

## **Kansas Public Investments and Contracts Protection Act—Environmental, Social, and Governance Criteria; HB 2100**

**HB 2100** creates the Kansas Public Investments and Contracts Protection Act and amends law governing the Kansas Public Employees Retirement Fund (Trust Fund) and investment standards to prohibit state agencies and other political subdivisions from giving preferential treatment to or discriminating against companies based on environmental, social, or governance (ESG) criteria in the procuring or letting contracts; require fiduciaries of the Kansas Public Employees Retirement System (KPERS or System) to act solely in the interest of participants and beneficiaries of the System; restrict state agencies from adopting ESG criteria or requiring any person or business to operate in accordance with such criteria; provide for enforcement of this act by the Attorney General; and indemnify KPERS with respect to actions taken in compliance with this act.

### ***Kansas Public Investments and Contracts Protection Act***

The bill designates the following provisions of the bill as the Kansas Public Investments and Contracts Protection Act (Act).

#### *Definitions*

The bill creates several definitions for terminology associated with the Act. Among these terms, the bill defines:

- “Board” means the Board of Trustees of KPERS;
- “System” means KPERS;
  - “System” does not include participant-directed individual account plans;
- “Environmental, social, and governance criteria” means any criterion that gives preferential treatment or discriminates based on whether a company meets or fails to meet one or more of the following criteria:
  - Engaging in the exploration, production, utilization, transportation, sale, or manufacturing of:
    - Fossil fuel-based energy;
    - Nuclear energy; or
    - Any other natural resource;
  - Engaging in the production of agriculture;
  - Engaging in the production of lumber;
  - Engaging in mining;

- Emitting greenhouse gases or not disclosing or offsetting such greenhouse gas emissions;
  - Engaging in the manufacturing, distribution, or sale of firearms, firearms accessories, ammunition, or ammunition components;
  - Having a governing corporate board or other officers whose race, ethnicity, sex, or sexual orientation meets or does not meet any criterion;
  - Facilitating or assisting or not facilitating or assisting employees in obtaining abortions or gender reassignment services; and
  - Doing business with any company described in the above-listed criteria;
- “Fiduciary” means any person acting on behalf of the Board of Trustees or System as an investment manager, proxy advisor, or contractor, including the System’s Board of Trustees;
    - The bill further specifies that a fiduciary may reasonably be determined to have taken an action or considered a factor with a purpose to further social, political, or ideological interests based upon evidence indicating such a purpose, including, but not limited to, any fiduciary commitment to further, through portfolio company engagement, board, or shareholder votes or otherwise as a fiduciary, any of the following beyond what controlling federal or state law requires, specifically on assets managed on behalf of the System:
      - Eliminating, reducing, offsetting, or disclosing greenhouse gas emissions;
      - Instituting or assessing corporate board, employment, composition, compensation, or disclosure criteria that incorporates characteristics protected under state law;
      - Divesting from, limiting investment in, or limiting the activities or investments of any company for failing or not committing to meet environmental standards or disclosures;
      - Accessing abortion, sex or gender change, or transgender surgery; or
      - Divesting from, limiting investment in, or limiting the activities or investments of any company that engages in, facilitates, or supports the manufacture, import, distribution, marketing, advertising, sale, or lawful uses of firearms, ammunition, or component parts and accessories of firearms or ammunition; and
  - “Fossil fuels” means coal, natural gas, petroleum, or oil formed by natural processes through decomposition of dead organisms.

The bill also defines the terms “Act,” “company,” “fiduciary commitment,” “financial,” and “natural resources.”

### *State Contracts—No Preferential Treatment or Discrimination Against Based on ESG Criteria*

The bill requires the State and its agencies (including the Pooled Money Investment Board) and subdivisions, when engaged in procuring or letting contracts for any propose, to ensure that bidders, offerors, contractors, or subcontractors are not given preferential treatment or discriminated against based on ESG criteria.

The bill further prohibits the State and its agencies and subdivisions from adopting any procurement regulation or policy that causes any bidder, offeror, contractor, or subcontractor to be given preferential treatment or be subject to discrimination based on ESG criteria, except as otherwise specifically permitted or required by law.

### *Investments by the Retirement System and Duties of the System, Investment Managers, and Other Advisors*

**Discharge of duties.** The bill requires the System and any investment manager, proxy advisor, or contractor, when making and supervising investments of the System, to discharge its duties solely in the financial interest of the participants and beneficiaries for the exclusive purposes of providing financial benefits to participants and their beneficiaries and defraying reasonable expenses of administering the System.

The bill further subjects investment managers, proxy advisors, or contractors retained by the System to the same fiduciary duties as the System's Board of Trustees. The bill also states that a fiduciary shall consider only financial factors when discharging such fiduciary's duties with respect to the System.

**Proxy voting authority and practice.** The bill also provides the following conditions regarding proxy votes (voting of shares):

- All shares held directly or indirectly by or on behalf of the System or the participants and their beneficiaries must be voted solely in the financial interest of the system participants and their beneficiaries;
- Unless no economically practicable alternative is available, the System cannot grant proxy voting authority to any person who is not part of the System, unless that person has a practice of, and in writing commits to, following guidelines that match the System's obligation to act solely upon financial factors, in which case the System may grant proxy voting authority to such person;
- Unless no economically practicable alternative is available, in the selection of the proxy advisor, the System must give preference to a proxy advisor service that commits in writing to engage in voting shares and making recommendations in a strictly fiduciary manner, and without consideration of policy objectives that are not the express policy objectives of the System, in which case the System may engage a proxy voting advisor;
- Unless no economically practicable alternative is available, System assets cannot be entrusted to a fiduciary unless the fiduciary has a practice of, and in

writing commits to, following guidelines, when engaging with portfolio companies and voting shares or proxies, that follow the system's obligation to act solely upon financial factors and not upon policy considerations that are not the express policy objectives of the System, in which case the System may entrust engagement and share voting to a fiduciary;

- Unless no economically practicable alternative is available, an investment manager or contractor cannot adopt a practice of following the recommendations of a proxy advisor or other service provider unless the advisor or service provider has a practice of, and in writing commits to, following proxy voting guidelines that follow the system's obligations to act solely upon financial factors, in which case the investment manager or contractor may follow the recommendations of a proxy or other service advisor; and
- All proxy votes must be tabulated and reported annually to the System's Board of Trustees and to the Joint Committee on Pensions, Investments and Benefits. The reports must be posted on the System's website for review by the public; and
  - The reports must contain, for each vote: a vote caption, the System's vote, the recommendation of company management, and, if applicable, the proxy advisor's recommendation.

The bill further states that provisions relating to proxy voting authority, selection of proxy advisors, voting shares and guidelines, and reporting shall apply only to assets managed on behalf of the System and shall not apply to alternative or real estate investments as defined in the law governing the Trust Fund and investment standards (KSA 74-4921(5)).

#### *State Agencies, Prohibition on ESG Requirements on Persons or Businesses*

The bill prohibits state agencies from sharing or publishing information, adopting policies, adopting rules and regulations, or issuing guidelines for the purposes of ESG criteria that restrict the ability of any industry to offer products or services. Under the bill, a state agency cannot require any person or business to adopt or operate in accordance with ESG criteria. The bill defines "state agency" for its use in this section as "an office, board, commission, department, council, bureau, governmental entity, or other agency of state government having authority to adopt or enforce rules and regulations."

#### *Enforcement of the Act, Contracts Subject to the Act*

The bill provides that the Act or any contract subject to the Act may be enforced by the Attorney General. The bill further states if the Attorney General has reasonable cause to believe that a person has engaged in, is engaging in, or is about to engage in a violation of the Act, the Attorney General may require:

- The person to file on such forms as the Attorney General may prescribe a statement of report in writing, under oath, as to all the facts and circumstances concerning the violation; and

- The filing of other data and information as deemed necessary.

**Damages.** The bill provides that, in addition to any other remedies available at law or equity, a system investment manager or contractor that serves as a fiduciary and violates the provisions of Section 3 (duties of the system, investment managers, other advisors) will be obligated to pay damages to the State in an amount equal to three times all moneys paid to the investment manager or contractor by the System for the services of such investment manager or contractor.

*Compliance with Act; Indemnification for System and its Representatives, Board of Trustees*

The bill provides that in a cause of action based on action, inaction, decision, divestment, investment, report, or other determination made or taken in compliance with the Act, without regard to whether the person performed services for compensation, the State must indemnify and hold harmless for actual damages, courts costs, and attorney fees adjudged against and defend the System and any of its current and former employees, members of the Board, or any other officers of the System related to the Act or omission on which the damages are based.

***Kansas Public Employees Retirement Fund and Investment Objective Delegated to the Board of Trustees***

The bill also amends law governing the Trust Fund and investment standards to modify an existing prohibition on the investment and reinvestment of the Trust Fund to state that no moneys may be invested or reinvested if an investment objective is for economic development or social purposes or objectives. [*Note:* Current law states these moneys could not be invested or reinvested if the sole or primary investment objective is for economic development or social purposes or objectives.]

The bill also makes technical updates to the Trust Fund provisions by updating the organization of the statutes and removing obsolete language.