
CITY OF BALTIMORE

BRANDON M. SCOTT
Mayor



DEPARTMENT OF LAW
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May 19, 2021

The Honorable President and Members
of the Baltimore City Council
Attn: Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Re: City Council Bill 21-0066 –Retirement Systems – Precluded Investment
and Divestment – Fossil Fuel Companies

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 21-0066 for form and legal sufficiency. The bill would prohibit the Employees’ Retirement System, the Elected Officials Retirement System, and the Fire and Police Employees’ Retirement System (collectively, the “Retirement Systems”) from investing any funds in any fossil fuel company within an actively managed separate account as defined in the bill. It would also require that the Retirement Systems divest from fossil fuel companies within actively managed separate accounts within a certain timeframe after written notice is sent to the companies that are subject to the divestment.

The bill expressly intends to preserve the fiduciary duty and legally required discretion of the Board of Trustees with regard to delaying divestment in line 23 on page 3 of the Bill. This is required because under Maryland law, “pension plans create contractual duties toward persons with vested rights under the plans.” *Bd. of Trustees of the Employees’ Ret. Sys. of the City of Baltimore v. Mayor and City Council of Baltimore*, 317 Md. 72, 100 (1989). These contractual duties include the “common-law duties of prudence and loyalty.” *Id.* at 734.

This Bill does not have enough safeguards for this fiduciary duty to pass legal muster. In 1989, the Maryland Court of Appeals considered the validity of the City’s ordinances that required divestment of pension holdings from companies doing business in South Africa. *Id.* at 723. Among other issues, the Court considered whether the ordinances violated the boards’ duties of prudence and loyalty. *Id.* at 734. The Court concluded that the ordinances did not violate those duties because “there exist[ed] numerous safeguards” to guarantee that the divestment would occur in a prudent manner. *Id.* at 736, 738.

Those safeguards included a transition to divestment “gradually, over a two-year period.” *Id.* at 736. The South African divestment “expressly empower[ed]” pausing the divestiture at any time for up to 90 days if the divestment had become imprudent. *Id.* There was no limit on the number of suspensions that the boards could adopt. *Id.*

Similarly, when evaluating a 2007 Maryland law concerning divestment in Sudan, the Attorney General noted that preservation of the fiduciary responsibility was evident because the law did “not require the Board of Trustees to take divestment action unless the Board determines, in good faith, that such action is consistent with its other fiduciary duties.” 93 Md. Op. Atty. Gen. 168 (2008).

Unlike the City’s prior divestiture ordinance concerning South Africa or Maryland’s divestment from Sudan, Bill 21-0066 gives no discretion or flexibility to the Retirement System boards to suspend or modify the divestment policy. Although Bill 21-0066 allows for delay, this is not enough for a Court to conclude that it preserves the Boards’ fiduciary duties. At a minimum, the bill must be amended to include the language found sufficient by the Maryland Attorney General: “Nothing in this section shall require the Board to take action as described in this section unless the Board determines, in good faith, that the action is consistent with the fiduciary duties and responsibilities of the Board as required by law.” *Id.* at 174. Language for this suggested amendment is attached as Required Amendment 1.

Another suggested amendment is to include “any other index approved by the Board” in the definition of “fossil fuel company” to give the Board greater flexibility to divest from fossil fuel companies that are not listed on the one named trading index. Language for this amendment is attached as Possible Amendment 2. While this amendment is not required to make the bill legally sufficient, it is recommended so that the Board can divest from fossil fuel companies not listed on the index mentioned or its successor index, but on any other indices.

Finally, the bill should give guidance to the Retirement Systems boards similar to what is found in Section 7(a)(1)(v) of Article 22 of the City Code concerning divesting from Sudan. A list of possible considerations for divestment decisions gives some framework to the Retirement Systems boards that must exercise their fiduciary responsibilities. It also includes language to reference those parent and subsidiary companies of Fossil Fuel Companies that may have control but no direct ownership of fossil fuel reserves. A potential list of criteria for the divestment decisions for fossil fuels is attached as Possible Amendment 3. This Amendment is not needed to make the bill legally sufficient but could be utilized to allow the Mayor and City Council some greater control over the process.

Assuming Bill 21-0066 is amended to provide the legally required safeguards for the Retirement System boards’ fiduciary duties as suggested in Required Amendment 1 or similar language, the Law Department could approve the bill for form and legal sufficiency.

Very truly yours,



Ashlea Brown
Assistant City Solicitor

A handwritten signature in blue ink, appearing to read "Hilary Ruley".

Hilary Ruley
Chief Solicitor

cc: James L. Shea, City Solicitor
Matthew Stegman, Mayor's Office of Government Relations
Elena DiPietro, Chief Solicitor, General Counsel Division
Victor Tervalá, Chief Solicitor

AMENDMENTS TO COUNCIL BILL 21-0066
(1st Reader Copy)

Proposed by: Law Dep't

Required Amendment 1

On page 3, in line 23 and on page 6 in line 27 strike “; *DIVESTMENT DELAY*” and on page 3 strike lines 24 through 27 and substitute, “NOTHING IN THIS PARAGRAPH (2) SHALL REQUIRE THE BOARD TO TAKE ACTION AS DESCRIBED IN THIS PARAGRAPH (2) UNLESS THE BOARD DETERMINES, IN GOOD FAITH, THAT THE ACTION IS CONSISTENT WITH THE FIDUCIARY DUTIES AND RESPONSIBILITIES OF THE BOARD AS REQUIRED BY LAW.” and on page 6 strike lines 28 through 31 and substitute, “NOTHING IN THIS PARAGRAPH (3) SHALL REQUIRE THE BOARD TO TAKE ACTION AS DESCRIBED IN THIS PARAGRAPH (3) UNLESS THE BOARD DETERMINES, IN GOOD FAITH, THAT THE ACTION IS CONSISTENT WITH THE FIDUCIARY DUTIES AND RESPONSIBILITIES OF THE BOARD AS REQUIRED BY LAW.”

Possible Amendment 2

On page 2 in line 29 and on page 5 in line 30 before the period insert “ANY OTHER INDEX APPROVED BY THE BOARD”.

Possible Amendment 3

On page 3 after line 32 and on page 6 after line 36 insert:

IN DETERMINING WHETHER TO TAKE DIVESTMENT ACTION WITH REGARD TO THE INVESTMENT OF FUNDS IN ACTIVELY-MANAGED SEPARATE ACCOUNTS IN ANY FOSSIL FUEL COMPANY, THE BOARD OF TRUSTEES MAY CONSIDER THE FOLLOWING:

1. THE ECONOMIC IMPACT OF THE DIVESTMENT FROM THE PORTFOLIO
2. WHETHER THE CARBON EMISSIONS LISTED FOR THE COMPANY ARE TO DECREASE BECAUSE THE COMPANY’S BUSINESS MODEL IS CHANGING
3. WHETHER NON-RESERVE OWNING SUBSIDIARIES OR PARENT COMPANIES OF A LISTED COMPANY SHOULD ALSO BE CONSIDERED FOR DIVESTMENT
4. ANY OTHER FACTOR THAT THE BOARD OF TRUSTEES DEEMS PRUDENT.