

# STATE OF NEW YORK

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2126--A

2019-2020 Regular Sessions

## IN SENATE

January 22, 2019

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Introduced by Sens. KRUEGER, ADDABBO, BAILEY, BIAGGI, BRESLIN, BROOKS, CARLUCCI, COMRIE, GIANARIS, HARCKHAM, HOYLMAN, JACKSON, LIU, MAY, METZGER, MONTGOMERY, MYRIE, PARKER, PERSAUD, RAMOS, RIVERA, SALAZAR, SANDERS, SEPULVEDA, SERRANO, SKOUFIS, STAVISKY, THOMAS -- read twice and ordered printed, and when printed to be committed to the Committee on Civil Service and Pensions -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the retirement and social security law, in relation to limitations on investments of public pension funds; and providing for the repeal of such provisions upon expiration thereof

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. This act shall be known and may be cited as the "fossil  
2 fuel divestment act".

3 § 2. Legislative findings. 1. a. Climate change is a real and serious  
4 threat to the health, welfare, and prosperity of all New Yorkers, now  
5 and in the future. Maintaining the status quo of fossil fuel energy  
6 production will lead to catastrophic results.

7 b. The United Nations Intergovernmental Panel on Climate Change has  
8 determined that in order to keep the increase in global average temper-  
9 ature below 1.5 degrees Celsius, global greenhouse gas emissions must  
10 decline by 45% by 2030, and reach net zero by 2050.

11 c. As such, New York State has codified into law a goal of reaching a  
12 40% economy-wide greenhouse gas emissions reduction relative to 1990  
13 levels by 2030, and net zero emissions by 2050.

14 d. The threat of climate change and the transformation of the global  
15 energy system that will be necessary to mitigate it will have a serious  
16 negative impact on investors whose assets are not aligned with a 1.5  
17 degree trajectory.

18 2. a. Continued investment in fossil fuel producers poses unacceptable  
19 risk to the long-term sustainability of the Common Retirement Fund.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

LBD05278-04-9

1 b. Experts estimate that demand for fossil fuels is likely to peak  
2 within the next decade. In spite of this, the majority of fossil fuel  
3 producers are not adjusting their business models to take into account  
4 the changing energy market, investing billions of dollars in exploring  
5 and extracting new reserves, creating stranded asset risk and the poten-  
6 tial for rapid, unexpected, and significant loss of value.

7 c. Attempting to beat the market by holding these investments until  
8 the last possible moment is a high-risk strategy that could result in  
9 the loss of investment principal. In the words of the Decarbonization  
10 Advisory Panel for the New York State Common Retirement Fund, "being too  
11 early in the avoidance of the risk of permanent loss is much less of a  
12 danger than being too late."

13 3. a. The Legislature is bound by a fiduciary responsibility over the  
14 pension fund.

15 b. This responsibility includes a duty to future as well as current  
16 beneficiaries. It is therefore incumbent upon the Legislature as fiduci-  
17 ary to concern itself with how the Fund rebalances its investments to  
18 meet its financial performance targets, favoring the long-term sustaina-  
19 bility of the Fund over seeking short-term gains. Fossil fuel producers  
20 are currently underperforming compared to the broader market. However,  
21 even if they were to produce acceptable returns in the near term, they  
22 present undue long-term risk that compels trustee action on behalf of  
23 future beneficiaries.

24 c. Duties to future beneficiaries may reasonably include consideration  
25 of their human interests, quality of life, and public safety and securi-  
26 ty, and therefore may mandate that trustees try to accelerate the shift  
27 away from fossil fuels to help mitigate the future adverse effects of  
28 climate change.

29 d. Given the systemic threat of climate change to the economy as a  
30 whole, and therefore to the value of the Fund's entire portfolio,  
31 consideration of the climate impact of certain investments is entirely  
32 appropriate. According to the US Department of Labor's interpretive  
33 bulletin 2015-1, environmental issues "may have a direct relationship to  
34 the economic value of the plan's investment. In these instances, such  
35 issues are not merely collateral considerations or tie-breakers, but  
36 rather are proper components of the fiduciary's primary analysis of the  
37 economic merits of competing investment choices."

38 e. The Common Retirement Fund has set a precedent by choosing to  
39 divest from certain industries in the past due to the moral implications  
40 of their business models, including private prisons, firearms manufac-  
41 turers, and companies doing business with Sudan, all while complying  
42 with the Comptroller's fiduciary obligations.

43 f. Over 1,100 institutional investors representing more than \$11 tril-  
44 lion in holdings have chosen to pursue full or partial divestment from  
45 fossil fuel producers, including the Teachers Retirement System of the  
46 City of New York, the New York City Employees Retirement System, the  
47 endowment and pension funds of the University of California system, and  
48 the sovereign wealth funds of Norway and Ireland. This bill adopts the  
49 prevailing approaches of these similarly situated fiduciaries with  
50 regard to fossil fuel divestment, and therefore complies with the  
51 prudent investor standard defined by section 11-2.3 of the estates,  
52 powers and trusts law.

53 4. a. The Legislature is within its constitutional authority to  
54 instruct the Comptroller to divest from fossil fuel producers along the  
55 lines outlined in this bill.

b. The Court of Appeals ruled in Scaglione v. Levitt that the Comptroller's freedom to invest is "limited by the continuing power of the Legislature to expand or restrict the classes and kinds of investments in which he may place the funds in his care," provided that his or her discretion is not impaired. The Comptroller's discretion is maintained in this bill through the mechanism of the Determination of Prudence.

c. The Court of Appeals further ruled in McDermott v. Regan and Guzdek v. McCall that a proposed change to the management of the Retirement System would be deemed "radical" and would compel "close examination" if, in addition to interfering with the Comptroller's discretion, it destabilized the system or created an inappropriate level of risk in the management of the Fund. The Legislature finds that there is extensive evidence that this bill, if enacted, would not meet any of these thresholds.

d. Existing state law, in effect for decades, provides an example of a limitation on the Comptroller's freedom to invest, placing requirements on the Comptroller to consider certain social and political factors before investing in companies doing business in Northern Ireland.

5. a. Given the severely adverse impact that climate change will have on the lives of all New Yorkers and all people on the planet, the State has a responsibility to take all available steps to avert and mitigate it.

b. Attempting to profit from investments in companies whose business models, public relations campaigns, and lobbying efforts not only fail to comply with New York's statutory climate goals, but put the stability of our society and the safety of our citizens at risk, is neither morally acceptable nor in compliance with the Legislature's fiduciary responsibility to current and future pension beneficiaries.

§ 3. The retirement and social security law is amended by adding a new section 423-d to read as follows:

§ 423-d. Fossil fuel divestment. 1. Definitions. As used in this section:

a. "coal producer" means any corporation or company, or any subsidiary or parent of any corporation or company, that derives at least twenty percent of annual revenue from thermal coal production, or accounts for more than one percent of global production of thermal coal, or whose reported coal reserves contain more than 0.3 gigatons of potential carbon dioxide emissions;

b. "direct investment" means ownership of an individual stock, security, equity, asset, or other obligation of a corporation or company;

c. "exclusion list" means the list created pursuant to paragraph a of subdivision two of this section;

d. "indirect investment" means a holding in an investment vehicle that directly or indirectly owns an individual stock, security, equity, asset, or other obligation of a corporation or company;

e. "oil and gas producer" means any corporation or company, or any subsidiary or parent of any corporation or company, that derives at least twenty percent of annual revenue from oil or gas production, or accounts for more than one percent of global oil or gas production, or whose reported combined oil and gas reserves contain more than 0.1 gigatons of potential carbon dioxide emissions;

f. "oil or gas production" means exploration, extraction, drilling, production, refining, processing, or distribution activities related to oil or gas; and

g. "thermal coal production" means mining, transport, processing, or exploration activities related to thermal coal.

1     2. Fossil fuel producer exclusion list. a. Within six months of the  
2 effective date of this section, the comptroller shall create an exclu-  
3 sion list of all coal producers and oil and gas producers in whose  
4 stocks, securities, equities, assets, or other obligations the common  
5 retirement fund has any moneys or assets directly invested.

6     b. Upon completion of the exclusion list, it shall be made publicly  
7 available, and a copy shall be sent to the temporary president of the  
8 senate and the speaker of the assembly.

9     c. The comptroller shall submit notification to any corporation or  
10 company that has been included in the exclusion list informing them of  
11 their inclusion, as well as the requirements of subdivisions three and  
12 five of this section.

13     d. At the comptroller's discretion, but no later than two years after  
14 the completion of the exclusion list, and no less frequently than bien-  
15 ennially thereafter, the comptroller shall update the exclusion list to  
16 remove any corporation or company that is no longer a coal producer or  
17 an oil and gas producer, and add any corporation or company necessary to  
18 comply with paragraph a of this subdivision, with the exception of such  
19 companies removed from the exclusion list pursuant to paragraph b of  
20 subdivision four of this section.

21     3. Removal from the exclusion list. a. At any time following the  
22 publication of the exclusion list, any corporation or company included  
23 in the list may submit to the comptroller a request for removal on the  
24 basis of clear and convincing evidence that they are not currently a  
25 coal producer or an oil and gas producer as defined in subdivision one  
26 of this section or that they will no longer meet such definition by  
27 January first, two thousand thirty.

28     b. Upon satisfaction that a corporation or company has met the  
29 requirements of paragraph a of this subdivision, the comptroller shall  
30 remove that corporation or company from the exclusion list, and provide  
31 a written explanation for such removal to the temporary president of the  
32 senate and the speaker of the assembly.

33     4. Determination of prudence. a. Within six months from the completion  
34 of the exclusion list the comptroller shall issue a determination as to  
35 whether divestment from any or all corporations or companies on the  
36 exclusion list, in whole or in part, pursuant to subdivision five of  
37 this section complies with his or her fiduciary obligations and the  
38 prudent investor rule as defined by section 11-2.3 of the estates,  
39 powers and trusts law. The comptroller shall make such determination  
40 publicly available and a copy shall be sent to the temporary president  
41 of the senate and the speaker of the assembly.

42     b. If the comptroller determines that divestment from any corporation  
43 or company on the exclusion list does not comply with his or her fiduci-  
44 ary obligations and the prudent investor rule as defined by section  
45 11-2.3 of the estates, powers and trusts law, that corporation or compa-  
46 ny shall be removed from the exclusion list.

47     c. At any time, subject to the comptroller's discretion, but no later  
48 than five years and six months from the effective date of this section,  
49 and every five years thereafter, any corporations or companies removed  
50 from the exclusion list pursuant to paragraph b of this subdivision  
51 shall be returned to the exclusion list, subject to a new determination  
52 of prudence issued at that time pursuant to paragraph a of this subdivi-  
53 sion.

54     5. Divestment. a. Commencing one year after the effective date of this  
55 section, subject to an affirmative determination of prudence pursuant to  
56 subdivision four of this section, and in accordance with sound invest-

1 ment criteria and consistent with his or her fiduciary obligations, the  
2 comptroller shall: (i) divest the common retirement fund of any stocks,  
3 securities, equities, assets, or other obligations of corporations or  
4 companies on the exclusion list in which any moneys or assets of the  
5 common retirement fund are directly invested; and (ii) cease new direct  
6 investments of any moneys or assets of the common retirement fund in any  
7 stocks, securities, or other obligations of any corporation or company  
8 that is a coal producer or oil and gas producer.

9 b. Divestment from oil and gas producers pursuant to this subdivision  
10 shall be completed no later than five years from the effective date of  
11 this section. Divestment from oil and gas producers returned to the  
12 exclusion list pursuant to paragraph c of subdivision four of this  
13 section shall be completed no later than five years from the date of  
14 return to the exclusion list.

15 c. Divestment from coal producers pursuant to this subdivision shall  
16 be completed no later than two years from the effective date of this  
17 section. Divestment from coal producers returned to the exclusion list  
18 pursuant to paragraph c of subdivision four of this section shall be  
19 completed no later than two years from the date of return to the exclu-  
20 sion list.

21 6. Limitations on indirect investment. Commencing one year after the  
22 effective date of this section, and no later than five years from the  
23 effective date of this section, subject to an affirmative determination  
24 of prudence pursuant to subdivision four of this section, and in accord-  
25 ance with sound investment criteria and consistent with his or her fidu-  
26 ciary obligations, the comptroller shall endeavor to ensure that no  
27 moneys or assets of the common retirement fund are invested in an indi-  
28 rect investment vehicle unless he or she is satisfied on reasonable  
29 grounds that such indirect investment vehicle is unlikely to have in  
30 excess of two percent of its assets, averaged annually, directly or  
31 indirectly invested in coal producers and oil and gas producers.

32 7. Reporting. Commencing two years after the effective date of this  
33 section and annually thereafter the comptroller shall issue a report to  
34 the temporary president of the senate and the speaker of the assembly,  
35 and shall make such report publicly available, outlining all actions  
36 taken to comply with this section.

37 § 4. This act shall take effect immediately and shall expire and be  
38 deemed repealed January 1, 2050.