

HOUSE BILL No. 2436

By Committee on Appropriations

2-22

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

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

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

19 (b) As used in this act:

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

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

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

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

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

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

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

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

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

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

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

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

18 (10) "System" means the Kansas public employees retirement system.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 person or business to adopt or operate in accordance with environmental,
2 social and governance criteria.

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

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

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

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

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

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

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

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

1 contain in durable form conventional signals used for the electronic
2 communication of messages.

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

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

19 (4) In investing and reinvesting moneys in the fund and in acquiring,
20 retaining, managing and disposing of investments of the fund, the board
21 shall exercise the judgment, care, skill, prudence and diligence under the
22 circumstances then prevailing, which persons of prudence, discretion and
23 intelligence acting in a like capacity and familiar with such matters would
24 use in the conduct of an enterprise of like character and with like aims by
25 diversifying the investments of the fund so as to minimize the risk of large
26 losses, unless under the circumstances it is clearly prudent not to do so,
27 and not in regard to speculation but in regard to the permanent disposition
28 of similar funds, considering the probable income as well as the probable
29 safety of their capital.

30 (5) Notwithstanding subsection (4):

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

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

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

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

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

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

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

6 (vi) the individual alternative investment does not exceed more than
7 2.5% of the total alternative investments made under this subsection. If the
8 alternative investment is made pursuant to participation by the system in a
9 multi-investor pool, the 2.5% limitation contained in this subsection is
10 applied to the underlying individual assets of such pool and not to
11 investment in the pool itself. The total of such alternative investments
12 made pursuant to participation by the system in any one individual multi-
13 investor pool shall not exceed more than 20% of the total of alternative
14 investments made by the system pursuant to this subsection. Nothing in
15 this subsection requires the board to liquidate or sell the system's holdings
16 in any alternative investments made pursuant to participation by the
17 system in any one individual multi-investor pool held by the system on the
18 effective date of this act, unless such liquidation or sale would be in the
19 best interest of the members and beneficiaries of the system and be
20 prudent under the standards contained in this section. The 20% limitation
21 contained in this subsection shall not have been violated if the total of such
22 investment in any one individual multi-investor pool exceeds 20% of the
23 total alternative investments of the fund as a result of market forces acting
24 to increase the value of such a multi-investor pool relative to the rest of the
25 system's alternative investments; however, the board shall not invest or
26 reinvest any moneys of the fund in any such individual multi-investor pool
27 until the value of such individual multi-investor pool is less than 20% of
28 the total alternative investments of the fund;

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

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

36 (ix) the total of alternative investments does not exceed 15% of the
37 total investment assets of the fund. The 15% limitation contained in this
38 subsection shall not have been violated if the total of such alternative
39 investments exceeds 15% of the total investment assets of the fund, based
40 on the fund total market value, as a result of market forces acting to
41 increase the value of such alternative investments relative to the rest of the
42 system's investments. However, the board shall not invest or reinvest any
43 moneys of the fund in alternative investments until the total value of such

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

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

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

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

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

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

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

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

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

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

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

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

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

7 (7) The board may enter into contracts with one or more persons
8 whom the board determines to be qualified, whereby the persons undertake
9 to perform the functions specified in subsection (2) to the extent provided
10 in the contract. Performance of functions under contract so entered into
11 shall be paid pursuant to rates fixed by the board subject to provisions of
12 appropriation acts and shall be based on specific contractual fee
13 arrangements. The system shall not pay or reimburse any expenses of
14 persons contracted with pursuant to this subsection, except that after
15 approval of the board, the system may pay approved investment related
16 expenses subject to provisions of appropriation acts. The board shall
17 require that a person contracted with to obtain commercial insurance
18 which provides for errors and omissions coverage for such person in an
19 amount to be specified by the board, provided that such coverage shall be
20 at least the greater of \$500,000 or 1% of the funds entrusted to such person
21 up to a maximum of \$10,000,000. The board shall require a person
22 contracted with to give a fidelity bond in a penal sum as may be fixed by
23 law or, if not so fixed, as may be fixed by the board, with corporate surety
24 authorized to do business in this state. Such persons contracted with the
25 board pursuant to this subsection and any persons contracted with such
26 persons to perform the functions specified in subsection (2) shall be
27 deemed to be agents of the board and the system in the performance of
28 contractual obligations.

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

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

37 (9) (a) Except as provided in subsection (7) and this subsection, the
38 custody of money and securities of the fund shall remain in the custody of
39 the state treasurer, except that the board may arrange for the custody of
40 such money and securities as it considers advisable with one or more
41 member banks or trust companies of the federal reserve system or with one
42 or more banks in the state of Kansas, or both, to be held in safekeeping by
43 the banks or trust companies for the collection of the principal and interest

1 or other income or of the proceeds of sale. The services provided by the
2 banks or trust companies shall be paid pursuant to rates fixed by the board
3 subject to provisions of appropriation acts.

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

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

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

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

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

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

42 Sec. 7. K.S.A. 2022 Supp. 74-4921 is hereby repealed.

43 Sec. 8. This act shall take effect and be in force from and after its

- 1 publication in the statute book.