

SENATE BILL No. 291

By Committee on Federal and State Affairs

3-6

Proposed amendment to SB 291
Senate Committee on Federal and State Affairs
3/13/2023
Prepared by Office of Revisor of Statutes

1 AN ACT concerning environmental, social and governance criteria
2 involving public contracts and investments; enacting the Kansas public
3 investments and contracts protection act; prohibiting the state or a
4 political subdivision from giving preferential treatment to or
5 discriminating against companies based on environmental, social and
6 governance criteria in procuring or letting contracts; requiring
7 fiduciaries of the Kansas public employees retirement system to act
8 solely in the financial interest of participants and beneficiaries of the
9 system; restricting state agencies from adopting environmental, social
10 and governance criteria or requiring any person or business to operate
11 in accordance with such criteria; directing registered investment
12 advisers to provide certain environmental, social and governance
13 criteria notice to clients; requiring the legislative research department to
14 develop and maintain an environmental, social and governance
15 disclosure webpage; providing for enforcement of such act by the
16 attorney general; amending K.S.A. 2022 Supp. 74-4921 and repealing
17 the existing section.
18

indemnifying the Kansas public employees
retirement system with respect to actions
taken in compliance with such act;

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

20 New Section 1. (a) The provisions of sections 1 through 5, and
21 amendments thereto, shall be known and may be cited as the Kansas
22 public investments and contracts protection act.

7

23 (b) As used in this act:

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

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

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

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

1 criteria:

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

4 (i) Fossil fuel-based energy;

5 (ii) nuclear energy; or

6 (iii) any other natural resource;

7 (B) engaging in the production of agriculture;

8 (C) engaging in the production of lumber;

9 (D) engaging in mining;

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

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

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

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

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

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

23 (6) "Fiduciary commitment" means any evidence of a fiduciary's
24 purpose in managing assets as a fiduciary, including, but not limited to,
25 any of the following in a fiduciary's capacity as a fiduciary:

, specifically on assets managed on behalf of the system

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

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

31 (7) (A) "Financial" means having been prudently determined by a
32 fiduciary to have a material effect on the financial risk or the financial
33 return of an investment.

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

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

, specifically on assets managed on behalf of the system

- 1 (i) Eliminating, reducing, offsetting or disclosing greenhouse gas
2 emissions;
- 3 (ii) instituting or assessing corporate board, employment,
4 composition, compensation or disclosure criteria that incorporates
5 characteristics protected under state law;
- 6 (iii) divesting from, limiting investment in or limiting the activities or
7 investments of any company for failing or not committing to meet
8 environmental standards or disclosures;
- 9 (iv) accessing abortion, sex or gender change or transgender surgery;
10 or
- 11 (v) divesting from, limiting investment in or limiting the activities or
12 investments of any company that engages in, facilitates or supports the
13 manufacture, import, distribution, marketing, advertising, sale or lawful
14 use of firearms, ammunition or component parts and accessories of
15 firearms or ammunition.
- 16 (8) "Fossil fuels" means coal, natural gas, petroleum or oil formed by
17 natural processes through decomposition of dead organisms.
- 18 (9) "Natural resources" means fossil fuels, minerals, metal ores or any
19 other nonrenewable or finite resource that cannot be readily replaced by
20 natural means at the speed at which it is consumed.
- 21 (10) "System" means the Kansas public employees retirement system.
- 22 New Sec. 2. (a) The state, any agency of the state, any political
23 subdivision of the state, or any instrumentality thereof, including the
24 pooled money investment board established by K.S.A. 75-4221a, and
25 amendments thereto, when engaged in procuring or letting contracts for
26 any purpose, shall ensure that bidders, offerors, contractors or
27 subcontractors are not given preferential treatment or discriminated against
28 based on any environmental, social and governance criteria.
- 29 (b) The state, any agency of the state, any political subdivision of the
30 state or any instrumentality thereof, including the pooled money
31 investment board established by K.S.A. 75-4221a, and amendments
32 thereto, shall not adopt any procurement regulation or policy that causes
33 any bidder, offeror, contractor or subcontractor to be given preferential
34 treatment or be subject to discrimination based on any environmental,
35 social and governance criteria, except as otherwise specifically permitted
36 or required by law.
- 37 New Sec. 3. (a) In making and supervising investments of the system,
38 the system and any investment manager, proxy advisor or contractor
39 thereof shall discharge its duties solely in the financial interest of the
40 participants and beneficiaries for the exclusive purposes of:
- 41 (1) Providing financial benefits to participants and their beneficiaries;
42 and
- 43 (2) defraying reasonable expenses of administering the system.

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

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

6 (d) All shares held directly or indirectly by or on behalf of the system
7 or the participants and their beneficiaries shall be voted solely in the
8 financial interest of system participants and their beneficiaries.

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

, in which case the system may grant proxy voting authority to such person

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

, in which case the system may engage a proxy voting advisor

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

, in which case the system may entrust engagement and share voting to a fiduciary

27 (h) Unless no economically practicable alternative is available, an
28 investment manager or contractor shall not, in providing service for the
29 system, follow the recommendations of a proxy advisor or other service
30 provider, unless such advisor or service provider has a practice of, and in
31 writing commits to, following proxy voting guidelines that follow the
32 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

33 (i) All proxy votes shall be tabulated and reported annually to the
34 system's board of trustees and to the ~~legislative coordinating council~~. For
35 each vote, the report shall contain a vote caption, the system's vote, the
36 recommendation of company management and, if applicable, the proxy
37 advisor's recommendation. Such reports shall be posted on the system's
38 website for review by the public.

joint committee on pensions, investments and benefits

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

(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.

43 (b) No state agency shall share or publish information, adopt policies,

1 adopt rules and regulations or issue guidelines for purposes of
2 environmental, social and governance criteria that restrict the ability of any
3 industry to offer products or services. No state agency shall require any
4 person or business to adopt or operate in accordance with environmental,
5 social and governance criteria.

6 New Sec. 5. (a) A registered investment adviser, as defined in K.S.A.
7 17-12a102, and amendments thereto, shall disclose to each new client
8 prior to the investment of any moneys owned by the client, and at least
9 annually to each existing client, the following notice, in writing:

10 "NOTICE: Environmental, social and governance (ESG) investing may
11 limit your return on investment compared to investments that do not use
12 such criteria. You should ask your investment adviser for more specific
13 information on whether there are investment alternatives available with
14 entities that do not use such ESG criteria and that instead rely on ordinary
15 business considerations in making investment decisions. The Kansas
16 legislative research department, with content as approved by the legislative
17 coordinating council, maintains a website link, at
18 www.kslegresearch.org/esgdisclosure that contains information about
19 environmental, social and governance investing and how the utilization of
20 ESG standards, including preferential or discriminatory considerations
21 other than financial risk or financial return, may affect the return on your
22 investments."

23 (b) The legislative research department shall develop and maintain an
24 environmental, social and governance disclosure webpage on the
25 legislative research department's website that contains information about
26 environmental, social and governance investing. Such information shall be
27 approved by the legislative coordinating council.

28 New Sec. 6. (a) This act or any contract subject to this act may be
29 enforced by the attorney general.

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

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

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

38 (c) In addition to any other remedies available at law or equity, an
39 investment manager or contractor of the system that serves as a fiduciary
40 and violates the provisions of section 3, and amendments thereto, shall be
41 obligated to pay damages to the state in an amount equal to three times all
42 moneys paid to the investment manager or contractor by the system for the
43 services of such investment manager or contractor.

New Sec. 7. 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.

Renumber sections accordingly