

STATE OF NEW HAMPSHIRE

Inter-Department Communication

RC

DATE: April 8, 2021
AT (OFFICE): NHPUC

FROM: Jay Dudley - Analyst, Electric Division
Brian D. Buckley - Staff Attorney/Hearings Examiner

SUBJECT: DE 20-124, Vanguard Group, Inc.

TO: Commissioners
Debra Howland, Executive Director
Tom Franz, Director Electric Division

Summary

The Vanguard Group, Inc. (Vanguard), is an investment management company wholly and jointly owned by 34 investment companies that offer, in the aggregate, more than 190 distinct mutual funds. As of June 30, 2020, 67 of those mutual funds held small interests in Eversource Energy, with no individual fund holding more than 3 percent, but totaling 13.45 percent when aggregated across all Vanguard Advised Funds. Vanguard advises, but holds no ownership interest in, the individual mutual funds.

Vanguard, on behalf of the Vanguard Advised Funds, (collectively, "Petitioners") have requested: (1) a declaratory ruling that the Petitioners are not entities subject to the approval requirements of RSA 374:33; or (2) a finding that Petitioners' acquisition of interests in New Hampshire public utilities and their parent companies is in the public interest as required by RSA 374:33, so long as the total holdings in aggregate of all of the Vanguard Advised Funds do not exceed 25 percent ownership or exceed 10 percent ownership by any individual Vanguard Fund.

Staff recommends the Commission: (1) grant the Petitioners' request for a declaratory ruling that Petitioners are not entities subject to the approval requirements of RSA 374:33 because neither Vanguard nor any individual Vanguard Advised Fund own 10 percent or more of the stocks or bonds of any New Hampshire public utility or public utility holding company; and (2) deem the request for an RSA 374:33 public interest finding moot in light of the declaratory ruling.

Vanguard Group, Inc. Requests

On July 31, 2020, the Petitioners filed a request for a limited exemption from RSA 374:33, which limits the ability of a public utility or public utility holding company to directly or indirectly acquire more than 10 percent of any New Hampshire public utility or public utility holding company doing business in the state.

On November 2, 2020, the Petitioners filed an amended request for either: (1) a declaratory ruling that the Petitioners are not entities subject to the approval requirements of RSA 374:33; or

(2) a finding that Petitioners' acquisition of interests in New Hampshire public utilities and their parent companies is in the public interest as required by RSA 374:33, so long as the total holdings in aggregate of all of the Vanguard Advised Funds do not exceed 25 percent ownership or exceed 10 percent ownership by any individual Vanguard Fund. Amended Petition at 6-7. In the amended request, Petitioners also assert that the Commission should not aggregate the individual fund interests for the purpose of determining whether the investment threshold of 374:33 are triggered. *Id.* at 5.

Analysis

RSA 374:33 provides:

No public utility or public utility holding company as defined in section 2(a)(7)(A) of the Public Utility Holding Company Act of 1935 shall directly or indirectly acquire more than 10 percent, or more than the ownership level which triggers reporting requirements under 15 U.S.C. section 78-P,¹ whichever is less, of the stocks or bonds of any other public utility or public utility holding company incorporated in or doing business in this state, unless the commission finds that such acquisition is lawful, proper, and in the public interest.

Public utility is defined by RSA 362:2 which provides, in pertinent part:

The term "public utility" shall include every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court... owning, operating or managing any plant or equipment or any part of the same for the conveyance of telephone or telegraph messages or for the manufacture or furnishing of light, heat, sewage disposal, power or water for the public, or in the generation, transmission or sale of electricity ultimately sold to the public[.]

Section 2(a)(7)(A) of the Public Utility Holding Company Act of 1935 (PUHCA 1935) defines "holding company" as:

any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company or of a company which is a holding company by virtue of this clause or clause (B) of this paragraph, unless the Commission, as hereinafter provided, by order declares such company not to be a holding company.

15 U.S.C.A. § 79b (effective August 26, 1935, through February 7, 2006)

Whether the Petitioners' particularized circumstances place them within the Commission's authority under RSA 374:33 turns on: (1) whether they are a public utility under RSA 362:33;

¹ 15 U.S.C. § 78-P requires reporting for every person who is directly or indirectly the beneficial owner of more than 10 percent of any class of equity security.

and (2) whether they are a public utility holding company under PUHCA 1935's now repealed definition of public utility holding Company.²

Although Petitioners are from time to time in possession of equity shares of public utilities or public utility holding companies incorporated in or doing business in New Hampshire, they do not directly own, operate, or manage plant or equipment "for the manufacture or furnishing of light, heat, sewage disposal, power or water for the public, or in the generation, transmission or sale of electricity ultimately sold to the public." Therefore, Petitioners are not public utilities within RSA 362:2.

Whether Petitioners should be considered a public utility holding company within Section 2(a)(7)(A) of PUHCA 1935 turns on the relationship between Vanguard and the funds it advises. Vanguard is owned collectively by the individual funds it advises; it does not possess an ownership interest in any of the individual funds. There is no single entity, corporation, or company that connects the individual funds other than Vanguard. Attached to this recommendation is an organizational chart demonstrating the relationship between Vanguard and the Vanguard advised funds.

Although Vanguard's advisory relationship with its funds does not implicate ownership, it is possible that through its advisory relationship Vanguard could be viewed as indirectly controlling the Vanguard Advised Funds through its oversight of the voting power of the individual funds and the public utility shares they hold, which would suggest that those shares should be aggregated for the purposes of interpreting the PUHCA 1935 definition of holding company. Vanguard asserts that the funds it advises do not make investments "for the purposes of managing, controlling or entering into business transactions with portfolio companies, including the publicly traded parent company of any New Hampshire public utilities."³ Amended Petition at 5.

However, the Commission need not reach a conclusion on whether Vanguard should be considered a "holding company" because RSA 374:33 focuses only on the *acquisition and ownership* of 10 percent or more of the stocks or bonds of any other public utility or public utility holding company incorporated in or doing business in this state. Even if Vanguard were a holding company under PUHCA 1935, RSA 374:33's focus on ownership rather than control does not permit aggregation of the interests of the individual Vanguard advised funds for the purpose of determining whether Vanguard and the Vanguard advised funds have reached the 10

² The definition of "holding company" in PUHCA 1935 was repealed and replaced by the Public Utility Holding Company Act of 2005. However, when a state law incorporates a federal law by reference, the non-delegation doctrine generally prescribes that the referenced federal provision remains as it existed at the time of the state statute's passage. See, F. Scott Boyd, *Looking Glass Law: Legislation by Reference in the States*, 68 La. L. Rev. 1201, 1251 (2008) Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol68/iss4/7>

³ Vanguard registers its ownership of equity interests with the SEC under Schedule 13G, which is available only to passive investors who do not intend to exert control. See, Kristin Giglia, *A Little Letter, A Big Difference: An Empirical Inquiry into Possible Misuse of Schedule 13G/13D Filings*, 116 Columbia L. Rev. No. 1 ¶ 2. Available at: <https://columbialawreview.org/content/a-little-letter-a-big-difference-an-empirical-inquiry-into-possible-misuse-of-schedule-13g13d-filings/>

percent threshold.⁴ As of June 30, 2020, 67 of those mutual funds held small interests in Eversource Energy, with no individual fund holding more than 3 percent. *Id.* at 3. The Petition does not state an intent for any individual fund to acquire holdings in a New Hampshire public utility at the levels that would invoke the Commission's RSA 374:33 authority.

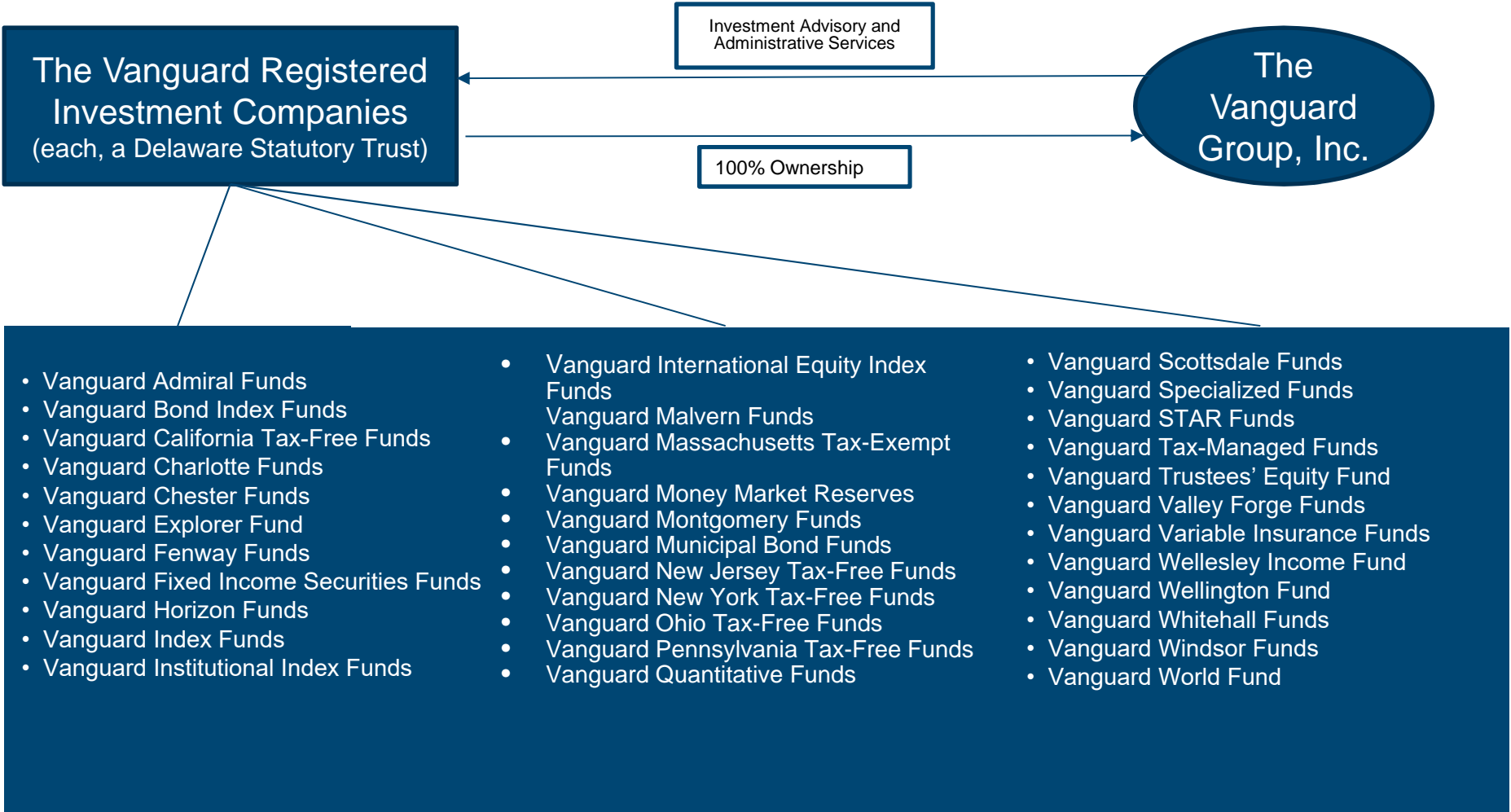
Recommendation

Staff recommends that the Commission should find that the interests held at the individual fund level should not be aggregated for the purposes of determining whether Vanguard has reached the 10 percent threshold set forth in RSA 374:33.

Since Vanguard has no ownership interest in any of the Vanguard advised funds, and the Petition does not express an intent for any individual fund to acquire holdings in a New Hampshire public utility at the levels that would invoke the Commission's RSA 374:33 authority, Staff also recommends the Commission: (1) grant the Petitioners' request for a declaratory ruling that Petitioners are not entities subject to the approval requirements of RSA 374:33 because neither Vanguard nor any individual Vanguard Advised Fund own 10 percent or more of the stocks or bonds of any New Hampshire public utility or public utility holding company; and (2) deem the request for an RSA 374:33 public interest finding moot in light of the declaratory ruling.

⁴ In some jurisdictions, such as Maine, acquisition statutes include control-based relationships, in addition to ownership, and may permit aggregation of interest for the purposes of the acquisition statute under the circumstances described in the Petition. *See*, 35-A M.R.S. § 708.

Vanguard Registered Investment Companies



Service List - Docket Related

Docket#: 20-124

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