

MEMO# 35232

April 6, 2023

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

[35232]

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TO: ICI Members

Investment Company Directors SUBJECTS: Bank Regulation
Compliance

Investment Advisers

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

Late last week, ICI responded to the New York Department of Financial Services' December 2022 [industry letter](#) (NYDFS Letter) on the presumption of control that applies to certain financial institutions regulated under the New York Banking Law. ICI's response is attached.[\[1\]](#)

Background

Any person seeking to acquire control of a New York-chartered banking organization or certain other New York-licensed financial institutions (each a Regulated Entity) generally must obtain the prior approval of the New York Superintendent of Financial Services. A presumption of control typically is triggered when a person acquires, directly or indirectly, ten percent or more of a Regulated Entity's voting stock. According to the NYDFS 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, on that basis, have sought guidance on obtaining a

determination of "non-control." The NYDFS Letter proposes sample passivity commitments that may be considered by the Superintendent in evaluating a request for a determination of non-control.[\[2\]](#)

ICI Response

The ICI letter [\[3\]](#) commends the NYDFS for acknowledging the unique circumstances presented by investments in Regulated Entities by Regulated Funds and other vehicles (collectively, Managed Funds) and recognizing that the normal control presumptions may not be appropriate in the context of Managed Funds' passive ownership of securities issued by these entities. ICI recommends that the NYDFS modify its proposal in several respects to ease compliance and accord with other regulatory frameworks, specifically by:

- Aligning its aggregation of ownership positions of different Managed Funds with the existing framework under section 13(g) of the Securities Exchange Act of 1934. ICI explains that under this approach, the NYDFS should only require aggregation of positions held by funds and other clients that share the same investment adviser, where the funds and other clients are investing for economic exposure and not with the purpose or effect of changing or influencing the control of a Regulated Entity.
- Not requiring "mirror voting" or granting management power to vote shares in excess of the amount that would trigger a presumption of control (as contemplated in sample passivity commitment #1).
- Not limiting arms' length business dealings between a Managed Fund, its investment adviser and an investee Regulated Entity (as contemplated in passivity commitment #4).
- Explaining the process by which any passivity commitments will be entered into and acted on by the NYDFS.
- Clarifying that once control is rebutted (whether by way of entry into appropriate passivity commitments or by other means), an adviser's Managed Funds together may acquire up to 25% of any class of voting stock of a Regulated Entity.

Rachel H. Graham
Associate General Counsel & Corporate Secretary

Notes

[\[1\]](#) Shortly after ICI filed its response, the NYDFS [announced](#) that it had extended the comment period to April 14, 2023.

[\[2\]](#) For a more fulsome description of the NYDFS letter, see [ICI Memorandum No. 34742](#) (Jan. 4, 2023).

[\[3\]](#) [ICI Comment Letter](#) to NYDFS

should not be considered a substitute for, legal advice.