52:18A-89.1 to 52:18A-89.3

LEGISLATIVE HISTORY CHECKLIST

NJSA: 52:18A-89.1 to 52:18A-89.3 (Public Pension Funds--companies involved in South Africa--divestiture)

LAWS OF: 1985 **CHAPTER:** 308

Bill No: A1309

Sponsor(s): Brown and others

Date Introduced: February 23, 1984

Committee: **Assembly:** Revenue, Finance and Appropriations

Senate: State Government, Federal and Interstate Relations and Veterans Affairs

Amended during passage: Yes Amendments during passage denoted by asterisks.

Date of Passage: **Assembly:** May 13, 1985

Senate: June 27, 1985

Date of Approval: August 27, 1985

Following statements are attached if available:

Sponsor statement: Yes Attached: Senate amendments to Assembly amendments, adopted 6-24-84 (with statement)

Committee statement: **Assembly** Yes

Senate Yes

Fiscal Note: Yes

Veto Message: No

Message on Signing: No

Following were printed:

Reports: Yes

Hearings: Yes

(OVER)

974.90 New Jersey. Legislature. Assembly. State Government, Civil Service,
P418 Elections, Pensions and Veterans' Affairs Committee.
1984c Public hearing on A.1308, A.1309, S.J.R. 16, held 9-24-84. Trenton, 1984.

974.90 New Jersey. Legislature. Assembly. State Government, Civil Service
P418 Elections, Pensions and Veterans' Affairs Committee. Public hearing . . . held
1984b 7-10-84. Trenton, 1984.

974.90 Speaker's Pension Investment Policy Forum (1982)
P418 Speaker's Pension Investment Policy Forum.
1982c held 9-14-82. Trenton, 1982.

974.901 New Jersey. Division of Investment.
I96 Semi-annual report to the Legislative . . .
February 24, 1986. Trenton, 1986.

See newspaper clipping file in New Jersey Reference Department under "N.J.--Divestiture--1985" and "N.J.--Government employees--pensions--1985".

AG opinion 1985 - F.O.1 -- attached.

308 85

8-27-85

[SECOND OFFICIAL COPY REPRINT]

ASSEMBLY, No. 1309

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 23, 1984

By Assemblymen BROWN, CHARLES, KARCHER, THOMPSON, WATSON, BRYANT and Assemblywoman GARVIN

AN ACT concerning the investment of certain public funds.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Notwithstanding any provision of law to the contrary, no assets of any pension or annuity fund under the jurisdiction of the Division of Investment in the Department of the Treasury shall be invested in any bank or financial institution which directly or through a subsidiary has outstanding loans to the Republic of South Africa or its instrumentalities, and no assets shall be invested in the stocks, securities or other obligations of any company engaged in business in or with the Republic of South Africa.

2. The State Investment Council and the Director of the Division of Investment shall take appropriate action to sell, redeem, divest or withdraw any investment held in violation of the provisions of this act*[, except that nothing]* *. *Nothing** in this act shall be construed to require the premature **or otherwise imprudent** sale, redemption, divestment or withdrawal of an investment*, *but such sale, redemption, divestment or withdrawal shall be completed not later than* **[two]** ***three*** *years following the effective date of this act**.

3. Within 30 days after the effective date of this act, the Director ***of the Division of Investment*** shall file with the Legislature a list of all investments held as of the effective date of this act which are in violation of the provisions of this act. Every three

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter printed in italics *thus* is new matter.

Matter enclosed in asterisks or stars has been adopted as follows:

***—Assembly committee amendments adopted October 11, 1984.**

****—Senate amendments adopted June 24, 1985.**

months thereafter, and until all of these investments are sold, redeemed, divested or withdrawn, the **[Director]** ***director*** shall file with the Legislature a list of the remaining investments. ***The director shall include with the first such list, and with the lists to be filed at six month intervals thereafter, a. a report of the progress which the division has made since the previous report and since the enactment of this act in implementing the provisions of section 2 of this act, and b. an analysis of the fiscal impact of the implementation of those provisions upon the total value of and return on the investments affected, taking all possible account of the investment decisions which would have been made had this act not been enacted, and including an assessment of any increase or decrease, as the result of the implementation of those provisions and not as the result of market forces, in the overall investment quality and degree of risk characteristic of the pension and annuity funds' portfolio.***

4. This act shall take effect immediately.

STATEMENT

This bill requires the divestiture of all investments of the State's public pension and annuity funds which are directly or indirectly linked to the Republic of South Africa. In view of the fiduciary responsibility of the State Investment Council to manage funds in a prudent manner, the bill sets no deadline for divestiture, but requires the council to file quarterly reports on its progress in reaching complete divestiture.

A1309 (1985)

ASSEMBLY REVENUE, FINANCE AND APPROPRIATIONS COMMITTEE

STATEMENT TO

ASSEMBLY, No. 1309

[OFFICIAL COPY REPRINT]

STATE OF NEW JERSEY

DATED: APRIL 29, 1985

PROVISIONS:

Assembly Bill No. 1309 (OCR) requires the divestiture of all investments of the State's public pension and annuity funds which are directly or indirectly linked to the Republic of South Africa.

Where an investment is in violation of the restrictions, the Director of the Division of Investment is required to divest within a two-year time frame. However, the bill specifically states that this should not require premature or otherwise imprudent divestment.

Quarterly reports are to be made to the Legislature concerning the violative investments.

FISCAL IMPACT:

Estimated costs on this subject matter vary greatly. Public hearings were held by the Assembly State Government, Civil Service, Elections, Pensions and Veterans Affairs Committee on July 10, 1984 and September 24, 1984.

Testimony varied on the costs of losses to possible gains depending on the market situation during the time of divesting vis-a-vis the investment income from current holdings. The committee at this point in time cannot state or estimate what the outcome will be in financial terms, what the financial market would be at any point in time, or the magnitude or even certainty of the investment holdings.

SENATE STATE GOVERNMENT, FEDERAL AND INTERSTATE RELATIONS AND VETERANS AFFAIRS COMMITTEE

STATEMENT TO

ASSEMBLY, No. 1309

[OFFICIAL COPY REPRINT]

STATE OF NEW JERSEY

DATED: MAY 30, 1985

This bill provides that no assets of any pension or annuity fund under the jurisdiction of the Division of Investment in the Department of the Treasury shall be invested in any bank or financial institution which has outstanding loans to the Republic of South Africa and that no assets shall be invested in the stocks, securities or other obligations of any company engaged in business in or with the Republic of South Africa.

The State Investment Council shall, within two years following the effective date of this act, sell, redeem, divest or withdraw any investment held in violation of this act.

Within 30 days after the effective date of this act, the Director of the Division of Investment shall file with the Legislature a list of all investments held which violate the provisions of this act. Every three months thereafter, and until all such investments are sold, redeemed, divested or withdrawn, the director shall file with the Legislature a list of remaining investments.

ADOPTED
JUN 24 1985

OK
HkR
6/25/85
TCM

R-54
6/24/35/et

Senate Amendments
Proposed by Senator Lipman

to

Assembly Bill No. 1309 OCR
Sponsored by Assemblyman Brown

end:

Sec.	Line	
2	8	Omit "two" insert "three"
3	1	After "Director" insert "of the Division of Investment"
3	6	Omit "Director" insert "director"
3	7	After "." insert "The director shall include with the first such list, and with the lists to be filed at six month intervals thereafter, a. a report of the progress which the division has made since the previous ~~such~~ report and since the enactment of this act in implementing the provisions of section 2 of this act, and b. an analysis of the fiscal impact of the implementation of those provisions upon the total value of and return on the investments affected, taking all possible account of the investment decisions which would have been made had this act not been enacted, and including an assessment of any increase or decrease, as the result of the implementation of those provisions and not as the result of market forces, in the overall investment quality and degree of risk characteristic of the pension and annuity funds' portfolio."

ADOPTED
JUN 24 1985

STATEMENT

This amendment would extend from two to three years the deadline for total divestment of South Africa-related securities from the pension funds'

Senate Amendments

to

Assembly Bill No. 1309 (OCR)

Amend:

Page	Sec.	Line

Legislature, on a semiannual basis, a report on the progress of the divestment program and an analysis of its fiscal impact..

FISCAL NOTE TO

ASSEMBLY, No. 1309

[OFFICIAL COPY REPRINT]

STATE OF NEW JERSEY

DATED: APRIL 26, 1985

Assembly Bill No. 1309 (OCR) of 1984 would prohibit the investment of any pension or annuity fund assets under the jurisdiction of the State Division of Investment in any bank or financial institution or in any company engaged in business in or with the Republic of South Africa. The State Investment Council is directed to sell, redeem, divest or withdraw any investment held in violation of the act and must do so within two years of the effective date of the act.

The Division of Investment estimates an annual cost to the State of $51.6 million. This estimate is based on testimony presented by Mr. Frank K. Kelemen, Chairman of the State Investment Council, to the Assembly State Government, Civil Service, Elections, Pensions and Veterans Affairs Committee on September 24, 1984. The Division of Budget and Accounting has approved his estimate.

The division's estimate is made up of two components, one representing the immediate effects of divestiture and one representing the prospective effects. First, the division contends that divestiture of existing investments in corporations doing business in South Africa would result in a net realized portfolio loss of $65.3 million, using June 30, 1984 market prices. The division states that this loss would translate into an addition to the unfunded liability of the pension funds and would be amortized by additional State and local government payments of about $1.6 million per year for 40 years.

The second component described by the division contemplates a future earnings loss to the pension funds, estimated at $50 million per year. According to the division, this would result from additional transaction costs and the prospective replacement of corporate debt issues with the U. S. Government obligations. The added transaction costs include the commissions on a larger number of purchase and sale orders, but, more importantly, the market impact of the State purchasing large blocks of stock in smaller companies, where the purchase may represent a significant percentage of the total capitalization and therefore may tend to drive prices up. As far as debt issues are concerned, the investment

council believes that "if higher quality government debt is used to replace ineligible corporate debt, then lower yields will result."

The Office of Legislative Services (OLS) has reviewed the transcripts of both hearings held on A–1309 before the Assembly State Government Committee, as well as written testimony and other reports on divestiture experiences. OLS agrees that cautionary evidence has been presented concerning the dislocative effects of divesting $2 billion in book value pension fund assets—almost 20% of the entire portfolio—and shifting those assets to other investment vehicles. These potential effects include the possibility of increased risk exposure, reduced diversification opportunities (especially in certain industries) and increased administrative costs.

Having stated this, OLS is nonetheless unable to affirm or deny a specific dollar "cost" associated with the divestiture provisions of A–1309. By its nature, any such figure must be speculative, given the dynamic nature of market conditions and the many variables governing the suitability of alternative investments. As an example, the division's estimate of an initial $65.3 million decline in portfolio value was based on a divestiture date of June 30, 1984. Not only will market conditions be different, in either direction, in the future, but A–1309 also provides for a two-year divestiture period, which would allow the division to select the most opportune "time window" for the sale of holdings. Likewise, a loss in principal value resulting from the forced sale of low-yield corporate debt instruments at a discount could be overcome in the long run by the purchase of other debt, corporate or government, with lower face value but higher annual income yields.

Based on these factors, OLS believes that while the potential exists for the types of costs described by the Division of Investment, their magnitude or even their certainty cannot be estimated. In fact, some evidence presented at legislative hearings points to a contrary conclusion—that a reasonable potential exists to achieve long-term investment gains from careful reinvestment in a "South Africa free" portfolio.

This fiscal note has been prepared pursuant to P. L. 1980, c. 67.

IRWIN I. KIMMELMAN
ATTORNEY GENERAL

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
RICHARD HUGHES JUSTICE COMPLEX
CN 080
TRENTON, N J 08625
609 292 4919

December 19, 1985

Honorable Roland Machold
Director, Division of Investment
CN-290
Trenton, New Jersey 08625

FORMAL OPINION NO. 1 - 1985

Dear Director Machold:

The Division of Investment has raised numerous questions concerning the interpretation and implementation of L. 1985, c. 308, N.J.S.A. 52:18A-89.1 et seq. the South African divestiture legislation enacted into law on August 27, 1985. The legislation prohibits the Division from making certain South African-related investments, requires it to divest itself of pre-existing ones, and prescribes certain reporting requirements concerning the implementation of the first two parts.

In regard to the prohibitory provision of the legislation, Section 1 provides in pertinent part, as follows:

> ... no assets of any pension or annuity fund under the jurisdiction of the Division of Investment ... shall be invested in any bank or financial institution which directly or through a subsidiary has outstanding loans to the Republic of South Africa or its instrumentalities, and no assets shall be invested in the stocks, securities or other obligations of any company engaged in business in or with the Republic of South Africa.

The paramount question raised is the meaning of the phrase, "any company engaged in business ... in the Republic of South Africa." The phrase is not defined in the statute, nor is it susceptible to a precise definition. Materials Research Corp. v. Metron, 64 N.J. 74, 79 (1973). Whether a foreign corporation is doing, transacting or engaging in business in a state, or, in this case, another country, is a question dependent primarily on the facts and circum-

stances of each particular case, considered in light of the language and objects of the pertinent statute or constitutional provision involved. 36 Am. Jur.2d, Foreign Corporations, §317 (1984). As a general proposition, however, subject to such modifications as may be necessary in view of the purpose of particular statute involved, it is recognized that a foreign corporation is "doing," "transacting," "engaging in," or "carrying on" business in a particular state or country when it has entered the state by its agents and is there through such agents engaged in carrying on and transacting some substantial part of its ordinary or customary business. The business activity is deemed to be usually continuous in the sense that it may be distinguished from merely casual, sporadic or occasional transaction and isolated acts. Id. at §317.

There is no question, of course, that under this general definition a foreign company is engaged in business in a state or country where it maintains an office, factory, plant, or like location, from which it operates its customary or ordinary business. The real question here concerns whether there are any circumstances under which companies that do not actually maintain a physical presence in a state or country, but merely trade with entities in such state or country, nevertheless are engaged in business there.

The legislative history of the statute suggests that the Legislature did not intend to cover trading transactions. Assemblyman Brown, the leading sponsor of the bill commented at the legislative hearings held before the Assembly's State Government, Civil Service, Elections, Pensions and Veterans' Affairs Committee, as follows:

> I have introduced legislation, A1309, that would require the divestiture of all investments of the State's public pension and annuity funds which are directly or indirectly linked to the South African regime.
>
> Businesses which are involved in South Africa are not only profiting from an immoral, [repressive] system; they are directly playing an active role in maintaining the system and are, themselves, perpetrators of apartheid.
>
> United States corporate investment, including loans, in South Africa has totalled about $5 billion dollars in recent times, ...; clearly, continued United States investment in South Africa is thereby supportive of South Africa in the economic growth in the well being and related strength of the government.

> The United States corporations have come to dominate the sectors of the South African economy most vital to its health and growth, and most strategic when considering the country's vulnerability: petroleum, computers and high technology, mining, and heavy engineering ....
>
> There are approximately 6,350 companies listed on the major exchanges in this country, of that number, less than 200 do business with South Africa, and these companies are apt to be heavy industrial or mature companies whose future growth rate might be lower than smaller companies. (Emphasis added).

(July 10, 1985 Hearing, pp. 14-15). Assemblyman Brown's references to businesses which are involved in South Africa, to businesses which have investments there, and to businesses which dominate key sectors of its economy, indicate that the concern of the legislature was with companies that maintained some sort of physical presence or operation in that country. This view is supported by the following written statement submitted to the committee by a co-sponsor of the bill, Assemblyman Eugene Thompson:

> .... Many of South Africa's black leaders believe that foreign investors should pull out of the country....
>
> In the United States public and private organizations are enacting a variety of policies to bring pressure upon corporations and financial institutions to cease operations in South Africa. (Emphasis added).

(July 10, 1984 Hearing, Exhibit 37X). Thus, co-sponsor Thompson referred here to the need for companies to "pull out" of South Africa and to "cease operations" there, suggesting that the companies in mind are those that had a physical presence in South Africa in the first place.

An estimate by Assemblyman Brown that only 200 companies would be effected by the divestiture legislation is significant. A survey undertaken by the Investor Responsibility Research Center Inc., (IRRC), a non-profit organization which monitors the involvement of foreign companies in South Africa, states there are approximately 200 companies which either directly own assets in South Africa, or which own at least 10% of an affiliate or subsidiary which does own assets in South Africa. There is no indication that Assemblyman Brown based his estimate on this survey, but it is clear as a matter of common knowledge there are far more than 200 foreign companies in the world which trade with entities located

inside of South Africa. This would lead one to assume that Assemblyman Brown viewed the phrase, "any company engaged in business with or in South Africa," to exclude trading transactions by a foreign company, where no physical presence or operation is maintained by it in South Africa.

Furthermore, in a closely analogous context, the New Jersey Supreme Court has interpreted the phrase, "transact business in New Jersey," in New Jersey's corporate qualification law, as not applying to foreign corporations that merely sold goods from outside the state to a New Jersey citizen, even if the sale was solicited by the corporation's New Jersey sales agent, where the sale was subject to final acceptance by the foreign corporation. Material Research Corp. v. Metron, supra, at 79.

Moreover, if the phrase, "engaged in business ... in South Africa," were intended to cover that kind of trading transaction, the additional prohibition in the law on engaging in business with the Republic of South Africa would have been unnecessary. The former prohibition would have been broad enough to cover the latter transaction. It is axiomatic that the Legislature is not presumed to enact superfluous statutory provisions. Gabin v. Skyline Cabana Club, 54 N.J. 550 (1969). The fact that the Legislature felt it necessary to add the prohibition on doing business with the Republic of South Africa must be construed as demonstrative of its intent to construe the phrase, "engaged in business," as generally nonInclusive of mere trading entities. For these reasons, it is our interpretation of the legislative intent that the ban on investments in companies engaging in business in South Africa does not encompass those companies which trade with entities in South Africa, but do not maintain a physical presence, such as a factory, office or plant, either directly or indirectly through subsidiaries or affiliated corporations in that country.*

In some instances, though, foreign corporations which only trade with South African entities may have such a contractual relationship with them that in fact such entities really are acting as the agents of the foreign corporation; for example dealers, licensees, franchisees and distributors. In the context of qualification laws, where a foreign corporation has effective control over such entities, they are deemed to be transacting business in the territory in which such agents operate. 36 Am. Jur.2d. Foreign Corporation, §335, §363-364 (1968). Business generated by foreign

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* However, as noted, it is clear that the divestiture language also prohibits investment by the Division in companies which are engaged in business with the Republic of South Africa as well. Thus, it is clear that if a foreign company actually trades with the Republic of South Africa or its instrumentalities, then such companies are subject to the provisions of this legislation.

corporation through intermediaries over whom they exercise effective control can be just as vital to the economy of South Africa as that generated by foreign corporations maintaining a presence there in their own name or capacity. Accordingly, it must be assumed the Legislature intended to proscribe investment in companies that operate not only directly in South Africa, but also through the vehicle of intermediaries over whom they exercise effective control.

The Division should adopt regulations which establish criteria as guidance to determine whether effective control is being exercised in individual instances. For example, as part of an inquiry as to whether an issuer has a disqualifying relationship to an agent, franchisee or distributor in South Africa, it would be important to know whether it has the contractual power to exercise discretion as to any of the following matters: (1) the price of goods sold to third parties; (2) the payment terms; (3) the acceptance of orders; (4) the recall of products; (5) the settlement of disputes over the quality or quantity of goods delivered; or (6) the nature of promotional or advertising campaigns. In addition, an ability to share in the profits of the intermediaries, would be indicative of control. An affirmative answer as to any of these questions would more likely than not support a determination that the corporation is transacting business in South Africa.*

You have also asked whether the divesture's mandate applies to corporations which, while they do not engage in business in South Africa in their own name, do so through subsidiaries or affiliates. As in the case of controlled intermediaries, it is clear that the divestiture law applies to foreign corporations that have subsidiaries or affiliates operating in South Africa. In order to interpret a statute, the purpose of the legislation must be considered. Where a literal rendering will lead to a result not in accord with the essential purpose and design of an act, the spirit of the law will control the letter. New Jersey Turnpike Employees Union, Local No. 194 I.F.P.T.E. AFL- CIO v. New Jersey Turnpike Authority, 200 N.J. Super. 48, 53 (App. Div. 1985). The evident purpose of the statute is to induce foreign companies, through the withdrawal of capital investment, to "pull out" of South Africa, thereby pressuring the government there to end apartheid. It would defeat that purpose if foreign companies seeking capital from our pension funds were construed to be not subject to the divestiture law merely because such companies do not operate in

* If the Division does not have the resources to corroborate or verify the responses given, it would be an adequate approach to require a corporate officer, authorized by resolution of an issuer's board of directors to answer the inquiry and to certify to the truth of the answers. Random checks could then be performed to verify certain of the responses.

South Africa through their own corporate identities, but instead carry out their business purposes through the medium of subsidiaries or affiliates. Since the reality is that many, if not most, foreign corporate entities operate in South Africa in the latter fashion, and keeping in mind the remedial nature of the statute, it is concluded that the term, "company," in the phrase, "company engaged in business ...," must be read liberally to include any subsidiary or affiliate of a corporate issuer.

By the same token, the word "company" must be read to include any issuer which is itself a subsidiary or affiliate of a parent company engaged in business in South Africa. This situation is of importance to the Division because it invests a significant amount of money in short-term debt securities of finance companies that are subsidiaries of parents engaged in business in South Africa. The finance companies themselves operate only domestically. However, any investment in a subsidiary plainly benefits a parent company. It would equally defeat the salutary purpose of the legislation if pension and annuity funds were to be indirectly invested in companies engaged in business in South Africa through subsidiaries or affiliated companies rather than directly through a single parent corporate entity.

The Division has also asked whether it would be permissible to rely on the findings of the IRRC as to which companies are engaged in business in South Africa. Absent express statutory authorization, an administrative agency is not empowered to delegate discretionary duties to outside parties. Application of North Jersey District Water Supply Commission, 175 N.J. Super. 167 (App. Div. 1980). The legislation provides no authority for the delegation of any discretionary duties relating to its implementation. Although the canvassing or surveying of companies involves, to a certain extent, a fairly mechanical or ministerial task, the interpretation of the data received still requires some discretionary or interpretative judgment on the part of the party gathering the information. Therefore, the Division should directly ascertain for itself whether an issuer is one which is engaged in business with or in the Republic of South Africa in accordance with its regulations establishing standards and criteria. The most practical and effective procedure would be to prepare a questionnaire embodying the guidelines established by the Division and to send one to each issuer in which the Division is contemplating investment. This would be accompanied by a notice to each such company that the purpose of the questionnaire is to ascertain eligibility for investment under the legislation and, further, that the failure to respond within a certain period shall be taken as presumptive proof

that the company is in fact engaged in business with or in the Republic of South Africa.*

You have also asked whether the legislation applies to investments of the New Jersey Cash Management Fund. That fund, (the "CMF"), is a common trust fund maintained by the Division of Investment in which are deposited surplus monies of the State, municipalities and local agencies, and also pension and annuity monies. These monies are then invested by the Division in certificates of deposit, commercial paper and other short-term debt securities. As provided in the regulations of the State Investment Council, the depositors in the CMF essentially share in the gains and losses resulting from the investments on a pro rata basis. Since the legislation is applicable to all assets of the pension and annuity funds and the CMF is an asset of pension funds to the extent of their proportional share therein, it is clear that the CMF is subject to the divestiture law as long as the pension and annuity funds continue to own shares therein. Application of the statute to the CMF, however, would cease were the Division to withdraw the pension and annuity funds from the CMF and establish a similar common fund strictly applicable to them, one that would have a South African-free portfolio.

Another question raised is whether the Division is prohibited from entering into repurchase agreements with dealers and banks, if such companies are engaged in business in South Africa. The legislation prohibits the Division from investing pension and annuity funds in "... the stocks, securities or other obligations..." of any company engaged in business in South Africa. Repurchase agreements ("repos") are written agreements entered into between dealers or banks, on the one hand, and investors, on the other, whereby the former sell to the investors securities of third parties, consisting usually of government obligations or certificates of deposit, and promise to buy them back within a stated period of time at a premium. There are two basic types of repos: wholesale repos and retail repos. See Note, Lifting the Cloud of Uncertainly Over the Repos Market: Characterization of Repos as Separate Purchases and Sales of Securities, 37 Vand L. Rev. 401, 403-407 (1984). The former are typically short-term contracts to sell and repurchase large-denomination government securities. These repos are entered into by the Federal Reserve to carry out monetary policies or by government securities dealers to acquire

* This is not to say, however, that the Division may not consider the IRRC findings. The IRRC publication may be used as source material and as a guide but the final determinations as to which companies are engaged in business in South Africa should always be made by the Division.

short term funds. Id. at 405. Retail repos are usually longer term contracts to sell government securities or certificates of deposit and are usually entered into by depository institutions. Ibid. Wholesale repos are sold to sophisticated investors, whereas retail repos are often mass-marketed to smaller investors having varying levels of sophistication and expertise. Ibid.

While repos certainly represent contractual obligations of the dealer or bank, we do not read the phrase "... or other obligations," to mean any contractual or legal obligation of a party with whom the Division may deal. The legislation specifically bars investments by the Division, not any and all contracts entered into by it with companies doing business in South Africa. Indeed, on signing the bill, Governor Kean recommended that executive action now be considered restricting state contracts with vendors that engage in business in South Africa, making it clear that he did not intend it to encompass such normal contractual obligations between the State and outside parties. It is also an axiom of statutory construction that in the construction of a statute in which special language is followed by general language, the special language is, under the doctrine of ejusdem generis, definitive of the general language, and the general words are not to be construed in their widest sense, but are meant to apply only to things of the same general kind of class as those specifically mentioned. Atlantic City Transportation Co. v Walsh, 6 N.J. Super. 262 (App. Div. 1950). Thus, the phrase, "or other obligation," must be read to apply only to the same general kind of class as those specifically mentioned, i.e. stocks and securities. It refers to "bonds", "notes" and other instruments designed and used to raise capital for a corporation.

The term "securities," a generic class of which the term "stocks," is itself a species, is generally defined as any financial scheme involving an investment of money by a party in a common enterprise, with the profits to come solely from the efforts of others. 69 Am. Jur.2d, Securities Regulation, S17 (1973). Since the United States Securities and Exchange Commission (SEC) is charged with the duty of enforcing and administering the federal securities laws, it is appropriate in this context to defer to that agency's judgment as to whether a particular transaction or device constitutes a security or similar-type of investment vehicle, given the absence of any definition in the divestiture law. In this regard, it is noted that SEC has issued a policy statement wherein it has determined that wholesale repos are not in themselves securities subject to the registration requirements of the federal securities laws, but only represent instead a purchase and sale transaction in respect to the underlying security. Note, supra, at 423, citing 46 Fed. Reg. 48,637 (1981). Similarly, in two no-action letters issued by it, the SEC has implicitly determined to treat retail repos as purchases and sales of the underlying securities and not as the securities themselves. Ibid, citing 46 Fed. Reg. 48,637 (1981). Our review of the case law in the field has

revealed no subsequent judicial decision invalidating these interpretations of repos by the SEC. You are advised that, unless the SEC should recharacterize repos as securities, or the federal courts should construe them as securities, their purchase by the Division would not be barred, provided the issuers of the underlying securities are not themselves engaged in business in South Africa.*

In a related question, you have also asked whether the Division may invest in an option or futures contract involving a "market basket" of stocks selected from among the Standard and Poor 100 list of issuers. Suffice it to say that, to the extent the basket contains the stocks of companies engaged in business in South Africa or trading with the Government, the investment would be prohibited.

In regard to banks, the prohibitory provision of the legislation, provides that the Division may not invest pension and annuity monies in " ... any bank or financial institution which directly or through a subsidiary has outstanding loans to the Republic of South Africa or its instrumentalities ..." The Division has inquired as to whether it is prohibited from investing in a bank that may have had an outstanding loan to the Republic of South Africa at the time of enactment of the legislation, but no longer does. It also asks whether a company which was engaged in business in South Africa at the time of enactment, but ceased such business there, is subject to the divestiture law.

To conclude that the prohibition would continue to apply, regardless of future actions of a bank or company, would mean that, once prohibited, an investment in a bank would remain prohibited. The very purpose of the legislation, though, is to induce banks and companies to withdraw from South Africa. If a company is forever barred from eligibility for investment, there would of course be no inducement. The only reasonable construction of the legislation is that, if a bank no longer has outstanding loans to the Republic of South Africa or, if a company has ceased its business there, then the Division may invest in its stocks, securities and other obligations. Obviously, in such a case the purpose of the legislation has been fulfilled.

In a related matter, you have pointed out that some banks are trying to retire preexisting loans to the Republic of South

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* Although we have found no SEC or judicial ruling on this, it follows, by the same reasoning, that vendors which contract to deliver securities of third parties to the Division presently, or for future delivery, are only involved in the purchase and sale of the underlying securities and are not themselves issuers of "securities" or "other obligations."

Africa but, that, in some cases, it is impossible to retire the debt, short of writing it off. The question asked is whether the Division is prohibited from investing in such banks, despite their good intentions. Although disqualification of such banks may arguably defeat an aspect of the legislative purpose insofar as it may encourage banks seeking investment of our pension monies to write off the debt owed by the South African government, thereby helping it, the language used here by the Legislature is plain and unambiguous. Hence, no interpretative process is necessary, nor is the legislative wisdom in structuring a strict rule open to debate. Accordingly, it must be concluded that the intent of the Legislature was to impose the disqualification regardless of the good faith efforts of certain banks to alter lending practices as long as loans to the government remain outstanding.

It has been suggested that a conflict exists between two clauses in the prohibitory provision of the legislation in respect to banks, since the provision specifically bars investment in banks having outstanding loans to the Republic of South Africa, and also bars investment in any company engaged in business with or in the Republic of South Africa. The question that arises is whether a bank that does not have outstanding loans to the Republic of South Africa, but has a branch office in South Africa from which loans are made to South African companies -- and, hence, is engaged in business there--is subject to this law. In our view, no such irreconcilable conflict exists. As in the case of non-bank commercial enterprises, a two part test exists. Those which merely trade their products in South Africa without being engaged in business there directly or through subsidiaries, affiliates or intermediates are outside the reach of the statute. Irrespective of whether they have a presence within South Africa, those doing business with or trading with the South African government triggers the divestiture act's provisions and its attendant disabilities. The same is true with respect to banks. That is the general statutory scheme, and while arguably there may have been no need to include the specific bank investment clause at all -- since banks making loans to the government of South Africa are doing business with it within any reasonable definition of that phrase, and so would be subsumed in the broader prohibition -- the fact that it was so included does not warrant the inference that the Legislature meant to otherwise relieve banks of the divestiture act's reach. Indeed, it would be anomalous to suggest that the Legislature intended to draw a distinction between banks having outstanding loans with the Republic of South Africa, and those doing business in that country, prohibiting investment in the former, but allowing investment in the latter. Given the breadth of the legislative object -- to encourage retreat by companies essential to the economy of South Africa and thus encourage it to alter its ways -- exemption of banks, save where they loaned monies directly to the South African government, would deprive the statute of much of its economic threat. Consequently, investment in banks engaged in business in South Africa, (as defined infra), is prohibited, as

well as investment in banks which have loans outstanding with the government of that country.

A further question presented in respect the prohibitory provision is whether it applies to assets of the Supplemental Annuity Collective Trust, established pursuant to N.J.S.A. 52:18A-107, et seq. State employees are authorized to supplement their state retirement benefits under the pension system by making additional or supplemental payments out of salary deductions into a trust called the Supplemental Annuity Collective Trust. N.J.S.A. 52:18A-113.1. The Trust is administered by a council, the Council of Trust, comprised of the State Treasurer, the Commissioner of Banking, and the State Budget Director. N.J.S.A. 52:18A-111. At the election of the worker, his or her contributions may be placed in either a Variable Division Account or a Fixed Division Account. N.J.S.A. 52:18A-116, 119. Monies in the former account are to be invested in common stocks and securities, listed on a securities exchange in the United States, N.J.S.A. 52:18A-115, while monies in the Fixed Division account are to be invested in fixed-income securities that are legal investments for life insurance companies. N.J.S.A. 52:18A-118. Upon retirement, a worker will get supplemental retirement benefits in the form of a life annuity or of a cash payment, in lieu thereof, based solely on the contributions made by him and the income earned thereon from the investments. N.J.S.A. 52:18A-117. Unlike the regular pension systems, the supplemental annuity program is not a defined benefit plan -- the worker is not entitled to a fixed retirement account -- and, consequently, the State has no obligation to fund the Trust.

The law, by its terms, applies to " ... any pension or annuity fund under the jurisdiction of the Division of Investment ..." While the Supplemental Annuity Collective Trust is an annuity fund in a generic sense, the issue is whether it is an annuity fund under the jurisdiction of the Division of Investment. By statute, the Division is charged with responsibility for the investment of all monies belonging to the six state-administered retirement systems, e.g., the Public Employee's Retirement System, plus monies in or belonging to the 1837 Surplus Revenue fund and the Trustees for the Support of Public Schools fund. N.J.S.A. 52:18A-88.1. No such specific charge is made to the Division to invest or manage the funds in the Trust. However, by understanding with the Council, i.e., an inter-agency agreement, the Division invests the money in the Trust.

The question, therefore, is whether this difference in the source of legal responsibility for investment should remove the trust assets from the ambit of the divestiture legislation. The use of the word "jurisdiction" by the legislature does not provide a clear answer, since, as used in this context, the word is ambiguous. Jurisdiction generally and most commonly refers to the power of a court to hear or decide a judicial controversy. But it is reasonable to conclude that the Legislature here meant to use the

word in the sense of an agency's having the administrative responsibility over a certain matter within the province of the Executive Branch, as where the Division of Taxation has the power to collect state taxes. The Division certainly has such responsibility here. It matters not that the source of the responsibility is by way of voluntary undertaking, rather than legislative mandate. Nor does it matter that the Council could oust the Division of its "jurisdiction" by opting to handle the investment of the trust's assets itself or though another agent. In sum, there is no question that the Trust is an annuity fund under the jurisdiction of the Division, and that, notwithstanding the lack of state contributions, it is an integral part of the State's overall retirement program. Hence, the provision of the statute applies to trust assets provided their investment remains within the responsibility of the Division.

Any doubt as to the validity of this conclusion is dissipated by the legislative history. During the legislative process, details concerning all the funds being managed by the Division were submitted to the Legislature -- the fiscal note to A1309 -- and the trust assets were included. Presumably, therefore, the Legislature was aware that the Division invests the monies in the Trust and that the assets of the trust were thought encompassed within the ambit of the bill. Therefore, it is reasonable to conclude that if the Legislature had wanted to exclude the monies in the Trust from the scope of the divestiture law, it would have so provided. In this regard, during the legislative hearings concern was expressed by the drafters of the law that continued investment by the Division in companies engaged in business in South Africa would be morally repugnant to members of the retirement system whose contributions were the source of the investment monies. (Comments of Assembly Speaker Karcher at July 10, 1985 Hearing, supra, at 5). This concern, which prompted the legislation, applies with equal force to those members of the retirement system who have chosen to supplement their retirement incomes through contributions into the Trust. For these reasons, you are advised that the divestiture law applies to assets in the Trust, so long as the Division remains responsible for their investment.

You also have inquired as to the applicability of the divestiture law to monies invested by the Division from the Deferred Compensation Fund. Suffice it to say here that that Fund, established pursuant to N.J.S.A. 52:18A-163, et seq., is not part of the State's pension system, but is simply a fund established by law, consistent with IRS regulations, to allow workers the opportunity to establish the equivalent of individual retirement accounts in order to defer taxable income. As such, the Deferred Compensation Fund is not subject to the divestiture law.

Turning to the divestiture provision of the statute, Section 2 states in pertinent part that:

> "... the Division of Investment shall take appropriate action to sell, redeem, divest or withdraw any investment held in violation of the provisions of this act. Nothing in this act shall be construed to require the premature or otherwise imprudent sale, redemption, divestment or withdrawal of an investment, but such sale, redemption, divestment or withdrawal shall be completed not later than three years following the effective date of this act."

It has been suggested that the required divestiture within three years might, in regard to certain of the Division's investments, contravene the prudency requirement imposed on fiduciaries under the New Jersey Prudent Investor Law, N.J.S.A. 3B:20-12 et seq., which establishes the so-called prudent inventor standard for New Jersey fiduciaries. By virtue of N.J.S.A. 52:18A-88.1, investment of funds in the State-administered retirement systems by the Division is subject to that prudency law. You are concerned because, under the divestiture legislation, the Division is required to dispose of certain low-interest bonds prior to their date of maturity. You are advised, however, that since this section of the statute imposes a divestiture requirement on the Division, it must be considered to have modified the prudent investor standard. Thus, even if divestiture might, in other circumstances, be deemed imprudent under the Prudent Investor Law, it is nevertheless sanctioned, and indeed required. It is true of course that the divestiture provision states that nothing therein shall be deemed to require a "premature or otherwise imprudent" divestment, but this is plainly qualified by the controlling three year time limit for divestment. The plain thrust of this provision is that the Division need not dispose of its South African-related portfolio immediately, but should manage that portfolio so as to achieve divestiture at a point within the three years where the loss to be sustained is minimized. In any event, general prudency standards are superceded by the three-year divestiture requirement, at least insofar as it applies to the South African-related portfolio.

Questions have also been raised in respect to the timing and substance of the periodic lists and reports that the Division must file with the Legislature regarding the progress of divestiture. The reporting provision of the law in Section 3 directed that, within 30 days of the law's enactment, the Division had to file with the Legislature a list of all investments held as of the effective date, " ... which are in violation of the provisions of this act," (the "initial list"). This, you have advised, the Division has already done. The reporting provision also requires, however, that:

> ... Every three months thereafter, and until all of these investments are sold, redeemed, divested or withdrawn, the director shall file with the Legislature a list of the remaining investments. The director shall include with the first such list, and with the lists to be filed at six month intervals thereafter, a. a report of the progress which the division has made since the previous report and since the enactment of this act in implementing the provisions of section 2 of this act, and b. an analysis of the fiscal impact of the implementation of those provisions upon the total value of and return on the investments affected, taking all possible account of the investment decisions which would have been made had this act not been enacted, and including an assessment of any increase or decrease, as the result of the implementation of those provisions and not as the result of market forces, in the overall investment quality and degree of risk characteristic of the pension and annuity funds' portfolio.

You have asked whether the list of remaining investments, next following the initial list, (the "second list"), should be filed three months from the effective date of the act, i.e. August 27, 1985, or, instead, three months from the date of filing of the initial list. The reporting provision, as noted, imposes the requirement that the initial list be filed within 30 days of enactment and that the the filing of the second list should occur "every three months thereafter." It is clear from this sequence that the word, "thereafter," refers back to the filing of the initial list, not the date of enactment. Thus, the second list is due to be filed 90 days from the date the initial list was filed.*

You have also asked when the first progress report must be filed. The above quoted provision states that the Director is to include the first progress report "with the first such list," without specifying whether the initial, or the second list, was intended. Referential and qualifying phrases in a statute refer solely to the last antecedent where no contrary intention appears. State v. Congdon, 76 N.J. Super. 493 (App. Div. 1962). Here, the antecedent is the second list. It would also be illogical to interpret the provision as requiring that a progress report on divestiture be included with the initial list, since no meaningful

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* The initial list was filed September 26, 1985. Therefore, the second list is technically due to be filed December 26, 1985, but see text this page.

progress could realistically be achieved within only 30 days of enactment. You are, accordingly, advised that the first progress report shall be due upon the filing of the second list.

This will also confirm our previous advice that the filing of that list may be deferred a very brief period of time so as to enable the Division to include in its progress report the most up-to-date financial information. The Division's records as to the value of its portfolio and other information is based in part on the most current quarterly financial reports filed by corporate issuers. Since the initial list was filed September 26, 1985, technically, the second list is due December 26, 1985, but that would mean that the most recent quarterly reports would have been dated September 30, 1985, whereas, if the Division deferred filing a brief time, its progress report would include the most recent data deriving from the December 31, 1985 quarterly reports. Such deferment would be a one-time matter only, since the progress reports would be synchronized thereafter with the most recent quarterly reports.

A primary purpose of the periodic progress report provision is to enable the Legislature to periodically assess the wisdom of the legislation in light of predictions made by the Chairman of the State Investment Council and others at the legislative hearings that divestiture would result in substantial losses to the pension funds. That purpose would be more adequately fulfilled if those reports included the most recent financial information available. Accordingly, a brief, one-time only, filing delay would not contravene the legislation.

Finally, you have conveyed to us the concern of some members of the State Investment Council that the constitutionality of divestiture law might at some point be challenged in Court and that, if the challenge were proven meritorious, the members of the Council might be subjected to personal liability or surcharged for imprudent investment decisions. Because there is the distinct possibility that the legislation might in fact be challenged, it would be inappropriate for us to comment at this time on the constitutionality of the law, except to note that, under settled principles of constitutional law and statutory construction, this legislation is presumed to be constitutional. That being the case, it follows that to the extent the members of the Council or the Director of the Division complied with the dictates of that law, they would be acting within the scope of their duties and, accordingly, would, without question, be entitled to the full protection of the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq., including its immunity provisions as well as to full indemnification and representation by the State for any claims arising from such actions.

In summary, based upon an interpretation of the statutory language, a review of legislative history and an awareness of the social purposes for which the divestiture legislation was enacted, you are advised of the following major conclusions: The prohibition on investment by the Division of Investment in stocks, securities and obligations of any company engaged in business in the Republic of South Africa means any company conducting ongoing business activities in that country and maintaining a physical presence through the operation of offices, plants, factories, and similar premises and would not include trading transactions by a company with entities in that country. The prohibitory language of the statute would encompass corporations whose intermediaries, subsidiaries and affiliated companies over which a corporation maintains effective control engage in business in or with the Republic of South Africa. The legislation applies to investments made by the New Jersey Cash Management Fund to the extent state pension and annuity funds continue to own shares therein. There is no ban on the Division of Investment entering into repurchase agreements with dealers and banks doing business in South Africa provided the issuers of the underlying securities are not themselves engaged in business in South Africa. The prohibitory provisions of the legislation would not preclude investment in a banking institution which retired an outstanding loan to the Republic of South Africa but would apply to such a banking institution where the loan has not yet been retired. The terms of the act also apply to prohibit investments in banking institutions which engage in business in South Africa in the same manner as a nonbanking institution, as well as prohibiting investment in any banking institution making loans directly to the government of the Republic of South Africa. The prohibitory provision of the act applies to assets of the New Jersey Supplemental Annuity Collective Trust because the Trust is an annuity fund under the jurisdiction of the Division of Investment and subject to the state's overall retirement program but would not apply to monies invested from the state's Deferred Compensation Fund. Finally, insofar as the procedural requirements of the act relative to reporting requirements of the Division of Investment are concerned, you are advised that a list of the Division's investments following the initial list filed with the legislature should be filed 90 days from the date the initial list was filed. Further, a progress report on the Division's activities regarding divestiture should be filed with the legislature together with the filing of the second list of investments; but the second list of investments may be deferred a brief period of time to enable the Division to include up to date information in its progress report.

Very truly yours,

IRWIN I. KIMMELMAN
Attorney General