

SENATE BILL No. 291

By Committee on Federal and State Affairs

3-6

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

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.

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:

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:

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.

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.

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.

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.

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.

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.

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.

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

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

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

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

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

1 (4) In investing and reinvesting moneys in the fund and in acquiring,
2 retaining, managing and disposing of investments of the fund, the board
3 shall exercise the judgment, care, skill, prudence and diligence under the
4 circumstances then prevailing, which persons of prudence, discretion and
5 intelligence acting in a like capacity and familiar with such matters would
6 use in the conduct of an enterprise of like character and with like aims by
7 diversifying the investments of the fund so as to minimize the risk of large
8 losses, unless under the circumstances it is clearly prudent not to do so,
9 and not in regard to speculation but in regard to the permanent disposition
10 of similar funds, considering the probable income as well as the probable
11 safety of their capital.

12 (5) Notwithstanding subsection (4):

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

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

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

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

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

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

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

31 (vi) the individual alternative investment does not exceed more than
32 2.5% of the total alternative investments made under this subsection. If the
33 alternative investment is made pursuant to participation by the system in a
34 multi-investor pool, the 2.5% limitation contained in this subsection is
35 applied to the underlying individual assets of such pool and not to
36 investment in the pool itself. The total of such alternative investments
37 made pursuant to participation by the system in any one individual multi-
38 investor pool shall not exceed more than 20% of the total of alternative
39 investments made by the system pursuant to this subsection. Nothing in
40 this subsection requires the board to liquidate or sell the system's holdings
41 in any alternative investments made pursuant to participation by the
42 system in any one individual multi-investor pool held by the system on the
43 effective date of this act, unless such liquidation or sale would be in the

1 best interest of the members and beneficiaries of the system and be
2 prudent under the standards contained in this section. The 20% limitation
3 contained in this subsection shall not have been violated if the total of such
4 investment in any one individual multi-investor pool exceeds 20% of the
5 total alternative investments of the fund as a result of market forces acting
6 to increase the value of such a multi-investor pool relative to the rest of the
7 system's alternative investments; however, the board shall not invest or
8 reinvest any moneys of the fund in any such individual multi-investor pool
9 until the value of such individual multi-investor pool is less than 20% of
10 the total alternative investments of the fund;

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

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

18 (ix) the total of alternative investments does not exceed 15% of the
19 total investment assets of the fund. The 15% limitation contained in this
20 subsection shall not have been violated if the total of such alternative
21 investments exceeds 15% of the total investment assets of the fund, based
22 on the fund total market value, as a result of market forces acting to
23 increase the value of such alternative investments relative to the rest of the
24 system's investments. However, the board shall not invest or reinvest any
25 moneys of the fund in alternative investments until the total value of such
26 alternative investments is less than 15% of the total investment assets of
27 the fund based on the market value. If the total value of the alternative
28 investments exceeds 15% of the total investment assets of the fund, the
29 board shall not be required to liquidate or sell the system's holdings in any
30 alternative investment held by the system, unless such liquidation or sale
31 would be in the best interest of the members and beneficiaries of the
32 system and is prudent under the standards contained in this section-;

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

43 ~~(e)~~(d) except as otherwise provided, the board may invest or reinvest

1 moneys of the fund in real estate investments if the following conditions
2 are satisfied:

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

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

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

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

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

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

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

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

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

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

32 (7) The board may enter into contracts with one or more persons
33 whom the board determines to be qualified, whereby the persons undertake
34 to perform the functions specified in subsection (2) to the extent provided
35 in the contract. Performance of functions under contract so entered into
36 shall be paid pursuant to rates fixed by the board subject to provisions of
37 appropriation acts and shall be based on specific contractual fee
38 arrangements. The system shall not pay or reimburse any expenses of
39 persons contracted with pursuant to this subsection, except that after
40 approval of the board, the system may pay approved investment related
41 expenses subject to provisions of appropriation acts. The board shall
42 require that a person contracted with to obtain commercial insurance
43 which provides for errors and omissions coverage for such person in an

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

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

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

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

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

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

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

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

11 (12)—(a) Any internal assessment or examination of alternative
12 investments of the system performed by any person or entity employed or
13 retained by the board which evaluates or monitors the performance of
14 alternative investments shall be reported to the legislative post auditor so
15 that such report may be reviewed in accordance with the annual financial-
16 compliance audits conducted pursuant to K.S.A. 74-49,136, and
17 amendments thereto.

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

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

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