STATE OF NEW YORK

1536--A

2019-2020 Regular Sessions

IN ASSEMBLY

January 15, 2019

Introduced by M. of A. ORTIZ, MOSLEY, FAHY, SIMON, THIELE, GOTTFRIED, SEAWRIGHT, O'DONNELL, STECK, ENGLEBRIGHT, CARROLL, GLICK, COLTON, BLAKE, NIOU, JAFFEE, RIVERA, DAVILA, RODRIGUEZ, ZEBROWSKI, BARRON, L. ROSENTHAL, WOERNER, GUNTHER, DINOWITZ, PEOPLES-STOKES, REYES, EPSTEIN, GRIFFIN, TAYLOR, ARROYO, RICHARDSON, HYNDMAN, CRUZ, PHEFFER AMATO -- Multi-Sponsored by -- M. of A. COOK, DenDEKKER, RAMOS -- read once and referred to the Committee on Governmental Employees -- 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:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. a. The Legislature is within its constitutional authority to instruct the Comptroller to divest from fossil fuel producers along the 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.

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

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

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

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

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

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

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

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

c. At any time, subject to the comptroller's discretion, but no later than five years and six months from the effective date of this section, and every five years thereafter, any corporations or companies removed from the exclusion list pursuant to paragraph b of this subdivision shall be returned to the exclusion list, subject to a new determination

of prudence issued at that time pursuant to paragraph a of this subdivision.

5. Divestment. a. Commencing one year after the effective date of this section, subject to an affirmative determination of prudence pursuant to subdivision four of this section, and in accordance with sound investment criteria and consistent with his or her fiduciary obligations, the comptroller shall: (i) divest the common retirement fund of any stocks, securities, equities, assets, or other obligations of corporations or companies on the exclusion list in which any moneys or assets of the common retirement fund are directly invested; and (ii) cease new direct investments of any moneys or assets of the common retirement fund in any stocks, securities, or other obligations of any corporation or company that is a coal producer or oil and gas producer.

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

c. Divestment from coal producers pursuant to this subdivision shall be completed no later than two years from the effective date of this section. Divestment from coal producers returned to the exclusion list pursuant to paragraph c of subdivision four of this section shall be completed no later than two years from the date of return to the exclusion list.

6. Limitations on indirect investment. Commencing one year after the effective date of this section, and no later than five years from the effective date of this section, subject to an affirmative determination of prudence pursuant to subdivision four of this section, and in accordance with sound investment criteria and consistent with his or her fiduciary obligations, the comptroller shall endeavor to ensure that no moneys or assets of the common retirement fund are invested in an indirect investment vehicle unless he or she is satisfied on reasonable grounds that such indirect investment vehicle is unlikely to have in excess of two percent of its assets, averaged annually, directly or indirectly invested in coal producers and oil and gas producers.

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

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