



**BALTIMORE CITY COUNCIL  
PUBLIC SAFETY AND  
GOVERNMENT OPERATIONS  
COMMITTEE**

**Mission Statement**

*On behalf of the Citizens of Baltimore City, the Public Safety and Government Operations will be responsible for matters concerning public safety, including, but not limited to; emergency preparedness, police services, fire/EMS, and the executive, administrative, and operational functions of the city government and libraries.*

**The Honorable Mark Conway  
Chairman**

**PUBLIC HEARING**

**Wednesday, May 26, 2021  
1:00 PM**

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



## BILL SYNOPSIS

**Committee: Public Safety and Government Operations**

**Bill 21-0066**

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### Retirement Systems – Precluded Investment and Divestment – Fossil Fuel Companies

***Sponsor: Councilmember Mark Conway***

***Introduced: April 19, 2021***

**Purpose:**

For the purpose of prohibiting the new investment of certain retirement funds in fossil fuel companies; requiring the divestment of certain retirement funds in fossil fuel companies within a certain timeframe; requiring certain reviews; specifying a certain procedure for the divestiture of investments; authorizing certain exemptions; defining certain terms; and providing for a special effective date.

**Effective:** This ordinance takes effect on January 1, 2022

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### Agency Reports

Fire and Police Employees' Retirement System	Comments
Retirement Savings Plan Board of Trustees	Comments
Labor Commissioner	
Dept. of Human Resources	Defers to Retirement Systems
Law Department	Comments
Employees' Retirement System	Comments
Dept. of Finance	
Office of the Comptroller	Favorable

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By adding:

Article 22 – Retirement Systems; Section(s) 7(a)(2), 23(c), and 35(a)(3); Baltimore City Code (Edition 2000)

## **Analysis**

### **Background**

If enacted, Bill 21-0066 would divest city pension funds from the 200 largest fossil fuel companies in the world at a rate of 20% per year over the next five years. Baltimore City has a history of divesting as a form of protest, specifically when City Hall officials divested from companies doing business in South Africa and Sudan to protest apartheid and genocide.

In 1985, the state pension board decided not to invest in companies active in South Africa unless the firms agreed to follow the Sullivan Principles, a voluntary ethics code that guided racial practices under apartheid. The city voted to divest its pension funds completely from companies that did business in South Africa in 1986.

In 1989, the Maryland Court of Appeals upheld two Baltimore ordinances requiring the city's employee pension systems to divest their holding in companies doing business in South Africa (Board of Trustees of the Employees' Retirement System vs. Mayor of Baltimore City). The trustees of the three pension systems and two employee beneficiaries of the funds filed suit claiming that the divestment ordinances:

1. Improperly delegated legislative authority to a nonprofit organization by directing the trustees to reference its list of companies with ties to South Africa,
2. Impaired the city's contractual obligation with the pension fund beneficiaries,
3. Were preempted by the federal anti-apartheid legislation,
4. Intruded on the federal government's authority to conduct foreign policy, and
5. violated the Commerce Clause.

The court ruled that the ordinances did not improperly delegate legislative authority or violate the contracts, thus rejecting the claim that they altered the trustees' fiduciary duties. Although “the ordinances place some limits on the scope of investment... economically competitive, substitute investments remain available.” The court ruled that investment policy for public pension funds is “clearly a matter of traditional local regulation” and no federal law or treaty preempts the ordinances in question. Moreover, it held that the ordinances “have only an incidental or indirect affect in foreign countries” and did not interfere with the federal government's foreign relations powers. The court also ruled that the ordinances did not violate the commerce clause because the city was acting as a market participant rather than as a market regulator.

Aside from its policy on South Africa, Baltimore City in 1993 adopted principles for investing in companies that do business in Northern Ireland. At that time, Baltimore City Council members had also discussed a proposal to divest from companies active in the nuclear power and weapons industries, but no official actions were ever taken.

## **Fossil Fuel Industry**

Fossil fuels are natural non-renewable resources formed by a natural process of the decomposition of plants and other organisms, buried beneath layers of sediment and rock, and have taken a long time to become carbon-rich deposits. Major examples of fossil fuels are coal, crude oil, and natural gas, all considered as such because they were formed from the fossilized, buried remains of plants and animals. Studies have shown that these sources provide about 80% of energy needs.

What ways have fossil fuels impacted the environment?

1. Land Degradation – the process of clearing land for the purpose of establishing facilities and networks that enable the processes needed for the extraction, transportation, and processing of fossil fuels. The fossil fuel industry requires a large portion of land to develop infrastructure such as wells, pipelines, access roads, as well as facilities for processing, waste storage, and waste disposal;
2. Water Pollution – this occurs when harmful substances contaminate a body of water, such as a stream, river, lake, ocean, or aquifer, thereby degrading water quality, and making it dangerous to humans and or the environment. One of the most prominent ways that this happens in countries across the world is through oil spills;
3. Atmospheric Pollution – given the nature of the chemicals contained in fossil fuels, carbon dioxide enters the atmosphere through a process of burning fossil fuels and methane, which is emitted during the production and transport of fossil fuels, both are greenhouse gases, which during the greenhouse gas effect contributes to the natural process that warms the Earth’s surface.

Fossil fuel is big business around the world. In a report titled Banking on Climate Chaos 2021, researchers found that 60 of the world’s largest commercial and investment banks have collectively put \$3.8 trillion into fossil fuels between 2016 through 2020. The three banks that did the most fossil fuel financing in 2020, according to the report, were JPMorgan Chase at \$51.3 billion; Citi at \$48.4 billion; and Bank of America with \$42.1 billion. Despite clear warnings, these banks continue to finance fossil fuels projects and companies that impact communities every single day.

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### **Additional Information**

**Fiscal Note:** Not Available

**Information Source(s):** Connecticut Office of Legislative Reference, CNBC News Broadcast, Banking on Climate Chaos – Fossil Fuels Finance Report 2021, The Impact of Fossil Fuels on the Environment

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Analysis by: Samuel Johnson, Jr.  
Analysis Date: May 25, 2021

Direct Inquiries to: (410) 396-1091

**CITY OF BALTIMORE  
COUNCIL BILL 21-0066  
(First Reader)**

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Introduced by: Councilmember Conway, President Mosby, Councilmembers Costello, Stokes,  
Middleton, Torrence, Ramos, Burnett, Porter, Bullock

Introduced and read first time: April 19, 2021

Assigned to: Public Safety and Government Operations Committee

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REFERRED TO THE FOLLOWING AGENCIES: City Solicitor, Department of Finance, Employees'  
Retirement System, Fire and Police Employees' Retirement System, Retirement Savings Plan  
Board of Trustees, Labor Commissioner, Department of Human Resources

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A BILL ENTITLED

1 AN ORDINANCE concerning

2 **Retirement Systems – Precluded Investment and Divestment – Fossil Fuel Companies**

3 FOR the purpose of prohibiting the new investment of certain retirement funds in fossil fuel  
4 companies; requiring the divestment of certain retirement funds in fossil fuel companies  
5 within a certain timeframe; requiring certain reviews; specifying a certain procedure for the  
6 divestiture of investments; authorizing certain exemptions; defining certain terms; and  
7 providing for a special effective date.

8 BY adding

9 Article 22 - Retirement Systems  
10 Section(s) 7(a)(2), 23(c), and 35(a)(3)  
11 Baltimore City Code  
12 (Edition 2000)

13 **SECTION 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE,** That the  
14 Laws of Baltimore City read as follows:

15 **Baltimore City Code**

16 **Article 22. Retirement Systems**

17 **Subtitle – Employees' Retirement System**

EXPLANATION: CAPITALS indicate matter added to existing law.  
[Brackets] indicate matter deleted from existing law.

**Council Bill 21-0066**

**§ 7. Management of funds.**

(a) *Trustee of funds.*

...

(2) *FOSSIL FUEL INVESTMENTS.*

(i) *DEFINITIONS.*

1. IN THIS PARAGRAPH (2), THE FOLLOWING TERMS HAVE THE MEANINGS INDICATED.

2. A. "ACTIVELY MANAGED SEPARATE ACCOUNT" MEANS ASSETS OF THE SYSTEM THAT ARE ACTIVELY MANAGED AT THE DIRECTION OF THE BOARD OF TRUSTEES AND HELD IN A SEPARATE ACCOUNT.

B. "ACTIVELY MANAGED SEPARATE ACCOUNT" DOES NOT INCLUDE:

1. AN INDEXED FUND;

2. A PRIVATE EQUITY FUND;

3. A HEDGE FUND;

4. A REAL ESTATE FUND; OR

5. ANY OTHER COMMINGLED OR PASSIVELY MANAGED FUND.

3. "COMPANY" MEANS ANY SOLE PROPRIETORSHIP, ORGANIZATION, ASSOCIATION, CORPORATION, LIMITED LIABILITY COMPANY, UTILITY, PARTNERSHIP, JOINT VENTURE, OR ANY OTHER ENTITY OR BUSINESS ASSOCIATION, INCLUDING ANY WHOLLY-OWNED SUBSIDIARY, MAJORITY-OWNED SUBSIDIARY, OR PARENT ENTITY OF ANY COMPANY.

4. "DIVEST" OR "DIVESTMENT ACTION" MEANS SELLING, REDEEMING, TRANSFERRING, EXCHANGING, OR OTHERWISE DISPOSING OR REFRAINING FROM FURTHER INVESTMENT IN CERTAIN INVESTMENTS.

5. "FOSSIL FUEL COMPANY" MEANS A COMPANY LISTED IN THE 200 PUBLICLY TRADED COAL, OIL, AND GAS COMPANIES THAT HOLD REPORTED FOSSIL FUEL RESERVES WITH THE LARGEST POTENTIAL CARBON EMISSIONS, AS RANKED AND UPDATED ANNUALLY IN THE FOSSIL FREE INDEXES US ("FFIUS") OR ANY SUCCESSOR INDEX.

(ii) *NEW INVESTMENTS PROHIBITED.*

EXCEPT AS OTHERWISE PROVIDED IN THIS PARAGRAPH (2), THE BOARD OF TRUSTEES MAY NOT MAKE ANY NEW INVESTMENTS IN ANY FOSSIL FUEL COMPANY WITHIN AN ACTIVELY MANAGED SEPARATE ACCOUNT.

**Council Bill 21-0066**

1 (III) *PERIODIC REVIEW.*

2 AT LEAST EVERY 6 MONTHS, THE BOARD OF TRUSTEES SHALL REVIEW THE  
3 INVESTMENT HOLDINGS IN EACH ACTIVELY MANAGED SEPARATE ACCOUNT AND  
4 IDENTIFY EACH INVESTMENT IN ANY FOSSIL FUEL COMPANY.

5 (IV) *DIVESTMENT.*

6 EXCEPT AS OTHERWISE PROVIDED IN THIS PARAGRAPH (2), THE BOARD OF  
7 TRUSTEES SHALL:

- 8 1. BY JULY 1, 2022, DIVEST AT LEAST 20% OF ITS INVESTMENTS IN FOSSIL  
9 FUEL COMPANIES HELD IN ANY ACTIVELY MANAGED SEPARATE ACCOUNT  
10 AS OF JANUARY 1, 2022;
- 11 2. BY JULY 1, 2023, DIVEST AT LEAST 40% OF ITS INVESTMENTS IN FOSSIL  
12 FUEL COMPANIES HELD IN ANY ACTIVELY MANAGED SEPARATE ACCOUNT  
13 AS OF JANUARY 1, 2022;
- 14 3. BY JULY 1, 2024, DIVEST AT LEAST 60% OF ITS INVESTMENTS IN FOSSIL  
15 FUEL COMPANIES HELD IN ANY ACTIVELY MANAGED SEPARATE ACCOUNT  
16 AS OF JANUARY 1, 2022;
- 17 4. BY JULY 1, 2025, DIVEST AT LEAST 80% OF ITS INVESTMENTS IN FOSSIL  
18 FUEL COMPANIES HELD IN ANY ACTIVELY MANAGED SEPARATE ACCOUNT  
19 AS OF JANUARY 1, 2022; AND
- 20 5. BY JULY 1, 2026, DIVEST AT LEAST 100% OF ITS INVESTMENTS IN FOSSIL  
21 FUEL COMPANIES HELD IN ANY ACTIVELY MANAGED SEPARATE ACCOUNT  
22 AS OF JANUARY 1, 2022.

23 (V) *FIDUCIARY DUTY; DIVESTMENT DELAY.*

- 24 1. NOTHING IN THIS PARAGRAPH (2) REQUIRES THE BOARD OF TRUSTEES TO TAKE  
25 ANY ACTION DESCRIBED IN THIS PARAGRAPH (2) THAT THE BOARD  
26 DETERMINES IN GOOD FAITH TO BE INCONSISTENT WITH THE FIDUCIARY  
27 RESPONSIBILITIES OF THE BOARD UNDER THIS ARTICLE 22.
- 28 2. IF THE BOARD OF TRUSTEES FINDS THAT A DELAY IN DIVESTING FROM A FOSSIL  
29 FUEL COMPANY IS NECESSARY DUE TO ITS FIDUCIARY DUTY, THE BOARD  
30 SHALL, WITHIN 30 DAYS OF THAT FINDING, REPORT THE DELAY TO THE MAYOR,  
31 THE BOARD OF ESTIMATES, AND THE CITY COUNCIL AND REPORT AN  
32 ESTIMATED TIMELINE FOR THE RESUMPTION OF DIVESTMENT.

33 (VI) *NOTICE.*

- 34 1. BEFORE DIVESTING FROM A FOSSIL FUEL COMPANY UNDER THIS  
35 PARAGRAPH (2), THE BOARD SHALL PROVIDE WRITTEN NOTICE AND AN  
36 OPPORTUNITY TO RESPOND IN WRITING TO EACH COMPANY SUBJECT TO THE  
37 DIVESTMENT ACTION.

**Council Bill 21-0066**

1 2. NO DIVESTMENT ACTION MAY OCCUR UNTIL 90 DAYS FROM THE DATE OF THE  
2 NOTICE DESCRIBED IN SUB-SUBPARAGRAPH 1. OF THIS SUBPARAGRAPH (VI).

3 3. NO DIVESTMENT ACTION MAY OCCUR IF THE COMPANY DEMONSTRATES TO THE  
4 BOARD OF TRUSTEES THAT IT IS EXEMPT FROM DIVESTMENT UNDER  
5 SUBPARAGRAPH (VII) OF THIS PARAGRAPH (2).

6 (VII) *EXEMPTION.*

7 THE DIVESTMENT REQUIREMENTS AND INVESTMENT PROHIBITIONS OF THIS  
8 PARAGRAPH (2) DO NOT APPLY TO ANY COMPANY THAT CAN DEMONSTRATE TO  
9 THE BOARD OF TRUSTEES THAT THE COMPANY:

- 10 1. HAS STOPPED EXPLORING FOR NEW HYDROCARBONS;
- 11 2. CONTRACTUALLY AGREES NOT TO DEVELOP OR SELL 80% OF ITS CURRENT  
12 PROVEN FOSSIL FUEL RESERVES; AND
- 13 3. HAS CEASED LOBBYING OR ATTEMPTING TO INFLUENCE CITY, STATE, OR  
14 FEDERAL GOVERNMENT OFFICIALS TO PRESERVE FOSSIL FUEL SUBSIDIES,  
15 TAX BREAKS, OR THE COMPANY’S COMPETITIVE ADVANTAGE WITH  
16 RESPECT TO CLEAN, RENEWABLE ENERGY.

17 (VII) *ANNUAL REPORT.*

18 ON OR BEFORE JUNE 30 OF EACH YEAR, THE BOARD OF TRUSTEES SHALL SUBMIT A  
19 REPORT TO THE MAYOR AND CITY COUNCIL DETAILING THE OPERATION AND  
20 COMPLIANCE WITH THIS PARAGRAPH (2). THE REPORT SHALL INCLUDE:

- 21 1. IDENTIFICATION OF EACH INVESTMENT IN A FOSSIL FUEL COMPANY HELD IN  
22 AN ACTIVELY MANAGED SEPARATE ACCOUNT;
- 23 2. A LIST OF EACH DIVESTMENT ACTION TAKEN UNDER THIS PARAGRAPH (2) IN  
24 THE PRIOR FISCAL YEAR;
- 25 3. A DESCRIPTION OF EACH DECISION TO DELAY DIVESTMENT; AND
- 26 4. A CALCULATION OF THE ADMINISTRATIVE COST OF COMPLIANCE WITH THIS  
27 PARAGRAPH (2).

28 **Subtitle – Elected Officials’ Retirement System**

29 **§ 23. Management of Funds.**

30 (C) *FOSSIL FUEL COMPANY INVESTMENTS.*

31 THE PROVISIONS OF § 7(A)(2) OF THIS ARTICLE, CONCERNING THE INVESTMENT OF FUNDS  
32 IN FOSSIL FUEL COMPANIES, APPLY TO ALL FUNDS OF THE ELECTED OFFICIALS’  
33 RETIREMENT SYSTEM.



**Council Bill 21-0066**

**Subtitle – Fire and Police Employees’ Retirement System**

**§ 35. Management of Funds.**

(a) *Trustee of funds.*

...

(3) *FOSSIL FUEL INVESTMENTS.*

(i) *DEFINITIONS.*

1. IN THIS PARAGRAPH (3), THE FOLLOWING TERMS HAVE THE MEANINGS INDICATED.
2. A. “ACTIVELY MANAGED SEPARATE ACCOUNT” MEANS ASSETS OF THE SYSTEM THAT ARE ACTIVELY MANAGED AT THE DIRECTION OF THE BOARD OF TRUSTEES AND HELD IN A SEPARATE ACCOUNT.  
B. “ACTIVELY MANAGED SEPARATE ACCOUNT” DOES NOT INCLUDE:
  1. AN INDEXED FUND;
  2. A PRIVATE EQUITY FUND;
  3. A HEDGE FUND;
  4. A REAL ESTATE FUND; OR
  5. ANY OTHER COMMINGLED OR PASSIVELY MANAGED FUND.
3. “COMPANY” MEANS ANY SOLE PROPRIETORSHIP, ORGANIZATION, ASSOCIATION, CORPORATION, LIMITED LIABILITY COMPANY, UTILITY, PARTNERSHIP, JOINT VENTURE, OR ANY OTHER ENTITY OR BUSINESS ASSOCIATION, INCLUDING ANY WHOLLY-OWNED SUBSIDIARY, MAJORITY-OWNED SUBSIDIARY, OR PARENT ENTITY OF ANY COMPANY.
4. “DIVEST” OR “DIVESTMENT ACTION” MEANS SELLING, REDEEMING, TRANSFERRING, EXCHANGING, OR OTHERWISE DISPOSING OR REFRAINING FROM FURTHER INVESTMENT IN CERTAIN INVESTMENTS.
5. “FOSSIL FUEL COMPANY” MEANS A COMPANY LISTED IN THE 200 PUBLICLY TRADED COAL, OIL, AND GAS COMPANIES THAT HOLD REPORTED FOSSIL FUEL RESERVES WITH THE LARGEST POTENTIAL CARBON EMISSIONS, AS RANKED AND UPDATED ANNUALLY IN THE FOSSIL FREE INDEXES US (“FFIUS”) OR ANY SUCCESSOR INDEX.

**Council Bill 21-0066**

1 (II) *NEW INVESTMENTS PROHIBITED.*

2 EXCEPT AS OTHERWISE PROVIDED IN THIS PARAGRAPH (3), THE BOARD OF  
3 TRUSTEES MAY NOT MAKE ANY NEW INVESTMENTS IN ANY FOSSIL FUEL COMPANY  
4 WITHIN AN ACTIVELY MANAGED SEPARATE ACCOUNT.

5 (III) *PERIODIC REVIEW.*

6 AT LEAST EVERY 6 MONTHS, THE BOARD OF TRUSTEES SHALL REVIEW THE  
7 INVESTMENT HOLDINGS IN EACH ACTIVELY MANAGED SEPARATE ACCOUNT AND  
8 IDENTIFY EACH INVESTMENT IN ANY FOSSIL FUEL COMPANY.

9 (IV) *DIVESTMENT.*

10 EXCEPT AS OTHERWISE PROVIDED IN THIS PARAGRAPH (3), THE BOARD OF  
11 TRUSTEES SHALL:

- 12 1. BY JULY 1, 2022, DIVEST AT LEAST 20% OF ITS INVESTMENTS IN FOSSIL  
13 FUEL COMPANIES HELD IN ANY ACTIVELY MANAGED SEPARATE ACCOUNT  
14 AS OF JANUARY 1, 2022;
- 15 2. BY JULY 1, 2023, DIVEST AT LEAST 40% OF ITS INVESTMENTS IN FOSSIL  
16 FUEL COMPANIES HELD IN ANY ACTIVELY MANAGED SEPARATE ACCOUNT  
17 AS OF JANUARY 1, 2022;
- 18 3. BY JULY 1, 2024, DIVEST AT LEAST 60% OF ITS INVESTMENTS IN FOSSIL  
19 FUEL COMPANIES HELD IN ANY ACTIVELY MANAGED SEPARATE ACCOUNT  
20 AS OF JANUARY 1, 2022;
- 21 4. BY JULY 1, 2025, DIVEST AT LEAST 80% OF ITS INVESTMENTS IN FOSSIL  
22 FUEL COMPANIES HELD IN ANY ACTIVELY MANAGED SEPARATE ACCOUNT  
23 AS OF JANUARY 1, 2022; AND
- 24 5. BY JULY 1, 2026, DIVEST AT LEAST 100% OF ITS INVESTMENTS IN FOSSIL  
25 FUEL COMPANIES HELD IN ANY ACTIVELY MANAGED SEPARATE ACCOUNT  
26 AS OF JANUARY 1, 2022.

27 (V) *FIDUCIARY DUTY; DIVESTMENT DELAY.*

- 28 1. NOTHING IN THIS PARAGRAPH (3) REQUIRES THE BOARD OF TRUSTEES TO TAKE  
29 ANY ACTION DESCRIBED IN THIS PARAGRAPH (3) THAT THE BOARD  
30 DETERMINES IN GOOD FAITH TO BE INCONSISTENT WITH THE FIDUCIARY  
31 RESPONSIBILITIES OF THE BOARD UNDER THIS ARTICLE 22.
- 32 2. IF THE BOARD OF TRUSTEES FINDS THAT A DELAY IN DIVESTING FROM A FOSSIL  
33 FUEL COMPANY IS NECESSARY DUE TO ITS FIDUCIARY DUTY, THE BOARD  
34 SHALL, WITHIN 30 DAYS OF THAT FINDING, REPORT THE DELAY TO THE MAYOR,  
35 THE BOARD OF ESTIMATES, AND THE CITY COUNCIL AND REPORT AN  
36 ESTIMATED TIMELINE FOR THE RESUMPTION OF DIVESTMENT.

**Council Bill 21-0066**

1 (VI) *NOTICE.*

- 2 1. BEFORE DIVESTING FROM A FOSSIL FUEL COMPANY UNDER THIS  
3 PARAGRAPH (3), THE BOARD SHALL PROVIDE WRITTEN NOTICE AND AN  
4 OPPORTUNITY TO RESPOND IN WRITING TO EACH COMPANY SUBJECT TO THE  
5 DIVESTMENT ACTION.
- 6 2. NO DIVESTMENT ACTION MAY OCCUR UNTIL 90 DAYS FROM THE DATE OF THE  
7 NOTICE DESCRIBED IN SUB-SUBPARAGRAPH 1. OF THIS SUBPARAGRAPH (VI).
- 8 3. NO DIVESTMENT ACTION MAY OCCUR IF THE COMPANY DEMONSTRATES TO THE  
9 BOARD OF TRUSTEES THAT IT IS EXEMPT FROM DIVESTMENT UNDER  
10 SUBPARAGRAPH (VII) OF THIS PARAGRAPH (3).

11 (VII) *EXEMPTION.*

12 THE DIVESTMENT REQUIREMENTS AND INVESTMENT PROHIBITIONS OF THIS  
13 PARAGRAPH (3) DO NOT APPLY TO ANY COMPANY THAT CAN DEMONSTRATE TO  
14 THE BOARD OF TRUSTEES THAT THE COMPANY:

- 15 1. HAS STOPPED EXPLORING FOR NEW HYDROCARBONS;
- 16 2. CONTRACTUALLY AGREES NOT TO DEVELOP OR SELL 80% OF ITS CURRENT  
17 PROVEN FOSSIL FUEL RESERVES; AND
- 18 3. HAS CEASED LOBBYING OR ATTEMPTING TO INFLUENCE CITY, STATE, OR  
19 FEDERAL GOVERNMENT OFFICIALS TO PRESERVE FOSSIL FUEL SUBSIDIES,  
20 TAX BREAKS, OR THE COMPANY'S COMPETITIVE ADVANTAGE WITH  
21 RESPECT TO CLEAN, RENEWABLE ENERGY.

22 (VII) *ANNUAL REPORT.*

23 ON OR BEFORE JUNE 30 OF EACH YEAR, THE BOARD OF TRUSTEES SHALL SUBMIT A  
24 REPORT TO THE MAYOR AND CITY COUNCIL DETAILING THE OPERATION AND  
25 COMPLIANCE WITH THIS PARAGRAPH (3). THE REPORT SHALL INCLUDE:

- 26 1. IDENTIFICATION OF EACH INVESTMENT IN A FOSSIL FUEL COMPANY HELD IN  
27 AN ACTIVELY MANAGED SEPARATE ACCOUNT;
- 28 2. A LIST OF EACH DIVESTMENT ACTION TAKEN UNDER THIS PARAGRAPH (3) IN  
29 THE PRIOR FISCAL YEAR;
- 30 3. A DESCRIPTION OF EACH DECISION TO DELAY DIVESTMENT; AND
- 31 4. A CALCULATION OF THE ADMINISTRATIVE COST OF COMPLIANCE WITH THIS  
32 PARAGRAPH (3).

33 **SECTION 2. AND BE IT FURTHER ORDAINED,** That the catchlines contained in this Ordinance  
34 are not law and may not be considered to have been enacted as a part of this or any prior  
35 Ordinance.

**Council Bill 21-0066**

1       **SECTION 3. AND BE IT FURTHER ORDAINED,** That this Ordinance takes effect on January 1,  
2       2022.

**PUBLIC SAFETY AND  
GOVERNMENT OPERATIONS  
COMMITTEE**

**AGENCY REPORTS**

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CITY OF BALTIMORE

BRANDON M. SCOTT  
Mayor



DEPARTMENT OF LAW  
JAMES L. SHEA, CITY SOLICITOR  
100 N. HOLLIDAY STREET  
SUITE 101, CITY HALL  
BALTIMORE, MD 21202

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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  
(1<sup>st</sup> 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

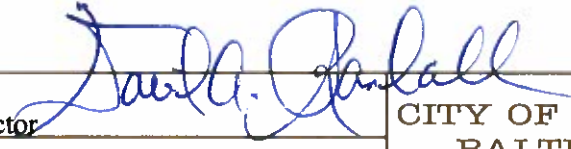

On page 2 in line 29 and on page 5 in line 30 before the period insert “ANY OTHER INDEX APPROVED BY THE BOARD”.

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.

FROM	NAME & TITLE	David A. Randall, Executive Director 	CITY OF BALTIMORE  <b>MEMO</b>	
	AGENCY NAME & ADDRESS	Employees' Retirement Systems 7 E. Redwood Street, 12 <sup>th</sup> Floor		
	SUBJECT	City Council Bill 21-0066		

DATE: May 20, 2021

TO

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

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

Dear Mr. President and City Council Members:

City Council Bill 21-0066 has been introduced to amend certain provisions of the Employees' Retirement System (ERS), Elected Officials' Retirement System (EOS), Fire and Police Employees' Retirement System (F&P) law to (1) prohibit new actively- managed investment of ERS, EOS and F&P retirement funds in certain fossil fuel companies on after January 1, 2022 and (2) require actively-managed investment funds to gradually divest from fossil fuel companies, at the rate of 20% per year, within a 5-year timeframe beginning July 1, 2022 and ending June 30, 2026.

**LEGISLATIVE SUMMARY**

This Legislation Summary is in agreement with the F&P position and is mirrored here in our agency documentation.

Fossil Fuel Company Defined

The Bill would prohibit new investment in, and require divestment from, any company listed in the 200 publicly traded coal, oil, and gas companies that hold reported fossil fuel reserves with the largest potential carbon emissions, as ranked and updated annually in the Fossil Free Indexes US ("FFIUS") or any successor index.

Actively-Managed Investment Prohibited

Only ERS, EOS, or F&P assets that are actively-managed and held in a separate account would be subject to the Bill's prohibition on new investment and the requirement to divest. The Bill defines "Actively Managed Separate Account" to not include the following accounts: (1) an indexed fund; (2) a private equity fund; (3) a hedge fund; (4) a real estate fund; or (5) any other commingled or passively ERS, EOS or F&P managed fund.

## Reporting Requirement

The Bill would require the ERS and F&P Boards of Trustees (Trustees) to file with the Mayor and the City Council, on or before June 30th of each year, an annual report detailing any new investment in, and any divestment from, fossil fuel companies during the past fiscal year, and a calculation of the administrative cost of compliance with fossil fuel divestment. Any decision to delay divestment during the fiscal year would also have to be described.

## Divestment Notice to Fossil Fuel Companies

The Bill provides that no ERS, EOS, or F&P divestment action may be taken until Trustees provides written notice and an opportunity to respond to each company subject to a proposed divestment action and waits 90 days from the written notice. If the subject company demonstrates to the Trustees that it is exempt from divestment, no divestment action may be taken. A subject company will be exempted from divestment if it can demonstrate that it: (1) has stopped exploring for new hydrocarbons; (2) contractually agrees not to develop or sell 80% of its current proven fossil fuel reserves; and (3) has ceased lobbying or attempting to influence city, state, or federal government officials to preserve fossil fuel subsidies, tax breaks, or the company's competitive advantage with respect to clean, renewable energy.

## Fiduciary Duty

Trustees need not take any divestment action under the Bill if it is determined in good faith by either Board of Trustees that divestment would be inconsistent with that Board's fiduciary responsibilities. If a Board of Trustees determines that its fiduciary duties require that it delay a divestment action, it must report that determination to the Mayor, City Council and Board of Estimates, along with an estimated timeline for resuming divestment.

## **LAW AND ANALYSIS**

ERS through their research and analysis with the following statement of legal analysis put forth by F&P and supports the following in case law. ERS also supports the case law analysis in the enclosed paragraphs contained in the letter addressed to the Council (see et seq.) but not fully quoted, hereof:

**\*\*In *Board of Trustees of Employees' Retirement System of Baltimore, et al. v. Mayor and City Council of Baltimore, et al.*, 317 Md. 72, 562 A.2d 720 (1989) (the South Africa case), the Maryland Court of Appeals upheld a City Council ordinance prohibiting retirement system investment in, and requiring divestment from, companies doing business in South Africa. The court defended the law against numerous challenges posed by the retirement systems Boards of Trustees. See, also, 93 Md. Op. Atty. Gen. 168 (2008) (law requiring State retirement system to divest from companies doing business in Iran or Sudan not in conflict with Trustees' fiduciary duties conflict and may be implemented.**

However, it was found that divestment from a system must receive fair market value return and costs of divestment must be de minis as compared to total fund assets. Also, substitute investments must be available that will yield competitive returns at a comparable level of risk.

## COST

In analyzing these factors, the Bill's provisions have been reviewed by Marquette Associates, the agency's investment advisor. Included is the attachment. The current investments in fossil fuels in the chart shows 35% of portfolio assets of ERS and 29 % of OPEB Trust that would be subject to impact of the bill. With the pension funds spread to four different investment managers that are presently making money above our target for the fund, the table enclosed shows the amount of investment at stake and required for divestment. This is a meaningful exposure to our holding that should not be required in such a short notice. Our Board exercises fiduciary duties and principles regarding the timing and manner of divestment in order to avoid imprudent transactions. Our Board has a fiduciary duty with prudent judgment to act upon expert analysis when acting for the benefit of the pension plan. The Board must be able to investigate alternatives, and diversify accordingly. The structure of this bill will not allow them to function in that capacity.

The bill creates a potential for less return in the marketplace when the Board is not allowed to divest at the best time, at the best execution to sell and receive fair market value in return. The opportunity costs of divestment are unknown. It cannot be predicted that substitute investments will yield competitive return for ERS. There has to be room for a gradual time for development of renewable energy and environmental responsibility; however, the bill does not give the Board that time sequence.

While ERS believes in the social concerns of investors, divestment legislation is ill-advised at this time. ERS prefers to implement investment guidelines in line with our mission statement (see enclosed) favoring renewable and alternative energy investment. Our mission would be to divest from fossil fuel companies in a timely manner based upon our investment managers' recommendations to the Board. Prudently, the likelihood that fossil fuel divestment will result in a measurable financial cost is not predictable, given unknown future determinants and adequate available substitute investments which are still to be determined.

The proposed council Bill 21-006 will result in cost to ERS and OPEB Trust if divestiture is handled within the time frame presented by this Bill. The ERS Board balances ESG investing with its fiduciary responsibilities and feels the request should not be law but policy.

However, the ERS Board respectfully believes that the Bill is feasible but asks for consideration of the following amendments.

## AMENDMENTS

### Reporting but not Mandating Divestment

The ERS Board supports prudent and gradual divestment staged over time pursuant to internal guidelines and our mission statement.

Therefore, delete all provisions of the Bill mandating divestment and retain only the definitions set forth on page 2, lines 1-29 and page 5, lines 1-30 and reporting sections set forth on page 4, lines 17-27 and page 7, line 22-32.

### Definition of Fossil Fuel Company

ERS through their research has discovered that the reference by the Bill to “Fossil Free Indexes US (FFIUS)” as referring to the index of the 200 listed companies with the largest carbon potential carbon emissions is outdated. Also, the current and commonly referred-to fossil fuel company index is known as “Carbon Underground 200 (CU200)”.

Accordingly, ERS agrees with F&P that on page 2, line 28 and page 5, line 29, “Fossil Free Indexes US (FFIUS)” should be changed to “Carbon Underground 200 (CU200)”.

### Divestment Timeframe with Annual Goals

The ERS Board with its mission statement can be shown in favor of divesting from fossil fuel but would like to do so in a manner which provides flexibility to reduce the cost of divestment and maximize the retirement systems’ ability to find alternative investments. Therefore, the ERS Board suggests that in lieu the proposed plan, the divestment time frame should be a 10 year plan with elimination of annual goals. This would provide the Board the ability to time the divestment without the potential of loss in an unpredictable market.

Therefore, on page 3, beginning with line 8, delete the entirety of sub-subparagraphs 1 through 4; on line 20, delete the number “5”, replace “2026” with “2031”, after “divest”, delete “at least 100%” and replace with “all”; and delete the rest of the line. Make the same amendments to subparagraph (IV) on page 6.

### 90 Day Notice Period

The ERS Board will exercise due diligence prior to divestment to ensure that each fossil fuel company subject to divestment is resolute in desiring to continue to engage in exploration, development, or sale of fossil fuels or lobbying to preserve governmental advantages for fossil fuels. However, the ERS Board is in agreement with the F&P Board in opposing the imposition of a 90-day period to accommodate communication with a subject fossil fuel company. Having any time frame imposed by law could potentially interfere with an advantageous sell strategy and execution.

Accordingly, on page 4, line 1, and on page 7, line 6, delete in its entirety sub-subparagraph 2.

## **RESOLUTION**

At their meeting of May 20, 2021, the ERS Board of Trustees resolved that the Bill is feasible with the aforementioned recommended amendments for consideration.

I will be available to provide testimony at the hearing scheduled for CC Bill 21-0066. Please call me at 443-984-3180 if you would like additional information.

DAR/EC/dsb

Enclosures

CC: Henry Raymond, Board Chair

Deborah Moore-Carter, Board Vice-Chair

Nichelle Lashley, Deputy Director

Nina Themelis



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

From: Marquette Associates, Inc. ("Marquette")

Date: May 14, 2021

Re: Investment Consultant Response

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**Topic**

The purpose of this client memorandum is to provide the investment consultant response to the implementation of City Council Bill 21-0066.

**Investment Portfolio Impact**

As the current investment consultant to the City of Baltimore Employee's Retirement System ("ERS"), City of Baltimore Elected Official's Retirement System ("EOS"), and the City of Baltimore Retirement Trust ("OPEB"), Marquette Associates, Inc. has reviewed the proposed City Council Bill 21-0066 (the "Bill") and evaluated the Bill's impact to the investment portfolios of ERS, EOS, and OPEB. Marquette consulted with the ERS, EOS, and OPEB investment managers that may be subject to the divestment as outlined in the Bill. The table below details investment managers that have a meaningful exposure to holdings that would require divestment under the terms of the Bill:

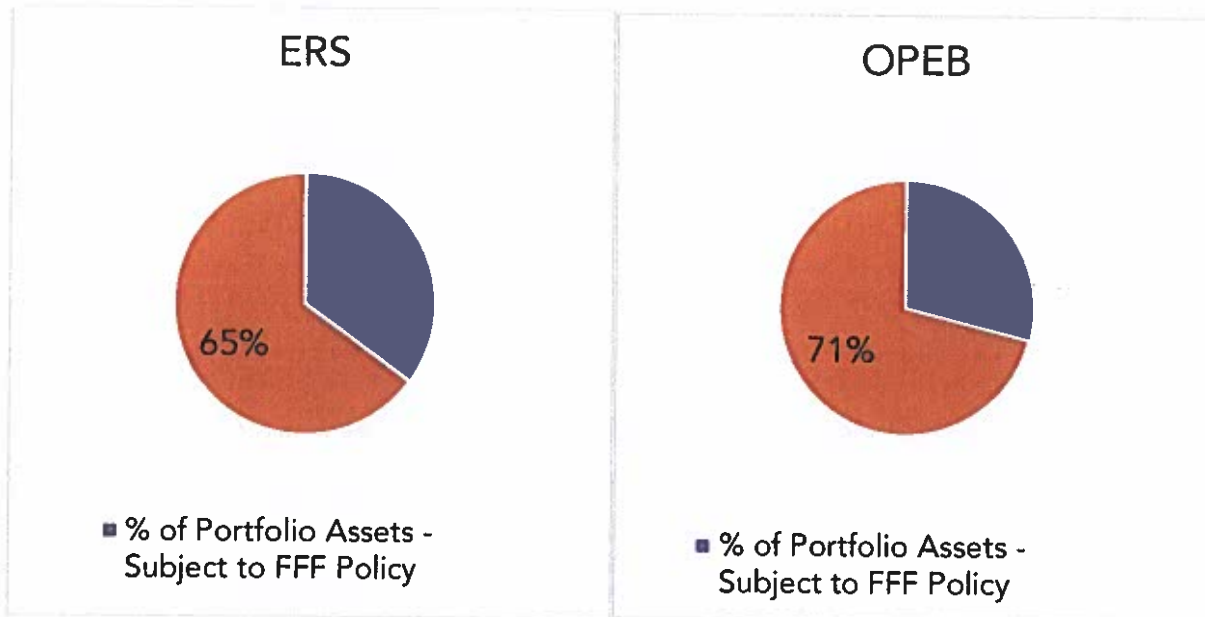
Investment Manager	Asset Class	Plan	% of Portfolio Required for Divestment	Value of Assets Required for Divestment (\$)
Edgar Lomax	U.S. Large Cap Value Equity	ERS	9%	\$9.7 million
Rothschild	U.S. Small Cap Value Equity	ERS	4%	\$4.5 million
Baird Advisors	Core Fixed Income	OPEB Trust	4%	\$2.4 million
Edgar Lomax	U.S. Large Cap Value Equity	OPEB Trust	9%	\$6.0 million

Earnest Capital	International Large Cap Equity	OPEB Trust	4%	\$1.1 million
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The pie chart below indicates the percent of total assets and the dollar value of assets that would require divestment under the current Bill:

Plan	% of Portfolio Required for Divestment	Value of Assets Required for Divestment (\$)
ERS	0.69%	\$15.0 million
OPEB	1.14%	\$9.6 million

The pie chart below indicates the percent of total assets that would be subject to the Bill:



### Summary

The current Bill as proposed would impact the investment portfolios highlighted in the information provided. The impact to the portfolios as highlighted above would be meaningful. Marquette believes a reasonable divestment timeline in line with industry standards would be a ten-year projected divestment. The ten-year timeline would ensure a thoughtful and efficient transition of investment portfolios. It would also allow for the implementation of a compliance

process of all service providers and City of Baltimore staff to ensure adherence to the new provisions.

**PREPARED BY MARQUETTE ASSOCIATES**

180 North LaSalle St, Ste 3500, Chicago, Illinois 60601    PHONE 312-527-5500  
CHICAGO BALTIMORE MILWAUKEE PHILADELPHIA ST LOUIS    WEB [MarquetteAssociates.com](http://MarquetteAssociates.com)

**CONFIDENTIALITY NOTICE:** This communication, including attachments, is for the exclusive use of the addressee and contains proprietary, confidential and/or privileged information; any use, copying, disclosure, dissemination or distribution is strictly prohibited. Marquette Associates, Inc. retains all proprietary rights they may have in the information.

The sources of information used in this report are believed to be reliable. Marquette Associates, Inc. has not independently verified all of the information and its accuracy cannot be guaranteed. Opinions, estimates, projections and comments on financial market trends constitute our judgment and are subject to change without notice. References to specific securities are for illustrative purposes only and do not constitute recommendations. Past performance does not guarantee future results.

**About Marquette Associates**

Marquette Associates is an independent investment consulting firm that guides institutional investment programs with a focused three-point approach and careful research. For more than 30 years Marquette has served this mission in close collaboration with clients – enabling institutions to be more effective investment stewards. Marquette is a completely independent and 100% employee-owned consultancy founded with the sole purpose of advising institutions. For more information, please visit [www.marquetteassociates.com](http://www.marquetteassociates.com).





# **Employees' and Elected Officials' Retirement System**

## **Mission Statement**

The System is committed to protecting and prudently investing member assets and providing accurate and timely retirement benefits with quality service to members and beneficiaries. ERS will continually apply the principles of responsible investing and strive to balance social responsibility with its fiduciary duty to provide strong long-term investment results to the System.

## **Standards of Conduct**

As Trustees and Staff, we are committed to:

Safeguard the members' assets.

Strive for continuous improvement.

Maintain confidentiality as appropriate.

Effectively communicate accurate information.

Provide accountable and proactive leadership.

Conduct all business in a fair and respectful manner.

Foster an atmosphere of cooperation and teamwork.

Value members as clients and advocate on their behalf.

Comply with the System's plan provisions, policies and guidelines.

Work efficiently, simplify procedures, and minimize bureaucratic hurdles.

Form alliances and partnerships to benefit the membership and the System.

Balance Environmental, Social and Governance (ESG) investing with fiduciary duty to obtain strong long-term investment results.

*We expect all who interact with us to adhere to these standards of conduct.*

*David A. Randall*

<b>FROM</b>	NAME & TITLE	David A. Randall, Executive Director
	AGENCY NAME & ADDRESS	Employees', Elected Officials', Retirement Savings Plan Systems – 7 E. Redwood Street, 12 <sup>th</sup> floor
	SUBJECT	City Council Bill 21-0066 – Retirement Systems – Precluded Investment and Divestment – Fossil Fuel Companies

CITY OF  
BALTIMORE

**MEMO**



**TO** DATE: May 20, 2021

The Honorable President and Members of the City Council  
 Attn: Natawna B. Austin, Executive Secretary  
 Room 409, City Hall  
 100 N. Holliday Street

Dear Mr. President and City Council Members:



City Council Bill 21-0066 was referred to the Retirement Savings Plan (“RSP”) Board of Trustees for comment. The bill’s stated purpose is for prohibiting the new investment of certain retirement funds in fossil fuel companies; requiring the divestment of certain retirement funds in fossil fuel companies within a certain timeframe; requiring certain reviews; specifying a certain procedure for the divestiture of investments; authorizing certain exemptions; defining certain terms; and providing for a special effective date.

The RSP Board takes the impact of fossil fuel energy very seriously and the efforts of the Mayor and City Council towards environmental changes.

The RSP is a qualified profit-sharing plan under IRC § 401(a) and a governmental plan under IRC § 414 (d) for the purpose of providing retirement benefits for eligible employees. While the Board of Trustees administers the Plan on behalf of Participants, all investment decisions under the Plan are at the sole discretion of Participants on whose behalf the Plan holds assets. These investments are made up entirely of mutual funds.

For the reasons specified above, the RSP Board takes no position on Bill 21-0066.

DAR/dsb  
 CC: Henry Raymond, Board Chairman  
 Nichelle Lashley, Deputy Director  
 Nina Themelis

FROM	NAME & TITLE	N. Anthony Calhoun, Executive Director 	CITY of BALTIMORE  <b>MEMO</b>	
	AGENCY NAME & ADDRESS	Fire and Police Employees' Retirement System 7 E. Redwood Street, 18th Floor		
	SUBJECT	City Council Bill 21-0066		

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

DATE: May 24, 2021

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

Dear Mr. President and City Council Members:

City Council Bill 21-0066 (the Bill) has been introduced to amend certain provisions of the Employees' Retirement System (ERS), Elected Officials' Retirement System (EOS), Fire and Police Employees' Retirement System (F&P) law to (1) prohibit new actively- managed investment of ERS, EOS and F&P retirement funds in certain fossil fuel companies on after January 1, 2022 and (2) require actively-managed investment funds to gradually divest from fossil fuel companies, at the rate of 20% per year, within a 5-year timeframe beginning July 1, 2022 and ending June 30, 2026.

### Legislation Summary

#### Fossil Fuel Company Defined

The Bill would prohibit new investment in, and require divestment from, any company listed in the 200 publicly traded coal, oil, and gas companies that hold reported fossil fuel reserves with the largest potential carbon emissions, as ranked and updated annually in the Fossil Free Indexes US ("FFIUS") or any successor index.

#### Actively-Managed Investment Prohibited

Only ERS, EOS, or F&P assets that are actively-managed and held in a separate account would be subject to the Bill's prohibition on new investment and the requirement to divest. The Bill defines "Actively Managed Separate Account" to not include the following accounts: (1) an indexed fund; (2) a private equity fund; (3) a hedge fund; (4) a real estate fund; or (5) any other commingled or passively ERS, EOS or F&P managed fund.

#### Reporting Requirement

The Bill would require the ERS and F&P Boards of Trustees (Trustees) to file with the Mayor and the City Council, on or before June 30th of each year, an annual report detailing any

new investment in, and any divestment from, fossil fuel companies during the past fiscal year, and a calculation of the administrative cost of compliance with fossil fuel divestment. Any decision to delay divestment during the fiscal year would also have to be described.

### Divestment Notice to Fossil Fuel Companies

The Bill provides that no ERS, EOS, or F&P divestment action may be taken until Trustees provides written notice and an opportunity to respond to each company subject to a proposed divestment action and waits 90 days from the written notice. If the subject company demonstrates to the Trustees that it is exempt from divestment, no divestment action may be taken. A subject company will be exempted from divestment if it can demonstrate that it: (1) has stopped exploring for new hydrocarbons; (2) contractually agrees not to develop or sell 80% of its current proven fossil fuel reserves; and (3) has ceased lobbying or attempting to influence city, state, or federal government officials to preserve fossil fuel subsidies, tax breaks, or the company's competitive advantage with respect to clean, renewable energy.

### Fiduciary Duty

Trustees need not take any divestment action under the Bill if it is determined in good faith by either Board of Trustees that divestment would be inconsistent with that Board's fiduciary responsibilities. If a Board of Trustees determines that its fiduciary duties require that it delay a divestment action, it must report that determination to the Mayor, City Council and Board of Estimates, along with an estimated timeline for resuming divestment.

## **Law and Analysis**

In *Board of Trustees of Employees' Retirement System of Baltimore, et al. v. Mayor and City Council of Baltimore, et al.*, 317 Md. 72, 562 A.2d 720 (1989) (the South Africa case), the Maryland Court of Appeals upheld a City Council ordinance prohibiting retirement system investment in, and requiring divestment from, companies doing business in South Africa. The court defended the law against numerous challenges posed by the retirement systems Boards of Trustees. In part, the Trustees claimed that requiring divestiture would compel the Trustees to violate their fiduciary duty to prudently invest retirement system funds "for the exclusive purpose" of providing member benefits. The court agreed that the City adopted common law fiduciary investing standards in the retirement systems provisions, see, Art. 22, Sections 7(h) and 35(h), but nevertheless upheld the ordinance, concluding that the South Africa divestiture mandate did not change the Trustees' duties of prudence and loyalty under the pension contracts.

In a 2008 opinion, the Maryland Attorney General followed and analyzed the South Africa case in advising the Maryland State Retirement System (MSRS) Board of Trustees to implement a state law requiring MSRS to divest from companies doing business in Iran or Sudan, finding that the divestiture law was not in conflict with Trustees' fiduciary duties. 93 Md. Op. Atty. Gen. 168 (2008). The AG found that divestment could be accomplished without interfering with trustees' fiduciary responsibilities "if:

- The System receives fair market value for the interests divested.
- The costs of divestment are *de minimis* as compared to total fund assets.
- Substitute investments are available that will yield competitive returns at a comparable level of risk.
- The fiduciaries exercise their discretion regarding the timing and manner of divestment so that they are able to avoid imprudent transactions.
- The fiduciaries otherwise act in accordance with the duties of loyalty and prudence - *i.e.*, ascertain relevant facts, investigate alternatives, obtain appropriate expert analysis, diversify appropriately, and act for the benefit of the beneficiaries.”

Attached is a review of the Bill from F&P’s investment advisor, NEPC. NEPC concludes that the fossil fuel divestiture program proposed by the Bill creates a potential for lower investment returns and that the amount of such lower returns is unknown. Also attached is a summary of F&P’s Exposure to Fossil Fuel Securities as of April 30, 2021.

Using NEPC’s review and the Maryland AG’s opinion as a framework for its review, the F&P Board cannot state with certainty that the Bill will not interfere with its fiduciary duty to prudently invest plan assets for the exclusive benefit of its membership. Specifically,

- The 5-year divestment timeframe, annual divestment goals, and 90-day divestment freeze mandated by the Bill may potentially interfere with the Board’s discretion regarding the timing and manner of divestment and its ability to sell fossil fuel securities while realizing “best price, best execution”. Those mandates may thus affect F&P’s ability to receive fair market value for divested securities, albeit, in NEPC’s view, marginally.
- Because the opportunity costs of divestment are unknown, it cannot be said with certainty that the cost of divestment will be *de minimis* nor that substitute investments will yield adequate competitive returns at a comparable level of risk.
- The Bill’s reliance on a no-invest list compiled by outside experts and the Bill’s criteria for allowing an exemption from divestment hinder the F&P Board’s discretion to weigh the investment and social attributes of a security against its investment risk and potential social cost. The F&P Board finds particularly onerous and intrusive the Bill’s requirements allowing a subject fossil fuel company to be exempted from divestment: (1) stop exploring for hydrocarbons, (2) contractually agree not to develop or sell 80% of its fuel reserves, and (3) cease lobbying governmental officials to preserve a company’s competitive advantage - even with regard to corporations which are actively and sincerely, but gradually, developing renewable energy sources and environmentally responsible practices, albeit not on pace with the Bill’s requirements.

On the other hand, it is apparent that the Bill’s sponsors were mindful of, and sensitive to, the F&P Board’s fiduciary duties inasmuch as the Bill attempts to ensure that those duties will not be violated. The Bill (1) mandates divestment over a 5-year timeframe, thus spreading the financial impact of divestment over time, (2) requires that the F&P Board communicate with subject corporations prior to divestment while freezing divestment for 90

days, and – most importantly - (3) allows trustees to suspend divestment action under the Bill upon a good faith determination that divestment would be inconsistent with their fiduciary responsibilities. While those assurances are commendable and would, in theory, allow the F&P Board to legally implement the Bill, the Board believes that the Bill is nevertheless ill-advised.

The F&P Board supports the social concerns of investors, and believes, as was noted by NEPC, “that, in the long run, fossil fuel will be rejected in favor of renewable energy sources, and, in future new economies, will not necessarily be optimal investments.” However, rather than being mandated by legislation, the Board prefers to implement divestment through an internal process favoring timely and prudent investment in renewable and alternative energy and divestment from fossil fuels based on the recommendations of F&P’s investment managers. It is the general view of the F&P Board that external, time-constrained restrictions on its discretion to invest, even if legal, are imprudent.

In summary, the F&P Board states for that record that it unequivocally supports the principles embodied in the Bill, namely, that fossil fuel exploration and extraction is anathema to the core values of the residents of Baltimore City and should thus be avoided while taking reasonable steps to minimize the financial cost to the retirement systems and the City. However, while the Bill may be feasible to implement, the F&P Board cannot state with certainty that the Bill will not impair its duty of prudence and loyalty, given unknown future determinants and adequate available substitute investments.

### **Amendments**

If the Bill is voted favorably out of committee, the F&P Board respectfully proposes that it be reported out with the following amendments:

#### **Reporting but not Mandating Divestment**

As stated above, the F&P Board is generally opposed to mandated divestment of fossil fuel companies but supports prudent and gradual divestment implemented over time pursuant to internal investment and divestment guidelines.

Accordingly, delete all provisions of the Bill mandating divestment and prohibiting investment; retain only: the definitions set forth on page 2, lines 1 – 29 and page 5, lines 1 – 30 and reporting sections set forth on page 4, lines 17 – 27 and page 7, line 22 – 32.

#### **Fossil Fuel Company Definition**

F&P’s due diligence has revealed that the reference by the Bill to “Fossil Free Indexes US (FFIUS)” as referring to the index of the 200 listed companies with the largest carbon potential carbon emissions is outdated. The current and commonly referred-to fossil fuel company index is known as “Carbon Underground 200 (CU200)”.

Accordingly, on page 2, line 28 and page 5, line 29, “Fossil Free Indexes US (FFIUS)” should be changed to “Carbon Underground 200 (CU200)”.

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To the extent the City Council rejects the above amendments, the F&P Board respectfully proposes that the Bill be reported out of committee with the following amendments:

Fossil Fuel Company Definition (see above explanation)

On page 2, line 28 and page 5, line 29, “Fossil Free Indexes US (FFIUS)” should be changed to “Carbon Underground 200 (CU200)”.

Divestment Timeframe and Annual Goals

The F&P Board is generally in favor of divesting from fossil fuel but would like to do so in a manner which provides flexibility to reduce the cost of divestment and maximize the retirement systems’ ability to find alternative investments. Therefore, the F&P Board suggests increasing the divestment timeframe to 10 years and eliminating annual goals during the timeframe to provide the Board its legal discretion over the timing and manner of divestment.

Accordingly, on page 3, beginning with line 8, delete the entirety of sub-subparagraphs 1 through 4; on line 20, delete the number “5”, replace “2026” with “2031”, after “divest”, delete “at least 100%” and replace with “all”. Make the same amendments to subparagraph (iv) on page 6.

90-Day Notice Period

The F&P Board is in favor of exercising due diligence prior to divestment to ensure that each fossil fuel company subject to divestment is resolute in desiring to continue to engage in exploration, development, or sale of fossil fuels or lobbying to preserve governmental advantages for fossil fuels. However, the Board opposes the imposition of a 90-day period to accommodate communication with a subject fossil fuel company. Any time frame imposed by law could potentially interfere with an advantageous sell strategy and execution.

Accordingly, on page 4, lines 1-2, and on page 7, lines 6-7, delete in its entirety sub-subparagraph 2.

**Resolution**

At their meeting of May 18, 2021, the F&P Board of Trustees neither opposed nor supported the Bill.

I will be available to provide testimony at the hearing scheduled for CC Bill 21-0066. Please call me at 410.497.7929 if you would like additional information.



**KEVIN M. LEONARD**  
Partner, Head of Public Funds Team

**NEPC, LLC**  
255 State Street  
Boston, MA 02109

May 12, 2021

**Peter Keith**  
Chairman, Board of Trustees  
Baltimore Fire & Police Employees' Retirement System  
7 East Redwood St  
18<sup>th</sup> Floor  
Baltimore, MD 21202

**RE: Bill 21-0066**

Dear Mr. Keith:

NEPC was asked to review City Council Bill 21-0066 (Retirement Systems-Precluded Investment and Divestment – Fossil Fuel Companies), as well as the two requested amendments by the F&P Board, and comment on potential costs to the F&P investment portfolio. The comments below reflect our opinion of the financial or investment implications of the legislation.

In any divestment, there are three major costs:

- **Hard Dollar Costs** – Hard dollar costs being the commissions paid to execute such a sale(s) and the associated custodial costs to book/account for the sale(s).
- **Realized Losses** - When force selling an asset within a given time period, an investor is at the discretion of the markets. Meaning that if the average cost of sale is lower than the average cost of purchase, it will result in a realized loss on investment.
- **Opportunity Cost** – When divesting from a company, or an industry, there is always potential for that company/industry to perform strongly into the future. This results in an investor missing out on investment return if the dollars that had been invested in said company/industry are re-invested into a lower performing investment.

Given the language, and requested amendments, in the Bill that limits divesture to actively managed traditional asset class (stocks and bonds) separate accounts, requires divestment notice to fossil fuel companies allowing them to respond prior to divesture, and most importantly the ability for Trustees to not take action under the Bill if it is determined in good faith that divestment would be inconsistent with the Board's fiduciary responsibilities, NEPC feels the "costs" listed above can be prudently minimized/managed. To NEPC the biggest potential cost would be "opportunity cost". This is also the biggest unknown as it is determinant on the future which is an unknown or a guarantee. The Bill ostensibly represents the view that, in the long run, fossil fuel will be rejected in favor of renewable



energy sources, and, in future new economies, will not necessarily be optimal investments. Although NEPC, given today's social views towards fossil fuel, somewhat agrees with the premise, there is not 100% certainty that this in fact will transpire. Therefore, if one were to fully divest from and prohibit investment in any company listed in the 200 publicly traded coal, oil, and gas companies that hold reported fossil fuel reserves with the largest potential carbon emissions, as ranked and updated annually in the Fossil Free Indexes (or any successor index) there is potential for lower investment returns.

Best Regards,

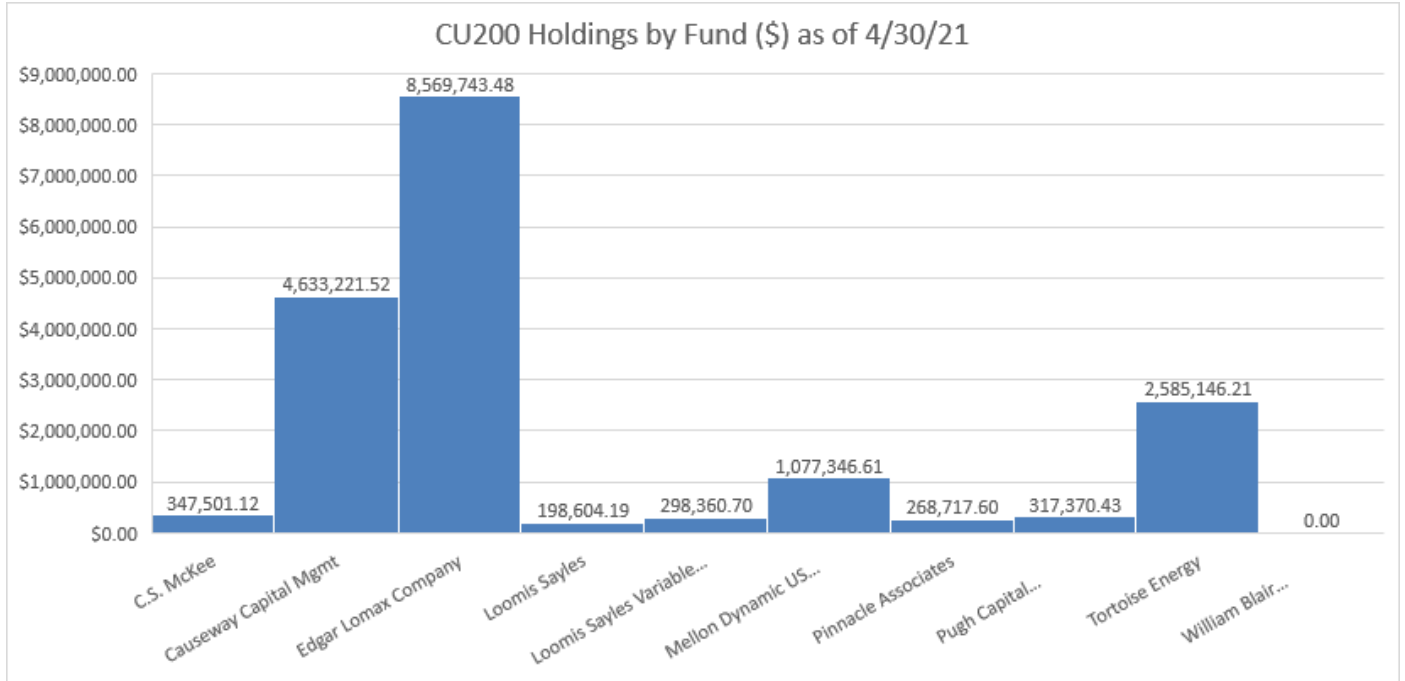
A handwritten signature in black ink, appearing to read 'K.M. Leonard', with a stylized flourish at the end.

Kevin M. Leonard, Partner

**FIRE AND POLICE EMPLOYEES' RETIREMENT SYSTEM OF THE CITY OF BALTIMORE**

**EXPOSURE TO CU200 SECURITIES**

**AS OF APRIL 30, 2021**



<b>CU200 Total</b>	<b>18,296,012</b>
<b>Fund Total</b>	<b>3,264,253,851</b>
<b>CU200 Percentage of Fund Total</b>	<b>0.56%</b>

CITY OF BALTIMORE

BRANDON M. SCOTT  
Mayor



DEPARTMENT OF HUMAN RESOURCES

QUINTON M. HERBERT, JD  
Director and Chief Human Capital Officer  
7 E. Redwood Street, 17th Floor  
Baltimore, MD 21202

May 21, 2021

To the Honorable City Council President, Nick Mosby  
and Members of the Baltimore City Council  
City Hall, 100 N. Holliday Street, Room 409  
Baltimore, Maryland 21202

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

Dear President and City Council Members,

The Department of Human Resources (DHR) has reviewed City Council Bill 21-0066 – Retirement Systems - Precluded Investment and Divestment - Fossil Fuel Companies for impact on the Baltimore City workforce. This bill was created to 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 companies. It would also require the divestment of certain fossil fuel companies within a certain timeframe; require certain reviews; and specify a certain procedure for the divestiture of investments.


DHR has reviewed the above referenced bill and takes **no position**.

DHR defers to the Retirement Systems and the Baltimore City Law Department concerning the feasibility of the divestment mandates. For the reasons stated above, DHR takes no position on Council Bill 21-0066. For any additional questions or concerns, please contact me via email at [Quinton.Herbert@baltimorecity.gov](mailto:Quinton.Herbert@baltimorecity.gov) or by phone at 410-396-1563.

Sincerely,

A handwritten signature in blue ink that reads 'Quinton M. H'.

Quinton M. Herbert, JD

<b>FROM</b>	<b>NAME &amp; TITLE</b>	Honorable Bill Henry, Comptroller of Baltimore City	CITY of BALTIMORE <b>MEMO</b>	
	<b>AGENCY NAME &amp; ADDRESS</b>	Office of the Comptroller, Room 204, City Hall		
	<b>SUBJECT</b>	21-0066 Retirement Systems - Precluded Investment and Divestment - Fossil Fuel Companies		

DATE:

**TO**

The Honorable President and  
 Members of the City Council  
 City Hall, Room 400

May 24, 2021

**Position: Support**

The Comptroller’s Office is offering comments 21-0066 Retirement Systems - Precluded Investment and Divestment - Fossil Fuel Companies. The purpose of this bill is to prohibit the Employees’ Retirement System, the Elected Officials Retirement System, and the Fire and Police Employees’ Retirement System (collectively, the “Retirement Systems”) from investing funds in fossil fuel companies. It would also require the divestment from certain fossil fuel companies within a certain timeframe; require certain reviews; and specify a certain procedure for the divestiture of investments.

**Background**

The Comptroller is an ex-officio member of each of the Retirement Systems Boards. Given the challenges involved in balancing their fiduciary responsibilities with the requirements created by this legislation, the Boards have declined to take a position on this bill. However, the Comptroller wanted to extend his individual support for the legislation, qualified by the allowances the bill contains to allow the Boards to divest their current holdings in a responsible fashion.

Climate change is an imminent threat to our communities. Cities, like Baltimore, have already begun experiencing the harmful effects of global warming through severe storms, extended heat waves, and dangerous air pollution. A reliance on fossil fuels will continue to exacerbate these weather events.

Municipal governments have the flexibility to divest from the stocks of fossil fuel companies that make money extracting coal, gas, and oil. As Baltimore’s internal operations become greener and more sustainable, the City should have an investment portfolio that reflects the same goals.

As a trustee, the Comptroller has a fiduciary responsibility to protect the assets of the Retirement Systems and takes this position very seriously Last December, chairman and CEO Larry Fink of Blackwater (the world’s largest asset manager) sent a letter to the chief executives of the world’s largest companies regarding corporate governance. In the letter, Fink wrote that investments in fossils fuels, “present a high sustainability-related risk” and asked companies to start shaving down their carbon footprint. Blackwater expanded by saying, “We also believe that climate transition creates a historic investment opportunity.”

Divestment is not just a moral cause, but a prudent financial decision. This legislation “feeds two birds with one scone,” – in diverting funds from fossil fuels, Cities can protect their financial assets as well as their residents.

### **Conclusion**

This legislation will allow the Retirement Systems five years for implementation and offers the necessary flexibility in case of an emergency or disaster. **For the reasons stated above, the Comptroller’s Office supports the bill.**