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SENATE BILL NO. 1331

Offered January 12, 2007

A BILL to govern the Virginia Retirement System's investments in certain companies related to Sudan.

Patrons—Cuccinelli, Devoletes Davis and Ticer; Delegates: Bulova, Ebbin, Marshall, R.G., O'Bannon, Plum, Scott, J.M., Sickles, Valentine and Watts

Referred to Committee on Finance

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 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

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 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); and

Whereas, 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"; and

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

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58 Whereas, it is a fundamental responsibility of the Commonwealth of Virginia to decide where, how,
59 and by whom financial resources in its control should be invested, taking into account numerous
60 pertinent factors; and

61 Whereas, it is the prerogative and desire of the Commonwealth of Virginia, in respect to investment
62 resources in its control and to the extent reasonable, with due consideration for, among other things,
63 return on investment, on behalf of itself and its investment beneficiaries, not to participate in an
64 ownership or capital-providing capacity with entities that provide significant practical support for
65 genocide, including certain non-United States companies presently doing business in Sudan; and

66 Whereas, it is the judgment of the General Assembly that this Act should remain in effect only
67 insofar as it continues to be consistent with, and does not unduly interfere with, the foreign policy of the
68 United States as determined by the federal government; and

69 Whereas, it is the judgment of the General Assembly that mandatory divestment of public funds from
70 certain companies is a measure that should be employed sparingly and judiciously, and that a
71 Congressional and Presidential declaration of genocide satisfies this high threshold; now, therefore,

72 **Be it enacted by the General Assembly of Virginia:**

73 **1. §1. Definitions. As used in this act, the following definitions shall apply:**

74 *"Active business operations" means all business operations that are not inactive business operations.*

75 *"Business operations" means engaging in commerce in any form in Sudan, including by acquiring,
76 developing, maintaining, owning, selling, possessing, leasing, or operating equipment, facilities,
77 personnel, products, services, personal property, real property, or any other apparatus of business or
78 commerce.*

79 *"Company" means any sole proprietorship, organization, association, corporation, partnership, joint
80 venture, limited partnership, limited liability partnership, limited liability company, or other entity or
81 business association, including all wholly-owned subsidiaries, majority-owned subsidiaries, parent
82 companies, or affiliates of such entities or business associations, that exists for profit-making purposes.*

83 *"Complicit" means taking actions during any preceding 20-month period which have directly
84 supported or promoted the genocidal campaign in Darfur, including, but not limited to, preventing
85 Darfur's victimized population from communicating with each other, encouraging Sudanese citizens to
86 speak out against an internationally approved security force for Darfur, actively working to deny, cover
87 up, or alter the record on human rights abuses in Darfur, or other similar actions.*

88 *"Direct holdings" in a company means all securities of that company held directly by the public fund
89 or in an account or fund in which the public fund owns all shares or interests.*

90 *"Government of Sudan" means the government in Khartoum, Sudan, which is led by the National
91 Congress Party (formerly known as the National Islamic Front) or any successor government formed on
92 or after October 13, 2006 (including the coalition National Unity Government agreed upon in the
93 Comprehensive Peace Agreement for Sudan) and does not include the regional government of southern
94 Sudan.*

95 *"Inactive business operations" means the mere continued holding or renewal of rights to property
96 previously operated for the purpose of generating revenues but not presently deployed for such purpose.*

97 *"Indirect holdings" in a company means all securities of that company held in an account or fund,
98 such as a mutual fund, managed by one or more persons not employed by the public fund, in which the
99 public fund owns shares or interests together with other investors not subject to the provisions of this
100 act.*

101 *"Marginalized populations of Sudan" include, but are not limited to, the portion of the population in
102 the Darfur region that has been a victim of genocide; the portion of the population of southern Sudan
103 victimized by Sudan's North-South civil war; the Beja, Rashidiya, and other similarly underserved
104 groups of eastern Sudan; the Nubian and other similarly underserved groups in Sudan's Abyei, Southern
105 Blue Nile, and Nuba Mountain regions; and the Amri, Hamadab, Manasir, and other similarly
106 underserved groups of northern Sudan.*

107 *"Military equipment" means weapons, arms, military supplies, and equipment that readily may be
108 used for military purposes, including, but not limited to, radar systems or military-grade transport
109 vehicles; or supplies or services sold or provided directly or indirectly to any force actively
110 participating in armed conflict in Sudan.*

111 *"Oil-related activities" include, but are not limited to, owning rights to oil blocks; exporting,
112 extracting, producing, refining, processing, exploring for, transporting, selling, or trading of oil;
113 constructing, maintaining, or operating a pipeline, refinery, or other oil-field infrastructure; and
114 facilitating such activities, including by providing supplies or services in support of such activities,
115 provided that the mere retail sale of gasoline and related consumer products shall not be considered
116 oil-related activities.*

117 *"Power production activities" means any business operation that involves a project commissioned by
118 the National Electricity Corporation (NEC) of Sudan or other similar Government of Sudan entity whose
119 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.

"Public fund" means the assets of the Virginia Retirement System or the Board of Trustees of that system.

"Scrutinized company" means any company that meets the criteria in paragraph 1, 2, or 3 below:

1. The company has business operations that involve contracts with or 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) more than 10% of the company's revenues or assets linked to Sudan involve oil-related activities; less than 75% of the company's revenues or assets linked to Sudan involve contracts with and/or provision of oil-related 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 (ii) more than 10% of the company's revenues or assets linked to Sudan involve power production activities; less than 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.

2. The company is complicit in the Darfur genocide.

3. 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.

"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 not oil-related or power production activities.

"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 on behalf of one or more marginalized populations of Sudan; or through engagement with the Government of Sudan, materially improving conditions for the victimized population in Darfur.

§ 2. Identification of Companies

Within 90 days following passage 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:

1. 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 non-profit organizations, research firms, international organizations, and government entities;

2. Contacting asset managers contracted by the public fund that invest in companies with business operations in Sudan; and

3. Contacting other institutional investors that have divested from and/or engaged with companies that have business operations in Sudan.

By the first meeting of the public fund following the 90-day period described in this section, the public fund shall assemble all scrutinized companies identified into a "scrutinized companies list."

The public fund shall update the scrutinized companies list on a semi-annual basis based on evolving information from, among other sources, those listed in this section.

§ 3. Required actions.

The public fund shall adhere to the following procedure for companies on the scrutinized companies list:

A. Engagement.

1. The public fund shall immediately determine the companies on the scrutinized companies list in which the public fund owns direct or indirect holdings.

181 2. For each company identified in subdivision 1 with only inactive business operations, the public
182 fund shall send a written notice informing the company of this Act and encouraging it to continue to
183 refrain from initiating active business operations in Sudan until it is able to avoid scrutinized business
184 operations. The public fund shall continue such correspondence on a semi-annual basis.

185 3. For each company newly identified in subdivision 1 with active business operations, the public
186 fund shall send a written notice informing the company of its scrutinized company status and that it may
187 become subject to divestment by the public fund. The notice shall offer the company the opportunity to
188 clarify its Sudan-related activities and shall encourage the company, within 90 days, to either cease its
189 scrutinized business operations or convert such operations to inactive business operations in order to
190 avoid qualifying for divestment by the public fund.

191 4. If, within 90 days following the public fund's first engagement with a company pursuant to
192 subdivision 3, that company ceases scrutinized business operations, the company shall be removed from
193 the scrutinized companies list and the provisions of this section shall cease to apply to it unless it
194 resumes scrutinized business operations. If, within 90 days following the public fund's first engagement,
195 the company converts its scrutinized active business operations to inactive business operations, the
196 company shall be subject to all provisions relating thereto.

197 B. Divestment.

198 1. If, after 90 days following the public fund's first engagement with a company pursuant to
199 subdivision A3, the company continues to have scrutinized active business operations, and only while
200 such company continues to have scrutinized active business operations, the public fund shall sell,
201 redeem, divest, or withdraw all publicly-traded securities of the company, except as provided below,
202 according to the following schedule: (i) At least 50% of such assets shall be removed from the public
203 fund's assets under management by nine months after the company's most recent appearance on the
204 scrutinized companies list, and (ii) 100% of such assets shall be removed from the public fund's assets
205 under management within 15 months after the company's most recent appearance on the scrutinized
206 companies list.

207 2. If a company that ceased scrutinized active business operations following engagement pursuant to
208 subdivision A3 resumes such operations, the provisions of subdivision 1 shall immediately apply, and the
209 public fund shall send a written notice to the company. The company shall also be immediately
210 reintroduced onto the scrutinized companies list.

211 C. Prohibition.

212 At no time shall the public fund acquire securities of companies on the scrutinized companies list
213 that have active business operations, except as provided subsections D and E.

214 D. Exemption.

215 No company which the United States Government affirmatively declares to be excluded from its
216 present or any future federal sanctions regime relating to Sudan shall be subject to divestment or
217 investment prohibition pursuant to subsections B and C.

218 E. Excluded securities.

219 Notwithstanding anything herein to the contrary, subsections B and C shall not apply to indirect
220 holdings in actively managed investment funds. The public fund shall, however, submit letters to the
221 managers of such investment funds containing companies with scrutinized active business operations
222 requesting that they consider removing such companies from the fund or create a similar actively
223 managed fund with indirect holdings devoid of such companies. If the manager creates a similar fund,
224 the public fund shall replace all applicable investments with investments in the similar fund in an
225 expedited time frame consistent with prudent investing standards. For the purposes of this section,
226 "private equity" funds shall be deemed to be actively managed investment funds.

227 § 4. Reporting.

228 A. The public fund shall file a publicly available report to the General Assembly and Attorney
229 General that includes the scrutinized companies list within 30 days after the list is created.

230 B. Annually thereafter, the public fund shall file a publicly available report to the General Assembly
231 and Attorney General and send a copy of that report to the United States Presidential Special Envoy to
232 Sudan (or an appropriate designee or successor) that includes:

233 1. A summary of correspondence with companies engaged by the public fund under subdivision A2 of
234 § 3 and subdivision A3 of § 3;

235 2. All investments sold, redeemed, divested, or withdrawn in compliance with Section 4(b);

236 3. All prohibited investments under subsection C of § 3; and

237 4. Any progress made under subsection E of § 3.

238 § 5. Provisions for expiration of Act

239 This Act shall expire upon the occurrence of any of the following:

240 A. The Congress or President of the United States declares that the Darfur genocide has been halted
241 for at least 12 months; or

242 B. The United States revokes all sanctions imposed against the Government of Sudan; or

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

246 § 6. Other legal obligations.

247 All actions taken in compliance with this Act, including all good faith determinations regarding
248 companies as required by this Act, shall be deemed within the standard of care outlined by the prudent
249 person rule, and the public fund shall be exempt from any conflicting statutory or common law
250 obligations, including any such obligations in respect to choice of asset managers, investment funds, or
251 investments for the public fund's securities portfolios.

252 § 7. Reinvestment in certain companies with scrutinized active business operations

253 Notwithstanding anything herein to the contrary, the public fund shall be permitted to cease divesting
254 from certain scrutinized companies pursuant to subsection B of § 3 and/or reinvest in certain scrutinized
255 companies from which it divested pursuant to subsection B of § 3 if clear and convincing evidence
256 shows that the value for all assets under management by the public fund becomes equal to or less than
257 99.50% (50 basis points) of the hypothetical value of all assets under management by the public fund
258 assuming no divestment for any company had occurred under subsection B of § 3. Cessation of
259 divestment, reinvestment, and/or any subsequent ongoing investment authorized by this section shall be
260 strictly limited to the minimum steps necessary to avoid the contingency set forth in the preceding
261 sentence. For any cessation of divestment, reinvestment, and/or subsequent ongoing investment
262 authorized by this section, the public fund shall provide a written report to the General Assembly and
263 Attorney General in advance of initial reinvestment, updated semi-annually thereafter as applicable,
264 setting forth the reasons and justification, supported by clear and convincing evidence, for its decisions
265 to cease divestment, reinvest, and/or remain invested in companies with scrutinized active business
266 operations. This section has no application to reinvestment in companies on the ground that they have
267 ceased to have scrutinized active business operations.

268 § 8. Severability

269 If any one or more provision, section, subsection, sentence, clause, phrase, or word of this legislation
270 or the application thereof to any person or circumstance is found to be invalid, illegal, unenforceable,
271 or unconstitutional, the same is hereby declared to be severable and the balance of this legislation shall
272 remain effective and functional notwithstanding such invalidity, illegality, unenforceability, or
273 unconstitutionality. The General Assembly hereby declares that it would have passed this legislation,
274 and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact
275 that any one or more provision, section, subsection, sentence, clause, phrase, or word be declared
276 invalid, illegal, unenforceable, or unconstitutional, including, but not limited to, each of the engagement,
277 divestment, and prohibition provisions of this legislation.