 (ii) clear and convincing evidence in support of the reasons and justification provided
285 in Subsection (5)(c)(i).

286 (d) This Subsection (5) does not apply to reinvestment in companies on the basis that
287 they have ceased to have scrutinized active business operations.

288 (6) This section shall cease to be in effect if:

289 (a) The Congress of the United States or the President of the United States, through
290 legislation or executive order, declares that the Darfur genocide has been halted for at least 12
291 months;

292 (b) the United States revokes all sanctions imposed against the government of Sudan;

293 (c) the Congress of the United States or the President of the United States, through
294 legislation or executive order, declares that the government of Sudan has honored its
295 commitments to:

296 (i) cease attacks on civilians;

297 (ii) demobilize and demilitarize the Janjaweed and associated militias;

298 (iii) grant free and unfettered access for deliveries of humanitarian assistance; and

299 (iv) allow for the safe and voluntary return of refugees and internally displaced
300 persons; or

301 (d) the Congress of the United States or the President of the United States, through
302 legislation or executive order, declares that mandatory divestment of the type provided for in
303 this section interferes with the conduct of United States foreign policy.

304 **Section 2. Notice to the Attorney General of the United States.**

305 Not later than 30 days after the day that this bill is approved by the governor, or the day
306 following the constitutional time limit of Utah Constitution Article VII, Section 8, without the

307 governor's signature, the Office of Legislative Research and General Counsel shall submit
308 written notice of this bill's passage to the Attorney General of the United States in accordance
309 with the Sudan Accountability and Divestment Act of 2007.

Legislative Review Note
as of 1-17-08 4:20 PM

Office of Legislative Research and General Counsel

H.B. 138 - Sudan Divestment Act

Fiscal Note

2008 General Session

State of Utah

State Impact

Enactment of this bill may result in foregone revenue for the Utah Retirement Systems of \$1,726,000 in FY 2009 and \$1,705,000 in years thereafter based on URS's current portfolio of investments. This bill may limit future investments by the Utah Retirement Systems and as a result may affect its ability to maximize returns, which in turn may affect existing unfunded liabilities or future contribution rates.

Individual, Business and/or Local Impact

Enactment of this bill likely will not result in direct, measurable costs and/or benefits for individuals, businesses, or local governments.
