

HOUSE BILL No. 2436

By Committee on Appropriations

2-22

Proposed amendment to HB 2436
House Committee on Financial Institutions and Pensions
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; providing for enforcement of such act
12 by the attorney general; amending K.S.A. 2022 Supp. 74-4921 and
13 repealing the existing section.
14

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

16 New Section 1. (a) The provisions of sections 1 through ~~5~~⁶ and
17 amendments thereto, shall be known and may be cited as the Kansas
18 public investments and contracts protection act.

19 (b) As used in this act:

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

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

24 (3) "Company" means any organization, association, corporation,
25 partnership, joint venture, limited partnership, limited liability partnership,
26 limited liability company or other entity of business association, including
27 a wholly owned subsidiary, majority-owned subsidiary, parent company or
28 affiliate of such entities or business associations that exists for the purpose
29 of making a profit.

30 (4) "Environmental, social and governance criteria" means a
31 preferential treatment or a discrimination evaluation conducted by the
32 state, any agency of the state, any political subdivision of the state, or any
33 instrumentality thereof, that considers whether a company meets or fails to
34 meet one or more of the following criteria:

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

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

- 1 (i) Fossil fuel-based energy;
- 2 (ii) nuclear energy; or
- 3 (iii) any other natural resource;
- 4 (B) engaging in the production of agriculture;
- 5 (C) engaging in the production of lumber;
- 6 (D) engaging in mining;
- 7 (E) emitting greenhouse gases or not disclosing or offsetting such
- 8 greenhouse gas emissions;
- 9 (F) engaging in the manufacturing, distribution or sale of firearms,
- 10 firearms accessories, ammunition or ammunition components;
- 11 (G) having a governing corporate board or other officers whose race,
- 12 ethnicity, sex or sexual orientation meets or does not meet any criterion;
- 13 (H) facilitating or assisting or not facilitating or assisting employees
- 14 in obtaining abortions or gender reassignment services; and
- 15 (I) doing business with any company described by subparagraphs (A)
- 16 through (H).
- 17 (5) "Fiduciary" means any person acting on behalf of the board or
- 18 system as an investment manager, proxy advisor or contractor, including
- 19 the system's board of trustees.
- 20 (6) "Fiduciary commitment" means any evidence of a fiduciary's
- 21 purpose in managing assets as a fiduciary, including, but not limited to,
- 22 any of the following in a fiduciary's capacity as a fiduciary:
- 23 (A) Advertisements, statements, explanations, reports, letters to
- 24 clients, communications with portfolio companies, statements of principles
- 25 or commitments; or
- 26 (B) participation in, affiliation with or status as a signatory to any
- 27 coalition, initiative, joint statement of principles or agreement.
- 28 (7) (A) "Financial" means having been prudently determined by a
- 29 fiduciary to have a material effect on the financial risk or the financial
- 30 return of an investment.
- 31 (B) "Financial" does not include any action taken or factor considered
- 32 by a fiduciary with any purpose whatsoever to further social, political or
- 33 ideological interests.
- 34 (C) A fiduciary may reasonably be determined to have taken an
- 35 action or considered a factor with a purpose to further social, political or
- 36 ideological interests based upon evidence indicating such a purpose,
- 37 including, but not limited to, any fiduciary commitment to further, through
- 38 portfolio company engagement, board or shareholder votes or otherwise as
- 39 a fiduciary, any of the following beyond what controlling federal or state
- 40 law requires:
- 41 (i) Eliminating, reducing, offsetting or disclosing greenhouse gas
- 42 emissions;
- 43 (ii) instituting or assessing corporate board, employment,

, specifically on assets managed on behalf of the system

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1 composition, compensation or disclosure criteria that incorporates
2 characteristics protected under state law;

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

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

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

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

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

18 (10) "System" means the Kansas public employees retirement system.
19 New Sec. 2. (a) The state, any agency of the state, any political
20 subdivision of the state, or any instrumentality thereof, including the
21 pooled money investment board established by K.S.A. 75-4221a, and
22 amendments thereto, when engaged in procuring or letting contracts for
23 any purpose, shall ensure that bidders, offerors, contractors or
24 subcontractors are not given preferential treatment or discriminated against
25 based on an environmental, social and governance criteria.

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

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

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

40 (2) defraying reasonable expenses of administering the system.

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

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

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

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

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

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

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

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

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

40 (b) No state agency shall share or publish information, adopt policies,
41 adopt rules and regulations or issue guidelines for purposes of
42 environmental, social and governance criteria that restrict the ability of any
43 industry to offer products or services. No state agency shall require any

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

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

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

, in which case the investment manager or contractor may follow the
recommendations of a proxy or other service advisor

joint committee on pensions, investments and benefits

(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.

1 person or business to adopt or operate in accordance with environmental,
2 social and governance criteria.
3 New Sec. 5. (a) This act or any contract subject to this act may be
4 enforced by the attorney general.

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

8 (1) Such person to file on such forms as the attorney general may
9 prescribe a statement or report in writing, under oath, as to all the facts and
10 circumstances concerning the violation; and
11 (2) the filing of such other data and information as the attorney
12 general may deem necessary.

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

19 Sec. 6. K.S.A. 2022 Supp. 74-4921 is hereby amended to read as
20 follows: 74-4921. (1) There is hereby created in the state treasury the
21 Kansas public employees retirement fund. All employee and employer
22 contributions shall be deposited in the state treasury to be credited to the
23 Kansas public employees retirement fund. The fund is a trust fund and
24 shall be used solely for the exclusive purpose of providing benefits to
25 members and member beneficiaries and defraying reasonable expenses of
26 administering the fund. Investment income of the fund shall be added or
27 credited to the fund as provided by law. All benefits payable under the
28 system, refund of contributions and overpayments, purchases or
29 investments under the law and expenses in connection with the system
30 unless otherwise provided by law shall be paid from the fund. The director
31 of accounts and reports is authorized to draw warrants on the state
32 treasurer and against such fund upon the filing in the director's office of
33 proper vouchers executed by the chairperson or the executive director of
34 the board. As an alternative, payments from the fund may be made by
35 credits to the accounts of recipients of payments in banks, savings and loan
36 associations and credit unions. A payment shall be so made only upon the
37 written authorization and direction of the recipient of payment and upon
38 receipt of such authorization such payments shall be made in accordance
39 therewith. Orders for payment of such claims may be contained on:

40 (a) A letter, memorandum, telegram, computer printout or similar
41 writings; or

42 (b) any form of communication, other than voice, which is registered
43 upon magnetic tape, disc or any other medium designed to capture and

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.

Renumber sections accordingly