Re: Divestment

CC: President Fleming

THE UNIVERSITY OF MICHIGAN

ANN ARBOR

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PRIVILEGED AND CONFIDENTIAL

To the Board of Regents
of the University of Michigan

RE: South Africa Divestiture Case

Dear Regents:

As you have undoubtedly heard, the Michigan Senate has approved Senate Bill #171 which requires the divestiture of the assets of public employee retirement systems or plans created by and established by the State or a political subdivision, from stock, securities or other obligations of (1) a National Corporation of South Africa or of (2) a U. S. company with an investment in South Africa or a franchise, license agreement or management agreement with an individual or company located in South Africa. Such divestiture is to occur generally over a five year period.

Vice President Kennedy expects that the differing provisions between the Senate Bill and a prior House version will be reconciled shortly and the resulting act immediately signed into law by the Governor. This will obviously have a potential impact upon on our case. As you recall, the Court of Appeals' ruling in favor of the University placed great emphasis on the fact that there was no clearly established public policy in this state precluding the investment of public funds in organizations operating in South Africa and particularly pointed out that investment of public employee pension funds had not been so restricted.

I have discussed this matter with Dick Daane. We feel that you should be aware of the following:

1. If you choose to divest the remainder of the unrestricted University investments in South Africa, this will not make the case with the State moot. This is because there is authority which indicates that such an important public issue should still be considered by the Michigan Supreme Court and because there are still other University South Africa investments in the area of donor restricted stock and unitrust investments.

2. While a new State policy of restricting investments of public retirement funds in South Africa would certainly weaken the emotional impact of the University's argument of hypocrisy on the part of the State, voluntary divestiture by you of the University's unrestricted investments in South Africa would probably further jeopardize the University's position in court. It is our advice not to divest unless the University can get something in return for such action. Otherwise, the University could suffer psychological damage in the eyes of the court which could then treat the University's interest as significantly more insubstantial and act in a cavalier fashion concerning the University's position.

3. The University's position on the clearly established public policy argument will suffer because of the new legislation, even though it will argue that such legislation was not in existence as part of the record of the Court of Appeals. However, Dick can still argue that the legislative attempt to restrict the University's investments at issue still does not meet the standard established under Article 9, §19 of the Michigan Constitution. Article 9, §19 of the Constitution, which the State has argued is the basis for its legislative restriction of the University, provides that endowment funds for educational purposes may be invested as provided by law governing the investment of funds held in trust by trustees. The Senate Bill in question applies only to public retirement fund investments and not to investments by trustees in general. Thus, the University can still maintain that the South Africa divestiture position in the Elliott-Larsen Civil Rights Act cannot legally be applied to the University because of non-compliance with Article 9, §19 of the Constitution.

4. The University should be vigilant concerning some special knowledge in the Office of the Attorney General or otherwise that indicates that Perry Bullard and his cohorts could be influenced by others to drop the State's appeal, if the University divests the remainder of its unrestricted investments in South Africa.

With all of the above in mind, Dick and I are of the opinion that it would be best to at least wait a month and see whether, in the interim, anything positive will surface indicating that the State would respond favorably to the University's voluntary divestiture of its unrestricted investments in South Africa by dismissing its appeal. We would also advise having another closed meeting at the July Regents' meeting to consider the viable options concerning divestiture at that time.

Naturally, both Dick and I are well aware that you may ultimately decide, for policy reasons, to divest unilaterally the University's unrestricted South African investments, apart from any legal concerns.

I have enclosed a copy of Senate Bill 171 for those of you with the stamina to read it.

Yours very truly,

John D. Ketelhut

John D. Ketelhut
Acting General Counsel

jdk/ldd
enclosure
cc: R. W. Fleming
J. F. Brinkerhoff
R. L. Kennedy
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