

As Amended by House Committee

Session of 2023

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; **indemnifying the Kansas public employees**
13 **retirement system with respect to actions taken in compliance with**
14 **such act**; amending K.S.A. 2022 Supp. 74-4921 and repealing the
15 existing section.

16

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

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

21 (b) As used in this act:

22 (1) "Act" means the Kansas public investments and contracts
23 protection act.

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

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

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

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

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

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

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

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

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

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

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

30 (h) Unless no economically practicable alternative is available, an
31 investment manager or contractor shall not adopt a practice of following
32 the recommendations of a proxy advisor or other service provider, unless
33 such advisor or service provider has a practice of, and in writing commits
34 to, following proxy voting guidelines that follow the system's obligation to
35 act solely upon financial factors, **in which case the investment manager**
36 **or contractor may follow the recommendations of a proxy or other**
37 **service advisor.**

38 (i) All proxy votes shall be tabulated and reported annually to the
39 system's board of trustees and to the ~~legislative coordinating council~~ **joint**
40 **committee on pensions, investments and benefits.** For each vote, the
41 report shall contain a vote caption, the system's vote, the recommendation
42 of company management and, if applicable, the proxy advisor's
43 recommendation. Such reports shall be posted on the system's website for

1 review by the public.

2 **(j) Subsections (e) through (i) shall apply only to assets managed**
3 **on behalf of the system and shall not apply to alternative or real estate**
4 **investments as defined in K.S.A. 74-4921(5), and amendments thereto.**

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

9 (b) No state agency shall share or publish information, adopt policies,
10 adopt rules and regulations or issue guidelines for purposes of
11 environmental, social and governance criteria that restrict the ability of any
12 industry to offer products or services. No state agency shall require any
13 person or business to adopt or operate in accordance with environmental,
14 social and governance criteria.

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

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

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

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

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

31 **New Sec. 6. In a cause of action based on an action, inaction,**
32 **decision, divestment, investment, report or other determination made**
33 **or taken in compliance with this act, without regard to whether the**
34 **person performed services for compensation, the state shall indemnify**
35 **and hold harmless the system for actual damages, court costs and**
36 **attorney fees adjudged against, and defend the system and any of its**
37 **current and former employees, members of the board or any other**
38 **officers of the system related to the act or omission on which the**
39 **damages are based.**

40 ~~Sec. 6.~~ 7. K.S.A. 2022 Supp. 74-4921 is hereby amended to read as
41 follows: 74-4921. (1) There is hereby created in the state treasury the
42 Kansas public employees retirement fund. All employee and employer
43 contributions shall be deposited in the state treasury to be credited to the

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

18 (a) A letter, memorandum, telegram, computer printout or similar
19 writing;; or

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

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

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

40 (4) In investing and reinvesting moneys in the fund and in acquiring,
41 retaining, managing and disposing of investments of the fund, the board
42 shall exercise the judgment, care, skill, prudence and diligence under the
43 circumstances then prevailing, which persons of prudence, discretion and

1 intelligence acting in a like capacity and familiar with such matters would
2 use in the conduct of an enterprise of like character and with like aims by
3 diversifying the investments of the fund so as to minimize the risk of large
4 losses, unless under the circumstances it is clearly prudent not to do so,
5 and not in regard to speculation but in regard to the permanent disposition
6 of similar funds, considering the probable income as well as the probable
7 safety of their capital.

8 (5) Notwithstanding subsection (4):

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

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

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

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

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

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

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

27 (vi) the individual alternative investment does not exceed more than
28 2.5% of the total alternative investments made under this subsection. If the
29 alternative investment is made pursuant to participation by the system in a
30 multi-investor pool, the 2.5% limitation contained in this subsection is
31 applied to the underlying individual assets of such pool and not to
32 investment in the pool itself. The total of such alternative investments
33 made pursuant to participation by the system in any one individual multi-
34 investor pool shall not exceed more than 20% of the total of alternative
35 investments made by the system pursuant to this subsection. Nothing in
36 this subsection requires the board to liquidate or sell the system's holdings
37 in any alternative investments made pursuant to participation by the
38 system in any one individual multi-investor pool held by the system on the
39 effective date of this act, unless such liquidation or sale would be in the
40 best interest of the members and beneficiaries of the system and be
41 prudent under the standards contained in this section. The 20% limitation
42 contained in this subsection shall not have been violated if the total of such
43 investment in any one individual multi-investor pool exceeds 20% of the

1 total alternative investments of the fund as a result of market forces acting
2 to increase the value of such a multi-investor pool relative to the rest of the
3 system's alternative investments; however, the board shall not invest or
4 reinvest any moneys of the fund in any such individual multi-investor pool
5 until the value of such individual multi-investor pool is less than 20% of
6 the total alternative investments of the fund;

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

10 (viii) prior to the time the alternative investment is made, the system
11 has in place procedures and systems to ensure that the investment is
12 properly monitored and investment performance is accurately measured;
13 and

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

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

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

42 (i) The system has received a favorable and appropriate
43 recommendation from a qualified, independent expert in investment

1 management or analysis in that particular type of real estate investment;

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

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

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

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

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

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

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

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

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

28 (7) The board may enter into contracts with one or more persons
29 whom the board determines to be qualified, whereby the persons undertake
30 to perform the functions specified in subsection (2) to the extent provided
31 in the contract. Performance of functions under contract so entered into
32 shall be paid pursuant to rates fixed by the board subject to provisions of
33 appropriation acts and shall be based on specific contractual fee
34 arrangements. The system shall not pay or reimburse any expenses of
35 persons contracted with pursuant to this subsection, except that after
36 approval of the board, the system may pay approved investment related
37 expenses subject to provisions of appropriation acts. The board shall
38 require that a person contracted with to obtain commercial insurance
39 which provides for errors and omissions coverage for such person in an
40 amount to be specified by the board, provided that such coverage shall be
41 at least the greater of \$500,000 or 1% of the funds entrusted to such person
42 up to a maximum of \$10,000,000. The board shall require a person
43 contracted with to give a fidelity bond in a penal sum as may be fixed by

1 law or, if not so fixed, as may be fixed by the board, with corporate surety
2 authorized to do business in this state. Such persons contracted with the
3 board pursuant to this subsection and any persons contracted with such
4 persons to perform the functions specified in subsection (2) shall be
5 deemed to be agents of the board and the system in the performance of
6 contractual obligations.

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

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

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

25 (b) The state treasurer and the board shall collect the principal and
26 interest or other income of investments or the proceeds of sale of securities
27 in the custody of the state treasurer and pay same when so collected into
28 the fund.

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

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

40 (11) The board shall provide for an examination of the investment
41 program annually. The examination shall include an evaluation of current
42 investment policies and practices and of specific investments of the fund in
43 relation to the objective set forth in subsection (3), the standard set forth in

1 subsection (4) and other criteria as may be appropriate, and
2 recommendations relating to the fund investment policies and practices
3 and to specific investments of the fund as are considered necessary or
4 desirable. The board shall include in its annual report to the governor as
5 provided in K.S.A. 74-4907, and amendments thereto, a report or a
6 summary thereof covering the investments of the fund.

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

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

20 Sec. 7. **8.** K.S.A. 2022 Supp. 74-4921 is hereby repealed.

21 Sec. 8. **9.** This act shall take effect and be in force from and after its
22 publication in the statute book.