STATE REPRESENTATIVE
FREDERICK P. KESSLER
WISCONSIN STATE ASSEMBLY
12TH DISTRICT

Testimony of State Representative Frederick P. Kessler
Senate Committee on Veterans and Military Affairs,
Biotechnology and Financial Institutions
Wisconsin Capitol—Room 411 South
Wednesday, March 28, 2007
Senate Bill 57

This is an important bill to me. I was born in 1940. During my lifetime genocide has occurred in Europe against Jews, in Bosnia against Muslims, in Rwanda against Tutsi's and now in Sudan against the Fur people. Every time the rest of the world did not respond until it was too late.

The government of Sudan has a terrible history of oppressing its own people. It pillaged, raped and burned Christian and animists among the Dinka and Nuer in southern Sudan. It now is killing and raping Muslim peasant farmers in Darfur. 200,000 people have died in Darfur. 2,000,000 have fled to the Central African Republic and other neighboring countries.

The government has armed and encouraged Janjaweed militias to kill, pillage and rape. The people in southern Sudan, the first victims of the government were black Christian Dunka's and Nuers. The government, dominated by Arab Sudanese Muslims is now attacking the Fur and related tribal groups who are black Muslims (not Arabs). The Janjaweed (the term colloquially means "a man with a gun on a horse") are Arab tribesmen.

We cannot sit by ideally and ignore this genocide. We can and must take action to put economic pressure on the Sudan government. The way we do that is by keeping the State of Wisconsin Investment Board from investing in companies doing business with the Sudan government.

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Testimony on SB57

Dave Mills, Executive Director
State of Wisconsin Investment Board
March 28, 2007

Thank you very much for the opportunity to testify in opposition to SB 57.

I want to first commend the authors and sponsors of this legislation for their efforts to draw attention to the incredible tragedy taking place in Sudan, and specifically in Darfur. Every person affiliated with the State of Wisconsin Investment Board and the Wisconsin Retirement System with whom I've talked finds the situation there deplorable. We all wish that the U.S. and the international community would have found a way to stop this conflict long ago.

I also want to say that personally I don't relish having to speak in opposition to this well-intentioned bill. Although I may be personally conflicted, however, I have no choice. I must separate personal feelings from my professional responsibilities. Past Legislatures and Governors gave the Investment Board and me as Executive Director the responsibility to act as fiduciaries, which means to demonstrate undivided loyalty to members of the Wisconsin Retirement System and to invest the trust funds solely for the purposes set forth in law. Those purposes are:

> (2) PURPOSE. The public employee trust fund is a public trust and shall be managed, administered, invested and otherwise dealt with solely for the purpose of ensuring the fulfillment at the lowest possible cost of the benefit commitments to participants, as set forth by this chapter, and shall not be used for any other purpose. (Wis. Stats., S. 40.02)

I pledged to fulfill that responsibility when I took my oath of office, an oath that I take no less seriously than each of you accepts yours. One cannot be a "fair weather" fiduciary, embracing your duty when it's convenient and setting it aside when it's not. The nearly 535,000 members of the Wisconsin Retirement System, their families and dependents, are counting on us.

Let me describe the investments that are affected by the bill. In total, we invest $90 billion, of which $110 million or just over one-tenth of one percent (0.12%) of the assets are invested in companies identified by the Sudan Divestment Task Force from which divestment would be called for under the bill. Yet we estimate the costs to possibly reach $440 million over the next two to three years before provisions of the bill would temporarily suspend divestment requirements. We have no investments in Sudanese companies nor in bonds of the government, but rather investments in approximately 15 large international companies that generally have a very small fraction of their worldwide operations located in Sudan. SWIB invests through actively managed portfolios that hold shares in SWIB's name, through actively managed funds pooled with other institutional investors, and through passive investments in pooled market index funds. As a very large investor, we end up with some exposure to almost every large international company through index funds.

Many of you know that SWIB has a long history of engaging companies in discussions about topics that we think could improve shareholder value. Involvement in Sudan is one such topic. For a year now we have maintained a dialogue with companies with operations in Sudan. The requirement in the bill for engagement represents the one part with which we have no problem; we were engaging companies before the bill was introduced and will be engaging them whether the bill becomes law or not.

So, why is SWIB opposed to this legislation? There are five reasons: 1) the bill raises several legal questions; 2) the bill could result in a significant increase in taxes and a significant reduction in future annuities to retired members of the WRS; 3) the bill would be costly and negatively affect our overall investment program; 4) the bill in its present form is administratively unworkable; and 5) the bill would result in an unfortunate precedent and undesirable public and investment policy.

I. The Bill Raises Several Legal Questions and Could Ultimately Require the Repayment of Several Hundreds of Millions of Dollars By the State

Let me begin by commenting on the bill's legal problems, which are more thoroughly described in an attached memorandum from my Chief Counsel, Jane Hamblen, to me dated March 23, 2007.

The bill is in conflict with the purposes of the trusts and funds that SWIB manages. As mentioned previously, current law requires SWIB to administer the assets of each trust or fund solely for the purposes set forth in Chapter 40 and not for any other purpose. None of the funds and trusts under SWIB's investment management was established for the purpose of sponsoring a social or political agenda. No matter how worthwhile the purpose of this bill, it is not one of the purposes for which the employee trust fund was established [Wis. Stat. § 40.01(1)].

The Wisconsin Supreme Court has stated unequivocally that "legislative action affecting the WRS must be consistent with the stated objectives of the trust." [*Wisconsin Professional Police Assn v. Lightbourn,* 243 Wis.2d 512, 583, 627 N.W.2d 807 (2001)].

The bill could also result in an unconstitutional taking of private property without just compensation or an unconstitutional impairment of contract. The Wisconsin Supreme Court has held that the purpose and authorized use of the fund can't be changed by the Legislature to the detriment of the participants, and that public pension fund participants have a contractual relationship with the state and a property interest in the public pension fund by virtue of the statutes that created the trust. Consequently, the Supreme Court has said, "the legislature and the…board are not free to spend or appropriate the earnings of the fund except in a manner authorized by statute relating to the…retirement system." *State Teachers' Retirement Board v. Giessel*, 12 Wis. 2d. 5, 9, 106 N.W.2d 301 (1960).

Finally, the Supreme Court has further said that legislation that alters the "contractual expectations of the parties impairs the obligation of contract…" Participants have every reason to expect that the employee trust fund will be used only for the purposes stated in

Wis. Stat. § 40.01(1) and not for political or social purposes. *Wisconsin Professional Police Assn v. Lightbourn,* 243 Wis.2d 512, 627 N.W.2d 807 (2001), *citing State ex rel. Cannon v. Moran,* 111 Wis. 2d 544, 555, 331 N.W.2d 369 (1983).

There are other legal problems with the bill, including aspects that appear to conflict with the fiduciary duty of the trustees and me. Were we to apply a law later seen by the Court as an unconstitutional taking, we could be found to have breached our fiduciary duty, as happened in the Wisconsin Retired Teachers vs. Wisconsin Retirement Board case, better known as the Special Investment Performance Dividend or "SIPD" case. In that case, the state re-directed the use of approximately $80 million in employee trust funds. The Court held that the legislation was an unconstitutional taking of property from WRS participants. When settled, the Wisconsin Supreme Court ultimately ordered that the state re-pay $216 million, including interest. You can do the math on what the State might eventually owe given the $440 million estimate of the cost for this bill. It is important to note that the cap on costs provided in the bill, one-half of one percent (.5%) percent of the assets, doesn't change the fact that it would be a fiduciary breach; rather, the cap would simply limit the amount of the damages.

II. Even if Legal, The Bill Could Result in a Significant Increase in Taxes and a Significant Reduction in Future Annuities to Retired Members of the WRS

If our good faith cost estimates prove accurate, this bill will increase local and state government taxes by approximately $260 million and reduce funding for future retiree benefits by $180 million. The Department of Employee Trust Funds (DETF) has concluded that this would permanently increase employer contributions – paid almost entirely by units of government – by .12% of the public employee payroll in Wisconsin, which exceeded $11 billion in 2006.

DETF further estimates that once the fiscal effect is smoothed out through the Market Recognition Account, the annual annuity payment for each member of the Wisconsin Retirement System would be reduced by almost 0.5% for the rest their lives and those of

their beneficiaries. On the surface, this may not sound like much, but this means that the bill would in essence require them to donate $1 of every $200 they receive each year for the remainder of their lives, even long after the Sudan conflict is hopefully resolved.

The reason for this is quite simple: in a defined benefit retirement system, the cost of benefits is always equal to the contributions paid in plus investment earnings less expenses. When investment earnings go down and expenses go up – as may happen to the tune of $440 million under this bill – contributions must rise and retiree benefits must be offset in an equal amount.

III. Even if Legal, The Bill Would Be Costly and Negatively Affect SWIB's Overall Investment Program

The bill has been characterized as a "targeted disinvestment bill." While that may have been the authors' intent, in practice it doesn't work that way. Let me use one example to illustrate my point.

As one of our many investment strategies, SWIB invests heavily in various index funds. We have $12 billion invested in the Russell 1000, an index that represents the largest 1000 publicly traded companies in the U.S. capital markets. In June of this year, Schlumberger, a large international energy company headquartered in France, will join the Russell 1000 index. Less than 1% of its international business includes providing oil field services in Sudan, although it also is engaged in projects within Sudan that are humanitarian, educational and health prevention oriented.

When Schlumberger enters the Russell 1000 index, under the provisions of this bill we will no longer be able to invest in that index. Rather, we will be forced to liquidate our $12 billion investment and move it to a Sudan-free index fund. One of 1000 companies has less than 1% of its international operations in Sudan, yet SWIB would have to move $12 billion. Money managers are eager at the opportunity to create these special funds; why wouldn't they be since to do so enables them to charge higher management fees?

Even in index funds, which have the lowest investment fees, when you invest $12 billion, the fees paid are substantial.

IV. The Bill in its Present Form is Administratively Unworkable

The bill asks the Investment Board to evaluate the nature of business operations of companies in Sudan far in excess of our staff's capabilities and expertise, and to acquire information that is not readily available. Although the bill says that we can rely upon information available from other sources, including the Sudan Divestment Task Force, as institutional investors and fiduciaries we must have confidence that appropriate due diligence has been conducted.

Here is an example: The bill charges SWIB with identifying "scrutinized companies." To do so, we would need to identify the nature of the business operations in Sudan of a company or its affiliates, what percentage is objectionable under the bill, the degree to which those business operations serve individual groups in specific geographic areas of Sudan, and whether the company may have engaged in any activity that has attempted to limit communication among the people of Darfur. In the bill drafting file, which is a public record, the Legislature's own attorney working on the drafting is quoted as saying:

> "From my perspective, what SDTF (Sudan Divestment Task Force) has provided is not very practical or useful. Their model legislation is convoluted and complex; to me it is deficient in offering SWIB a practical way of carrying out the many demands of the legislation.... The latest draft "model legislation" from SDTF goes the opposite way, creating a convoluted mass of requirements that are difficult to follow and difficult to administer."

The drafter's comments notwithstanding, the model legislation was followed in drafting this bill.

V. The Bill Would Result in An Unfortunate Precedent From a Public Policy and Investment Perspective

The State of Wisconsin Investment Board has a long-term record of outstanding investment success. This past year we earned $32 million in investment earnings each day of the year, for a total of $11.6 billion. Our performance over the years has played a key role in saving employers and employees billions of dollars in higher contributions and in providing post-retirement dividends to retirees to help them keep pace with inflation and health insurance costs. One key reason the Board has been successful is that it has been able to let investment analysis determine where and when to invest based upon purely economic factors. As meritorious as this cause may be, it would be the first time that the public employee trust fund would be used for a political or social cause, but would certainly not be the last if SB 57 becomes law.

In the last two years alone, SWIB has been asked to invest or divest for over 40 different causes. While what is happening in Sudan today may seem to rise to a different level, future advocates for other causes will not see things that way. Wind Power? Tobacco? Stem cells? Big Pharma? Biofuels? Mine safety? What about Iran? Israel? Syria? Russia? China? Some argue today that we should not invest in companies doing business in China, yet our own Governor will soon lead a second trade mission there.

Once one begins to make exceptions as called for in SB57, there is simply no good place to draw the line. Past Legislatures have demonstrated great foresight and have never passed legislation that would require SWIB to set political or social matters above investment considerations. This is one of the reasons the Wisconsin Retirement System is virtually 100% funded while most other states face substantial shortfalls. In my personal opinion, to change that at this time would severely compromise our ability to be the first class investment organization that the Legislature and our members expect us to be, and need us to be.

Thank you very much for the opportunity to offer these comments.

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State of Wisconsin Investment Board
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MEMORANDUM

To: Dave Mills, Executive Director
Gail Hanson, Deputy Executive Director

From: L. Jane Hamblen
Chief Legal Counsel

Date: March 23, 2007

Re: Legal Comments on Proposed Sudan Divestment Legislation (LRB—823/P1)

1. **The bill is inconsistent with the purposes of the trusts and funds that SWIB manages.** SWIB must administer the assets of each trust or fund solely for the purpose of ensuring the fulfillment of the purpose of each trust or fund at a reasonable cost and not for any other purpose. Wis. Stat. § 25.15(2)(c). A parallel provision in Wis. Stat. § 40.01(2) requires that the public employee trust fund (ETF) be invested solely for the purpose of ensuring the fulfillment at the lowest possible cost of the benefit commitments to WRS participants and shall not be used for any other purpose. None of the funds and trusts under SWIB's management was established for the purpose of sponsoring a social or political agenda outside of Wisconsin. For example, the ETF was established as a trust fund for the following stated purpose:

> [T]o aid public employees in protecting themselves and their beneficiaries against the financial hardships of old age, disability, death, illness and accident, thereby promoting economy and efficiency in public service by facilitating the attraction and retention of competent employees, by enhancing employee morale, by providing for the orderly and humane departure from service of employees no longer able to perform their duties effectively, by establishing equitable benefit standards throughout public employment, by achieving administrative expense savings and by facilitating transfer of personnel between public employers.

Wis. Stat. § 40.01(1). No matter how worthwhile the purpose of this bill, it is not one of the purposes for which the ETF was established. In addition to the clear language of the statute, the Wisconsin Supreme Court has stated unequivocally that "legislative action affecting the WRS must be consistent with the stated objectives of the trust." *Wisconsin Professional Police Assn. v. Lightbourn,* 243 Wis.2d 512, 583, 627 N.W.2d 807 (2001).

2. **The bill could result in an unconstitutional taking of private property.** The purpose and authorized use of the ETF cannot be changed by the legislature to the detriment of the participants in the ETF. The Wisconsin Supreme Court has held that public pension fund participants have a contractual relationship with the state and a property interest in the public pension fund by virtue of the statutes. *State Teachers' Retirement Board v. Giessel*, 12 Wis. 2d 5, 9, 106 N.W.2d 301 (1960). Consequently, "the legislature and the...board are not free to spend or appropriate the earnings of the fund except in a manner authorized by statute relating to the...retirement system." *Giessel*, 12 Wis. 2d at 10.

The Wisconsin Supreme Court has held that each public retirement system participant has a broad property interest in the public retirement system as a whole, which includes the right to have the fund applied as provided by the statute that established the trust. *Association of State Prosecutors v. Milwaukee County*, 199 Wis. 2d 549, 544 N.W.2d 888 (1996); *Wisconsin Retired Teachers Ass'n v. Employe Trust Funds Board*, 207 Wis. 2d 1, 19, 558 N.W.2d 83 (1997). In a long line of cases spanning more than 40 years, the Wisconsin Supreme Court has repeatedly found that legislation that uses public pension funds for non-trust purposes constitutes an unconstitutional taking of private property for public purpose. While the proposed Sudan legislation does not directly divert funds from the ETF for the payment of non-trust obligations, it does require that investments be made and evaluated on the basis of non-trust purposes. If investing and divesting in accordance with the Sudan legislation resulted in losses to the ETF, a court could find the legislation to be an unconstitutional taking of the participants' property rights, and the state could be required to make the trust fund whole for any such losses.

Losses to the ETF could occur in a number of ways. The forced liquidation of investments without regard to the market can result in undesirable losses. The need to sell private equity investments (in order to invest in a manager's Sudan-free fund as required by the bill) could cause a fire-sale resulting in large losses. The elaborate process of identifying companies, communicating, monitoring and reporting established by the bill will require significant staff time which would otherwise be spent on furthering the purposes of the trusts and funds under management. SWIB has a limited number of positions and is already thinly staffed for its many responsibilities.

3. **The bill could constitute an unconstitutional impairment of contract.** As mentioned above, the supreme court has held that public pension fund participants have a contractual relationship with the state with respect to the public pension fund. Further, "We have said that legislation that alters the "contractual expectations of the parties impairs the obligation of contract." *Wisconsin Professional Police Assn. v. Lightbourn,* 243 Wis.2d 512, 627 N.W.2d 807 (2001), *citing State ex rel. Cannon v. Moran*, 111 Wis. 2d 544, 555, 331 N.W.2d 369 (1983). Participants have every reason to expect that the employee trust fund will be used only for the purposes stated in Wis. Stat. § 40.01(1) and not for political or social purposes.

4. **The bill conflicts with the SWIB's fiduciary duty.** The bill purports to exempt SWIB from "conflicting statutory or common law obligations," including SWIB's duty of prudence and the duty to invest solely for the purpose of fulfilling the obligations of the pension system at the lowest possible cost, which are imposed by Wis. Stat. § 25.15(2); however, it is unlikely that a court would enforce such a provision in a lawsuit that WRS participants might bring against trustees or staff members claiming that any losses that result from the application of this legislation were caused because the trustees breached their fiduciary duty. The public employee retirement fund is a trust to which the board members have a fiduciary duty under both common trust law and Wis. Stat. § 25.15. Similarly, SWIB has fiduciary duties to the other funds and trusts under its management by virtue of common law and Wis. Stat. § 25.15. That fiduciary duty includes the duty of loyalty—the responsibility to use the trust funds solely for trust purposes. If SWIB applies a law that is found to constitute an unconstitutional taking, the trustees and staff could be found to have breached their fiduciary duty to the trusts. In *Wisconsin Retired Teachers*, the trial court concluded that the Employee Trust Funds Board had

breached its fiduciary duty by applying the unconstitutional law that required the use of the trust fund for non-trust purposes.. The supreme court reversed that decision only because the board had implemented the unconstitutional statute based on its good faith reliance on the legal opinion of the Attorney General that the law was constitutional. Although I am not aware of any case law directly on point, it is possible that, if a court found that the divestment legislation was constitutional without finding that the use of the ETF required by the legislation was within the purpose of the ETF, the members of the board could still be found liable, if they implement the legislation, for breach of their fiduciary duty to administer the assets solely for the purpose of the trust funds.

The fact that the bill allows SWIB to cease divestment or commence investment if the fund has lost 50 basis points would not absolve SWIB from its fiduciary duty. It would only limit the amount of damages for which the fiduciaries would be liable to the fund.

5. **SWIB has the fiduciary duty, but is subject to the supervision of agencies that do not have that fiduciary duty.** The bill not only requires SWIB to make investments for non-trust purposes, but it also replaces SWIB's judgment about the investments with that of the legislature and the attorney general, neither of which have a fiduciary duty to the trust funds. Before SWIB can cease divesting or commence investing under paragraph (8) of the bill, it must present "the reasons and justification, supported by clear and convincing evidence, for the board's decision" to the attorney general and the legislature. This provides the attorney general with the opportunity and authority to sue SWIB if the attorney general disagrees with SWIB's analysis.

6. **Current law relates to the concern addressed by the bill.** SWIB is already subject to Wis. Admin. Code § IB 2.02(7), which requires SWIB consider, when investing, whether organizations in which it invests respect basic human rights, adhere to prevailing local and national laws and generally accepted standards of conduct. The rule also requires SWIB to encourage managements of the organizations in which SWIB invests to respect basic human rights. That rule does not infringe on SWIB's fiduciary obligations to the funds and trusts that it manages, but ensures that these principles are codified in SWIB's policies.

7. **The bill would be difficult to administer.** The very broad definition of "company" in the bill includes subsidiaries and affiliates—SWIB does not necessarily know—the company itself does not necessarily know–what, if any, actions the parent or affiliate is taking with respect to Sudan. Further, there is no definition of an "affiliate," so that could include an unreasonably broad range of organizations and individuals.

The bill assumes that reliable information regarding the activities of all companies in Sudan is readily available, which is not the case. Different sources provide different information and different nuances on the same information. The bill leaves open the possibility of disputes among SWIB, the legislature and the attorney general about which source should be relied upon.

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Response to the National Foreign Trade Council's Letter on Sudan Divestment

The National Foreign Trade Council (NFTC) writes a generic letter to every single state that is considering Sudan divestment no matter how the bill deviates from the core concerns they have. As such, the Sudan Divestment Task Force (SDTF), in consultation with legal counsel, has prepared a response to the NFTC letter.

Background on the Constitutionality of Targeted Divestment

As referred to in the NFTC letter, in late February, U.S. District Judge Matthew F. Kennelly ruled the Illinois' blanket Sudan divestment statute to be unconstitutional. However, instead of striking down divestment *per se* as unconstitutional, Judge Kennelly defined certain limits to Sudan divestment statutes and ruled that Illinois had crossed those certain limits. In response, Illinois legislators have stated in a press release that they intend to amend the law to bring it in line with constitutional requirements outlined by Judge Kennelly.

In order to protect the targeted Sudan divestment model from the litigation faced in Illinois and from past litigation dealing with somewhat similar circumstances (especially *NFTC vs. Crosby,* cited in the NFTC letter), the targeted model was written in close consultation with a team from Cooley Godward Kronish LLP, one of the nation's top law firms. That team was headed up by a former clerk for two US Supreme Court Justices. The targeted Sudan model was also written after an extensive legal analysis of the Illinois case, in an attempt to address the primary concerns of the litigants. Furthermore, the targeted Sudan divestment model has received support from state pension funds that have traditionally opposed mandated divestment.

It is critical to note that the targeted Sudan divestment model is different in every conceivable way from the Illinois law. The Illinois law targeted over 160 companies (including some of the largest companies in the US), it requires divestment to begin immediately without any engagement of problematic companies in dialogue, it targets all investment vehicles, and it contains no sunset provision, all factors not present in the targeted Sudan divestment model.

Furthermore, unlike the targeted divestment model, the Illinois law fundamentally contained two main provisions/requirements:

1. One portion, which is referred to as the "banking provision" below, forbade any state entity from contracting with a bank that wouldn't certify it was free from any business relationship with entities connected to Sudan.

2. The second portion, which is referred to as the "divestment provision" below, prohibited public investment funds in the state, particularly pension funds, from investing in any company that had a non-humanitarian connection to Sudan.

NFTC Claim: Sudan divestment violates the Supremacy Clause

The Illinois Court found this argument only applies to "banking provision" in Illinois law. ***In fact the Court explicitly concluded "that federal law regarding relations with Sudan does not preempt the provision of the Illinois Sudan Act that amends the Illinois Pension Code [which is the "divestment provision" of the Illinois law]."***

While the targeted Sudan divestment model does contain language relating to divestment for state pension funds or other similar entities, it contains no analogous "banking provision." As such, the direct implication of the Illinois court ruling is that the targeted Sudan divestment model is acceptable under the Supremacy Clause. Furthermore, the "divestment provisions" of the targeted Sudan divestment model substantially differ from the blanket/all-encompassing approach of the Illinois law's "divestment provisions." Many of these differences were meant to explicitly put the targeted Sudan divestment model explicitly in line with federal foreign policy towards Sudan. For example, and in contrast to Illinois' Sudan law, the targeted Sudan divestment model exempts companies operating in certain regions of Sudan, exempts US companies who have permission by the federal government to work in Sudan, and exempts certain types of businesses in Sudan no matter where those operations are located. Each one of these exemptions was explicitly cited by Judge Kennelly as potential areas where Illinois' law differed from federal foreign policy (and, notably, Judge Kennelly did not cite any other examples of where divestment might deviate from federal foreign policy). Given that the targeted divestment model had preemptively addressed the exact concerns Judge Kennelly laid out in the Illinois case, the Illinois ruling has actually become an affirmation that the targeted divestment model addresses all Supremacy Clause concerns regarding discrepancies between federal Sudan policy and targeted divestment.

NFTC Claim: Sudan divestment violates the foreign commerce clause

The Illinois Court found that the state does not have the power under the foreign commerce clause to regulate whether local pension funds, governed and administered by local authorities, should divest from Sudan. But the Illinois Court did not make any pronouncement against Sudan divestment for state assets, including state pension funds, that are under the control or management of the state. For these assets, the court acknowledged that the state may be acting as a "market participant" rather than a state regulator. "Market participation" affords the state the ability to make investment decisions that any other private investor, including private institutions and individuals, might make. Certainly, restricting investments in companies linked to Sudan is within the right of any individual or private institution charged with making investment decisions.

In contrast to the targeted Sudan divestment model, the Illinois law applied to all pension funds of the state, including local pension funds run by local authorities. The targeted

divestment model is written and tailored so as to only apply to investing entities that could reasonably considered to be a part of the state rather than a local unit, thereby preserving the "market participant" defense.

NFTC Claim: Targeted Sudan divestment would reach foreign subsidiaries and affiliates of companies

The US government has applied broad sanctions against Sudan, including a broad prohibition against most US companies operating in or with the country. The prohibition also applies to foreign subsidiaries and affiliates of US companies. The only US companies or foreign affiliates/subsidiaries allowed to operate in Sudan are those that have been given explicit permission from the federal government. Importantly, the Illinois law explicitly targeted US companies and their affiliates/subsidiaries operating in Sudan, even though the federal government had granted permission for these companies to operate in Sudan. In contrast, the targeted divestment model explicitly exempts from divestment any company that has been given permission by the US government to operate in Sudan. As such, the NFTC is incorrect that targeted Sudan divestment would "reach foreign subsidiaries and affiliates of [US] companies." Indeed, the targeted divestment model was written exactly to avoid this constitutionally problematic circumstance

NFTC Claim: Targeted Sudan divestment intrudes on the foreign policy powers of the President

Again, the Illinois Court found that there is only enough evidence to say that the "banking provision" of the Illinois act violated the doctrine of dormant foreign affairs power to which the NFTC is referring. ***In contrast, the Court explicitly stated that the "divestment provisions" of the act did not violate the doctrine of dormant foreign affairs powers, noting that "what matters is the Illinois Sudan Act's effect on the federal government's authority to conduct foreign affairs. The section of the Act amending the Illinois Pension Code [the "divestment provision" of the Act] does not interfere with that authority."***

Furthermore, the targeted divestment model contains clear sunset provisions tied to federal policy on Sudan. ***These sunset clauses render the legislation void as soon as the federal government determines that divestment is no longer in the interest of federal foreign policy or as soon as the federal government removes its sanctions on Sudan.*** These provisions address one of the primary concerns in the Illinois decision and in previous court rulings such as *NFTC vs. Crosby* – that the state legislation must be flexible enough to adapt/adjust to changes in federal foreign policy. In contrast, Illinois' Sudan law contained no such "benchmarked" sunset provisions.

NFTC Claim: Divestment is unlikely to achieve its stated goal

It should first be noted that the targeted divestment model is first and foremost a model of shareholder engagement to encourage more responsible business practices in Sudan. Out

of the 500+ multinationals operating in Sudan, only 2-3 dozen companies have operations problematic enough to be targeted for engagement and divestment under the targeted divestment model. These "scrutinized" companies have a business relationship with the Sudanese government or government-created project, fail to benefit civilians outside of government controlled circles, and fail to reasonably address the genocide through corporate action. Divestment action is only taken on the smaller subset of these 2-3 dozen companies that have proven insufficiently responsive to repeated attempts at shareholder engagement. These firms typically come from the oil, mineral extraction, and power sectors in Sudan, although not all companies in these sectors are targeted.

Why is divestment likely to have its intended impact? The Sudanese government has a long history of susceptibility to economic pressure, with a foreign debt larger than its GDP. More than US diplomacy, the country has responded to US economic pressure in the past. Despite this historical responsiveness, the regime has faced little in the way of economic consequences for its perpetuation of genocide in Darfur, heavily protected by a small set of international actors whose commercial interests in Sudan are very strong. Indeed, while the regime has been brutal towards its own citizens, it has been a shrewd attracter of foreign investment- it currently ranks in the top 20 countries in the world in attracting foreign investment dollars as a percentage of its GDP and it holds international investor conferences, even as the genocide is ongoing, with amazing regularity. This is a government acutely attuned to the country's finances but facing little challenge from the international community. As if to emphasize this point, Sudan's President, Omar Al-Bashir, recently stated to the international press, "When countries gave us sanctions, God gave us oil."

The emerging Sudan divestment movement has already caught the attention of the Sudanese government, which has spent considerable time and energy attacking the campaign, even going so far as to purchase a six page ad for more than $1 million in the New York Times to counteract the divestment movement. Several major companies operating in Sudan, including ABB, Siemens and Total, have also recently altered their business practices, largely in response to the divestment movement.

Prominent foreign policy experts and think tanks which do not classically support blanket sanctions, including experts from the International Crisis Group, Harvard University, the Heritage Foundation, have all endorsed targeted sanctions, including divestment, on the Sudanese regime, calling it a critical tool for influencing the behavior of the Sudanese government and bringing long-term peace and security to the region. More recently, a group of 15 former foreign ministers from Europe, Canada, and the US reiterated the need for targeted sanctions on Khartoum. And in March 2007, a report from the UN Human Rights Commission explicitly included a prohibition on contracts with problematic companies operating in Sudan as one important remedy for the atrocities in Darfur.

NFTC Claim: Divestment has the real potential of adversely impacting the retirement funds of public servants

We agree that while states might be interested in doing what they can to prevent human kind's worst crime, they also have an important obligation to manage retirement assets in a financially prudent manner. Recognizing this obligation, the targeted Sudan divestment model was designed in close consultation with fiduciaries, asset managers, and legal counsel allowing states to dissociate themselves from genocide while safeguarding investment portfolios.

The targeted model limits financial risk in six key ways (thereby also setting it **far** apart from the Illinois law):

1. First, all company research, template letters, and other pertinent information needed to carry out the targeted model's research and engagement provisions are available free of charge from reputable non-profits, thereby minimizing administrative burdens on state fiduciaries.

2. Second, the model limits the number of companies targeted to those warranting "scrutiny," representing only a very small fraction of states' total holdings.

3. Third, the model precludes divestment from certain types of investments, including private equity and actively managed, commingled funds, that have caused the most problems for divesting fiduciaries.

4. Fourth, the model allows fiduciaries to attempt to change company behavior through an expedited engagement process prior to the enactment of any divestment.

5. Fifth, the model gives fiduciaries at least 15 months to engage the "scrutinized companies" and complete divestiture of companies unresponsive to engagement.

6. Sixth, the model contains an explicit opt-out clause that can be exercised when and if fiduciaries can demonstrate a non-trivial negative impact to portfolio returns.

Finally, it should be clearly noted that the companies fiduciaries choose as replacements for divested companies may very well perform better than the offending companies in Sudan, since an additional 19 US states are currently considering targeted divestment from those very companies.

Conclusion

Divestment is an option that should be considered only in the most extreme of circumstances. Heeding every call for divestment is impractical and imprudent. However, the overwhelmingly heinous and urgent nature of genocide, combined with validation of

the genocide by official, non-biased, and highly trustworthy sources, makes the call for Sudan divestment truly singular among other recent divestment campaigns.

It should also be noted that this is the first time in history that genocide has been declared while atrocities are still ongoing. This clearly makes a Sudan divestment decision unique and allows fiduciaries to maintain an extraordinarily high benchmark for considering divestment in the future. This response will provide background on the constitutionality of targeted Sudan divestment and address specific claims made by the NFTC.

from Mr. Mohammed

DARFUR PROBLEM IN SUDAN

- ★ The Janjawid is a militia created by the government of Omar El Bashir. They originally are from some Arab countries (Libya), Chad, Niger, and Nomads from the North of the Sudan

- ★ The Government created it in 1979. After that the people of our area created what is now (the front for liberation and justice in the Sudan) created in February 2003. The aim of the government was to get rid of the African race or Arabilize them.

- ★ The regime of Sudan practiced discrimination in so many ways; education, healthcare, housing, and wealth distribution. The demand of our people was just equality in healthcare, education, and equal distribution of the Sudan natural resources. Meanwhile the government should have provided security and civil right to all without discrimination.

THE PEACE IN SOUTH SUDAN

- ★ The peace that was signed between NCP and SPLM/SPLA in 2005 is under threat to collapse because the NCP of president Omar Bashir party is seriously violating the peace accord that was signed by continuing to recruit militia in the south and completely ignore the implementation of the Abei protocol. AS time goes on without progress, this agreement violation can lead to resumation of war if international community don't intervene as soon as possible.

- ★ If possible: there should be need to discuss some security and protection measures as basic means for oppressed people to protect

WISCONSIN CATHOLIC CONFERENCE

TESTIMONY IN SUPPORT OF SENATE BILL 57
March 28, 2007

My name is John Huebscher and on behalf of the Catholic bishops of Wisconsin, I urge you to support Senate Bill 57.

Our Catholic advocacy is grounded in a number of bedrock principles. Two of these are the sanctity and dignity of human life, which reflect our conviction that every life is important and the principle of solidarity which reflects our conviction that life is social and that we are connected to each other.

The principle of human life and dignity calls us to assess our personal choices and policy preferences in light of their impact on all human beings. The principle of solidarity reminds us that we are one human family and therefore, as Pope John Paul II put it, "that all are truly responsible for all."

We live out the principles of human life, dignity and solidarity when we give of our resources and ourselves to people we can't see. That is why we care about unborn children and the terminally ill. That's why we ask people in rural areas to fund educational opportunities for the urban poor in Milwaukee. It is why we ask people in Milwaukee to help pay for farm to market roads in rural areas. The principles of human life and solidarity are why we ask our neighbors to care about all human life, whether in the womb, in the lab, or in the world.

And the principles of human life, dignity, and solidarity are why we all should care about what is happening in the Darfur region of Sudan. For when we stand idle or silent while the strong destroy the weak, we not only deny these bedrock principles, but we make it easier for others to do so.

On the other hand, every time we uphold human life, dignity, and solidarity, our actions not only help the afflicted, but they also inspire others to do the same. The more we affirm that certain practices won't be tolerated, the more we hasten the day when they won't happen at all.

Now it is true that the federal government is responsible for making foreign policy. Decisions about military action or economic aid to Darfur rest with Congress and the President.

It is also true that in terms of humanitarian aid, non-government organizations are already doing a great deal. Catholic Relief Services, for example, has extended its presence in the Darfur region and provides desperately needed food and other basic assistance. CRS has long managed the largest agricultural development program in Sudan.

But in Wisconsin, we too can make a difference. We can, by our state investment policy, show the world that we value human life and dignity more than fiscal benefits. We can witness our disgust at the economic forces that enable and abet the genocide taking place in that afflicted corner of our world.

We often hear that politics is the art of the possible. What this bill asks is not only possible, it is necessary for the preservation of human life, dignity, and solidarity. Thank you.

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MJC
Milwaukee Jewish Council
for Community Relations

Testimony in Support of S.B. 57, Targeted Divestment from Sudan

Thank you for the opportunity to testify in support of SB 57, related to targeted Sudan divestment. My name is Paula Simon and I am the Executive Director of the Milwaukee Jewish Council for Community Relations, as well as the founding member of the Darfur Action Coalition of Wisconsin. The Council represents the organized Jewish community on behalf of its public affairs and community relations agenda. 29 constituent member organizations are represented on the Council's Board of Directors.

As Jews, our collective memory of persecution and genocide evokes deep empathy for the victimized people of Darfur, and keen recognition of our responsibility—as Jews, as Americans, as people of conscience—to aid them. Bitter history has taught us that indifference must never be the response to genocide.

Over the past four years, the Janjaweed militias, with the active support and encouragement of the Sudanese government, have systemically killed at least 400,000 people and displaced more than 2.5 million in Sudan's Darfur region. Another 300,000 have fled to neighboring Chad. More than 400,000 have died from violence, disease, and related conditions related to forced displacement an insufficient access to humanitarian assistance. For the first time in history, the US government has declared ongoing atrocities to be genocide. The U.N. has declared the crisis the "worst humanitarian disaster in the world today." Tens of thousands of civilians in Darfur have been brutally murdered by the Janjaweed militia with the encouragement and active support of the Sudanese government.

Since the Holocaust, the Jewish community's attitude toward preventing genocide has been summed up in the moral philosophy of "Never Again." Over time, however, the words have come to encompass a broader commitment, among Jews and non-Jews, that genocide not be tolerated in any place at any time. Because the Jewish people experienced genocide firsthand and were abandoned by the international community in their time of greatest need, Jews bear a particular responsibility to ensure that genocide be prevented.

Nationally, the Jewish community's response to the genocide in Darfur on the grassroots level has been extraordinary: thousands of Jewish individuals and communities around the country have educated, advocated, and raised money to end the Sudanese government's policy of mass extermination. Locally, the Milwaukee Jewish Council for Community Relations founded the Darfur Action Coalition of Wisconsin, bringing together a broad cross-section of faith, ethnic, student and community organizations to work strategically on raising awareness and fostering advocacy. Despite all of the activism, the situation continues to deteriorate. It is incumbent upon all of us who care to use all of the tools available to us to end the genocide.

Targeted divestment is one such tool. It can have maximal impact on Sudanese government behavior and minimal impact on innocent Sudanese and the financial health of institutional portfolios. With bi-partisan support for this effort in the Wisconsin legislature, it is imperative that this committee vote to move this bill forward quickly, and include Wisconsin in the list of states that have already passed legislation calling for state funds to be divested from Sudan. Divestment continues to keep Darfur in the public eye and sends a clear message to both the Federal government and the international community that the crisis warrants attention. We must not wait patiently for the politicians and diplomats to debate protocol while people are being annihilated.

Whether we are individuals donating money to humanitarian causes, or activists imploring the United Nations to act on its own resolution to place a peacekeeping force on the ground, or a state government using its powers to divest state funds from companies doing business with Sudan, we each have a responsibility to respond. I encourage you to act in a timely fashion to pass SB 57.

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Wisconsin Retired
Educators' Association

Your voice. Your choice.

Testimony of
THE WISCONSIN RETIRED EDUCATORS' ASSOCIATION (WREA)
Jane Elmer, Executive Director
Arnold Chandler, Legislative Chair

Committee on Veterans and Military Affairs,
Biotechnology and Financial Institutions

Wednesday, March 28, 2007 1:00 p.m., 411-S

RE: Opposition to SB 57
Prohibiting the Investment Board from certain investments relating to Sudan

Senator Sullivan and members of the committee, thank you for allowing me to testify today on behalf of the 12,500 members of the Wisconsin Retired Educators' Association (WREA). My name is Jane Elmer, and I am the executive director of WREA.

As I begin my remarks, I want to tell you and the others gathered here that WREA believes we cannot assign a dollar value to human life. WREA joins with many other people and organizations that deplore the genocide in Sudan and other places in the world.

However, WREA also recognizes that investment decisions in the state pension fund are the responsibility of the State of Wisconsin Investment Board (SWIB) and investment professionals. WREA members are dependent on the work of the Investment Board because they are annuitants in the system.

When we look beyond the emotional impact of the genocide in Sudan, there are several reasons for our opposition.

- WREA was the lead plaintiff in the 1987-1997 litigation (*Wisconsin Retired Teachers Association v. Employe Trust Funds Board*) in which

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the Wisconsin Supreme Court ruled unanimously that use of pension funds for non-trust purposes is unconstitutional and creates a taking of property. The 1987 "taking" was $84 million; by the time the pension fund was reimbursed 10 years later, the cost to the state was about $215 million. Divestment from Sudan would have a negative impact on future earnings, and losses to the retirement fund as a result of SB 57 would violate the rights of the participants of the fund.

- The Wisconsin Retirement System (WRS) is a public employee trust fund created to provide financial security to its members and their families, including members of WREA. SWIB trustees and staff are fiduciaries and are required by law to make investments based on economic reasons, not for social or political causes.

- While the goal of this bill is to ultimately stand up for the rights of people in Sudan, it would open the door to a never-ending series of political or social investing reasons.

- SWIB currently complies with strict investment guidelines relative to Sudan and other areas where human rights and life are not respected.

There are some other practical considerations that merit attention:

- It is impossible to get an accurate or complete list of companies doing business in Sudan or other countries in question.

- Any one of us who has mutual fund or index fund investments probably has money indirectly invested in Sudan. Those of us who support this legislation should take a good look at our own portfolios and assess the challenges of divesting on a personal level. Compare that to the challenges created for a $90 billion dollar pension fund.

Thank you for allowing me to speak on behalf of the Wisconsin Retired Educators' Association today. I appreciate the opportunity to share our concerns, and I encourage you to oppose this legislation.

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Introduction
Chairman Sullivan, distinguished members of the committee, thank you for the opportunity to speak today.

My name is Dr. Sarah W. Peck. I have a B.A. from Yale University, a Masters in Applied Economics and a Doctorate in finance and accounting from Rochester University. I am an Associate Professor and Chair of the Finance Department, College of Business Administration at Marquette University. I teach a course titled, "Investment Management, Ethics, and Society" in the Applied Investment Management program at Marquette. I am also a Trustee on the Milwaukee County Pension Board.

I am not representing Marquette University or the Milwaukee County Pension Board in my appearance before the Senate today.

I support SB 57.

Socially responsible investing always creates arguments about what is socially responsible and the "slippery slope." That is not the case here. There is no moral ambiguity. Genocide is wrong. Any economic support for entities that fund genocide is wrong. Fiduciary duty does not require the investment professional to invest in immoral economic activity.

My comments today are related to my experiences as a fiduciary and my academic expertise in finance.

Fiduciary
First, as a fiduciary, I appreciate that the legislation would create additional set of regulations for SWIB to follow and in general this is something to be avoided. However, given the humanitarian issues involved this is not the case here.

Second, enacting SB 57 would **not** interfere with SWIB's fiduciary duty. In general, fiduciary duty says that you should maximize risk-adjusted returns for beneficiaries. However, fulfilling your fiduciary duty does not require you to break the law- ***you cannot make investments that violate the law.*** For example, if there was a private equity opportunity in Russia that would generate fabulous risk-adjusted returns, but also involved getting into business with the Mob, SWIB would turn down this opportunity because it would involve them breaking the law. In fact, the CFA Institute, a professional organization that is the standard bearer for ethical practices, states specifically that you must follow the law (CFA Institute Standards & Practice Handbook, p. 14) when managing money for clients.

Once SB 57 becomes law, SWIB must divest and doing so would not interfere with their fiduciary duty. In fact, would make it ***easier*** for SWIB to follow a divestment plan, follow the administrative rule which directs SWIB to "… seek investments in organizations that respect basic human rights…" [Wis. Admin. Code sec. IB 2.02 (7)],

without leaving them vulnerable to what the interpretation of this administrative law is and whether or not how they've chosen to interpret it is a violation of their fiduciary duty.

Cost estimates
I would like to comment on cost estimates provided by SWIB in their Fiscal Estimates Worksheet for SB 57. SWIB states that it would "incur at least the following estimated expenses."

These estimates are at best misleading and at worse overstated.

We can think of divestment as an investment strategy and as such would be evaluated using the standard methods in the industry. In a nutshell, these methods look at the balance between risk and return as well as management fees. The money manager's job is to take risks and generate excess returns.

The information that SWIB provided does not follow these usual methods.

Information Provided is Incomplete
First, SWIB has provided very little information about where their cost estimates come from, what assumptions they have made, what data they have used, etc.

I would like to focus on the reduced return figures item (b) on the last page of SWIB's Fiscal Estimates Worksheet.

They have Mis-labeled Tracking Errors as Reduced Returns
Using additional documents provided by the Sudan Divestment Task Force, which I believe they received through an Open Records Request, I was able to determine that the reductions of 100 bp, 50 bp, etc. were, in fact, "tracking errors."

Let me briefly explain what tracking error is. Money managers are hired to manage money that tracks a particular index, with the idea that they earn management fees for beating the index. For example, suppose a manager is hired to track the S&P 500. Tracking error represents the additional variance in returns that occurs because your fund doesn't have exactly the same holdings as the S&P 500. If the fund did have exactly the same holdings as the S&P 500, then the tracking error would be zero. Thus tracking error is a way to assess how well the manager is doing tracking the index, the benchmark his performance is judged against.

Tracking error is a standard deviation. Please recall what a standard deviation is. Suppose you have a normal or bell-shaped curve. The standard deviation tells you the dispersion around the average or mean. It is a ***plus or minus*** figure. For example, expected or average returns were 13% +/- 5%. ***An increase in standard deviation means that there is both the possibility for lower returns <u>but also the possibility for higher returns</u>.***

Reporting a Tracking Error as Return Reduction is Only One Half of the Story
The figures provided by SWIB that show a 100 bp reduction in returns are standard deviations so ***they could also represent a 100 bp increase.***

Further, because the figures represent a one standard deviation reduction in return they overstate the expected cost reduction. Assuming a normal distribution of returns -- the common industry practice -- the probability of getting a reduction one standard deviation or lower is 16%. Thus the expected outcome or return reduction would be 0.16*100 bp or 16 bp or 16% of the $173 million shown. Taking an outcome and multiplying it by its probability to get expected outcome is a basic principle taught in the introductory undergraduate finance courses.

The Tracking Errors Reported Are Small
The tracking errors are small. In a paper presented this January at the American Finance Associate meetings by Professors Martijn Cremers and Antti Petajisto at Yale, they report out of 1,678 equity mutual funds, only 93 had tracking errors of 200 bp or lower – or 99.94% of these funds have a tracking error ***greater*** than 200 bp. The largest increase in tracking error provided by SWIB is 100 bp. This is very small.

In addition, most funds advertise a range in which they will manage their tracking error. Typically these are from 100 bp to 800 bp. Are the increases reported by SWIB within these ranges? They do not provide this information.

SWIB Does Not Report Impact on Expected Returns or Information Ratio
Is it okay to just look at tracking error in evaluating an investment strategy? Is the goal of a fund manager to minimize tracking error? ***No***.

An increase in tracking error is rewarded by earning a higher return. Thus you hire a fund manager to track the S&P 500 so that you can earn returns higher than the S&P 500. A commonly used measure to balance the tradeoff between risk and return is to look at returns divided by standard deviation. The most common measure is the information ratio, which is the returns earned by the fund in excess of the index or benchmark, divided by tracking error. This tells you how much additional return the fund is earning beyond the benchmark per unit of tracking error. A published study by Gupta, Prajogi, and Stubbs in the *Journal of Portfolio Management* (a peer-reviewed journal respected by academics and practitioners alike) have shown that for fund managers to consistently generate positive excess returns ***they must have some tracking error***.

The information ratio is commonly used to assess fund managers and investment strategies. SWIB does not provide either this measure or any information about how expected returns would be impacted by divestment.

Evaluating Expected Returns and the Impact of Divestment
Expected returns are usually estimated by looking at historical return performance. However, as with all investment strategies, future events that could change returns should be taken into account. When evaluating expected returns for stocks that are divestment candidates, the impact of divestment policies by public pension funds and university endowments must be taken into account.

We know that when stocks are sold by large institutional holders, prices can fall. In fact, the SEC is investigating whether hedge fund managers are getting tipped off by brokers at investment firms when funds are selling positions. If a hedge fund manager can sell ahead of a mutual fund and a price decline, they can in effect sell high, buy low and enhance return.

If SWIB does this analysis, SWIB may determine that it is prudent for SWIB to divest in any case.

How realistic is SWIB's conclusion?
SWIB states if they divest $110 million, in "just the first two-three years after enactment" they would have a loss of $440 million. This would mean that there would be a negative **500% return** or a 50,000 bp cost of divestment, which is neither reasonable nor consistent with other numbers provided by SWIB.

How else is SWIB exaggerating the cost?
One other quick example – I question the need for SWIB to hire two full-time staff to monitor the portfolio when other states are using the services provided free by the Sudan Divestment Task Force. Rather than reject the Task Force, SWIB could simply articulate what standards the Task Force would have to meet. There is no reason for the state to just start taking on additional costs when the market is providing those services.

Conclusion
The costs provide by SWIB are overstated; and on the other hand, the clear benefit of saving lives is immeasurable. I urge you to pass SB57 and make the Sudan Divestment Bill law.

Tracking Error = standard deviation of the differenced between the return of the managed portfolio, P, and the return of the benchmark, B.

$$TE = [\ \Sigma_{i=1 \text{ to } n} (R_P - R_B)^2 / N-1\ ]^{1/2}$$

Information Ratio = the difference in the returns generated by the managed portfolio, P, and the benchmark, B, divided by the tracking error.

$$IR = [R_P - R_B] / TE$$

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MEMORANDUM

TO: Honorable Members of the Senate Committee on Veterans and Military Affairs, Biotechnology and Financial Institutions

FROM: Jayme Sellen, Legislative Associate

DATE: March 28, 2007

SUBJECT: Oppose Senate Bill 57

The Wisconsin Counties Association (WCA) opposes Senate Bill 57 (SB 57) which would prohibit the state's investment board from making certain investments relating to Sudan. We oppose this simply because of the $440 million loss to the funds managed by SWIB, in particular the Wisconsin Retirement System (WRS).

WRS receives contributions from public employers and employees to pay benefits to retired or disabled public employees or their beneficiaries. In addition to a loss of approximately $440 million, there is great potential for missed opportunities that would occur from not investing. As a result, contributions to WRS will more than likely increase. Public employers will either pay higher contribution rates per employee or public employees will have to make that contribution to WRS.

County budgets are already under the confinements of revenue limitations and increased costs for fuel and energy, health and general liability insurance. Increased contributions to WRS do not fit within the means of many of the 72 counties.

WCA respectfully requests you oppose SB 57.

Thank you for considering my comments. Please feel free to contact the WCA office if you have any questions.

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Wisconsin Manufacturers' Association • 1911
Wisconsin Council of Safety • 1923
Wisconsin State Chamber of Commerce • 1929

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Michael R. Shoys
Vice President
Administration

TO: **Senate Committee on Veterans and Military Affairs, Biotechnology and Financial Institutions**

FROM: **Jeff Schoepke, Director, Tax & Corporate Policy**

DATE: **March 28, 2007**

RE: **Senate Bill 57 – State of Wisconsin Investment Board Policy**

Thank you for the opportunity to register our concerns about Senate Bill 57 (SB 57), relating to State of Wisconsin Investment Board investments in Sudan.

The public outrage caused by recent events in the war-torn region of Darfur in Sudan is understandable and justified. Such atrocities cannot be tolerated and must be dealt with by the international community. However, we have significant concerns about attempting to dictate U.S. foreign policy through state investment boards. We therefore oppose the approach taken by SB 57.

SB 57 establishes a number of specific humanitarian, financial, geographic and business segment criteria that SWIB must use to identify companies that may have business operations in Sudan and are thus subject to divestment. SWIB manages a pension fund; as such it is good at identifying stocks and other investments that can provide a return to state employee investors. SWIB does not have the expertise to easily determine "scrutinized companies" with investments in Sudan as required by the bill. In addition, the ongoing administrative difficulties for both SWIB and companies suspected of conducting business in Sudan will be significant and beyond any impact divestment will have on the Sudanese political situation.

The State of Wisconsin Investment Board (SWIB) is generally regarded to be a well-run, well-financed pension fund. While public debate on the level funding for such pension programs is natural, the success of SWIB as an investor is due largely to the "hands-off" approach taken by policymakers in regards to investment decisions. SWIB has generally invested wisely on behalf of the pension fund's beneficiaries—largely state employees. These professionals have a fiduciary duty to make wise, ethical investments, and are under state and federal court order not to have investment strategies dictated by politics.

The fiscal note attached to this bill predicts losses to the pension fund of over $400 million annually. These losses come not only from divestment of companies easily identifiable as "scrutinized" under the bill, but also divestment of legitimate, even Wisconsin operated

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Gundersen Lutheran, La Crosse

JOHN B. TORINUS JR., Chairman & CEO
Serigraph Inc., West Bend

LARRY L. WEYERS, Chairman, President & CEO
WPS Resources Corporation, Green Bay

GERALD WHITBURN, Chairman & CEO
Church Mutual Insurance Company, Merrill

businesses that may unknowingly do business with companies that have operated in Sudan in the past.

Finally, there are also several significant constitutional issues with this approach. Since federal law has prohibited U.S. investment in Sudan since 1997, state sanctions would be prohibited by the Supremacy Clause of the U.S. Constitution. Because SB 57 attempts to impact foreign subsidiaries, it could run counter to the Foreign Commerce Clause. In addition, it clearly attempts to impose limits on the foreign policy responsibilities of the President provided by the Constitution. While there are differences between this bill and an Illinois law recently struck down by a federal district court, similarities abound and the legality of this legislation is, at best, questionable.

Again, we appreciate and share the concerns and outrage over events in Sudan. We also support policies that discourage any investment that directly funds groups responsible for such terror. However, we respectfully conclude that political involvement in SWIB investments will have little affect in Sudan, but significant impact on Wisconsin investors and on trust fund beneficiaries.