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SENATE BILL NO. 87**AMENDMENT IN THE NATURE OF A SUBSTITUTE**(Proposed by the Senate Committee on Finance
on January 22, 2008)

(Patron Prior to Substitute—Senator Cuccinelli)

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

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, then 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 (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"; 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

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

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

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

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

Be it enacted by the General Assembly of Virginia:

1. § 1. Definitions.

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

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

"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.

"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.

"Complicit" means taking actions during any preceding 20-month period that 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.

"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.

"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.

"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.

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

"Marginalized populations of Sudan" include, but are not limited to, the portion of the population in the Darfur region that has been a victim of genocide; 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.

"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.

"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.

"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.

"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 subdivision 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) a material portion of the company's revenues or assets linked to Sudan involve oil-related activities; the company does not contract directly with the regional government of southern Sudan or with a project or consortium created exclusively by that regional government; and the company has failed to take substantial action; or (ii) a material portion of the company's revenues or assets linked to Sudan involve power production activities; most of such activities do not 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 postsale 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 that 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 nonprofit 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 semiannual 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.

2. For each company identified in subdivision 1 with only inactive business operations, the public fund shall send a written notice informing the company of this Act and encouraging it to continue to refrain from initiating active business operations in Sudan until it is able to avoid scrutinized business

operations. The public fund shall continue such correspondence on a semiannual basis.

3. For each company newly identified in subdivision 1 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 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.

4. If, within 90 days following the public fund's first engagement with a company pursuant to subdivision 3, that company ceases scrutinized business operations, the company shall be removed from the scrutinized companies list and the provisions of this section shall cease to apply to it unless it resumes scrutinized business operations. If, within 90 days following the 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 thereto.

B. Divestment.

1. If, after 90 days following the public fund's first engagement with a company pursuant to subdivision A 3, 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, except as provided below, according to the following schedule: (i) at least 50% of such assets shall be removed from the public fund's assets under management by nine months after the company's most recent appearance on the scrutinized companies list, and (ii) 100% of such assets shall be removed from the public fund's assets under management within 15 months after the company's most recent appearance on the scrutinized companies list.

2. The public fund may relax the target schedule only to the degree that the public fund determines divestment from particular companies or funds will likely, in the public fund's good faith judgment, result in public fund losses exceeding the 99.5% mark described in § 7. If such a circumstance arises, the public fund shall submit a report to the Joint Legislative Audit and Review Commission setting forth the reasons and justification, accompanied by supporting documentation that includes objective numerical estimates, for its decision to relax the target schedule. Such report shall be updated semiannually thereafter as applicable.

3. If a company that ceased scrutinized active business operations following engagement pursuant to subdivision A 3 resumes such operations, the provisions of subdivision B 1 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.

C. Prohibition.

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

D. Exemption.

No company that the United States Government affirmatively declares to be excluded from its present or any future federal sanctions regime relating to Sudan shall be subject to divestment or investment prohibition pursuant to subsections B and C. This exemption shall extend to all wholly owned subsidiaries and majority-owned subsidiaries of any such company.

E. Excluded securities.

Notwithstanding anything herein to the contrary, subsections B and C 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.

§ 4. Reporting.

A. The public fund shall file a publicly available report to the General Assembly, the U.S. Attorney General and the Joint Legislative Audit and Review Commission that includes the scrutinized companies list within 30 days after the list is created.

B. Annually thereafter, the public fund shall file a publicly available report to the General Assembly, the U.S. Attorney General and the Joint Legislative Audit and Review Commission and send a copy of that report to the United States Presidential Special Envoy to Sudan (or an appropriate designee or successor) that includes:

1. A summary of correspondence with companies engaged by the public fund under subdivisions A 2 and A 3 of § 3;

2. All investments sold, redeemed, divested, or withdrawn in compliance with subsection B of § 3;

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

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

§ 5. Provisions for expiration of Act.

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

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

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

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

§ 6. Other legal obligations.

All actions taken in compliance with this Act, including all good faith determinations regarding companies as required by this Act, shall be deemed within the standard of care outlined in § 51.1-124.30 of the Code of Virginia. Moreover the public fund shall be exempt from any requirements that conflict with § 51.1-124.30 or with any other 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 portfolios.

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

Notwithstanding anything herein to the contrary, the public fund shall be permitted to cease divesting from certain scrutinized companies pursuant to subsection B of § 3 and/or reinvest in certain scrutinized companies from which it divested pursuant to subsection B of § 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 99.5% (a loss of 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 subsection B of § 3. Cessation of divestment, reinvestment, and/or any subsequent ongoing investment authorized by this section shall be strictly limited to the minimum steps necessary to avoid the contingency set forth in the preceding sentence. For any cessation of divestment, reinvestment, and/or subsequent ongoing investment authorized by this section, the public fund shall provide a written report to the General Assembly and the Joint Legislative Audit and Review Commission 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, and/or remain invested in companies with scrutinized active business operations. This section has no application to reinvestment in companies on the ground that they have ceased to have scrutinized active business operations.

§ 8. Immunity.

With respect to all actions taken in good faith compliance with this act, a public fund, its board of directors, individual board members, agents, trustees, officers, employees, custodians, and fiduciaries shall be immune from any liability.

§ 9. Severability.

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