LEGISLATURE OF NEBRASKA
ONE HUNDREDTH LEGISLATURE
SECOND SESSION

LEGISLATIVE BILL 992

Introduced by Avery, 28.

Read first time January 16, 2008

Committee: Nebraska Retirement Systems

A BILL

1 FOR AN ACT relating to state funds; to amend section 72-1260,
2 Reissue Revised Statutes of Nebraska, and section
3 84-1309.01, Revised Statutes Cumulative Supplement, 2006;
4 to provide duties and responsibilities relating to public
5 funds invested in Sudan-related companies; to harmonize
6 provisions; and to repeal the original sections.
7 Be it enacted by the people of the State of Nebraska,
Section 1. The Legislature 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, the United States Secretary of State told the United States 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, the President of the United States affirmed the Secretary of State's finding and stated, "[A]t 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 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";

(5) Also on December 7, 2004, the 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";

(6) On September 25, 2006, the 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";

(7) 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 [Darfur] 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";

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

(9) The United States 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);

(10) According to a former chair of the United States
Securities and Exchange Commission (SEC), "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”;

(11) Since 1993, the 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;

(12) A 2006 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”;

(13) 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;

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

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

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

(17) It is the prerogative and desire of the State
of Nebraska, 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 non-United States
companies doing business in Sudan;

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

(19) It is the judgment of the Legislature that mandatory
divestment of state 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.

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

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

Sec. 4. 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.

Sec. 5. 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.

Sec. 6. Complicit means taking actions during any preceding twenty-month period which have 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.

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

Sec. 8. 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.

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

Sec. 10. 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 state, in which the state owns shares or interests together
with other investors not subject to the provisions of sections 1 to
25 of this act.

Sec. 11. 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.

Sec. 12. 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.

Sec. 13. Mineral extraction activities include exploring,
extracting, processing, transporting, or wholesale selling or
trading of elemental minerals or associated metal alloys or oxides,
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.

Sec. 14. 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, except that the retail sale
of gasoline and related consumer products shall not be considered
oil-related activities.

Sec. 15. Power production activities means any business
operation that involves a project commissioned by the National
Electricity Corporation 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.

Sec. 16. Scrutinized company means any company:

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

(i) Of which more than ten percent of its revenue or
assets linked to Sudan involve oil-related activities or mineral
evacuation activities, of which less than seventy-five percent of
the company’s revenue 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
which has failed to take substantial action; or

(ii) Of which more than ten percent of its revenue
or assets linked to Sudan involve power production activities,
of which less than seventy-five 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
which has failed to take substantial action;
(2) That is complicit in the Darfur genocide; or

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

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

Sec. 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.

Sec. 18. Substantial action means (1) adopting,
publicizing, and implementing a formal plan to cease scrutinized
business operations within one year and to refrain from any such
new business operations, (2) undertaking significant humanitarian
efforts, in conjunction with an international organization, the
Government of Sudan, the regional government of southern Sudan, or
a nonprofit entity, 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 (3) through engagement with the Government
of Sudan, materially improving conditions for the genocidally
victimized population in Darfur.

Sec. 19. (1) Within ninety days after the effective date
of this act, the state investment officer shall make his or her
best efforts to identify all scrutinized companies in which the
state has direct holdings or indirect holdings or could possibly
have such holdings in the future. Such efforts shall include, as
appropriate:

(a) Reviewing and relying on publicly available
information regarding companies with business operations in Sudan,
including information provided by nonprofit organizations, research
firms, international organizations, an government entities;

(b) Contacting asset managers that invest in companies
with business operations in Sudan; and

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

(2) The state investment officer shall assemble all
scrutinized companies identified into a scrutinized companies list.

(3) The state investment officer shall update the
scrutinized companies list on a quarterly basis based on evolving
information from, among other sources, those listed in subsection
(1) of this section.

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

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

(2) For each company identified in subdivision (1) of
this section with only inactive business operations, the state
investment officer shall send a written notice informing the
company of the provisions of sections 1 to 25 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 state investment officer shall continue
such correspondence on a semiannual basis;

(3) For each company newly identified in subdivision
(1) of this section with active business operations, the state
investment officer shall send a written notice informing the
company of its scrutinized company status and that it may
become subject to divestment by the state. The notice shall
offer the company the opportunity to clarify its Sudan-related
activities and shall encourage the company, within ninety days
after the date notice was sent, to either cease its scrutinized
business operations or convert such operations to inactive business
operations in order to avoid qualifying for divestment;

(4) If, within ninety days after the state investment
officer’s first engagement with a company pursuant to subdivision
(3) of this section, the 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 ninety days after the state investment officer’s
first engagement under such subdivision, the company converts
its scrutinized active business operations to inactive business
operations, the company shall be subject to all provisions relating
to such operations;

(5) If the company continues to have scrutinized
active business operations ninety days after the state investment
officer’s first engagement with a company pursuant to subdivision
(3) of this section, and only while such company continues to
have scrutinized active business operations, the state investment
officer shall sell, redeem, divest, or withdraw all publicly traded
securities of the company, except as provided in this section,
according to the following schedule:
(i) At least fifty percent of such securities shall be removed within nine months after the company’s most-recent appearance on the scrutinized companies list; and

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

(6) If a company that ceased scrutinized active business operations after engagement pursuant to subdivision (3) of this section resumes such operations, subdivision (1) of this section shall immediately apply, and the state investment officer shall send a written notice to the company. The company shall also be immediately reintroduced onto the scrutinized companies list.

At no time shall the state acquire securities of companies on the scrutinized companies list that have active business operations except as provided in this section.

No company which the United States Government affirmatively declares to be excluded from its present or future sanctions relating to Sudan shall be subject to divestment or investment prohibition pursuant to this section.

This section does not apply to indirect holdings in actively managed investment funds. The state investment officer shall 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 state investment officer shall replace all applicable
investments with investments in the similar fund in an expedited
timeframe consistent with prudent investing standards. For purposes
of this section, private equity funds shall be deemed to be
actively managed investment funds.

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

(2) Annually thereafter, the state investment officer
shall file a publicly available report with the Clerk of the
Legislature and Attorney General and send a copy of the 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 state investment officer under section 20 of this act;

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

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

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

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

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

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

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

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

Sec. 23. Sections 1 to 25 of this act apply to state
funds administered by the State of Nebraska and invested by
the Nebraska Investment Council and the state investment officer
pursuant to the Nebraska State Funds Investment Act except for:

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

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

With respect to actions taken in compliance with sections 1 to 25 of this act, including all good-faith determinations regarding companies as required by such sections, the state investment officer 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 state funds.

Sec. 24. The state investment officer shall be permitted to cease divesting from scrutinized companies or reinvest in scrutinized companies from which he or she divested if clear and convincing evidence shows that the value for all assets under management by the state investment officer becomes equal to or less than 99.50 percent of the hypothetical value of all assets under management by the state investment officer assuming no divestment for any company had occurred. Cessation of divestment, reinvestment, 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 this section. For any cessation of divestment, reinvestment, or subsequent ongoing investment authorized by this section, the state investment officer shall provide a written report to the Clerk of the Legislature and Attorney General 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 section

has no application to reinvestment in companies on the ground that

they have ceased to have scrutinized active business operations.

Sec. 25. The Attorney General shall enforce the

provisions of sections 1 to 25 of this act and may bring such

actions in court as are necessary to do so.

Sec. 26. Section 72-1260, Reissue Revised Statutes of

Nebraska, is amended to read:

72-1260 Sections 72-1237 to 72-1260 and sections 1 to 25

of this act shall be known and may be cited as the Nebraska State

Funds Investment Act.

Sec. 27. Section 84-1309.01, Revised Statutes Cumulative

Supplement, 2006, is amended to read:

84-1309.01 The board shall provide benefit liability

information and other assistance to the Nebraska Investment Council

for the establishment of policy portfolio objectives for the

investing and reinvesting of the assets of the retirement system.

The board shall verify that the investments of the assets of the

retirement system by the council and the state investment officer

are invested and reinvested for the exclusive purposes of providing

benefits to members and members’ beneficiaries and that the assets

of the retirement system are not invested with the sole or primary

investment objective of economic development or social purposes or

objectives except as provided in sections 1 to 25 of this act.
Such verification shall be included in the written plan of action pursuant to subsection (3) of section 84-1503.

Sec. 28. Original section 72-1260, Reissue Revised Statutes of Nebraska, and section 84-1309.01, Revised Statutes Cumulative Supplement, 2006, are repealed.