

SENATE BILL 248

By Marrero B

AN ACT to enact the "Sudanese Divestment Act of 2009" and to amend Tennessee Code Annotated, Title 4, Chapter 3, Part 24; Title 8, Chapter 34; Title 8, Chapter 35; Title 8, Chapter 36; Title 8, Chapter 37; Title 8, Chapter 5 and Title 9, Chapter 4, relative to public investments in companies operating in Sudan.

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

SECTION 1. Tennessee Code Annotated, Title 8, Chapter 37, Part 1, is amended by adding the following language as a new section:

Section 8-37-117.

(a) This section shall be known and may be cited as the Sudanese Divestment Act of 2009;

(b) The general assembly finds and declares that:

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

(2) On September 9, 2004, Secretary of State Colin L. Powell told the U.S. Senate Foreign Relations committee that "genocide has occurred and may still be occurring in Darfur" and "the Government of Sudan and the Janjaweed bear responsibility";

(3) 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";

(4) On December 7, 2004, the U.S. 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" and 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";

(5) 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";

(6) On September 26, 2006, the U.S. 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";

(7) The Darfur crisis represents the first time the United States Government has labeled ongoing atrocities 'genocide';

(8) The Federal government has imposed sanctions against the Government of Sudan since 1997. These sanctions are monitored through the U.S. Treasury Department's Office of Foreign Assets Control (OFAC);

(9) According to a former chair of the U.S. 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";

(10) Since 1993, the U.S. 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;

(11) A 2006 U.S. 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";

(12) 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;

(13) The current Sudan divestment movement is growing and encompasses individuals, universities, cities, states and private pension plans;

(14) It is a fundamental responsibility of the state of Tennessee to decide where, how, and by whom financial resources in its control should be invested, taking into account numerous pertinent factors;

(15) It is the prerogative and desire of the state of Tennessee 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;

(16) 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

(17) It is the judgment of this 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.

(c) As used in this section, unless the context otherwise requires:

(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-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 (1) 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 this section;

(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 fund" means any funds held by the state treasurer to the credit of the Tennessee consolidated retirement system (TCRS);

(15) "Scrutinized business operations" means business operations that have resulted in a company becoming a scrutinized company;

(16)

(A) "Scrutinized company" means any company that meets one (1) or more of the following criteria:

(i) The company has business operations that involve contracts with, or provision of supplies or services to, the Government of Sudan, to companies in which the Government of

Sudan has any direct or indirect equity share, Government of Sudan-commissioned consortiums or projects, or to Companies involved in Government of Sudan-commissioned consortiums or projects and at least one (1) of the following conditions is satisfied:

(a) 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, 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

(b) 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;

(ii) The company is complicit in the Darfur genocide;

(iii) 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.

(B) Notwithstanding any provision of this section to the contrary, a social development company which is not complicit in the Darfur genocide shall not be considered a scrutinized company;

(17) "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; and

(18) "Substantial action" means adopting, publicizing, and implementing a formal plan to cease scrutinized business operations within one (1) year and to refrain from any such new business operations; undertaking significant humanitarian efforts on behalf of one (1) or more marginalized populations of Sudan; or through engagement with the Government of Sudan, materially improving conditions for the genocidally victimized population in Darfur.

(d)

(1) Within ninety (90) days of the effective date of this act, 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; and

(C) Contacting other institutional investors that have divested from companies that have business operations in Sudan.

(2) By the first meeting of the board of trustees of the public fund following the ninety-day period described in subdivision (d)(1), the public fund shall assemble all scrutinized companies identified into a "scrutinized companies list".

(3) The public fund shall update the scrutinized companies list on a quarterly basis based on evolving information from, among other sources, those listed in subdivision (d)(1).

(e)

(1) The public fund shall adhere to the procedure for companies on the scrutinized companies list as provided in this subsection (e).

(2)

(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 subdivision (e)(2)(A) with only inactive business operations, the public fund shall send a written notice informing the company of the provisions 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 public fund shall continue such correspondence on a semiannual basis.

(C) For each company newly identified in subdivision (e)(2)(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 ninety (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 ninety (90) days following the public fund's first engagement with a company pursuant to subdivision (e)(2)(C), that company ceases scrutinized business operations, the company shall be removed from the scrutinized companies list and the provisions of this subsection (e) shall cease to apply to the company unless it resumes scrutinized business operations. If, within ninety (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 to such operations.

(3)

(A) If, after ninety (90) days following the public fund's first engagement with a company pursuant to subdivision (e)(2)(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 within fifteen (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 subdivision (e)(2)(C) resumes such operations, subdivision (e)(3)(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.

(4)

(A) At no time shall the public fund knowingly acquire securities of companies on the scrutinized companies list that have active business operations, except as provided in this subdivision (e)(4).

(B) 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 subdivisions (e)(3) and (e)(4)(A).

(C) Subdivisions (e)(3) and (e)(4)(A) 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.

(f)

(1) One hundred twenty (120) days after the effective date of this act, the public fund shall file a report to the general assembly that includes the scrutinized companies list.

(2) Annually beginning one (1) year after the effective date of this act, the public fund shall file a report to the general assembly and send a copy of that report to the United States Presidential Special Envoy to Sudan, or an appropriate designee or successor, which includes:

(A) A summary of correspondence with companies engaged by the public fund under subdivisions (e)(2)(B) and (2)(C);

(B) All investments sold, redeemed, divested, or withdrawn in compliance with subdivision (e)(3);

(C) All prohibited investments under subdivision (e)(4)(A); and

(D) Any progress made under subdivision (e)(4)(C).

(g)

(1) The restrictions on investments by the public fund pursuant to this section shall continue until a written determination is made by the treasurer finding this section obsolete based on the occurrence of any one (1) of the following events:

(A) A declaration by Congress or President of the United States stating that the Darfur genocide has been halted for at least twelve (12) months;

(B) Revocation by the United States of all sanctions imposed against the Government of Sudan;

(C) A declaration by Congress or President of the United States stating 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) Legislative or executive action by Congress or President of the United States declaring that mandatory divestment of the type provided for in this section interferes with the conduct of United States foreign policy.

(2) Any written determination pursuant to subdivision (g)(1) shall be transmitted to the public fund board of trustees, speaker of the senate, speaker of the house of representatives, governor and commissioner of finance and administration. Within thirty (30) days of any such determination, the treasurer

shall notify the executive secretary of the Tennessee code commission that this section is deemed to be obsolete.

(h) With respect to actions taken in compliance with this section, including all good faith determinations regarding companies as required by this section, 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.

(i) Notwithstanding any provision of this section to the contrary, the public fund is permitted to cease divesting from certain scrutinized companies pursuant to subdivision (e)(3) or reinvest in certain scrutinized companies from which it divested pursuant to subdivision (e)(3) if clear and convincing evidence shows that the value for all assets under management by the public fund becomes equal to or less than ninety-nine and five-tenths percent (99.50%), fifty (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 subdivision (e)(3). Cessation of divestment, reinvestment, or any subsequent ongoing investment authorized by this subsection (i) 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, or subsequent ongoing investment authorized by this subsection (i), the public fund shall provide a written report to the general assembly 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, or remain invested in companies with scrutinized active business operations. This subsection (i) has no application to reinvestment in companies on the ground that they have ceased to have scrutinized active business operations.

SECTION 2. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 3. This act shall take effect upon becoming a law, the public welfare requiring it.