

STATE OF KANSAS



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GOVERNOR LAURA KELLY

MESSAGE FROM THE GOVERNOR

REGARDING HOUSE BILL 2100

Because I have reservations about the potential unforeseen consequences of House Bill 2100 for the state and for local governments, I will allow the bill to become law without my signature.

THE GOVERNOR'S OFFICE

BY THE GOVERNOR

A handwritten signature in blue ink, appearing to read "Laura Kelly", written over a horizontal line.

DATED: April 24, 2023

HOUSE BILL No. 2100

AN ACT concerning environmental, social and governance criteria involving public contracts and investments; enacting the Kansas public investments and contracts protection act; prohibiting the state or a political subdivision from giving preferential treatment to or discriminating against companies based on environmental, social and governance criteria in procuring or letting contracts; requiring fiduciaries of the Kansas public employees retirement system to act solely in the financial interest of participants and beneficiaries of the system; restricting state agencies from adopting environmental, social and governance criteria or requiring any person or business to operate in accordance with such criteria; providing for enforcement of such act by the attorney general; indemnifying the Kansas public employees retirement system with respect to actions taken in compliance with such act; amending K.S.A. 2022 Supp. 74-4921 and repealing the existing section.

*Be it enacted by the Legislature of the State of Kansas:*

New Section 1. (a) The provisions of sections 1 through 6, and amendments thereto, shall be known and may be cited as the Kansas public investments and contracts protection act.

(b) As used in this act:

(1) "Act" means the Kansas public investments and contracts protection act.

(2) "Board" means the board of trustees of the Kansas public employees retirement system.

(3) "Company" means any organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, limited liability company or other entity of business association, including a wholly owned subsidiary, majority-owned subsidiary, parent company or affiliate of such entities or business associations that exists for the purpose of making a profit. "Company" does not mean a sole proprietorship.

(4) "Environmental, social and governance criteria" means any criterion that gives preferential treatment or discriminates based on whether a company meets or fails to meet one or more of the following criteria:

(A) Engaging in the exploration, production, utilization, transportation, sale or manufacturing of:

- (i) Fossil fuel-based energy;
- (ii) nuclear energy; or
- (iii) any other natural resource;

(B) engaging in the production of agriculture;

(C) engaging in the production of lumber;

(D) engaging in mining;

(E) emitting greenhouse gases or not disclosing or offsetting such greenhouse gas emissions;

(F) engaging in the manufacturing, distribution or sale of firearms, firearms accessories, ammunition or ammunition components;

(G) having a governing corporate board or other officers whose race, ethnicity, sex or sexual orientation meets or does not meet any criteria;

(H) facilitating or assisting or not facilitating or assisting employees in obtaining abortions or gender reassignment services; and

(I) doing business with any company described by subparagraphs (A) through (H).

(5) "Fiduciary" means any person acting on behalf of the board or system as an investment manager, proxy advisor or contractor, including the system's board of trustees.

(6) "Fiduciary commitment" means any evidence of a fiduciary's purpose in managing assets as a fiduciary, including, but not limited to, any of the following in a fiduciary's capacity as a fiduciary, specifically on assets managed on behalf of the system:

(A) Advertisements, statements, explanations, reports, communications with portfolio companies, statements of principles or commitments; or

(B) participation in, affiliation with or status as a signatory to any coalition, initiative, joint statement of principles or agreement.

(7) (A) "Financial" means having been prudently determined by a fiduciary to have a material effect on the financial risk or the financial

return of an investment.

(B) "Financial" does not include any action taken or factor considered by a fiduciary with any purpose whatsoever to further social, political or ideological interests.

(C) A fiduciary may reasonably be determined to have taken an action or considered a factor with a purpose to further social, political or ideological interests based upon evidence indicating such a purpose, including, but not limited to, any fiduciary commitment to further, through portfolio company engagement, board or shareholder votes or otherwise as a fiduciary, any of the following beyond what controlling federal or state law requires, specifically on assets managed on behalf of the system:

(i) Eliminating, reducing, offsetting or disclosing greenhouse gas emissions;

(ii) instituting or assessing corporate board, employment, composition, compensation or disclosure criteria that incorporates characteristics protected under state law;

(iii) divesting from, limiting investment in or limiting the activities or investments of any company for failing or not committing to meet environmental standards or disclosures;

(iv) accessing abortion, sex or gender change or transgender surgery; or

(v) divesting from, limiting investment in or limiting the activities or investments of any company that engages in, facilitates or supports the manufacture, import, distribution, marketing, advertising, sale or lawful use of firearms, ammunition or component parts and accessories of firearms or ammunition.

(8) "Fossil fuels" means coal, natural gas, petroleum or oil formed by natural processes through decomposition of dead organisms.

(9) "Natural resources" means fossil fuels, minerals, metal ores or any other nonrenewable or finite resource that cannot be readily replaced by natural means at the speed at which it is consumed.

(10) "System" means the Kansas public employees retirement system. "System" does not include participant-directed individual account plans.

New Sec. 2. (a) The state, any agency of the state, any political subdivision of the state, or any instrumentality thereof, including the pooled money investment board established by K.S.A. 75-4221a, and amendments thereto, when engaged in procuring or letting contracts for any purpose, shall ensure that bidders, offerors, contractors or subcontractors are not given preferential treatment or discriminated against based on any environmental, social and governance criteria.

(b) The state, any agency of the state, any political subdivision of the state or any instrumentality thereof, including the pooled money investment board established by K.S.A. 75-4221a, and amendments thereto, shall not adopt any procurement regulation or policy that causes any bidder, offeror, contractor or subcontractor to be given preferential treatment or be subject to discrimination based on any environmental, social and governance criteria, except as otherwise specifically permitted or required by law.

New Sec. 3. (a) In making and supervising investments of the system, the system and any investment manager, proxy advisor or contractor thereof shall discharge its duties solely in the financial interest of the participants and beneficiaries for the exclusive purposes of:

(1) Providing financial benefits to participants and their beneficiaries; and

(2) defraying reasonable expenses of administering the system.

(b) An investment manager, proxy advisor or contractor retained by the system shall be subject to the same fiduciary duties as the system's board of trustees.

(c) A fiduciary shall consider only financial factors when discharging such fiduciary's duties with respect to the system.

(d) All shares held directly or indirectly by or on behalf of the

system or the participants and their beneficiaries shall be voted solely in the financial interest of system participants and their beneficiaries.

(e) Unless no economically practicable alternative is available, the system shall not grant proxy voting authority to any person who is not a part of the system, unless such person has a practice of, and in writing commits to, following guidelines that match the system's obligation to act solely upon financial factors, in which case the system may grant proxy voting authority to such person.

(f) Unless no economically practicable alternative is available, in the selection of any proxy advisor, the system shall give preference to a proxy advisor service that commits in writing to engage in voting shares and making recommendations in a strictly fiduciary manner, and without consideration of policy objectives that are not the express policy objectives of the system, in which case the system may engage a proxy voting advisor.

(g) Unless no economically practicable alternative is available, system assets shall not be entrusted to a fiduciary, unless such fiduciary has a practice of, and in writing commits to, following guidelines, when engaging with portfolio companies and voting shares or proxies, that follow the system's obligation to act solely upon financial factors and not upon policy considerations that are not the express policy objectives of the system, in which case the system may entrust engagement and share voting to a fiduciary.

(h) Unless no economically practicable alternative is available, an investment manager or contractor shall not, in providing service for the system, follow the recommendations of a proxy advisor or other service provider, unless such advisor or service provider has a practice of, and in writing commits to, following proxy voting guidelines that follow the system's obligation to act solely upon financial factors, in which case the investment manager or contractor may follow the recommendations of a proxy or other service advisor.

(i) All proxy votes shall be tabulated and reported annually to the system's board of trustees and to the joint committee on pensions, investments and benefits. For each vote, the report shall contain a vote caption, the system's vote, the recommendation of company management and, if applicable, the proxy advisor's recommendation. Such reports shall be posted on the system's website for review by the public.

(j) Subsections (e) through (i) shall apply only to assets managed on behalf of the system and shall not apply to alternative or real estate investments as defined in K.S.A. 74-4921(5), and amendments thereto.

New Sec. 4. (a) As used in this section, "state agency" means an office, board, commission, department, council, bureau, governmental entity or other agency of state government having authority to adopt or enforce rules and regulations.

(b) No state agency shall share or publish information, adopt policies, adopt rules and regulations or issue guidelines for purposes of environmental, social and governance criteria that restrict the ability of any industry to offer products or services. No state agency shall require any person or business to adopt or operate in accordance with environmental, social and governance criteria.

New Sec. 5. (a) This act or any contract subject to this act may be enforced by the attorney general.

(b) If the attorney general has reasonable cause to believe that a person has engaged in, is engaging in or is about to engage in a violation of this act, the attorney general may require:

(1) Such person to file on such forms as the attorney general may prescribe a statement or report in writing, under oath, as to all the facts and circumstances concerning the violation; and

(2) the filing of such other data and information as the attorney general may deem necessary.

(c) In addition to any other remedies available at law or equity, an investment manager or contractor of the system that serves as a fiduciary and violates the provisions of section 3, and amendments

thereto, shall be obligated to pay damages to the state in an amount equal to three times all moneys paid to the investment manager or contractor by the system for the services of such investment manager or contractor.

New Sec. 6. In a cause of action based on an action, inaction, decision, divestment, investment, report or other determination made or taken in compliance with this act, without regard to whether the person performed services for compensation, the state shall indemnify and hold harmless for actual damages, court costs and attorney fees adjudged against, and defend the system and any of its current and former employees, members of the board or any other officers of the system related to the act or omission on which the damages are based.

Sec. 7. K.S.A. 2022 Supp. 74-4921 is hereby amended to read as follows: 74-4921. (1) There is hereby created in the state treasury the Kansas public employees retirement fund. All employee and employer contributions shall be deposited in the state treasury to be credited to the Kansas public employees retirement fund. The fund is a trust fund and shall be used solely for the exclusive purpose of providing benefits to members and member beneficiaries and defraying reasonable expenses of administering the fund. Investment income of the fund shall be added or credited to the fund as provided by law. All benefits payable under the system, refund of contributions and overpayments, purchases or investments under the law and expenses in connection with the system unless otherwise provided by law shall be paid from the fund. The director of accounts and reports is authorized to draw warrants on the state treasurer and against such fund upon the filing in the director's office of proper vouchers executed by the chairperson or the executive director of the board. As an alternative, payments from the fund may be made by credits to the accounts of recipients of payments in banks, savings and loan associations and credit unions. A payment shall be so made only upon the written authorization and direction of the recipient of payment and upon receipt of such authorization such payments shall be made in accordance therewith. Orders for payment of such claims may be contained on:

(a) A letter, memorandum, telegram, computer printout or similar writing; or

(b) any form of communication, other than voice, which is registered upon magnetic tape, disc or any other medium designed to capture and contain in durable form conventional signals used for the electronic communication of messages.

(2) The board shall have the responsibility for the management of the fund and shall discharge the board's duties with respect to the fund solely in the interests of the members and beneficiaries of the system for the exclusive purpose of providing benefits to members and such member's beneficiaries and defraying reasonable expenses of administering the fund and shall invest and reinvest moneys in the fund and acquire, retain, manage, including the exercise of any voting rights and disposal of investments of the fund within the limitations and according to the powers, duties and purposes as prescribed by this section.

(3) Moneys in the fund shall be invested and reinvested to achieve the investment objective which is preservation of the fund to provide benefits to members and member beneficiaries, as provided by law and accordingly providing that the moneys are as productive as possible, subject to the standards set forth in this act. No moneys in the fund shall be invested or reinvested if ~~the sole or primary~~ *any* investment objective is for economic development or social purposes or objectives.

(4) In investing and reinvesting moneys in the fund and in acquiring, retaining, managing and disposing of investments of the fund, the board shall exercise the judgment, care, skill, prudence and diligence under the circumstances then prevailing, which persons of prudence, discretion and intelligence acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims by diversifying the investments of the

fund so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so, and not in regard to speculation but in regard to the permanent disposition of similar funds, considering the probable income as well as the probable safety of their capital.

(5) Notwithstanding subsection (4):

(a) Total investments in common stock may be made in the amount of up to 60% of the total book value of the fund;

(b) the board may invest or reinvest moneys of the fund in alternative investments if the following conditions are satisfied:

(i) The total of the annual net commitment to alternative investments does not exceed 5% of the total market value of investment assets of the fund as measured from the end of the preceding calendar year;

(ii) if in addition to the system, there are at least two other qualified institutional buyers, as defined by section (a)(1)(i) of rule 144A, securities act of 1933;

(iii) the system's share in any individual alternative investment is limited to an investment representing not more than 20% of any such individual alternative investment;

(iv) the system has received a favorable and appropriate recommendation from a qualified, independent expert in investment management or analysis in that particular type of alternative investment;

(v) the alternative investment is consistent with the system's investment policies and objectives as provided in subsection (6);

(vi) the individual alternative investment does not exceed more than 2.5% of the total alternative investments made under this subsection. If the alternative investment is made pursuant to participation by the system in a multi-investor pool, the 2.5% limitation contained in this subsection is applied to the underlying individual assets of such pool and not to investment in the pool itself. The total of such alternative investments made pursuant to participation by the system in any one individual multi-investor pool shall not exceed more than 20% of the total of alternative investments made by the system pursuant to this subsection. Nothing in this subsection requires the board to liquidate or sell the system's holdings in any alternative investments made pursuant to participation by the system in any one individual multi-investor pool held by the system on the effective date of this act, unless such liquidation or sale would be in the best interest of the members and beneficiaries of the system and be prudent under the standards contained in this section. The 20% limitation contained in this subsection shall not have been violated if the total of such investment in any one individual multi-investor pool exceeds 20% of the total alternative investments of the fund as a result of market forces acting to increase the value of such a multi-investor pool relative to the rest of the system's alternative investments; however, the board shall not invest or reinvest any moneys of the fund in any such individual multi-investor pool until the value of such individual multi-investor pool is less than 20% of the total alternative investments of the fund;

(vii) the board has received and considered the investment manager's due diligence findings submitted to the board as required by subsection ~~(6)(e)~~ (6);

(viii) prior to the time the alternative investment is made, the system has in place procedures and systems to ensure that the investment is properly monitored and investment performance is accurately measured; and

(ix) the total of alternative investments does not exceed 15% of the total investment assets of the fund. The 15% limitation contained in this subsection shall not have been violated if the total of such alternative investments exceeds 15% of the total investment assets of the fund, based on the fund total market value, as a result of market forces acting to increase the value of such alternative investments relative to the rest of the system's investments. However, the board

shall not invest or reinvest any moneys of the fund in alternative investments until the total value of such alternative investments is less than 15% of the total investment assets of the fund based on the market value. If the total value of the alternative investments exceeds 15% of the total investment assets of the fund, the board shall not be required to liquidate or sell the system's holdings in any alternative investment held by the system, unless such liquidation or sale would be in the best interest of the members and beneficiaries of the system and is prudent under the standards contained in this section-;

~~(c)~~ for purposes of this ~~act~~ ~~section~~, "alternative investment" includes a broad group of investments that are not one of the traditional asset types of public equities, fixed income, cash or real estate. Alternative investments are generally made through limited partnership or similar structures, are not regularly traded on nationally recognized exchanges and thus are relatively illiquid, and exhibit lower correlations with more liquid asset types such as stocks and bonds. Alternative investments generally include, but are not limited to, private equity, private credit, hedge funds, infrastructure, commodities and other investments ~~which~~ *that* have the characteristics described in this paragraph; and

~~(e)(d)~~ except as otherwise provided, the board may invest or reinvest moneys of the fund in real estate investments if the following conditions are satisfied:

(i) The system has received a favorable and appropriate recommendation from a qualified, independent expert in investment management or analysis in that particular type of real estate investment;

(ii) the real estate investment is consistent with the system's investment policies and objectives as provided in subsection (6); and

(iii) the system has received and considered the investment manager's due diligence findings.

(6) *(a)* Subject to the objective set forth in subsection (3) and the standards set forth in subsections (4) and (5) the board shall formulate policies and objectives for the investment and reinvestment of moneys in the fund and the acquisition, retention, management and disposition of investments of the fund. Such policies and objectives shall include:

~~(a)(i)~~ Specific asset allocation standards and objectives;

~~(b)(ii)~~ establishment of criteria for evaluating the risk versus the potential return on a particular investment;

~~(e)(iii)~~ a requirement that all investment managers submit such manager's due diligence findings on each investment to the board or investment advisory committee for approval or rejection prior to making any alternative investment;

~~(d)(iv)~~ a requirement that all investment managers shall immediately report all instances of default on investments to the board and provide the board with recommendations and options, including, but not limited to, curing the default or withdrawal from the investment; and

~~(e)(v)~~ establishment of criteria that would be used as a guideline for determining when no additional add-on investments or reinvestments would be made and when the investment would be liquidated.

*(b)* The board shall review such policies and objectives, make changes considered necessary or desirable and readopt such policies and objectives on an annual basis.

(7) The board may enter into contracts with one or more persons whom the board determines to be qualified, whereby the persons undertake to perform the functions specified in subsection (2) to the extent provided in the contract. Performance of functions under contract so entered into shall be paid pursuant to rates fixed by the board subject to provisions of appropriation acts and shall be based on specific contractual fee arrangements. The system shall not pay or reimburse any expenses of persons contracted with pursuant to this subsection, except that after approval of the board, the system may pay approved investment related expenses subject to provisions of

appropriation acts. The board shall require that a person contracted with to obtain commercial insurance which provides for errors and omissions coverage for such person in an amount to be specified by the board, provided that such coverage shall be at least the greater of \$500,000 or 1% of the funds entrusted to such person up to a maximum of \$10,000,000. The board shall require a person contracted with to give a fidelity bond in a penal sum as may be fixed by law or, if not so fixed, as may be fixed by the board, with corporate surety authorized to do business in this state. Such persons contracted with the board pursuant to this subsection and any persons contracted with such persons to perform the functions specified in subsection (2) shall be deemed to be agents of the board and the system in the performance of contractual obligations.

(8) (a) In the acquisition or disposition of securities, the board may rely on the written legal opinion of a reputable bond attorney or attorneys, the written opinion of the attorney of the investment counselor or managers, or the written opinion of the attorney general certifying the legality of the securities.

(b) The board shall employ or retain qualified investment counsel or counselors or may negotiate with a trust company to assist and advise in the judicious investment of funds as herein provided.

(9) (a) Except as provided in subsection (7) and this subsection, the custody of money and securities of the fund shall remain in the custody of the state treasurer, except that the board may arrange for the custody of such money and securities as it considers advisable with one or more member banks or trust companies of the federal reserve system or with one or more banks in the state of Kansas, or both, to be held in safekeeping by the banks or trust companies for the collection of the principal and interest or other income or of the proceeds of sale. The services provided by the banks or trust companies shall be paid pursuant to rates fixed by the board subject to provisions of appropriation acts.

(b) The state treasurer and the board shall collect the principal and interest or other income of investments or the proceeds of sale of securities in the custody of the state treasurer and pay same when so collected into the fund.

(c) The principal and interest or other income or the proceeds of sale of securities as provided in ~~clause (a) of this subsection (9)~~ shall be reported to the state treasurer and the board and credited to the fund.

(10) The board shall with the advice of the director of accounts and reports establish the requirements and procedure for reporting any and all activity relating to investment functions provided for in this act in order to prepare a record monthly of the investment income and changes made during the preceding month. The record will reflect a detailed summary of investment, reinvestment, purchase, sale and exchange transactions and such other information as the board may consider advisable to reflect a true accounting of the investment activity of the fund.

(11) The board shall provide for an examination of the investment program annually. The examination shall include an evaluation of current investment policies and practices and of specific investments of the fund in relation to the objective set forth in subsection (3), the standard set forth in subsection (4) and other criteria as may be appropriate, and recommendations relating to the fund investment policies and practices and to specific investments of the fund as are considered necessary or desirable. The board shall include in its annual report to the governor as provided in K.S.A. 74-4907, and amendments thereto, a report or a summary thereof covering the investments of the fund.

~~(12) (a)~~ Any internal assessment or examination of alternative investments of the system performed by any person or entity employed or retained by the board which evaluates or monitors the performance of alternative investments shall be reported to the legislative post auditor so that such report may be reviewed in accordance with the



annual financial-compliance audits conducted pursuant to K.S.A. 74-49,136, and amendments thereto.

~~(b) The board shall prepare and submit an alternative investment report to the joint committee on pensions, investments and benefits prior to January 1, 2016. Such report shall include a review of alternative investments of the system with an emphasis on the effects of changes in law pursuant to this act and includes specific investment cost and market value information of each individual alternative investment.~~

Sec. 8. K.S.A. 2022 Supp. 74-4921 is hereby repealed.

Sec. 9. This act shall take effect and be in force from and after its publication in the statute book.

I hereby certify that the above BILL originated in the HOUSE, and was adopted by that body

\_\_\_\_\_  
HOUSE adopted  
Conference Committee Report \_\_\_\_\_

\_\_\_\_\_  
*Speaker of the House.*

\_\_\_\_\_  
*Chief Clerk of the House.*

Passed the SENATE  
as amended \_\_\_\_\_

SENATE adopted  
Conference Committee Report \_\_\_\_\_

\_\_\_\_\_  
*President of the Senate.*

\_\_\_\_\_  
*Secretary of the Senate.*

APPROVED \_\_\_\_\_

\_\_\_\_\_  
*Governor.*