April 25, 2019

Testimony of Bevis Longstreth before

the New York State Senate

Committee on Finance

Liz Krueger, Chair

April 30, 2019

The Proposed Fossil Fuel Divestment Act

I welcome this opportunity to discuss the idea of compelling the Comptroller, as sole trustee of the State's Common Retirement Fund, to divest from, and cease to invest in, any securities issued by the 200 largest publicly traded fossil fuel companies.

I applaud the Chair and all members of the Finance Committee for their initiative in calling this hearing, and inviting public attention to the transcendent issue of climate change. The drastic consequences to the planet and every sentient being in it of doing nothing to combat climate change are not adequately appreciated by the public. Too many fail to grasp the deep personal stake they and their loved ones have in taking up arms in this battle, in waging this war, and in winning it. Hearings such as yours are enormously important in helping to awaken the public to the danger. Indeed, anyone reading the excellent "Justification" for the proposed Bill contained in its supporting statement will be startled by that danger and fearful of the consequences of our continuing failure to act.

I have spoken and written in favor of divestment for at least four years. I agree with the supporting statement that "Divestment will send a powerful message to fossil fuel companies and remove their social license to operate without regard for human health and safety."

Nonetheless, I am opposed to the mandatory approach taken in the proposed Bill. A fiduciary's discharge of the duty of care and caution in managing money can not be successfully legislated. So history teaches. Abundant evidence

to this effect is found in the second half of the 19th Century, when state legislatures, led by New York, established so-called “legal lists” of securities permissible for fiduciaries to hold. Almost universally, equities were taboo. High quality debt was emphasized. Inflation was ignored. It took the collapse of bond values in the Great Depression to lead states away from legal lists to the eternal wisdom of the prudent man standard articulated in 1830 by the Massachusetts Supreme Judicial Court in the case of Harvard College v. Amory.

Although I’m sure it’s not the intention, the proposed Bill seems aimed more at striking a blow against the fossil fuel industry than at helping to manage the Common Retirement Fund. Without doubt, that industry has earned the growing animosity directed against it for pursuit of profit through shocking deceptions to mislead the public and powerful lobbying to block solutions. But, aren’t there better, more direct, ways to deliver that well-deserved blow? Given that most if not all of the 200 companies trade their securities in New York, couldn’t a disclosure law be written to compel them, for example, to address in detail each of the risks to New York listed in the Bill’s supporting statement, including exposure to liability for causation? Years ago New York’s AG mandated extensive disclosure by utilities.

Looking to the Bill, itself, if one were chiefly concerned with preventing climate change risks from causing permanent loss to the Retirement Fund, one would want to broaden the scope of perceived risk far beyond fossil fuel companies.

I have served for the past year or so on the Decarbonization Advisory Panel appointed by the Governor and Comptroller to advise the latter on climate change risk. We recently submitted our Report, about which you will have heard from Joy-Therese Williams, the Panel’s most able Chairman.

I don’t, myself, intend to address the Report, except to emphasize that it recommends the “decarbonization” of the Fund’s entire portfolio, not just companies engaged in exploration, development and sale of fossil fuels. This is a critical difference. Securities across the entire portfolio are exposed to physical and transition risks, many of which won’t be obvious. (Think, e.g., of PG&E’s downfall from wildfires triggered by climate change.)

I urge you not to mandate divestment. It is clear that fiduciary duty, as understood by fiduciaries and interpreted by courts, poses no obstacle to the decarbonization of trust fund investments. I have a separate statement in the Panel's Report that elaborates this point and makes several other arguments in favor of swift decabonization, including an argument against trying to engage fossil-fuel dependent businesses. I have included it with my written testimony.

As a policy matter, it is far better to encourage fiduciaries to decarbonize because fiduciary duty permits, and even compels, them to do so, than to be forced to do so by legislation. If, as I hope and expect, Comptroller DiNapoli proceeds to decarbonize his entire portfolio because, as a fiduciary, he thinks this is the right thing for him to do in serving his trust, he will have demonstrated leadership likely to be emulated across the country, affecting not just Government pension plans but fiduciary funds of every sort. The mandatory approach could even prove counter-productive, making divestment without legal compulsion appear inconsistent with fiduciary duty -- a perverse effect.

If this Committee insists on legislation aimed at managing the Common Retirement Fund, it might consider prescribing the elements of an adequate inquiry that should be observed to demonstrate that the duty of care has been exercised in deciding to hold or acquire investments in companies that are fossil-fuel dependent. In essense, the idea would be to shift the burden of proof. In 2016 I drafted a possible interpretative release for the then New York Attorney General, intended to do just that in the exercise of prudence by all those subject to New York's version of the Uniform Prudent of Institutional Funds Act. While showing serious interest in this concept, for a variety of reasons, the former AG never moved it forward as a priority. I have included this draft as part of my written testimony. If considered, the scope of companies covered would need to be broadened.

Again, my thanks for this opportunity, which I hope to dine out on with my demanding grandchildren.

Bevis Longstreth

April 25, 2019

Attachment 1

April 14, 2019

THE DECARBONIZATION ADVISORY PANEL

Remarks of Panel Member Bevis Longstreth on Panel Report in Elaboration and Concurrence

1. Terminology.

In the context of the Panel's work and in reference to investments in the State's Retirement Fund, "divestment" for me is synonymous with "decarbonization" and means:

a. The elimination from the portfolio over some reasonable time period of assets having an unacceptable (as determined by the fiduciary responsible for the decision) dependence on carbon emissions in pursuit of profits ("FF-Dependent Companies").
b. The avoidance of the purchase of like assets for the portfolio in the future.
c. The application of the rules in a) and b) above through, in the case of actively managed portions of the portfolio, direction to the managers

and, in the case of indexed portions of the portfolio, selection of indicies that conform to such rules.

2. Fiduciary Duty Today Imposes no Restraint on Achieving a Low Carbon Portfolio, and soon is likely to Require it in the Exercise of that Duty.

Fiduciaries responsible for other people's money are charged with the duty of care. Although language differs among various types of fiduciaries, the command is the same: to exercise "reasonable skill, care and caution." It is noteworthy that the required use of caution is what separates fiduciaries responsible for pensions and endowments from corporate fiduciaries, who are subject to the business standard of corporate law, where greater risk is not only permitted and encouraged, but often demanded by stockholders taking comfort in their ability to diversify risk across many enterprises.

It has become certain that today, a fiduciary possessed of an informed view of relevant climate change factors, may easily conclude – on the basis of financial considerations alone – that decarbonization of the Fund's portfolio is a permissible option.

Thus, it is equally certain that fiduciaries can no longer cling to the legal standard of prudence in order to justify holding FF-Dependent Companies in their portfolios. Fiduciary duty does not bar the gate to decarbonization.

Whether, at this time, decarbonization of a portfolio is compelled by the duty of care and caution is a more difficult question to answer. Anticipatory decarbonization in recognition that, at some unknown and unknowable point down the road, markets will suddenly adjust equity prices downward to reflect swiftly changing prospects for FF-Dependent Companies, however wise as a prudent option today, may not yet be compelled in the exercise of skill, care and caution.

However, the risk of the Fund of being too early in decarbonizing is far less than the risk of being too late. And the time is fast approaching when holding FF-Dependent Companies will be as imprudent as holding whale industry stocks was after kerosene replaced whale oil for lighting, or holding stocks in the horse carriage trade was after Henry Ford

replaced those buggies with his new-fangled vehicles. What's most important is to recognize we speak here not of some trading loss that can be recouped down the road. We speak of *the risk of permanent loss of capital* from this accelerating energy transition and its accompanying disruption. Indeed, permanent loss accompanied all those still invested in Peabody Energy, the largest private sector coal producer, when, two years after global coal demand peaked, it went bankrupt, having built capacity for demand from India and other emerging markets that didn't materialize, as these countries began the shift to renewables.

Carbon Tracker Initiative, the independent London-based think tank devoted to in depth analysis of the impact of energy transition on capital markets, released a new report, dated September 10, 2018, that bears on this matter. With substantial supporting analysis, it predicts the tipping point when total fossil fuel demand peaks will be between 2020 and 2027, and most likely by 2023. When that happens, or even in anticipation of the peak, investors still committed to FF-Dependent Companies will lose a vast amount of money. "The amounts at risk are colossal. The fossil fuel sector has $25 trillion of fixed assets which is increasingly vulnerable to stranding as the energy transition progresses." The report finds demand for coal, gas and oil to be stalling because 1) the cost of renewables and battery storage is falling fast, 2) emerging economies are pursuing clean energy, and 3) government policy is being driven by the need to slash emissions, control climate change and reduce air pollution.

In weighing the extent of market-place mispricing of FF-Dependent Companies, it is worth considering that no depreciation for the impact of achieving the Paris Agreement goals is currently being recognized on the financial statements of FF-Dependent Companies.

So, the risks of remaining invested in FF-Dependent Companies, including coal, oil and gas companies and other industry sectors especially impacted by the energy transition, like capital goods, transport and automotive, are today large and growing larger swiftly.

What about the risks from decarbonizing? The risk of lost opportunity? Of high relevance here is the unimpeachable evidence

adduced by the investment management firm GMO, founded and led by Jeremy Grantham, the guru who famously predicted the dot-com and housing bubbles of 2000 and 2007. In an August publication titled "The Race of Our Lives Revisited," he presents the firm's conclusion that, over long periods of time, it makes no difference to an investor whether one holds or eliminates the energy sector of the market from its ten major sectors. His research extends way back to 1925 with remarkably similar results throughout.

The central point is that returns from a well-diversified portfolio of US stocks will, for a long term investor, be the same with or without including in that portfolio the energy sector. This finding virtually eliminates concern as to whether decarbonization of FF-Dependent Companies is consistent with the duties of skill, care and caution.

3. Continuing to Hold FF-Dependent Companies is an Asymmetrical Bet.

It is unknowable whether a decarbonized portfolio will under- or out-perform in the short term. Looking back over time, results vary, but GMO's work renders those variations trivial. A decision to decarbonize rests on the well-supported claim that FF-Dependent Companies will prove to be bad investments over the long term, exposing those assets to the risk of permanent loss. A manager, in continuing to remain invested in such companies is making an asymmetrical bet where the risks of permanent capital loss stand in contrast to, at best, very modest short-term rewards compared to alternative investments not carrying that risk. This is a bet no manager should make without having in hand a very forceful case to offset the gross imbalance between risk and reward. Today, the burden of proof is on those who would continue to hold FF-Dependent Companies. To meet that burden within the duties of skill, care and caution is, in my opinion, not just difficult; it is swiftly becoming all but impossible.

4. Indexing is No Bar to a Low Carbon Portfolio.

Many managers are committed to indexing to achieve market returns at low cost instead of seeking to outperform the markets

through stock selection at far greater cost and significant risk of realizing below market returns. This form of investment, however, is no bar to decarbonizing a portfolio. In the late 1960's many managers decided to divest from companies doing business in South Africa. US companies then active in South Africa included some of the most respected and successful companies within the S&P 500. And, yet, investing in companies conducting business within an apartheid structure was considered to be unacceptable by many institutions affected with the public interest. In no instance was such a decision considered a breach of fiduciary duty. Investment advisers and consultants swiftly responded to this movement by offering to construct active or indexed portfolios that, in either case, excluded such companies. Those products proved to be popular among many institutional investors.

Index funds that are low carbon or even fossil free can not only be readily constructed, but have been offered by a number of investment firms, including the giant Blackrock, which is now serving at very low fees many fiduciaries seeking to index using a fossil-free screen.

5. Engagement.

It is not generally considered to be within the scope of duty for one managing a trust, endowment or pension fund to undertake to change the business model or governance practices of the companies in which one invests. It can often seem like pushing on a string instead of pulling it. To engage involves time, energy and expense, which must, in service to the duty of loyalty to beneficiaries, be devoted solely to their best interests. Moreover, those responsible for trust assets are not generally endowed with the skill set to create or change business models.

Engagement with top management has a record of success in many areas of corporate policy, be they environmental, social or governance. Indeed, shareholder advocacy has been the principal and highly successful driver in making public corporations sensitive to, and in a growing number of cases, responsive to, the concerns generally subsumed under the ESG umbrella.

However, this kind of shareholder advocacy has a poor record where the policy changes sought materially affect management's compensation or power, or the core of the corporation's business.

Engaging with Phillip Morris to drive it out of the cigarette business, or with Remington Arms to get it to stop making guns, or with private prison operators to drive them out of their main business have not proved successful. Engaging to cap executive compensation or give shareholders the power to nominate directors hasn't worked.

Engagement makes sense when the efforts undertaken are likely to serve the interests of beneficiaries to a greater extent than simply removing the investment from the portfolio. In the case of the oil majors, where exploration and sale of fossil fuel is central to their business model, engagement is hard to justify. The long record of efforts by the oil majors to mislead the public, while seeking to defeat governmental action against climate change makes justification even harder.

If the Panel's recommendation that the Fund achieve a portfolio containing 100% sustainable investments before 2030 is implemented, then decarbonization will have been accomplished and any need for engagement over climate change will have been eliminated.

6. Further Rationale for FF-Dependent Company Avoidance.

Beyond the growing risks of permanent loss from the mispricing of equities dependent for their profits on the exploration, development, sale or use of fossil fuels, there is an issue for the Fund as to why, given the science of climate change and its forward looking implications for the planet, it continues to seek profit from those activities. For, as a fiduciary, there can be no purpose in holding such equities beyond seeking monetary returns.

In the past the Fund has decided on the basis of deep distaste for certain profit-seeking businesses to avoid investment in them. (Current examples include private prisons and firearms manufacturers.) Thus, by precedent, the way is clear for the Fund to elect not to hold companies

where profits are derived principally from exploration, development, sale or use of fossil fuels.

Put a different way, given the Fund's immensely important public stature and purpose, what possible justification is there for seeking profit from activities that are hurting, and perhaps soon will be hurting irrevocably, the world its beneficiaries inhabit?

Bank of England Governor Mark Carney, said recently at a Parliamentary committee session "There is an inconsistency between monetizing carbon assets and achieving climate goals." This simple statement captures the essence of the issue for investors, and particularly for those like the Fund who are affected with the public interest. Why, given the Fund's freedom to avoid Carney's inconsistency, should it persist any longer in the Fund's investment program?

Bevis Longstreth
April 14, 2019

Attachment 2

Draft by Bevis Longstreth – 1/29/16

Outline of Possible Interpretative Release by States' Attorneys General Under The Uniform Prudent Management of Institutional Funds Act

Introduction.

All fifty states have enacted some version of the Uniform Prudent Management of Institutional Funds Act ("UPMIFA"), which governs the management and investment of funds held by not-for-profit corporations and certain other institutions . When managing and investing the funds they are responsible for, fiduciaries subject to UPMIFA must satisfy a standard of prudence, the basic requirements for which are set forth in the Act. The variations in different state versions of the Act probably do not vary at all in respect of prudence and its discussion here. The Attorneys General of our states are charged with interpreting and enforcing the Act as enacted within their respective jurisdictions.

The approach that institutional investors should take towards investing in the fossil fuel industry and in industries affected by climate change is a question of pressing concern. Recent years have revealed a growing understanding and acceptance of the fact that anthropogenic greenhouse gas ("GHG") emissions are causing climate change, and of the urgent global need to phase out fossil fuels. The investment risks associated with climate change, and the bright future prospects for clean energy, are increasingly recognized by financial intermediaries, regulatory bodies, and others.[1]

There is a need for interpretative guidance for fiduciaries subject to the Act as to how the duty of prudence should be exercised with respect to the rapidly growing climate change risks to the coal, oil, gas and other fossil fuel industries as well as to industries significantly dependent on such sources of energy. An interpretative release by a state's Attorney General would, of course reflect only the views of that office. As with other statutes, the interpretation of the Act is ultimately a matter for the courts.

A. The Prudence Standard.

Section 3 of UPMIFA sets the standard of conduct for fiduciaries managing and investing funds subject to the Act. In subsection (b), the duty of prudence is stated as follows:

> "[E]ach person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances."

The language in Section 3 of UPMIFA derives from the Revised Model Not-for-profit Corporation Act and from the prudent investor rule of the Uniform Prudent Investor Act. The Drafting Committee intended, by adopting language from both the RMNCA and the UPIA, to clarify that common standards of prudent investing apply to all charitable institutions, whether in corporate or trust form. Of high importance to understanding the Act is the fact that the phase "care, skill and caution," found in the UPIA (2(a)) as well as the Restatement (Third) of Trusts (337), the Uniform Trust Act (804) and the Restatement (Second) of Trusts (174) is said by the Drafting Committee to be "implicit in the term 'care' as used in the RMNCA", and therefore, equally implicit in that term as used in UPMIFA.

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[1] *See, e.g.*, GOLDMAN SACHS, THE FUTURE OF CLEAN ENERGY, *The Low Carbon Economy*; *Key Takeaways from the Paris Agreement*; and *Financing the Future: Capital Innovation and the Clean Energy Industry* (2015), available at http://www.goldmansachs.com/our-thinking/new-energy-landscape/future-of-clean-energy/index.html; Dec. 29, 2015 Statement by chiefs of five major North American tiremakers, available at http://www.tirereview.com/five-tiremakers-urge-firm-action-on-climate-change-threat/.

It is the need for fiduciaries subject to UPMIFA to exercise caution that distinguishes the meaning of prudence for such fiduciaries from directors subject to the business judgment standard of corporate law. In the Prefatory Note to UPMIFA, the Drafting Committee notes that "the preservation of the endowment fund" has been added as a prudence factor, making clear the requirement for caution in evaluating risky investments that could pose the threat of impairment.

B. Climate Change Risks to Investment in Fossil Fuel Companies.

1. Risk Disclosures by Public Companies.

The investment risks associated with climate change have previously been recognized by the Securities and Exchange Commission (SEC) in connection with its disclosure requirements. The SEC's Interpretative Release (Nos. 33-9106; 34-61469), titled *Commission Guidance Regarding Disclosure Related to Climate Change,* with an effective date of February 8, 2010, set forth the SEC's views on how its existing disclosure requirements apply to climate change matters. Since that date, the special concerns for issuers affecting and affected by climate change have grown dramatically, as evidenced by the recent Paris Agreement and the underlying findings upon which that Agreement was based.[2]

2. Summary of Principal Terms of Paris Agreement.

The Paris Agreement, signed by 195 countries on December 12, 2015, provides a long-term temperature goal of "holding the increase in global average temperature to well below 2 degrees C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 degrees C." Article 2. Of all the parties to the Agreement, 188 accepted the requirement to prepare "Intended Nationally Determined Contributions," or pledges of "ambitious efforts" to cut emissions, which are to become progressively more ambitious over time. Article 4. While developed countries "should continue taking the lead by undertaking economy-wide emission reduction targets," Article 4 ¶ 4, the Agreement tasks both developed and developing countries with reducing their dependence on fossil fuels, and investing in renewable energy and the development of clean energy technology.

The Agreement also provides that "in order to achieve the long-term temperature goal … Parties aim to reach global peaking of greenhouse gas emissions as soon as possible and to achieve rapid reductions thereafter in accordance with best available science so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases (GHGs) in the second half of this century." Article 4 ¶ 1.

The principal terms of the Paris Agreement, and the facts underlying them, evidence new and major risks to the future prospects and valuations of fossil fuel companies, as national, subnational, and international authorities take action against climate change. These risks include:

a) pricing carbon so as to account for the uncompensated damage emitting GHG does to the planet;

[2] Note that the Release requires companies to "consider, and disclose when material, the impact on their business of treaties or international accords relating to climate change." (Part IV, B) The Paris Agreement is clearly an "accord" within the meaning of the Release.

b) eliminating the billions of dollars provided annually as subsidies to the exploration, development and sale of fossil fuels;
c) providing increased subsidies for the development and use of renewables; and
d) restricting GHG emissions to an increasing degree until, within the second half of this century, a global balance of net zero GHG emissions is achieved.

3. <u>Need for Guidance in regard to Investments by Fiduciaries.</u>

In its 2010 Release, the SEC addressed the impact of climate change on disclosures required of public companies. In light of the Paris Agreement, it would not be surprising for the SEC to update and augment this release. But in any event, for fiduciaries responsible for other people's money who are subject to the Act, there is no authoritative interpretation of prudence and how it should be exercised in regard to climate change risks. It is to fill this void that the AG has prepared this Interpretative Release.

C. The Prudence Standard Applied to Fossil Fuel Investments.

1. **<u>General Comments</u>.**

To achieve the Paris Agreement's long-term temperature goal, fossil fuel usage must be phased out, and the phase out must be far swifter than previously imagined. A recent paper in Nature Climate Change suggests that carbon dioxide from electricity would have to be brought close to zero by 2050, and by then around 25% of energy required for transportation would also need to come from electricity.

It would not be the purpose of an interpretative release to substitute an Attorney General's judgment for that of every fiduciary subject to the Act in answering the question whether securities of fossil fuel companies may continue to be held. Rather, the purpose of such a release would be three-fold:

a) To prescribe, as a minimum, the elements of adequate inquiry that must be observed and recorded to demonstrate that the duty of care in Section 3 of UPMIFA has been exercised with respect to any decision to hold or invest in a fossil fuel security;
b) To discuss some of the special risks that are arising from the circumstances – unique in the history of mankind – created by climate change and the world's response to the threat it poses for the planet; and
c) To note the overriding command of the Act, in regard to managing and investing an institutional fund, to "consider the purposes of the institution and the purposes of the institutional fund."

2. <u>Minimum Elements of Inquiry.</u>

The 2010 SEC Release lists the following four topics as representing some of the ways climate change may trigger disclosure requirements. Similarly, these topics should be considered and assessed by fiduciaries subject to the Act in determining whether an investment meets the prudence requirement:

1) Impact of legislation and regulation
2) International Accords

3) Indirect consequences of regulation or business trends
4) Physical impacts of climate change

Carbon Tracker Initiative's *Engagement Principles for Investors* sets forth seven risk engagement principles for fossil fuel companies to consider. Fiduciaries should in turn inquire as to whether these principles are satisfied. Namely, they should ascertain:

1) Whether there is any divergence between the company's commodity market planning assumptions and demand levels implied by climate and energy policy targets
2) How the board oversees climate risk management
3) How management would incorporate climate policy targets into investment decisions
4) Whether forward-looking projections evaluate potential project portfolios; whether quantitative disclosure aligns with data used by the company for investment decision-making and risk management
5) The company's vulnerability to price risk, as explained through stress-tests or sensitivity analysis
6) The assumptions underpinning financial reporting and impairment analysis
7) If a company's management is unable to provide answers to any of the above, a credible explanation should be given.

Further, the fiduciary should make an explicit judgment that the decision to hold or invest meets the elements of skill, care and caution required by the Act, based upon a thorough and satisfactory inquiry into the matters specified above , as well as a consideration of the special risks of climate change discussed below.

3. <u>Discussion of Special Risks of Climate Change</u>.

The prudence standard of the Act can easily support a decision not to continue to hold or invest in fossil fuel companies. The risks and rewards now offered by such securities are asymmetric, in the sense that the foreseeable rewards are not likely to be equal to the foreseeable risks. The risk that, at some unknown and unknowable, yet highly likely, point in the future, markets will begin to adjust the equity price of fossil fuel company securities downward to reflect the swiftly changing future prospects of those companies, is as serious as it is immense. Moreover, the possibility of that adjustment being a swift one is also a serious risk. A decision to linger in an investment with such an overhanging risk, and expect to time one's exit before the danger is recognized in the market, is a strategy hard to fit within the concept of prudence.

Whether the duties of care, skill and caution today compel a decision not to hold or invest in fossil fuel companies can ultimately only be answered by a court, which always looks back in time, and therefore can be subject to the force of hindsight.

At some point down the road towards the red light of 2 degrees C, however, it is entirely plausible, even predictable, that continuing to hold equities in fossil fuel companies will be ruled negligence. Here a powerful 2d Circuit decision by the famous jurist, Learned Hand, decided in 1932, becomes relevant. In that case, *The T.J. Hooper*, tug boat owners were found liable for loss of cargoes in a nor'easter because they hadn't issued to operators what were then newly developed short-wave receivers. At the time, this new-fangled device was a rarity on tugs. Had the operators possessed them,

they surely would have picked up weather reports warning of a storm and sought refuge on the inland waterway.

Here's the crucial finding of this great judge:

> "Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission." [Emphasis supplied.]

Many, if not most, fiduciaries subject to the Act serve charitable purposes enabling them to act as long term investors in the management of institutional funds. As such, they need not worry unduly about short-term results. Anticipatory divestment of fossil fuel company holdings could reasonably be viewed as having unknown short-term consequences for the portfolio, which could involve loss as well as gain. However, in the long run, those short-term results could reasonably be considered unimportant. The risks for fossil fuel companies described above could reasonably support a fiduciary's judgment that fossil fuel companies will prove to be bad investments over the long term and, therefore, with foresight that anticipates this result, should be removed from long-term holdings before the strengthening likelihood of this result becomes commonplace in the market.

4. Duties Owed to Purposes of the Institution.

Section 3(a) of UPMIFA requires fiduciaries, in managing and investing an institutional fund subject to the Act, to "consider the charitable purposes of the institution" to which that fund is dedicated and "the purposes of the institutional fund." Section (e) (1) requires fiduciaries, in managing and investing an institutional fund, to consider, if relevant, "an asset's special relationship or special value, if any, to the charitable purposes of the institution." Paragraph (H).

The Drafting Committee, in its Comment on Section 3, states: "Further, the decision maker must consider the charitable purposes of the institution and the purposes of the institutional fund for which decisions are being made." This requirement is described by the Committee as "a fundamental duty." And, in further elaboration of this so-called "charitable purpose doctrine", the Committee said: "In making decisions about whether to acquire or retain an asset, the institution should consider the institution's mission, its current programs …in addition to factors related more directly to the asset's potential as an investment."

The Act itself, and the interpretation thereof by the Drafting Committee responsible for its language, make it entirely clear that fiduciaries must consider the purposes for which the funds they manage and invest are held. This duty is in addition to, and overrides, the duty of prudence as applied solely to financial considerations.

It would not be the purpose of an interpretative release to apply this standard to any institution subject to the Act or even generally to various categories of institutions subject to the Act. Nor, indeed, could it do so.

The purpose here is merely to call attention to this fundamental duty of fiduciaries subject to the Act, a duty that could surely affect the choice of investments to hold or avoid, based in whole or in part, on the purposes of the institution. Thus, for example, if, in the judgment of its fiduciaries, it would be inconsistent with the purposes of an educational institution to hold, and thereby necessarily seek to profit from, investments in fossil fuel companies, such investments could not be held.

Bevis Longstreth