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Sens. Henry, Peterson, Simpson, Still; Reps. Johnson,
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DELAWARE STATE SENATE
144th GENERAL ASSEMBLY

SENATE BILL NO. 233

AN ACT TO AMEND THE DELAWARE CODE RELATING TO INVESTMENTS RELATED TO SUDAN.

1 WHEREAS, on July 23, 2004, the United States Congress declared that “the atrocities unfolding in Darfur, Sudan,
2 are genocide”; and

3 WHEREAS, on September 9, 2004, Secretary of State Colin L. Powell told the U.S. Senate Foreign Relations
4 Committee that “genocide has occurred and may still be occurring in Darfur” and “the Government of Sudan and the
5 Janjaweed bear responsibility”; and

6 WHEREAS, on September 21, 2004, addressing the United Nations General Assembly, President George W. Bush
7 affirmed the Secretary of State's finding and stated, “[A]t this hour, the world is witnessing terrible suffering and horrible
8 crimes in the Darfur region of Sudan, crimes my government has concluded are genocide”; and

9 WHEREAS, on December 7, 2004, the U.S. Congress noted that the genocidal policy in Darfur has led to reports
10 of “systematic rape of thousands of women and girls, the abduction of women and children, and the destruction of hundreds
11 of ethnically African villages, including the poisoning of their wells and the plunder of their crops and cattle upon which
12 the people of such villages sustain themselves”; and

13 WHEREAS, also on December 7, 2004, Congress found that “the Government of Sudan has restricted access by
14 humanitarian and human rights workers to the Darfur area through intimidation by military and security forces, and through
15 bureaucratic and administrative obstruction, in an attempt to inflict the most devastating harm on those individuals
16 displaced from their villages and homes without any means of sustenance or shelter.”

17 WHEREAS, on September 25, 2006, Congress reaffirmed that “the genocide unfolding in the Darfur region of
18 Sudan is characterized by acts of terrorism and atrocities directed against civilians, including mass murder, rape, and sexual
19 violence committed by the Janjaweed and associated militias with the complicity and support of the National Congress
20 Party-led faction of the Government of Sudan”; and

21 WHEREAS, on September 26, 2006, the U.S. House of Representatives stated that “an estimated 300,000 to
22 400,000 people have been killed by the Government of Sudan and its Janjaweed allies since the [Darfur] crisis began in
23 2003, more than 2,000,000 people have been displaced from their homes, and more than 250,000 people from Darfur
24 remain in refugee camps in Chad”; and

25 WHEREAS, the Darfur crisis represents the first time the United States Government has labeled ongoing atrocities
26 a genocide; and

27 WHEREAS, the Federal Government has imposed sanctions against the Government of Sudan since 1997. These
28 sanctions are monitored through the U.S. Treasury Department’s Office of Foreign Assets Control (OFAC); and

29 WHEREAS, according to a former chair of the U.S. Securities and Exchange Commission, “the fact that a foreign
30 company is doing material business with a country, government, or entity on OFAC’s sanctions list is, in the SEC staff’s
31 view, substantially likely to be significant to a reasonable investor’s decision about whether to invest in that company; and”

32 WHEREAS, since 1993, the U.S. Secretary of State has determined that Sudan is a country the government of
33 which has repeatedly provided support for acts of international terrorism, thereby restricting United States assistance,
34 defense exports and sales, and financial and other transactions with the Government of Sudan; and

35 WHEREAS, a 2006 U.S. House of Representatives report states that “a company's association with sponsors of
36 terrorism and human rights abuses, no matter how large or small, can have a materially adverse result on a public
37 company's operations, financial condition, earnings, and stock prices, all of which can negatively affect the value of an
38 investment; and”

39 WHEREAS, in response to the financial risk posed by investments in companies doing business with a terrorist-
40 sponsoring state, the Securities and Exchange Commission established its Office of Global Security Risk to provide for
41 enhanced disclosure of material information regarding such companies; and

42 WHEREAS, As of January 2008, 22 states had adopted policies of Sudan divestment: Arkansas, California,
43 Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New
44 Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Texas, and Vermont; and

45 WHEREAS, on December 31st, 2007, President George W. bush signed the Sudan Accountability and Divestment
46 Act (S.2271) into law following unanimous approval. The law authorizes state and local governments to adopt targeted
47 Sudan divestment policies and prohibits federal contracts with problematic companies that operate in the Sudan’s oil,
48 power, mineral and military sectors; and

WHEREAS, On January 17, 2008, President George W. Bush renewed calls for action in Darfur by appointing a new special Envoy to Sudan and stated that the situation contuse to require attention: “My administration called this a genocide. Once you label it ‘genocide’ you obviously have to do something about it.”; and

WHEREAS, companies facing such widespread divestment present further material risk to remaining investors; and

WHEREAS, it is a fundamental responsibility of the State of Delaware to decide where, how, and by whom financial resources in its control should be invested, taking into account numerous pertinent factors; and

WHEREAS, it is the prerogative and desire of the State of Delaware,, 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.; and

WHEREAS, it is the judgment of the General Assembly 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; and

WHEREAS, it is the judgment of the General Assembly 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.

NOW THEREFORE:

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1: Amend Title 29, Delaware Code by adding a new Section to read as follows:

“§5124. Sudans Related Investments

As used in this Act, the following definitions shall apply:

(a) Definitions

(1) ‘Active Business Operations’ means all Business Operations that are not Inactive Business Operations.

(2) ‘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.

(3) ‘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.

(4) ‘Complicit’ means taking actions during any preceding twenty (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.

(5) ‘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.

(6) ‘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.

(7) ‘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.

(8) ‘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 Act.

(9) ‘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.

(10) ‘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.

(11) '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.

(12) '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.

(13) '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.

(14) 'Public Funds' means all State pension funds managed or administered by the Board of Pension Trustees as provided in §8308 of this Title.

(15) 'Scrutinized' Company means any Company that meets the criteria in paragraph (1), paragraph (2), or paragraph (3) below:

a. The Company has Business Operations that involve contracts with and/or provision of supplies or services to (i) the Government of Sudan, (ii) Companies in which the Government of Sudan has any direct or indirect equity share, (iii) Government of Sudan-commissioned consortiums or projects, or (iv) Companies involved in Government of Sudan-commissioned consortiums or projects; and

(aa) More than ten percent (10%) of the Company's revenues or assets linked to Sudan involve Oil-Related Activities or Mineral Extraction Activities; less than seventy-five percent (75%) 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

(bb) More than ten percent (10%) of the Company's revenues or assets linked to Sudan involve Power Production Activities; less than seventy-five percent (75%) 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 herein to the contrary, a Social Development Company which is not Complicit in the Darfur genocide shall not be considered a Scrutinized Company.

(16) '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.

(17) '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 non-profit 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.

(b) Identification of Companies

(1) Within 90 days following passage of this Act, the Board 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 Board's judgment, on publicly available information regarding Companies with Business Operations in Sudan, including information provided by non-profit organizations, research firms, international organizations, and government entities; and/or

b. Contacting asset managers contracted by the Board that invest in Companies with Business Operations in Sudan; and/or

c. Contacting other institutional investors that have divested from and/or engaged with Companies that have Business Operations in Sudan.

(2) By the first meeting of the Board following the 90-day period described in subsection (a), the Board shall assemble all Scrutinized Companies identified into a publicly available "Scrutinized Companies List."

(3) The Board shall update the Scrutinized Companies List on a quarterly basis based on evolving information from, among other sources, those listed in subsection (a).

(c) Required Actions

The Board shall adhere to the following procedure for Companies on the Scrutinized Companies List:

(1) Engagement

a. The Board 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 on the Scrutinized Companies List with only Inactive Business Operations, the Board shall send a written notice informing the Company of this Act and encouraging it to continue to refrain from initiating Active Business Operations in Sudan until it is able to avoid Scrutinized Business Operations. The Board shall continue such correspondence on a semi-annual basis.

c. For each Company on the Scrutinized Companies List with Active Business Operations, the Board shall send a written notice informing the Company of its Scrutinized Company status and that it may become subject to divestment by the Board. 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 Board.

d. If, within 90 days following the Board's first engagement with a Company pursuant to sub-paragraph 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 Board'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.

(2) Divestment

(a) If, after 90 days following the Board's first engagement with a Company pursuant to sub-paragraph (c)(1)c. of this section, the Company continues to have Scrutinized Active Business Operations, and only while such Company continues to have Scrutinized Active Business Operations, the Board shall sell, redeem, divest, or withdraw all publicly-traded securities of the Company, except as provided below, according to the following schedule:

(i) At least 50% 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.

(ii) 100% 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 sub-paragraph (c)(1)c. of this section resumes such operations, paragraph (1) shall immediately apply, and the Board shall send a written notice to the Company. The Company shall also be immediately reintroduced onto the Scrutinized Companies List.

(3) Prohibition

At no time shall the Board acquire securities of Companies on the Scrutinized Companies List that have Active Business Operations, except as provided below.

(4) 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 subsections (b) and (c).

(5) Excluded Securities

Notwithstanding anything herein to the contrary, paragraphs (2) and (3) of subsection (c) shall not apply to Indirect Holdings in actively managed investment funds. The Board 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 Board shall replace all applicable investments with investments in the similar fund in an expedited timeframe consistent with prudent investing standards. For the purposes of this Section, “private equity” funds shall be deemed to be actively managed investment funds.

(d) Reporting

(1) Within 30 days of the passage of this Act, the Board shall file a written report to the United States Attorney General detailing the requirements contained in this Act.

(2) The Board shall file a publicly-available report with the Governor and General Assembly that includes the Scrutinized Companies List within 30 days after the list is created.

(3) Annually thereafter, the Board shall file a publicly-available report with the Governor and General Assembly and send copies of that report to the United States Attorney General and the United States Presidential Envoy to Sudan (or an appropriate designee or successor) that includes:

- a. A summary of correspondence relevant to this Act with Companies engaged by the Board;
- b. All investments sold, redeemed, divested, or withdrawn in compliance with this Act; and
- c. All prohibited investments pursuant to this Act.”

Section 3. Provisions for Expiration of Act

This Act shall Sunset upon the occurrence of any of the following:

(a) The Congress or President of the United States declares that the Darfur genocide has been halted for at least 12 months; or

(b) The United States revokes all sanctions imposed against the Government of Sudan; or

(c) The Congress or President of the United States declares 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; or

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

Section 4. Other Legal Obligations

With respect to actions taken in compliance with this Act, including all good faith determinations regarding Companies as required by this Act, the Board 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 Board's securities portfolios.

Section 5. Reinvestment in Certain Companies with Scrutinized Active Business Operations

Notwithstanding anything herein to the contrary, the Board shall be permitted to cease divesting from certain Scrutinized Companies and/or reinvest in certain Scrutinized Companies from which it divested if clear and convincing evidence shows that the value for all assets under management by the Board becomes equal to or less than 99.50% (50 basis points) of the hypothetical value of all assets under management by the Board assuming no divestment for any company had occurred. 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 Board shall provide a written report to the Governor and General Assembly in advance of initial reinvestment, updated semi-annually 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.

Section 6. Enforcement

The Attorney General is charged with enforcing the provisions of this Act and, through any lawful designee, may bring such actions in court as are necessary to do so.

Section 7. Severability

If any one or more provision, section, subsection, sentence, clause, phrase, or word of this legislation 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 legislation shall remain effective and functional notwithstanding such invalidity, illegality, unenforceability or unconstitutionality. The General Assembly hereby declares that it would have passed this legislation, 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 legislation.

SYNOPSIS

This Bill requires that the Board of Pension Trustees divest state-administered pension fund investments from companies, banks and financial institution that have ties to, or activities in Sudan or its instrumentalities

The General Assembly and the State are deeply concerned over the poor human rights situation in Sudan. The General Assembly concurs with the official United States Policy that has declared that genocide is ongoing in the Sudan and calls for stepped-up international efforts to end the crisis.

The government of Sudan is an authoritarian regime that took power in 1989. A large number of human rights abuses perpetrated by the government have been catalogued by the United States Department of State. These human rights abuses include severe restriction on freedoms of assembly, association, movement, and speech. The most sobering violation of human rights in Sudan is the existence of slavery. The pro-government militia continues to engage in abduction and slavery with impunity. The government has routinely violated its pledges to end the 20-year civil war. This war has taken the lives of more than two million people and displaced four million others.

Author: Senator Mc Dowell