Stephen Viederman

Fiduciary Duty

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Evolving out of the ethical waves of the past, Sustainable Investing involves the conscious strategic integration of extra-financial factors for the purpose of minimizing risk and generating long-term financial returns. With climate change and the imperative of sustainability transforming the world's capital markets, Sustainable Investing has already been outperforming the mainstream, and concerned investors need to know how best to position themselves for potentially radical market change.

In essence, Sustainable Investing is fast becoming the smart way of generating long-term returns. With conventional investors now scrambling to factor in issues such as climate change, business ethics and human rights, this book captures a turning point in the evolution of global finance.

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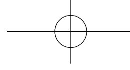

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Since the beginning of the Industrial Revolution at the end of the 18th century, human impact upon the environment has increased exponentially. Scientists observe that since then 'Earth has endured changes sufficient to leave a global stratigraphic signature distinct from that of the Holocene or of previous Pleistocene interglacial phases, encompassing novel biotic, sedimentary and geochemical change' (*GSA Today*, 2008). *Anthropocene* is the word they created to delineate this new epoch.

It has not been until the last few decades that economics and finance began to recognize the relationship between the physical and social world, on the one hand, and the economic world, on the other. What had been identified as *externalities* by the economists, and *intangibles* and *extra-financial factors* by investors, have recently begun to be seen as material and, as a result, are becoming more integrated within financial decision-making. Mainstream mega-firms, such as Goldman Sachs, Deutsche Bank, Lehman Brothers, State Street Global, Société Générale and others have recently started using social and environmental factors in their financial analysis in *some* of their specialized investment offerings. They see a market and they are offering products. A few even speak of the climate imperative as a driving force financially and politically (John Larkin, Deutsche Bank, pers comm, 24 April 2008). But the process has not yet become the norm.

This chapter offers a redefinition of fiduciary duty for the *Anthropocene*, the era of climate change, and discusses the role of sustainable investing in meeting the challenge.

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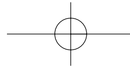
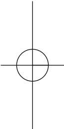
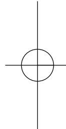


FIDUCIARY DUTY

Pension funds, foundations, endowments and religious institutions, amongst others, are, by definition, long-term investors. To meet their fiduciary obligations, they have a legal responsibility to exercise reasonable care, skill, caution and loyalty to the purposes of the trust. For public pension funds in the US, this is interpreted as maximizing financial returns on investment for their beneficiaries. For foundations and endowments, the same standards apply with greater flexibility, but are also usually framed in terms of maximization of profit.

There is, however, legal opinion that these institutions are not constrained with regard to the use of environmental, social and governance (ESG) factors. 'In our view', the 2005 report by leading international law firm Freshfields Bruckhaus Deringer, sponsored by the United Nations Environment Programme's Finance Initiative (UNEP FI), states: 'decision-makers are required to have regard (at some level) to ESG considerations in every decision they make'. In 1997, William McKeown, a lawyer at a leading New York firm, concluded: 'In order to fulfil their responsibility to see that the corporation [foundations and non-profit organizations] meets it charitable purposes, they may have a duty to consider whether their investment decisions will further those charitable purposes, or at least not run counter to them.' But in the absence of case law, and in the presence of inertia, maximization of financial return remains the goal (UNEP FI, 2005; see also Solomon and Coe, 1997, and McKeowen, 1997).

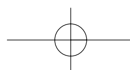




The largest global investors have not rushed to embrace these approaches, at least not in the US. Finance committees have generally been very slow in their approach to investing in new funds that have social *and* financial goals. Data on performance has been difficult to compare and benchmarks are not readily available because there is no standard approach to sustainable investing. This wariness contrasts with committee embrace of newly developed purely financial investments that 'promise' high rates of return in the short term. In the testosterone-driven world of institutional investing, maximizing returns is still the gold standard (Hotz, 2008), and is presumed to be the standard necessary to meet obligations of fiduciary duty.

Research has shown that US financial institution executives 'are willing to sacrifice economic value in order to meet a short-run earnings target. The preference for smooth earnings is so strong that 78 per cent of the surveyed executives would give up economic value for smooth earnings.' In addition, the authors found 'that 55 per cent of managers would avoid initiating a very positive net project value if it meant falling short of the current quarter's consensus earnings' (Graham et al, 2004).

ExxonMobil represents a paradigmatic case of the conflict between short-term and long-term profit generation. The world's largest corporation by market capitalization is an old-fashioned oil and gas company that identifies itself now



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as 'taking on the world's toughest energy problems'. In November 2007, Rex Tillerson, chairman and chief executive officer (CEO), publicly stated for the first time: 'it is increasingly clear that climate change poses risks to society and ecosystems that are serious enough to warrant action – by individuals, by businesses and by governments' (Tillerson, 2007). ExxonMobil has, however, refused to respond to a shareowner proxy resolution asking the company to 'adopt a policy on renewable energy research, development and sourcing'.[1] Given the long lead time to develop alternatives and renewables, and the approach of 'peak oil', renewable energy investment would contribute to their profitability in the next decades. Similarly, with their greenhouse gas (GHG) emissions increasing, they have refused the request of shareowners to set goals for reducing their GHG emissions. Although highly profitable now, are ExxonMobil's profits going to be sustainable, and is ExxonMobil in its pursuit of profit now limiting options for future generations?

Corporations also assume a fiduciary duty to their owners, although it is not necessarily solely to maximize shareowner wealth. Rather, they are required only to carry out the 'lawful directives of shareholders'. Thus, managers can engage in activities that reduce shareholder wealth as long as they 'do not engage in fraud or self-dealing and make rational, informed decisions'. But they, too, despite case law that supports this conclusion, are driven by the market to achieve the highest profit (Mackey et al, 2007).

THE CLIMATE CHALLENGE TO INVESTING AS USUAL

At this time, the beginning of the third century of the *Anthropocene*, climate change is the greatest human-induced challenge we face. The need to mitigate and adapt to the effects of climate change is likely to be the defining issue of the 21st century and must be approached urgently and seriously (IPCC, 2007; Pielke et al, 2008; Stern, 2008a; 2008b).

Although often framed as an *environmental* problem, climate change is much more. It is a *social*, *ethical* and *moral* problem. It is also truly a global problem from which no one can escape.

The question of what is a maximum rate of return comes into question, however, when we consider the risks of climate for society, with both short- and long-term ramifications. Is maximization of profit sufficient if the so-called *extra-financial* returns accelerate the consequences of climate change? Is a company operating in the best interests of its long-term shareowners if it fails to take actions now that will give greater assurance of high returns later, just so they can achieve maximum short-term financial returns?

What good is a maximum rate of return on investment if it fouls the air, poisons the water, degrades the land, changes the climate, and contributes to greater inequalities among people? Is it sufficient for some of us to reap financial return and to consume the products and services resulting from these

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investments, while all of us, and our children and grandchildren, face the prospect of increased morbidity and mortality, and, except for a few, a decreased quality of life? Societies including economic systems will be disrupted and that is not good for the companies themselves.

In effect, all of the world's population is a *universal owner* of the climate problem. It is the object of the world's corporate productive capacity and the externalities of that production, while only a very few of us reap the financial benefit. Investment is not only about how much you expect to earn. Investment is also about risk and about how much you can afford to lose. How much can *universal owners* afford to lose in the face of climate risk?

A REDEFINITION OF FIDUCIARY DUTY

What is, ultimately, needed is a new and more meaningful definition of fiduciary duty for the *Anthropocene*, a definition that accepts that the financial world and the social and environmental worlds are one and the same. There is no triple bottom line. There can only be a single bottom line that offers positive social and financial returns against which all business decisions must be measured. Fiduciary duty must transcend the solely financial responsibility of the company or the institutional investor to maximize profit. Fiduciaries must also consider the social and environmental consequences for the investors, the beneficiaries and society at large. We are all *universal owners*, as shareowners and stakeholders.

This redefinition must give weight to how ESG factors, more broadly understood than at present, affect both risks and opportunities, now and in the future. Let's look at some of the key words that currently define fiduciary duty.

'Profit', originally meaning to 'advance', and now defined in terms of 'benefit', must go beyond financial benefit. Maximizing financial profit, advancing it to its upper limits, provides goods, services and employment, but also diminishes social benefit in the real world. Money is necessary but not sufficient. As Robert Monks, investor and corporate governance activist, observes: 'The primary thing that workers need for their retirement [is] money, but don't workers also need a safe, clean, decent world in which to spend it. These ends are not economically exclusive' (Monks, 2000). Even the wealthiest among us cannot escape the assaults of climate change. As food riots around the world in April 2008 demonstrate, the poor can take no more as climate changes add further burdens to their lives.

'Prudent' in the 14th century meant to be far-seeing. Today the dictionary defines it as being circumspect, wise and exercising good judgement. The prudent financial person now looks through the rear-view mirror to conform to what has been done, rather than looking through the windscreen to see what must be done.

As financial transactions and investment vehicles become more specialized and complex, fiduciary duty must expand to encompass our greater knowledge

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and understanding of the long-term social and environmental costs, as well as benefits associated with investment decisions. Risks as well as opportunities must be assessed more prudently in the context of climate change. This includes the science and economics of climate risk, and also the political processes, nationally and globally, that will affect investment decisions. Investment committees may argue that they do not know how to do this. They use consultants to increase their comfort with exotic financial instruments; so, too, can they bring in climate and policy specialists. Lack of knowledge is not a reasonable response for inaction by fiduciaries.

Fiduciaries will need to seek out those investment managers and consultants who are already implementing investment programmes that focus on the *integration* of ESG factors with financial decision-making. This is not portfolio screening. They should explore different investment strategies that channel funds into new areas that are focused on climate solutions that will lead to long-term growth and sustainability, and will carry less risk and liability.

Fiduciaries will need to review their entire portfolios, not only individual assets or asset classes. Isolated investment decisions affect total portfolios that, in turn, have societal effects. For the larger fiduciaries – the *universal owners* – the financial and ESG bottom line is inevitably portfolio wide. Initially, a large long-term investor may benefit from a company in their portfolio externalizing costs but ultimately there will be a reduction in returns, overall, as the externalities negatively affect returns in other companies and assets. Raj Thamotheran and Helen Wildsmith (2007) suggest that because they are *universal owners*, collective action by large pension funds could improve long-term market returns (see also Hawley and Williams, 2000).

Fiduciaries must see themselves as *shareowners*, not simply as *shareholders*, and assume the responsibilities that go along with ownership. Owners are stewards of the capital that has been entrusted to them and cannot be passive. Being a responsible shareowner implies corporate engagement, minimally through the development of proxy voting guidelines and procedures for ESG factors, and voting of proxies. In addition, fiduciaries must demand greater accountability and transparency from the companies in their portfolios on climate factors, and policies and programmes to mitigate and adapt to climate change. These will reduce financial risk and social risk.

Fiduciaries are rightfully sensitive to the legal implications of their decisions. They should ask their lawyers *how* to accommodate these new responsibilities and obligations, rather than ask them *if* they can. There is now a significant body of research that an analytical approach to financial decision-making that integrates the risks and opportunities identified by social, environmental, political and cultural issues can compete with traditional investing styles, and produce social and environmental benefits as well (UNEP FI and Mercer, 2007).

Fiduciaries should also be aware of, and involved with, the formulation and execution of public policies that govern financial firms, transactions and markets, and climate risk (Viederman, 2004a; see also Viederman, 2008a, b).

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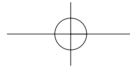


The corporation as the most powerful economic institution in the world will determine the social and environmental state of the world as much as, if not more than, governments and international organizations. As the effects of climate change become more visible, it is incumbent upon institutional investors and corporations to exercise these fiduciary duties now. With climate change, as with most things, inaction is the worst action.

SUSTAINABLE INVESTING AND A REDEFINED FIDUCIARY DUTY

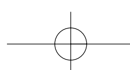
Sustainable and *sustainability*, as the terms are now generally used, cover a wide range of meanings.[2] The environment is the primary and sometimes exclusive focus of most sustainability discussions. 'Sustainability' came into common use during the 1980s in response to growing environmental concerns. The 'environment' is also conceptually clearer than most social areas, and data are more readily available and can be shown more convincingly to correlate with financial performance. 'Social' incorporates economic and financial factors, as well as political and cultural issues. 'Governance' is a measure of a company's ability to integrate environment and sustainability within its management structure, decision-making and action – to be prudent and far-seeing.

To be truly sustainable, equity and justice must be addressed in different ways than they are now (Viederman, 1995).

The term 'extra-financial' underlines the historical separation of finance from the real world – 'extra' referring to 'beyond what is normal'. Arguing that these factors are necessary for long-term financial returns, however, makes them 'financial' factors despite the fact that they have been disregarded for centuries. The difference now is the realization of their scale and impact.

'Full integration of ESG factors' raises significant questions concerning the limits of our understanding of what these factors are, how they interact and how they can be measured. 'Not everything that counts can be counted', Albert Einstein observed in his Nobel acceptance speech, 'and not everything that can be counted counts'. In addition, it raises issues relating to the limits of so-called corporate social responsibility, an ill-defined term that is often used as a substitute for ESG.

Is the desired outcome the achievement of 'long-term shareholder value', and/or meeting the needs of present and future generations? How are these outcomes related to each other and to financial decision-making? What are the timeframes? Clearly implied is the desire to change corporate behaviour since the impetus for sustainable investing reflects the financial systems' inability, as currently structured, to incorporate consideration of the long term and future generations. *Sustainable investing* has still to make clear how it is part of the process of sustaining society rather than just investing.



In order to be seen as more than a new name for an old process, sustainable investing will need to address more seriously than it has the application of 'environment' and 'sustainability', in particular. A product, such as tobacco, could be excluded because of its impact upon human health and the attendant social costs. But what about products relating to family planning and abortifacients that are decried by some and strongly approved by others who might otherwise agree on many other corporate activities? What about defence contractors? Critics have often chided social investors for not being serious by using exclusionary defence screens. They argued that people might not like wars, but defence is, nonetheless, necessary. Can an environmentally sensitive investment fund be considered sustainable if it does not assess other aspects of a company's performance, such as diversity in the workplace, a living wage and its impact upon the community?

Corporate social responsibility and *corporate citizenship* are buzzwords that have created a whole new industry. What are the limits on corporations that constrain the practice of sustainability? The answers to this question are essential in understanding what sustainable investing can legitimately expect from companies, and what issues are systemic and beyond their grasp and interventions. The latter will require action in other arenas – both political and conceptual.

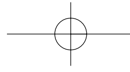
James Gustav Speth, now dean of Yale's School of Forestry, has had a long and varied career at the intersection of the environment and policy. In a new book, he concludes:

> *After much searching and considerable reluctance … that most environmental deterioration is a result of systemic failures of the capitalism we have today and that long-term solutions must seek transformative change in the key features of contemporary capitalism.*[3] (Speth, 2008)

He joins many others who have called for transformation of capitalism, or a totally new *ism*, calls little heeded by politicians, economists and businesses.

Systemic obstacles that corporations face under free market capitalism include:

- A commitment to full-cost accounting that must be a factor in sustainable investing. Externalization of environmental and social costs is still the norm.
- Ability to avoid the focus on returns in the short term that is seen even within the traditional social investment world. Today's returns, the next quarter's, but not the next quarter century's, are the benchmark. In practice, the future is discounted at a rate close to zero.
- A commitment to slow or no growth. Like a shark that must keep swimming to stay alive, so too must a company keep growing to survive. *Fortune Magazine* applauded Nike a number of years ago for creating a want for something no one knew they needed. Economic growth, at least in advanced economies, runs contrary to sustainability.



Solutions to the systemic issues requiring new paradigms of the economy and of finance are a long-term activity. The sustainable investing community has a role to play in the discussion and description of a transformed capitalism or a new *ism*. But this must also engage the intellectuals – economists and others – who are the keepers of the capitalism kingdom, and representatives of the broader population to ensure that their voices are heard in the search for something that works for all concerned. This process must begin now with a long-term commitment.

Companies are capable of more effectively addressing a number of issues that are possible within the limits of the capitalist free market economic system:

- They can make greater commitments to communities by listening better to the people most affected and acting on what they hear.
- They can make greater commitment to the environment, to human rights, to equal opportunity, to providing a living wage with pension and health benefits to their workers, and to their global supply chains with particular attention to issues such as child labour, wages and overtime.

Shareowners working together have demonstrated that they can play a significant role in encouraging corporations to be more responsive to environmental and social concerns. The obligation to exercise ownership rights must be an integral part of sustainable investing.

On a more practical level, sustainable investing also requires greater data depth, breadth and quality than are now available. This need not be a constraint to begin with, but should be a part of a near-future agenda. Currently, much of the data used is retrospective and historical.

Conceptualizations of criteria in general use are often spotty. For example:

- Corporate citizenship and corporate philanthropy are both oxymorons but are often used as stand-ins for 'community'.[4]
- Labour practice indicators are virtually non-existent, especially when the supply chain is long, reaching down to smaller producers in less developed countries.
- Social and environmental reporting not audited by outsiders has to be approached with caution. Corporate responsibility officers are constrained by lawyers from telling the whole truth for fear of litigation. The important work of the Carbon Disclosure Project (CDP) provides baselines for shareowners and governments to request setting limits on GHGs, but does not provide suasion for companies, such as ExxonMobil, to set goals. Owners must do that.

Leaders in sustainable investing will need to analyse the barriers to adopting this investment process and seek answers to the questions raised. This must be done within national contexts. As a Mercer study recently showed, there is consider-

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able difference in the way in which institutions in different countries respond to the idea of sustainable investing. The key decision-makers and gatekeepers in institutions will need to be identified and data gathered to create understanding of the process and desired outcomes. The cultures of finance committees immersed in the ways of financial investing must be considered and changed. Knowledgeable and skilled consultants able to guide institutions in their deliberations and direct them into sustainable investment vehicles are now in short supply. Change will not come about by itself. The sustainable investing community will have to give as much attention to the process of institutionalizing sustainable investing as to the substantive issues outlined above (Viederman, 2004b).

In order to become mainstream, sustainable investing, given its long-term horizon and the short timeframe of the market, will need to demonstrate both financial and social returns. We know that ESG factors are material and useful indicators of good financial performance. But the bottom line, an indicator of successful sustainable investing, will be that it can also facilitate, over time, movement towards a new economy that leaves options open for our children and grandchildren to live in a humane world. This should not be done apologetically. Sustainable investing is no more or no less a science and an art than mainstream investing despite the latter's claims to science. Sustainable investing's claim is that it will help to bridge the chasm between the economic and human condition.

Sustainable investing must play an important role in helping societies and individuals to mitigate and adapt to climate change, reversing the consequences of conventional investing. Advancing social, environmental *and* financial benefits is the new fiduciary duty.

Notes

1 I filed this resolution in my personal capacity as the owner of a small number of shares. ExxonMobil had recommended that shareowners vote against the resolution on the grounds that it was 'unwarrented'. At ExxonMobil annual meeting on 28 May 2008 the resolution received 27 per cent of the vote, 20 per cent more than in 2007. In many companies that would be sufficient to generate discussion between the filer and the board, but not at ExxonMobil.

2 I do not include *sustainable development* because it is a particularly troubling concept. The adjective describes a process that has been anything but sustainable (John Ehrenfeld, pers comm, May 2007).

3 Speth has been chair of the US Council of Environmental Advisers, founder and president of the World Resources Institute and administrator of the United Nations Development Programme (UNDP).

4 See Weeden (1998). A US Community Investing Index offered by Neuberger Berman/Lehman Bros in mid 2008, initiated by the Heron Foundation and constructed by Innovest Strategic Value Advisers, represents a breakthrough on community criteria.

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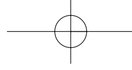

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