Fiduciary Duties of Investment Intermediaries - Comments to the UK Law Commission

15 JULY 2013 (Supplemental Signatories Added)

The undersigned participants in the **Network for Sustainable Financial Markets** (SFM), an international, non-partisan, non-profit organization comprised of financial market professionals and academics, submit these comments in response to the Commission's preliminary stakeholder consultation relating to recommendations in the Kay Report.[1] These comments were developed by members of the SFM Fiduciary Duty Working Group, which has been active for more than five years. We appreciate the opportunity to respond to this consultation.

Introduction

SFM Fiduciary Duty Working Group participants have submitted responses to various related consultation rounds, for example development of the OECD pension fund guidelines[2] and the Kay review,[3] which involved issues similar to this consultation. SFM participants have also published a number a scholarly and practitioner articles on fiduciary duty that provide additional support for our comments.[4] In short, we concur with the Kay Review Final Report's analysis of and recommendations on fiduciary duty.

Changed Circumstances Require Clarification of Fiduciary Duties

We believe that the factual circumstances in which fiduciary duty must be interpreted have changed dramatically since the last half of the twentieth century. Assumptions that suited the market, investment and social context of that time period are no longer reliable, and twentieth century perceptions of fiduciary duty are simply not fit for purpose today. The understanding of fiduciary duty must evolve (as it has in the past) to reflect this altered state of facts.

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[1] Signatories support this document in their personal capacities; organizational affiliations are listed for identification purposes only.
[2] Johnson, Keith L. and de Graaf, Frank Jan, Modernizing Pension Fund Legal Standards for the Twenty-First Century (May 20, 2009). Rotman International Journal of Pension Management, Vol. 2, No. 1, 2009. Available at SSRN: http://ssrn.com/abstract=1408691.
[3] Williams, Cynthia A., de Graaf, Frank Jan and Johnson, Keith L., The Economic Role of Finance: A Contribution to the Kay Review of UK Equity Markets and Long-Term Decision Making (November 28, 2011). Available at SSRN: http://ssrn.com/abstract=2084722 or http://dx.doi.org/10.2139/ssrn.2084722.
[4] For example, see Hawley, James P., Johnson, Keith L. and Waitzer, Edward J., Reclaiming Fiduciary Duty Balance (September 21, 2011). Rotman International Journal of Pension Management, Vol. 4, No. 2, p. 4, Fall 2011. Available at SSRN: http://ssrn.com/abstract=1935068; Waitzer, Ed and Sarro, Douglas. The Public Fiduciary: Emerging Themes in Canadian Fiduciary Law for Pension Trustees. The Canadian Bar Review, Vol. 91, 163 - 209 (2012). Available at http://irrcinstitute.org/award.php; Lydenburg, Steve. Reason, Rationality, and Fiduciary Duty. Journal of Business Ethics, 2013, Available at http://www.springerlink.com/openurl.asp?genre=article&id=doi:10.1007/s10551-013-1632-3; Youngdahl, Jay, Investment Consultants and Institutional Corruption (April 25, 2013). Edmond J. Safra Working Papers, No. 7. Available at SSRN: http://ssrn.com/abstract=2255669 or http://dx.doi.org/10.2139/ssrn.2255669; Clark, Gordon L., The Kay Review on Long-Horizon Investing: A Guide for the Perplexed (May 28, 2013). Rotman International Journal of Pension Management, Vol. 6, No. 1, 2013. Available at SSRN: http://ssrn.com/abstract=2271212. Youngdahl, Jay. The Time Has Come for a Sustainable Theory of Fiduciary Duty in Investment. 29 Hofstra Labor & Employment Law Journal 1, Fall 2011 (115-140).

Key changes include the following:

- The amount of assets managed by institutional investor fiduciaries has grown exponentially. Fiduciary principles are now a substantial force in the markets and economy. The collective behavior of fiduciaries can now affect market volatility, influence corporate decision making, transfer massive wealth and risk between generations and shape the future of society.[5] Fiduciaries have not yet cultivated a full appreciation of these dynamics, nor have they widely adopted the tools to measure them.

- Nearly universal adoption of broadly diversified investment strategies tied to capital weighted market indices has resulted in economic health and institutional investor success becoming mutually interdependent. The global financial crisis demonstrated that systemic economic risks are game changers for fund beneficiaries and taxpayers.

- Advances in technology and communications have shortened investment time horizons from years to months, or even milliseconds. Business planning cycles have become grossly mismatched with the attention span of most investors. Far too many fiduciaries have morphed from investors to traders, resulting in them having little business interest in the long-term consequences of their investment decisions.[6] Indeed, short-term pressure from investors has been cited as interfering with the ability of companies to allocate capital to long-term value creation projects.[7]

- Prevailing investment hypotheses and economic theories that had been dominant for more than a generation proved to be unreliable over the past decade. Nevertheless, the fiduciary duty of prudence has been understood as a mandate to favor the status quo, which has artificially suppressed demand for investment advisors and consultants to update their business models to address conceptual shortcomings and has discouraged fiduciaries from leaving safety of the "investor herd." It has also inhibited robust development of institutional investor stewardship engagement with companies.[8]

- The global spread of capitalism, along with population growth and increasing economic prosperity in the emerging markets, has introduced a new economic paradigm bounded by the ecological limits of our planet's natural resources and by climate change.[9] However, perception of a fiduciary obligation to follow the

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[5] Hawley, Johnson and Waitzer, supra, page 4.

[6] For example, the Bank of England reported that short-termism amongst investors has resulted in irrational investment decisions - particularly with respect to projects of longer duration, which often yield the highest private (and social) returns. Their data suggest that 10-year ahead cash flows are valued as if received 16 or more years ahead and almost no value is accorded to cash flows 30 years into the future. See Haldane, Andrew and Davies, Richard, The Short Long, speech to the 29th Société Universitaire Européene de Recherches Financières Colloquium: New Paradigms in Money and Finance?, Brussels (May 2011).

[7] "The obsession with short-term results by investors, asset management firms and corporate managers collectively leads to the unintended consequences of destroying long-term value, decreasing market efficiency, reducing investment returns, and impeding efforts to strengthen corporate governance." Krehmeyer, Orsagh and Schacht, 2006. Breaking the Short-Term Cycle, CFA Institute and the Business Roundtable Institute for Corporate Ethics, page 1. Available at http://www.cfapubs.org/doi/pdf/10.2469/ccb.v2006.n1.4194.

[8] Palter, R., Rehm, W. and Shih, J. Communicating with the Right Investors, McKinsey No 27, Spring 2008, pages 1-5.

[9] See Jones, Aled, et al., Resource Constraints: Sharing a Finite World, Implications of Limits to Growth for the Actuarial Profession, Report for the Institute and Faculty of Actuaries (January, 2013)(showing that actuarial assumptions about pension funds fail to consider resource constraints and thus limits to growth in future modeling, but that these constraints could well mean that defined benefit pension plans will be insolvent within 35 years, and defined contribution plans will be 50% reduced in value).

status quo makes it more difficult to recognize these changes.

- Growing complexity of the markets and inability of fiduciary boards to cope with this complexity has generated an entire new advisory and consulting industry that did not exist fifty years ago. Reliance on advice from these agents, who often disclaim fiduciary responsibility, has resulted in the creation of loopholes that dilute fiduciary responsibilities and introduce inequality in application of the fundamental principles on which fiduciary duty is grounded.

- Public policy, stakeholder and societal expectations about the role of institutional investors, and the obligations applicable to companies in which they invest, have grown beyond the standards of conduct that many fiduciaries feel compelled to implement. For example, these expectations now include investor stewardship; shareholder votes on executive remuneration; integrated reporting by companies of extra-financial and financial factors; and director obligations to take the interests of stakeholders into consideration (under section 172 of the Companies Act of 2006) to promote long-term success of their company. Nonetheless, the market-relative performance benchmarks which are predominately used by fiduciary investors largely ignore these growing expectations.

The point of these observations is not that fiduciary duty must address each and every change in the circumstances of institutional investors. However, the extent and speed of changes in the environment where institutional investor fiduciaries operate have been unprecedented over the past several decades; and the stakes have never been higher. Without some authoritative clarification, the disconnection between current reality and increasingly outdated fiduciary duty interpretations introduces growing risks that are likely to cause substantial economic damage before legal and investment industry thinking evolve to catch up with the rest of society. The Law Commission is in a unique position, and whatever action it takes on the Kay Report recommendations will be of great future significance, both in the UK and elsewhere.

Fiduciary Duty is a Dynamic Concept

Fiduciary duty is an ancient set of legal principles that have survived over centuries. While the fundamental concepts underlying fiduciary duty have proved to be durable, the understanding and application of them have evolved in response to changing circumstances.[10] Toward the end of the twentieth century, when application of fiduciary duty via lists of prudent investments was replaced with modern portfolio theory, an explanation was added in the Introduction to § 227 of the Restatement of Trusts (Third).

> "Trust investment law should reflect and accommodate current knowledge and concepts. It should avoid repeating the mistake of freezing its rules against future learning and developments."

An additional observation was included in Comment (f) to § 227 of the Restatement of Trusts (Third).

[10] See Hawley, Johnson and Waitzer, supra.

> "[There] are no universally accepted and enduring theories of financial markets or prescriptions for investment that can provide clear and specific guidance to trustees and courts."

Given the degree of change since those words were written, we believe that fiduciaries are poised for another evolution in understanding of how fundamental fiduciary duty principles should be applied in the twenty-first century. The Law Commission can be instrumental in determining how long that evolution takes and how much damage occurs from outdated application of fiduciary duty in the meantime.

Fiduciary Duty Requires Loyalty to the Interests of Human Beneficiaries

The duty of loyalty is one of the fundamental principles of fiduciary duty. Loyalty requires that a fiduciary approach its responsibilities from the viewpoint of beneficiaries, who happen to be human beings.[11] The duty of loyalty is not intended to protect the business models or the vested interests of trustees or pension fund service providers. As investment industry practitioners and academics who study this field, we are painfully aware that much commentary on investment practices of fiduciaries confuses the interests of service provider agents with the interests of human trust fund beneficiaries.

> "[There] is a widespread perception in the pension world that the investment industry is perverse in one crucial sense: its food chain operates in reverse, with service providers at the top and clients at the bottom. Agents fare better than principals."[12]

The fiduciary duty of loyalty addresses the inherent vulnerability of beneficiaries to being taken advantage of by those managing their assets, who often have specialized skills that cannot be meaningfully monitored by beneficiaries. Beneficiaries must rely on the loyalty and good faith of fiduciaries and are simply not in a position to exercise equal bargaining power. They must be protected from the rules of the marketplace in order for pensions and other long-term savings schemes to meet their social purposes. Trust is an essential element in fiduciary relationships involving vulnerability to expertise; preservation of that trust facilitates creation of effective pension institutions and benefits society as a whole.[13]

Accordingly, pension trustees have an overriding "duty to administer the trust solely in the interest of the beneficiaries" and are "prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests." Furthermore, the duty of loyalty must be strictly enforced to provide any real protection to beneficiaries. "First, the courts have acknowledged that it is difficult, if not impossible for a person to act impartially in a matter in which he has an

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[11] For a discussion of the dangers associated with ignoring that human beings (rather than inanimate pools of financial assets) are the beneficiaries of investment fund fiduciary relationships, see Freshfields Bruckhaus Deringer, A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment (October 2005), page 3. UNEP-FI. Unlike corporate directors, investment fiduciaries are held to a stricter standard of loyalty which runs to the fund's human beneficiaries. See Hawley, Johnson and Waitzer, supra, at page 7.

[12] Rajan, Amin (2008). DB & DC Plans: Strengthening Their Delivery. CREATE-Research, London.

[13] Waitzer and Sarro, supra, at page 172.

interest . . . Secondly, the courts have realized that fiduciary relationships lend themselves to exploitation . . . Finally, the courts have made much of the fact that disloyal conduct is hard to detect."

In circumstances where this trust and vulnerability are present, we do not see how trustees, investment managers, advisors, consultants, insurance companies and others who exercise discretion over management decisions, or those who exert controlling influence over discretionary management decisions by fiduciaries, cannot themselves be considered fiduciaries. Reaching the opposite conclusion requires turning the fiduciary relationship on its head and risks eviscerating the trust that is a prerequisite to obtaining the benefits generated by fiduciary relationships.[14] Given the erosion of trust in financial intermediaries and the financial system as a whole that was cited in the Kay Report, we think it is incumbent upon fiduciaries to prioritize engagement with and understanding of the risk tolerances, retirement goals and views of beneficiaries and other shareholders that relate to successfully delivering equitable and sustainable pension benefits.[15]

Fiduciaries have Inter-Generational Impartiality Obligations

The duty of loyalty includes an obligation to identify and impartially consider conflicting interest of different beneficiary groups, including those of current and future retirees. Indeed, *Cowan v Scargill* turned on the divergent interest of different beneficiaries.[16] The Restatement of Trusts (Third) describes this duty in the Comments to § 79(1).

> "[Trustees must] make diligent and good-faith efforts to identify, respect, and balance the various beneficial interests when carrying out the trustees' fiduciary responsibilities in managing, protecting, and distributing the trust estate, and in other administrative functions."

> "[Conduct] in administering a trust cannot be influenced by a trustee's personal favoritism . . . nor is it permissible for a trustee to ignore the interests of some beneficiaries merely as a result of oversight or neglect."

Much has changed since the *Cowan v. Scargill* decision to alter the factual circumstances in which the duty of impartiality must be applied today. For example, the current systemic influence of fiduciary investment decisions, carbon risk, ecological limits, reputational risks and stakeholder expectations (cited above) would require a more sophisticated fiduciary analysis of issues involving application of the duty of impartiality to human beneficiaries who happen to live in British society.

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[14] If liability exposure of fiduciaries is the motivating concern, we suggest that it can be dealt with separately through insurance and/or maximum exposure caps that recognize how fundamentally important the duty of loyalty is to fiduciary relationships. Fiduciary law provides guidance as well as imposing responsibilities on fiduciaries. We believe that greater attention needs to be paid to counseling fiduciaries on the principles and underlying policy goals of fiduciary duties, which have unfortunately taken a back seat to advice on liability avoidance and minimum standards of conduct.

[15] The National Association of Pension Funds reported that the primary reason why employees opt out of participation in pension funds is lack of trust in the industry. NAPF Workplace Pensions Survey – March 2012. Available at http://www.napf.co.uk/PolicyandResearch/DocumentLibrary/0220_NAPF_workplace_pensions_survey_-_March_2012.aspx.

[16] *Cowan v. Scargill* [1984] All ER 750.

Many of us are old enough to remember the days when equity securities were seen as imprudent investments for fiduciaries. Obviously, understanding and application of fiduciary duty principles change, as that is not the case now. We see systemic, environmental, social, governance and financial effects of investment decisions as all within the bounds of issues that must be considered and weighed by fiduciaries today, particularly those like perpetual endowments or pension funds with long-term and cross generational obligations. In fact, failure to take these real world ramifications into consideration strikes us as exactly what the duties of loyalty and impartiality are designed to prevent - ignoring future risks and costs associated with current decisions merely because the decision maker finds it more convenient to disregard factors not included in its established analytical model.

Application of Fiduciary Fundamentals to the Law Commission's Questions

With the above fundamental principles and factual circumstances as context, we now turn to questions posed by the Law Commission.

Who is subject to fiduciary duties? Given the duty of loyalty principles upon which fiduciary duty is founded, fiduciary responsibilities should be applied broadly to those who either directly or indirectly through their effective influence over others, exercise discretion in making decisions or providing oversight in the management or investment of assets held for the benefit of third party human being, whether in a pension scheme, foundation or similar long-term saving vehicle. The Law Commission could recommend clarification of this important concept. We think the policy basis underlying the duty of loyalty is present where the following are present, regardless of the type of entity involved:

a) disloyalty would be hard for the ultimate beneficiaries to timely detect;

b) beneficiaries are vulnerable to harm or abuse;

c) individual beneficiaries do not have the necessary power and skills to exercise equal bargaining power;

d) the agent has its own personal interest in the situation;

e) expertise of the agent makes it hard for beneficiaries to timely judge the quality of services provided; or

f) the agent's responsibilities involve taking divergent interests of various beneficiaries into consideration.

Are fiduciary duties a moral code? We believe that fiduciary duties are best understood as relating to (a) integrity of the process applied by agents who are acting as fiduciaries and (b) alignment of that process with an informed view of the human beneficiaries' interests over the relevant time horizons - which usually involves inter-generational fairness considerations. Where fiduciary duties relate to providing a retirement benefit in the future, inflation and related cost of living issues associated with the future environment in which financial benefits will be provided are fully relevant. Now that the collective effects of decisions guided by fiduciary principles are material to health of the economy, society and planet, fiduciary duty interpretation has tragedy of the commons implications. The short- and long-term consequences of fiduciaries' collective decisions on allocation of capital and risks are systemically important; costs and benefits of associated externalities can no longer be seen as irrelevant to the interests of human beneficiaries. While these issues might strike some as involving a moral code, we see them as fundamentally tied to real world inter-generational issues of fairness regarding financial obligations owed to human beneficiaries. The query seeks a distinction that is of no real difference, and the Law Commission should resolve its question accordingly.

What can fiduciary investors take into account? In our view, this question is worded in a way that appears to confuse modern portfolio theory with fiduciary duty. It also seems to assume that that fiduciary duty requires adherence to a *"free lunch"* model of investment analysis that ignores everything outside of an analytical model's assumptions. We make the observation that fiduciary duty does not allow unending endorsement of any particular investment approach, especially one that has been demonstrated to be fundamentally flawed.[17] Fiduciary duties are inter-generational in nature, are owed to human beings and are expected to evolve in response to changing circumstances and knowledge. The Kay Report and publications of SFM participants cited above offer guidance on application of a mature stewardship approach to fiduciary investing that does not draw an artificial line to exclude environmental, social and governance consequences of investment decisions experienced by the human beings to whom fiduciary duties are owed.[18] Fiduciary duty does not mandate a *"willful blindness"* to anything that might challenge the hypotheses and business models of service providers who choose to presume they are still operating in 1984.[19] Fiduciaries should be encouraged to consider all material risks, opportunities, facts and circumstances that are reasonably likely to materially affect the delivery of sustainable and inter-generationally impartial promised benefits to human beneficiaries, over both the short and long term.[20] The Law Commission could confirm that fiduciaries are not constrained to a *free lunch* investment analysis approach.

[17]For a critique of prevailing investment theory, see Financial Services Authority, The Turner Review: A Regulatory Response to the Global Banking Crisis (March 2009)(Section 1.4: Fundamental theoretical issues: efficient markets can be irrational, p. 39) and a speech by HRH The Prince of Wales at the Prince's Charities Investor Engagement Event "Resilience and the Long-Term: Rethinking Portfolio Strategy," 27 June 2013, available at http://www.prince of wales.gov.uk/media/speeches (asserting that pension funds must consider future resource constraints in their economic modeling, and recognize the inescapable challenges to "business as usual" going forward) .

[18] In regard to climate risk, Baker & McKenzie issued a report last year concluding that the gap between understanding of the risks posed by climate change and the limited action taken by trustees to address those risks represents clear future fiduciary liability exposure. Wilder, M. and Curnow, P. Pension and Superannuation Trustees and Climate Change Report (22 October 2012). Baker & McKenzie. Available at http://www.bakermckenzie.com/BKClimateChangeSuperannuationTrusteesOct12/.

[19] Integrating analysis of environmental, social and governance factors with a financial approach to investment can produce superior risk-adjusted returns when well executed by experienced managers. Deutsche Bank Group, DB Climate Change Advisors, Sustainable Investing: Establishing Long-Term Value and Performance (June 2012). Available at https://www.dbadvisors.com/content/_media/Sustainable_Investing_2012.pdf.

[20] For practical solutions and processes for integrating inter-generational, environmental, social and governance issues into a sustainable investment approach, see also Towers Watson, Sustainable Investing - We Need a Bigger Boat, September 2012. Available at http://www.towerswatson.com/en/Insights/IC-Types/Survey-Research-Results/2012/09/Sustainable-investing-we-need-a-bigger-boat.

Do fiduciary standards encourage 'lemming behaviour'? The short answer is "yes." We have all seen it. Rigid understanding of the duty of prudence as giving a free pass to those who run with the herd presents a serious roadblock to improving fiduciary practices. While reference to practices of similar investors is certainly appropriate, it should not excuse fiduciaries from neutrally evaluating the investment and governance enhancements that are now available - and doing so from the perspective of impartially serving the inter-generational interests of their human beneficiaries. Achieving a better balance between prudence and the duties of loyalty and impartiality would go a long way toward correcting the myopic vision that has captured the herd of fiduciary investors. At a minimum, the Law Commission should recognize that loyalty takes precedence whenever the duties of prudence and loyalty conflict.[21]

Do fiduciary duties discourage stewardship? Yes! The Kay Report and publications of FairPensions (now ShareAction) provide examples of this.[22] While there are influences beyond fiduciary duty that are at work in discouraging stewardship, we see a couple of areas where clarification of fiduciary duties by the Law Commission could help.

- The exclusive use of market-relative benchmarks discourages fiduciaries from undertaking efforts to improve corporate success because they will get no credit for moving the benchmark. Nonetheless, beneficiaries are best served by a focus on improving corporate performance, lowering risks and recognizing the impact that externalities have on human beneficiaries over the long term. Recognition of the fiduciary imperative to move beyond market-relative measures of success to include benchmarks that capture the real world impacts on beneficiaries over the long-term is needed.

- Collaboration on addressing shared issues, such as reducing systemic risk exposures or improving market practices through mutual stewardship activities, could be redefined as within the duty of prudence (or standard of care) that is expected of fiduciaries. Collaboration has become a leading practice for fiduciaries, though less sophisticated investors still mistakenly perceive collaboration as involving delegation of authority to other investors. To the contrary, collaboration allows each fund to retain control of its own actions while sharing costs and increasing effectiveness.[23]

- Conflicts of interest amongst agents that perform fiduciary functions (regardless of whether they are currently labeled "fiduciaries") discourages investment managers, for instance, from exercising shareholder rights in ways that might alienate corporate managers who would be able to steer corporate business to those

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[21] See Laby, Arthur, 2004. Resolving Conflicts of Interest in Fiduciary Relationships. American University Law Review 54: 75, at 78 ("When duties of loyalty and care collide, courts generally resolve the conflict in favor of the duty of loyalty representing minimum conduct to which the fiduciary must adhere.")

[22] For example, see Berry, Christine, Protecting our Best Interests; Rediscovering Fiduciary Obligations, FairPensions (March 2011). Available at http://www.shareaction.org/sites/default/files/uploaded_files/fidduty/FPProtectingOurBestInterests.pdf.

[23] Collaboration between investors to address executive remuneration issues was recently identified by a group of global investors meeting at the University of Toronto Rotman International Centre for Pension Management as one of the leading strategies for pension funds to better serve their beneficiaries. See Ambachtsheer, Keith and Bauer, Rob, Ten Strategies for Pension Funds to Better Serve Their Beneficiaries (June 20, 2013). Available at SSRN: http://ssrn.com/abstract=2282520 or http://dx.doi.org/10.2139/ssrn.2282520.

agents.[24] Extending the definition of "fiduciaries" to include all those who exercise discretionary authority or influence on behalf of beneficiaries would better align the service provider chain with interests of its human beneficiaries and be more consistent with the public policy basis of fiduciary duty.

Are some permitted market practices incompatible with fiduciary duties? Given that fiduciary duty focuses on integrity and alignment of processes used by fiduciaries in making decisions, we think that addressing the conflicts of interest and correcting for lack of balance between prudence, loyalty and impartiality are the most appropriate ways to address the issues raised by this question. Hard and fast prohibitions, while perhaps appropriate over the short term or in specific situations, risk outliving their relevance. Fiduciary duty is a dynamic concept that should be allowed to evolve in response to changing circumstances and knowledge.

Concluding remarks

When deliberating on its response to the Secretary of State for Business, Innovation and Skills, we recommend that the Law Commission consider observations of the famous jurist, Learned Hand, in a 1932 case involving the negligence of an entire industry. In the T.J. Hooper case, tug boat owners were found liable for loss of cargoes in a storm because they had ignored available resources and failed to issue short-wave receivers to their tug boat operators. At the time, radios were a rarity on tugs but were otherwise becoming widely used throughout society. The jurist observed that, had the tug boat operators possessed short-wave receivers, they would have heard weather reports about the developing storm and could have sought refuge out of the open water. At some point, his finding in the case could become equally applicable to institutional investor fiduciaries.

> "Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission."[25]

It is incumbent upon the Law Commission to heed findings of the Kay Report and take action that will hasten the uptake of a more mature understanding of fiduciary duties that reflects current knowledge and circumstances. When an industry puts its fulfillment of legal obligations to the intended beneficiaries and to society at risk by resisting adoption of newly available knowledge, the law must step in and say what is required.

[24] For additional discussion of agency conflicts in the investment service provider chain, see Wong, Simon C. Y., How Conflicts of Interest Thwart Institutional Investor Stewardship (2011). Butterworths Journal of International Banking and Financial Law, pp. 481-482, September 2011. Available at SSRN: http://ssrn.com/abstract=1925485.

[25] *The T.J. Hooper*, 60 F2d 737, 740 (2d Cir. 1932).

We hope that these comments will be of help to the Law Commission. Please do not hesitate to contact us if we can be of further assistance.

Respectfully submitted,

Keith L. Johnson, Co-Chair
SFM Fiduciary Duty Working Group
Reinhart Institutional Investor Services, Chairman

Dr. Frank Jan de Graaf, Co-Chair
SFM Fiduciary Duty Working Group
Academic and responsible investment specialist

Daniel Apfel, Executive Director
Responsible Endowments

Pablo Berrutti, Head of Responsible Investment - Asia Pacific
Colonial First State Global Asset Management

Angelo Calvello, PhD
Founder of Environmental Alpha

Daniela Carosio, Director
Sustainable Equity Value Ltd.

Peter Chapman, Executive Director
Shareholder Association for Research and Education

Gordon L Clark, FBA DSc
Professor and Director
Smith School of Enterprise and the Environment
Oxford University, Oxford OX1 3QY, UK
Sir Louis Matheson Distinguished Visiting Professor
Monash University, Melbourne, Australia

Andrew Clearfield, President
Investment Initiatives

Sarah Cleveland, Founder & CEO
Sarah Cleveland Consulting

William Michael Cunningham, Social Investing Advisor
Creative Investment Research, Inc.

Frank Curtiss, Head of Corporate Governance
RPMI Railpen Investments

Christopher P. Davis, Director - Investor Programs
Ceres

Stephen Davis, Senior Fellow
Harvard Law School Programs on Corporate Governance and Institutional Investors

Paul Dickinson, Chief Executive
Carbon Disclosure Project

Björn D. Fischer, Founder and Manager
Environmental Markets & Corporate Advisory

Ralf Frank, Secretary General
DVFA Society of Investment Professionals in Germany

Bill Hartnett, Head of Sustainability
Local Government Super - Australia

Andreas Hoepner
Lecturer in Banking & Finance, School of Management, University of St. Andrews
Deputy Director, Centre for Responsible Banking & Finance, School of Management, University of St. Andrews
Academic Fellow, United Nations backed Principles for Responsible Investment

James P. Hawley, PhD
Professor and Director, Elfenworks Center for the Study of Fiduciary Capitalism
School of Economics and Business, Saint Mary's College of California

Dr. Hazel Henderson, Author, Ethical Markets: Growing the Green Economy
President, Editor-in-Chief, Ethical Markets Media (USA and Brazil)

John Jarrett, Co-Founder and Partner
BHJ Partners

Adam Kanzer, Managing Director and General Counsel
Domini Social Investments

Sean Kidney, CEO
Climate Bonds Initiative

Dr. Matthew Kiernan, Chief Executive
Inflection Point Capital Management

Cary Krosinsky, Executive Director
Network for Sustainable Financial Markets

Kazutaka Kuroda, Social Media Director
Network for Sustainable Financial Markets

Rob Lake
Independent Responsible Investment Advisor

George Latham, Managing Partner
WHEB Asset Management

Dr Jeremy Leggett, Chairman
Carbon Tracker

Dr Michael Lloyd, Director
LCA Europe Limited
Senior Research Fellow, Global Policy Institute

Steve Lydenberg, Partner
Strategic Vision
Domini Social Investments

Tim MacDonald, Senior Fellow
Capital Institute

Dr Michael Lloyd, Senior Research Fellow
Global Policy Institute

Michael Musuraca
Pension Fund Manager

Steve Podmore, Founder & CEO,
Transform Capital Management

Julian Poulter, Executive Director
Asset Owners Disclosure Project.

Nick Robins, Head
Climate Change Centre of Excellence

Nelson Switzer, Director and Leader
Sustainable Business Solutions, PwC

Gabriel Thoumi, CFA
Integra LLC

Mark Van Clieaf, Managing Director
MVC Associates International

Stephen Viederman, Finance Committee Chair
Christopher Reynolds Foundation

Ed Waitzer, Partner, Stikeman Elliott and Jarislowky
Dimma Mooney Chair in Corporate Goveranc
Osgoode Hall Law School and the Schulich School of Business
York University

Cynthia Williams, Osler Chair in Business Law
Osgoode Hall Law School
York University

Jay Youngdahl, Senior Fellow
Initiative for Responsible Investment
Harvard University