

HOUSE BILL NO. 619
INTRODUCED BY M. JOPEK

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THE BOARD OF INVESTMENTS TO DIVEST FROM CERTAIN INVESTMENTS IN CERTAIN COMPANIES THAT CONDUCT CERTAIN BUSINESS ACTIVITIES IN SUDAN OR WITH THE GOVERNMENT OF SUDAN; REQUIRING THAT THE BOARD OF INVESTMENTS PROVIDE CERTAIN NOTICES AND CERTAIN REPORTS REGARDING THE INVESTMENT OR DIVESTMENT OF PUBLIC FUNDS; ALLOWING THE BOARD OF INVESTMENTS TO INVEST IN CERTAIN COMPANIES FROM WHICH THE BOARD HAD PREVIOUSLY BEEN REQUIRED TO DIVEST; AMENDING SECTION 17-6-201, MCA; AND PROVIDING A TERMINATION DATE."

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

WHEREAS, 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"; and

WHEREAS, on September 21, 2004, addressing the United Nations General Assembly, President George W. Bush 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"; and

WHEREAS, on December 7, 2004, the U.S. Congress noted that the genocidal policy in Darfur had 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

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

WHEREAS, 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"; and

WHEREAS, 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 [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"; and

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

WHEREAS, the United States government has imposed sanctions against the government of Sudan since 1997, which sanctions are monitored through the U.S. Treasury Department's Office of Foreign Assets Control (OFAC); and

WHEREAS, according to a former chairman 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"; and

WHEREAS, since 1993, the U.S. Secretary of State has determined that the government of Sudan 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; and

WHEREAS, 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"; and

WHEREAS, 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; and

WHEREAS, the current Sudan divestment movement encompasses nearly 100 universities, cities, states, and private pension plans; and

WHEREAS, on December 31, 2007, President George W. Bush signed the Sudan Accountability and Divestment Act (S.2271, 110th Congress). The legislation unanimously passed both the U.S. Senate and U.S. House of Representatives. The law authorizes state and local governments to adopt targeted Sudan divestment policies and prohibits federal contracts with problematic companies that operate in the Sudan's oil, power, mineral, and military sectors.

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

WHEREAS, it is a fundamental responsibility of the State of Montana, through its Board of Investments, to decide where, how, and by whom financial resources under the Board's control should be invested, taking into account numerous pertinent factors; and

WHEREAS, it is the prerogative and desire of the State of Montana, with 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 Senate and the House of Representatives of the State of Montana that this legislation 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 Senate and the House of Representatives of the State of Montana that mandatory divestment of public funds from certain companies is a measure that should be employed sparingly and judiciously; and

WHEREAS, the Congressional and Presidential declarations of genocide satisfy this high threshold.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Definitions.** As used in [sections 1 through 6], the following definitions apply:

- (1) "Active business operations" means all business operations that are not inactive business operations.
- (2) "Board" means the board of investments provided for in 2-15-1808.
- (3) "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.
- (4) "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 the entities or business associations, that exists for profit-making purposes.

(5) "Complicit" means taking an action during any preceding 20-month period that has directly supported or promoted the genocidal campaign in Darfur, including but not limited to preventing Darfur's victimized population from communicating among its members or with independent journalists, 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.

(6) "Direct holdings" means all securities of a company held directly by the board or in an account or fund in which the board owns all shares or interests.

(7) (a) "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.

(b) The government of Sudan as used in [sections 1 through 6] does not mean the regional government of southern Sudan.

(8) "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 that purpose.

(9) "Indirect holdings" means all securities of a company held in an account or fund, such as a mutual fund, that is managed by one or more persons not employed by the board and in which the board owns shares or interests together with other investors who are not subject to the provisions of [sections 1 through 6].

(10) "Marginalized populations of Sudan" means:

- (a) the portion of the population in the Darfur region that has been genocidally victimized;
- (b) the portion of the population of southern Sudan victimized by Sudan's north-south civil war;
- (c) the Beja, Rashidiya, and other similarly underserved groups of eastern Sudan and the Nubian and other similarly underserved groups in Sudan's Abyei, southern Blue Nile, and mountain regions; and
- (d) the Amri, Hamadab, Manasir, and other similarly underserved groups of northern Sudan.

(11) "Military equipment" means:

- (a) weapons, arms, military supplies, and equipment that readily may be used for military purposes, including but not limited to radar systems and military-grade transport vehicles; or
- (b) supplies or services sold or provided directly or indirectly to any force actively participating in armed conflict in Sudan.

(12) "Mineral extraction activities" means 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 those activities, including by providing supplies or services in support of those activities.

(13) (a) "Oil-related activities" means:

- (i) owning rights to oil blocks;
- (ii) exporting, extracting, producing, refining, processing, exploring for, transporting, selling, or trading oil;
- (iii) constructing, maintaining, or operating a pipeline, refinery, or other oilfield infrastructure; and
- (iv) facilitating any of the activities described in subsections (13)(a)(i) through (13)(a)(iii), including by providing supplies or services in support of the activities.

(b) The mere retail sale of gasoline and related consumer products is not considered oil-related activity.

(14) "Power production activities" means any business operation that involves a project commissioned by the national electricity corporation of Sudan or any other similar government of Sudan entity whose purpose is to facilitate power generation or 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, and facilitating activities associated with the project, including by providing supplies or services in support of project activities.

(15) (a) "Scrutinized company" means a company that:

- (i) has business operations that involve contracts with or the provision of supplies or services to:
 - (A) the government of Sudan;
 - (B) a company in which the government of Sudan has any direct or indirect equity share;
 - (C) a government of Sudan-commissioned consortium or project; or
 - (D) a company involved in a government of Sudan-commissioned consortium or project and:
 - (I) more than 10% of the company's revenues or assets linked to Sudan involve oil-related activities or mineral extraction activities unless more than 75% of the company's revenues or assets linked to Sudan involve contracts with or the provision of oil-related or mineral extracting products or services to the regional government of southern Sudan or to a project or consortium created exclusively by the government of southern Sudan and the company has failed to take substantial action; or
 - (II) more than 10% of the company's revenues or assets linked to Sudan involve power production activities, unless more than 75% of the company's power production activities include government of Sudan 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) is complicit in the Darfur genocide; or

(iii) supplies military equipment within Sudan unless the company 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 the purposes of this subsection (15)(a)(iii), rigorous and verifiable safeguards are indicated through post-sale tracking of the equipment by the company, certification from a reputable and objective third party that the equipment is not being used by a party participating in armed conflict in Sudan, or sale of the equipment solely to the regional government of southern Sudan or any internationally recognized peacekeeping force or humanitarian organization.

(b) The term does not include a social development company that is not complicit in the Darfur genocide.

(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) (a) "Substantial action" means:

(i) adopting, publicizing, and implementing a formal plan to cease scrutinized business operations within 1 year and to refrain from any new business operations that are performed by a scrutinized company; or

(ii) undertaking significant humanitarian efforts in conjunction with an international organization, the government of Sudan, the regional government of southern Sudan, or a nonprofit entity.

(b) For an action described in subsection (17)(a)(i) or (17)(a)(ii) to be considered a substantial action by a company, the action must be evaluated and certified by an independent third party to be substantial:

(i) in relationship to the company's Sudan business operations and of benefit to one or more marginalized populations of Sudan; or

(ii) through the company's engagement with the government of Sudan, materially improving conditions for the genocidally victimized population in Darfur.

NEW SECTION. Section 2. Identification of companies. (1) On or before [90 days after the effective date of this act], the board shall identify all scrutinized companies in which the board has direct or indirect holdings or could possibly have the holdings in the future. The board's efforts must include, as appropriate:

(a) reviewing and relying on, as appropriate in the board's judgment, 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 board 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) At least 2 weeks prior to the first meeting of the board held after [90 days after the effective date of this act], the board shall prepare a list of all scrutinized companies and make the list available on the board's website.

(3) The board shall update the list on a quarterly basis based on evolving information from, among other sources, the sources listed in subsection (1).

NEW SECTION. Section 3. Required actions. (1) Immediately upon compiling and after each update of the scrutinized companies list described in [section 2], the board shall determine the companies on the list in which the board owns direct or indirect holdings.

(2) The board shall semiannually send a written notice to each company on the scrutinized companies list that has only inactive business operations, informing the company of the provisions of [sections 1 through 6] and encouraging it to continue to refrain from initiating active business operations in Sudan until it is able to avoid scrutinized business operations.

(3) At least semiannually, the board shall send a written notice to each company on the scrutinized companies list that has active business operations, informing the company of its scrutinized company status and that it may become subject to divestment or prohibition by the board. The notice must offer the company the opportunity to clarify its Sudan-related activities and must encourage the company to, within 90 days:

(a) cease its scrutinized business operations; or

(b) convert its scrutinized business operations to inactive business operations.

(4) If, within 90 days following the board's first engagement with a company pursuant to subsection (3):

(a) the company ceases scrutinized business operations, the board shall remove the company from the scrutinized companies list and the provisions of [sections 1 through 6] cease to apply to the company unless it resumes scrutinized business operations; and

(b) the company converts its scrutinized active business operations to inactive business operations, the company is subject to only the provisions of this section relating to inactive business operations.

(5) If, after 90 days following the board's first engagement with a company to which the board sent notice

pursuant to subsection (3) the company continues to have scrutinized active business operations, and only while the company continues to have scrutinized active business operations, the board shall sell, redeem, divest, or withdraw all publicly traded securities of the company according to the following schedule:

(a) within 9 months after the company's most recent appearance on the scrutinized companies list, the board shall divest at least 50% of the company's assets managed by the board; and

(b) within 15 months after the company's most recent appearance on the scrutinized companies list, the board shall divest 100% of the company's assets managed by the board.

(6) If a company that ceased scrutinized active business operations following engagement pursuant to subsection (3) resumes the operations, the provisions of subsection (1) apply and the board shall immediately send a written notice to the company and reinstate the company on the scrutinized companies list.

(7) The board may not acquire securities of a company on the scrutinized companies list that has active business operations, except as provided in subsection (8) or (9).

(8) A company that the United States government affirmatively declares to be excluded from its sanctions regime relating to Sudan is not subject to divestment or investment prohibition pursuant to subsections (5) through (7).

(9) Except as otherwise provided in this section, subsections (5) through (7) do not apply to indirect holdings in actively managed investment funds. However, the board shall send a letter to the manager of each investment fund in which the board has invested funds that contains indirect holdings of a company with scrutinized active business operations and request the manager to consider removing the company from the fund or create a similar actively managed fund with indirect holdings devoid of the company. If the manager creates a similar fund, the board shall replace all investments that must be divested with investments in the similar fund in an expedited timeframe, consistent with prudent investing standards. For the purposes of this section, a private equity fund is considered to be an actively managed investment fund.

NEW SECTION. Section 4. Reporting. (1) On or before [30 days after the effective date of this act], the board shall send a copy of [sections 1 through 6] to the United States attorney general.

(2) (a) Within 30 days after the list of scrutinized companies required in [section 2] is created and by September 1 each year thereafter, the board shall provide a report to:

- (i) the legislature and attorney general;
- (ii) the United States attorney general; and
- (iii) the United States secretary of state.

- (b) The report must include:
 - (i) the list of scrutinized companies required to be prepared in [section 2];
 - (ii) a summary of correspondence with companies engaged by the board pursuant to [section 3(2) and (3)];
 - (iii) a list of all investments sold, redeemed, divested, or withdrawn in compliance with [section 3(5) and (6)];
 - (iv) a list of all prohibited investments under [section 3(7)]; and
 - (c) a detailed description of progress made pursuant to [section 3(9)].

NEW SECTION. Section 5. Other legal obligations. Subject to the provisions of [sections 1 through 6], including all good faith determinations regarding companies as required by [sections 1 through 6], the board is authorized to conduct business as a prudent investor with respect to choice of asset managers, investment funds, and investments of the assets entrusted to the board for investment purposes.

NEW SECTION. Section 6. Reinvestment. (1) Except as provided in [sections 1 through 6], the board may cease divesting from certain scrutinized companies pursuant to [section 3(5) or (6)] or reinvest in certain scrutinized companies from which it divested pursuant to [section 3(5)] if clear and convincing evidence shows that the ratio the market value of all assets under management by the board bears to the sum of the market value of all assets under management by the board, plus the market value of all divestment executed pursuant to [section 3], is not less than 0.995 to 1.

(2) (a) The cessation of divestment or the reinvestment or any subsequent ongoing investment authorized by this section is strictly limited to the minimum steps necessary to maintain the minimum ratio required in subsection (1).

(b) For any action considered to be a cessation of divestment or a reinvestment or subsequent ongoing investment authorized by this section, the board shall provide a written report to the legislature and attorney general in advance of the action, setting forth the reasons and justification for the action and supported by clear and convincing evidence, for its decisions to cease divestment or to reinvest or remain invested in a company engaged in scrutinized active business operations.

(3) This section does not apply to reinvestment in a company if the company has ceased to have scrutinized active business operations.

Section 7. Section 17-6-201, MCA, is amended to read:

"17-6-201. Unified investment program -- general provisions. (1) The unified investment program directed by Article VIII, section 13, of the Montana constitution to be provided for public funds must be administered by the board of investments in accordance with [sections 1 through 6] and the prudent expert principle; ~~which~~ The prudent expert principle requires an investment manager to:

(a) discharge the duties with the care, skill, prudence, and diligence, under the circumstances then prevailing, that a prudent person acting in a like capacity with the same resources and familiar with like matters exercises in the conduct of an enterprise of a like character with like aims;

(b) diversify the holdings of each fund within the unified investment program to minimize the risk of loss and to maximize the rate of return unless, under the circumstances, it is clearly prudent not to do so; and

(c) discharge the duties solely in the interest of and for the benefit of the funds forming the unified investment program.

(2) (a) ~~Retirement~~ Except as provided in [sections 1 through 6], retirement funds may be invested in common stocks of any corporation.

(b) Other public funds are subject to the provisions of [sections 1 through 6] and may not be invested in private corporate capital stock. "Private corporate capital stock" means only the common stock of a corporation.

(3) (a) ~~This~~ Except as provided in [sections 1 through 6], this section does not prevent investment in any business activity in Montana, including activities that continue existing jobs or create new jobs in Montana.

(b) The board is urged under the prudent expert principle to invest up to 3% of retirement funds in venture capital companies. Whenever possible, preference should be given to investments in those venture capital companies that demonstrate an interest in making investments in Montana.

(c) In discharging its duties, the board shall consider the preservation of purchasing power of capital during periods of high monetary inflation.

(d) The board may not make a direct loan to an individual borrower. The purchase of a loan or a portion of a loan originated by a financial institution is not considered a direct loan.

(4) The board has the primary authority to invest state funds. Another agency may not invest state funds unless otherwise provided by law. The board shall direct the investment of state funds in accordance with the laws and constitution of this state. The board has the power to veto investments made under its general supervision.

(5) The board shall:

(a) assist agencies with public money to determine if, when, and how much surplus cash is available for

investment;

(b) determine the amount of surplus treasury cash to be invested;

(c) determine the type of investment to be made;

(d) prepare the claim to pay for the investment; ~~and~~

(e) keep an account of the total of each investment fund and of all the investments belonging to the fund and a record of the participation of each treasury fund account in each investment fund; and

(f) execute the reporting, notice, and divestment requirements provided for in [sections 1 through 6].

(6) The board may:

(a) execute deeds of conveyance transferring real property obtained through investments. Prior to the transfer of real property directly purchased and held as an investment, the board shall obtain an appraisal by a qualified appraiser.

(b) direct the withdrawal of funds deposited by or for the state treasurer pursuant to 17-6-101 and 17-6-105;

(c) direct the sale of securities in the program at their full and true value when found necessary to raise money for payments due from the treasury funds for which the securities have been purchased.

(7) The cost of administering and accounting for each investment fund must be deducted from the income from each fund, other than the fund derived from land granted to the state pursuant to the Morrill Act of 1862, 7 U.S.C. 301 through 308, and the Morrill Act of 1890, 7 U.S.C. 321 through 329. An appropriation to pay the costs of administering and accounting for the Morrill Act fund is provided for in 77-1-108."

NEW SECTION. Section 8. Codification instruction. [Sections 1 through 6] are intended to be codified as an integral part of Title 17, chapter 6, and the provisions of Title 17, chapter 6, apply to [sections 1 through 6].

NEW SECTION. Section 9. Termination. [Sections 1 through 7] terminate immediately if:

(1) the congress or the president of the United States declares that the Darfur genocide has been halted for at least 12 months;

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

(3) 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

(4) the congress or president of the United States, through legislation or by executive order, declares that mandatory divestment of the type provided for in [sections 1 through 6] interferes with the conduct of foreign policy of the United States.

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