

MEMO# 35578

January 12, 2024

FERC Issues NOI Regarding Blanket Authorizations for Investment Companies

[35578]

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TO: SEC Rules Committee RE: FERC Issues NOI Regarding Blanket Authorizations for Investment Companies

In late December of 2023, the Federal Energy Regulatory Commission (FERC) issued a Notice of Inquiry (NOI) seeking comment on whether, and if so, how, it should revise its policy on providing blanket authorizations for investment companies under section 203(a)(2) of the Federal Power Act (FPA).^[1] FERC is also seeking comment on what constitutes control of a public utility in evaluating holding companies', including investment companies', requests for blanket authorization and what factors it should consider when evaluating control over public utilities as part of a request for blanket authorization.

ICI is working to develop a comment letter to the NOI. If your firm would like to participate in this effort, please email Nhan Nguyen at nhan.nguyen@ici.org.

Section 203(a)(2) of the FPA and FERC's Blanket Authorization Policy

Section 203(a)(2) of the FPA requires that a holding company (defined as any company that directly or indirectly owns or controls 10 percent or more of the outstanding voting securities of a public utility company) receive FERC authorization before acquiring any security worth more than \$10,000,000 in a transmission utility or electric utility.^[2] FERC has both established in its regulations and granted by order blanket authorizations under section 203(a)(2) for transactions that meet certain criteria. FERC has issued blanket authorizations, on a time-limited and case-specific basis to investment companies, that allowed the acquisitions of securities in public utilities over the \$10 million threshold established by Energy Policy Act of 2005 and up to 20% of the outstanding voting securities of a given public utility. For instance, in 2006, FERC granted a blanket authorization for a large asset manager to acquire utility securities on behalf of its funds, subject to certain conditions.^[3] As a result of these conditions, including limitations on the amount of both collective ownership and ownership of securities for each individual fund, governing policies, and status as beneficial owners eligible to file Schedule 13G under the Securities' and Exchange Act of 1934, the NOI notes that FERC found that the asset manager "could

not exercise control over public utilities, and that there would be no harm to the public interest that could otherwise result from their holding significant equity positions in public utilities."

The NOI notes that since FERC "revised its regulations to expand blanket authorizations under section 203(a)(2) and began granting case-specific blanket authorizations for holding companies, including investment companies, there have been changes in the public utility, finance, and banking industries that warrant consideration of whether [FERC's] blanket authorization policy continues to work as intended."

In citing the "growth of large index funds and asset managers," the NOI states that the "change in the manner in which assets are owned and controlled warrants [FERC's] careful consideration to make sure that its blanket authorization policy is consistent with the public interest."

The NOI seeks comment in three principal areas: 1) Blanket Authorization Policy; 2) Large Investment Companies; and 3) Evaluation of Control Under Section 203 of the FPA. FERC's request for comments in each area are summarized below.

Blanket Authorization Policy

The NOI poses seven questions regarding FERC's blanket authorization policy, including seeking comment on whether its blanket authorization policy is sufficient to ensure that investment companies lack the ability to control the public utilities whose securities they acquire and that the transactions underlying such blanket authorizations are consistent with the public interest. The NOI asks if the policies are insufficient to protect the public interest, and if so, how those policies should be revised.

Large Investment Companies

The NOI includes five questions specific to large investment companies, including seeking comment on whether and how FERC should consider the size of an investment company and how it should evaluate the influence and control exerted by investment companies, regardless of size, over their public utility portfolio companies. The NOI seeks input on how such companies' ownership of voting securities in multiple public utilities affects the public interest.

Evaluation of Control Under Section 203 of the FPA

The final five questions posed by the NOI seek comment on ways investment companies may exert control over public utilities that are not currently captured by FERC's policies and regulations, what indicia of control that FERC could look to when assessing whether a holding company can exercise control, and what corporate governance factors FERC should consider when evaluating whether investment companies can exercise control over public utilities.

Commissioner Christie's Concurrence

FERC Commissioner Mark Christie issued a concurrence, calling for heightened regulatory scrutiny of the "potential conflict ... when huge investment companies and asset managers ... appear to be acting not as passive investors simply seeking the best risk-based returns for their own clients, but instead appear to be actively using their investment power to affect how the utility meets its own public service obligations." Commissioner Christie references a number of asset managers by name, and notes that "[t]hese investment managers may occasionally use that financial power to push various types of policy

agendas, agendas that may ultimately conflict with the utility's public service obligations to its customers," and asserts that "'ESG' investor activity is simply a symptom of a larger, more pernicious threat that has always existed in the utility industry: improper investor influence and control over public utilities."

Initial comments are due March 25, 2024 and reply comments are due April 24, 2024.

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Notes

[1] Federal Power Act Section 203 Blanket Authorizations for Investment Companies, 88 FR 88900 (Dec. 26, 2023) available at:
<https://www.federalregister.gov/documents/2023/12/26/2023-28443/federal-power-act-section-203-blanket-authorizations-for-investment-companies>

[2] 16 U.S.C. 824b(a)(2).

[3] Cap. Research & Mgmt. Co., 116 FERC ¶ 61,267 (2006).