

MEMO# 34742

January 4, 2023

New York Department of Financial Services Seeks Comment on Presumption of Control Applicable to Investments in Certain State-Regulated Financial Institutions by an Investment Manager's Regulated Funds and Other Accounts

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TO: ICI Members

Investment Company Directors SUBJECTS: Bank Regulation
Compliance

Investment Advisers

State Issues RE: New York Department of Financial Services Seeks Comment on Presumption of Control Applicable to Investments in Certain State-Regulated Financial Institutions by an Investment Manager's Regulated Funds and Other Accounts

In late December, the New York Department of Financial Services issued an [industry letter](#) (Letter) requesting public comment on the presumption of control that applies to certain financial institutions regulated under the New York Banking Law. Comments must be submitted to the Department no later than March 3, 2023. This memorandum provides a brief overview of the Letter, which is organized in three parts: (i) background discussion; (ii) sample passivity commitments; and (iii) request for comments.

Background

Any person seeking to acquire control of a New York-chartered banking organization or certain other New York-licensed financial institutions (e.g., money transmitter, mortgage broker, sales finance company) (each a Regulated Entity) generally must obtain the prior approval of the New York Superintendent of Financial Services. The Letter states that for most Regulated Entities, a presumption of control is triggered when a person acquires, directly or indirectly, ten percent or more of a Regulated Entity's voting stock.

According to the Letter, certain investment managers, on behalf of themselves and the regulated funds and other funds/accounts they advise, have asserted that they hold voting stock of Regulated Entities solely as passive investors and that they have no intent or desire to exercise control over any Regulated Entity. These managers argue that they should not be deemed to control a Regulated Entity held in this capacity even if a manager (including its subsidiaries, affiliates, and the funds and accounts advised by 'the manager) acquires and holds, individually or in aggregate, an amount of voting stock of a Regulated Entity that would trigger a presumption of control. The Letter states that these managers have sought guidance on obtaining a determination of "non-control" from the Superintendent.

Sample Passivity Commitments

The Letter sets forth a range of sample passivity commitments that may be considered in evaluating a request for a determination of non-control by an investment manager and its advised funds/accounts when their ownership of voting stock of a Regulated Entity triggers a presumption of control. Among other things, the sample commitments relate to: the voting of stock in excess of the amount that would trigger a presumption of control; director, officer or employee interlocks; disposition of stock in the Regulated Entity; and transactions with the Regulated Entity.

Request for Comments

The Letter poses 13 questions for comment. Among the issues covered by the questions are: the maximum percentage of voting stock of a Regulated Entity that a manager and its advised funds/accounts should be permitted to vote; the maximum percentage of voting stock the manager and its advised funds/accounts should be permitted to hold and remain eligible for a determination of non-control; whether there should be a presumption of passivity for voting stock held by an index fund; the circumstances under which investment positions and associated voting rights managed by an unaffiliated subadviser would not be attributed to the investment manager or its funds/accounts' ownership of voting stock of a Regulated Entity; the appropriateness of the sample passivity commitments; and whether any additional conditions or safeguards should be required for a determination of non-control.

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