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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90675; File No. SR-NYSEArca-2020-54]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, to Amend NYSE Arca Rule 5.3-E to Exempt Registered Investment Companies that List Certain Categories of the Securities Defined as Derivative and Special Purpose Securities under NYSE Arca Rules From Having to Obtain Shareholder Approval Prior to the Issuance of Securities in Connection with Certain Acquisitions of the Stock or Assets of an Affiliated Company

December 15, 2020.

I. Introduction

On August 28, 2020, NYSE Arca, Inc. ("Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act")[1] and Rule 19b-4 thereunder,[2] a proposed rule change to amend NYSE Arca Rule 5.3-E (Corporate Governance and Disclosure Policies) to exempt certain categories of derivative and special purpose securities from the requirement to obtain shareholder approval prior to the issuance of securities in connection with certain acquisitions of the stock or assets of another company. The proposed rule change was published for comment in the Federal Register on September 17, 2020.[3] On October 30, 2020, pursuant to Section 19(b)(2) of the Exchange Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 89834 (September 11, 2020), 85 FR 58090 ("Original Proposal").

4 15 U.S.C. 78s(b)(2).

5 See Securities Exchange Act Release No. 90297, 85 FR 70701 (November 5, 2020). The Commission designated December 16, 2020, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

December 1, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, which superseded the proposed rule change as originally filed.[6] The Commission has received no comments on the proposed rule change. The Commission is publishing this notice and order to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons, and to institute proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act[7] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

II. The Exchange's Description of the Proposed Rule Change, as Modified by Amendment No. 1

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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6 In Amendment No. 1, the Exchange : (1) removed from the proposed rule text a condition that the proposed exemption from the Exchange's shareholder approval requirement would apply only to a transaction that does not require shareholder approval under Rule 17a-8 (as defined herein); (2) removed the related discussion in the proposed rule change about why the Exchange believed it would have been appropriate to only exempt transactions that do not require shareholder approval under Rule 17a-8; (3) removed statements in its purpose section that incorrectly stated that Rule 17a-8 exempts the acquiring company from obtaining shareholder approval under certain conditions; (4) supplemented its discussion of why the Exchange believes it is appropriate to exempt an issuer of 1940 Act Securities (as defined herein) from obtaining shareholder approval in the context of a merger of affiliated companies in light of its revised discussion of Rule 17a-8's shareholder approval requirements; and (5) made other clarifications, corrections, and technical changes. Amendment No. 1 is available on the Commission's website at https://www.sec.gov/rules/sro/nysearca.htm.

7 15 U.S.C. 78s(b)(2)(B).

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE Arca Rule 5.3-E(d)(9) requires issuers to obtain shareholder approval in connection with the acquisition of the stock or assets of another company, in the following circumstances:

(i) if any director, officer, or substantial shareholder of the listed company has a 5% or greater interest (or such persons collectively have a 10% or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction (or series of related transactions) and the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, could result in an increase in outstanding common shares or voting power of 5% or more; or

(ii) where the present or potential issuance of common stock, or securities convertible into or exercisable for common stock (other than in a public offering for cash), could result in an increase in outstanding common shares of 20% or more or could represent 20% or more of the voting power outstanding before the issuance of such stock or securities.

The Exchange proposes to exempt issuers of certain categories of derivative and special purpose securities[8] from having to comply with this requirement when they issue securities in connection with the acquisition of the stock or assets of an affiliated company. In general, the

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8 The Exchange proposes to exempt the following categories of derivative and special purpose securities: securities listed pursuant to Rules 5.2-E(h) (Unit Investment Trusts), 5.2-E(j)(3) (Investment Company Units), 5.2-E(j)(8) (Exchange-Traded Fund Shares), 8.100-E (Portfolio Depositary Receipts), 8.600-E (Managed Fund Shares), 8.601-E (Active Proxy Portfolio Shares) and 8.900-E (Managed Portfolio Shares) (collectively, the "1940 Act Securities"). Each of the aforementioned categories of derivative and special purpose securities are issued by an entity organized under the Investment Company Act of 1940 (the "1940 Act").

requirement to obtain shareholder approval prior to the issuance of securities in connection with certain acquisitions of the stock or asset of another company is designed to give existing shareholders a vote on the issuance of stock that may dilute their voting or economic rights. The Exchange notes that NYSE Arca Rule 5.3-E(d)(9) is also intended to give shareholders a vote on transactions where a director, officer, or substantial shareholder of the listed company has a significant interest in the company or assets to be acquired or the consideration to be paid and therefore may benefit from the transaction. Due to the unique nature of 1940 Act Securities as well as Rule 17a-8[9] (Mergers of affiliated companies) under the 1940 Act ("Rule 17a-8"), the Exchange believes that these concerns are limited with respect to the holders of such securities. Therefore, the Exchange believes it is appropriate to exempt issuers of 1940 Act Securities from having to obtain shareholder approval under Exchange rules which can be both time consuming and expensive.

The Exchange believes that the potential economic dilution concerns sometimes associated with a large share issuance are unlikely to be present when an issuer of a 1940 Act Security issues shares in connection with the acquisition of the stock or assets of an affiliated company. As described above, the proposed exemption will only apply to issuers of derivative and special purpose securities organized under the 1940 Act.[10] Rule 17a-8 exempts such issuers from prohibitions under the 1940 Act on certain transactions with affiliated persons, provided that, in connection with the merger with an affiliated investment company, the board of directors, including a majority of the directors that are not interested persons, affirmatively determine that (i) participation in the merger is in the best interest of their respective investment company, and (ii) the interests of their shareholders will not be diluted as a result of the transaction.[11] Because

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9 17 CRF 270.17a-8.

10 Approximately 88% of securities listed on the Exchange are issued by investment companies registered under the 1940 Act.

11 17 CRF 270.17a-8.

the board of directors must make an affirmative determination that the merger is not dilutive to existing shareholders, the shares issued by the acquiring investment company are issued at a price equal to the fund's net asset value.[12] While the Exchange notes that the shares are issued at a fund's net asset value when the fund is registered, the requirements of Rule 17a-8 also protect against dilution when the fund to be acquired is unregistered. Specifically, Rule 17a-8(a)(2)(iii) requires that where a fund is acquiring the assets of an unregistered fund, the board have procedures in place for the valuation of assets. Such procedures must include procedures that provide for a report to be prepared by an independent evaluator to provide a valuation for assets to be acquired.

The Exchange believes that the same provisions of Rule 17a-8 that protect against economic dilution also provide safeguards for existing shareholders when the transaction involves a director, officer, or substantial shareholder of the listed company that has a significant interest in the company or assets to be acquired or the consideration to be paid and therefore may benefit from the transaction. Because the board must make an affirmative decision that the transaction is in the best interest of its shareholders and that the transaction will not result in economic dilution for existing shareholders, there is reduced concern that existing shareholders will be disenfranchised as a result of the Exchange's proposed exemption.

Under Rule 17a-8 shareholders of funds being acquired by an affiliated company have the opportunity to vote on the proposed merger unless certain conditions are met. However, Rule 17a-8 does not require the acquiring fund (i.e., the fund issuing shares in the merger) to obtain the approval of its shareholders. When the Securities and Exchange Commission (the "Commission") proposed amendments to Rule 17a-8, it specifically sought comment on whether the outstanding voting securities of the fund that will survive the merger should also be required

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12 The Exchange notes that the proposing releases for Rule 17a-8 specifically contemplated that, in certain circumstances, the price paid may deviate from a fund's net asset value due to adjustments for tax purposes. See Investment Company Act Release No. 25259 at Footnote 26.

to approve the merger.[13] Importantly, the Commission ultimately did not include a requirement of approval of shareholders of an acquiring fund in its final rule.

Given that the Commission's rules do not require an issuer of 1940 Act Securities to obtain shareholder approval in the context of a merger of affiliated companies, the Exchange believes it is appropriate to exempt such issuers of 1940 Act Securities from having to comply with NYSE Arca Rule 5.3-E(d)(9).

As described above, the Exchange only proposes to exempt issuers of 1940 Act Securities from having to comply with NYSE Arca Rule 5.3-E(d)(9) if they are issuing shares to acquire the stock or assets of an affiliated company. Notwithstanding the proposed exemption, the Exchange notes that other provisions of Exchange rules or the 1940 Act may require shareholder approval and will still apply.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act,[14] in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,[15] in particular in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed amendment is consistent with the protection of investors, as the unique nature of 1940 Act Securities, as well as protections afforded by Rule

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13 See Investment Company Act Release No. 25259 at Section II(A)(2)(a): "Should the outstanding voting securities of the fund that will survive the merger also be required to approve the merger?"

14 15 U.S.C. 78f(b).

15 15 U.S.C. 78f(b)(5).

17a-8, means that (i) there is little risk of economic dilution to existing shareholders as a result of an issuance of shares by an issuer of 1940 Act Securities in connection with the acquisition of the stock or assets of an affiliated company, and (ii) existing shareholders are unlikely to be disenfranchised as a result of a Rule 17a-8-compliant transaction that involves a director, officer, or substantial shareholder of the listed company that has a significant interest in the company or assets to be acquired or the consideration to be paid.

The Exchange further believes its proposal is consistent with the protection of investors because its proposal is limited to issuers of derivative and special purpose securities that are organized under the 1940 Act. In the case of a merger of affiliated investment companies, the board of directors of each investment company, including a majority of the directors that are not interested persons of the respective investment company, must affirmatively determine that (i) participation in the merger is in the best interest of their respective investment company, and (ii) the interests of their shareholders will not be diluted as a result of the transaction. Because the interests of shareholders in such a transaction cannot be diluted, shares issues by one investment company to acquire the stock or assets of an affiliated investment company are issued at a price equal to the acquiring fund's net asset value. Because of the safeguards embedded in Rule 17a-8, as described above, the Exchange also believes that there are reduced concerns about economic dilution when the transaction involves a merger with an affiliate unregistered fund.

The Exchange believes that the same provisions of Rule 17a-8 that protect against economic dilution also provide safeguards for existing shareholders when the transaction involves a director, officer, or substantial shareholder of the listed company that has a significant interest in the company or assets to be acquired or the consideration to be paid and therefore may benefit from the transaction. Because the board must make an affirmative decision that the transaction is in the best interest of its shareholders and that the transaction will not result in economic dilution for existing shareholders, the is reduced concern that existing shareholders will be disenfranchised as a result of the Exchange's proposed exemption.

Rule 17a-8 proscribes when shareholder approval is required in the context of a merger of affiliated companies. Although shareholders of the company being acquired have a right to vote on the merger under certain circumstances, Rule 17a-8 does not require the shareholders of the acquiring company to approve the transaction. Accordingly, the Exchange believes it is appropriate to exempt issuers of 1940 Act Securities from the requirements of NYSE Arca Rule 5.3-E(d)(9) in this same limited circumstance.

Notwithstanding the proposed exemption described above, the Exchange notes that other provisions of Exchange rules or the 1940 Act may require shareholder approval and will still apply.

The Exchange believes it is not unfairly discriminatory to offer the exemption only to issuers of 1940 Act Securities completing a merger with an affiliated company, as opposed to all issuers of derivative and special purpose securities, because only 1940 Act Securities are subject to the requirements of the 1940 Act which offer the protections against dilution and self-dealing described herein.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed amendment will not impose any burden on competition, as they simply propose to offer 1940 Act Securities a limited exemption for the Exchange's shareholder approval rule in a specific circumstance where the Exchange believes there is a low risk of dilution to existing shareholders.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Proceedings to Determine Whether to Approve or Disapprove SR- NYSEArca-2020-54, as Modified by Amendment No. 1, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act[16] to determine whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposal.

Pursuant to Section 19(b)(2)(B) of the Exchange Act,[17] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with the Exchange Act, and, in particular, with Section 6(b)(5) of the Exchange Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.[18]

As discussed above, the Exchange is proposing to exempt issuers of registered investment companies that list certain categories of derivative and special purpose securities, including ETFs, from the requirement to obtain shareholder approval prior to substantial issuances of securities in connection with the acquisition of stock or assets of an affiliated company. The Exchange conditions its proposed exemption on, among other things, the transaction complying with Rule 17a-8 under the Investment Company Act of 1940, which

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16 15 U.S.C. 78s(b)(2)(B).

17 Id.

18 15 U.S.C. 78f(b)(5).

requires that the board of directors of each company participating in such a merger determine that participation in the merger is in the best interests of the company and that the interests of the company's shareholders will not be diluted as a result of the merger. In its Original Proposal, however, the Exchange erroneously described Rule 17a-8 as exempting an acquiring company from its shareholder approval requirements subject to certain conditions, when in fact that provision only applies to the non-surviving acquired company, and the Exchange justified its proposal in part on that misunderstanding. On December 1, 2020, the Exchange filed Amendment No. 1 that replaced and superseded its Original Proposal, and attempted to correct the erroneous description of Rule 17a-8. [19] The Exchange also made related changes to its proposed rule text and justification. Given the filing of this recent amendment, the Commission is seeking additional public comment on the proposed rule change in order to determine whether it is consistent with the requirements of Section 6(b)(5) of the Act.

The Commission notes that, under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder…is on the self-regulatory organization ['SRO'] that proposed the rule change."[20] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[21] and any failure of an SRO to provide this information may result in the Commission not having sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rule and regulations.[22]

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19 See supra note 6.

20 Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

21 See id.

22 See id.

For these reasons, the Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act[23] to determine whether the proposal should be approved or disapproved.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) or any other provision of the Exchange Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.[24]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

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23 15 U.S.C. 78s(b)(2)(B).

24 Section 19(b)(2) of the Exchange Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in Amendment No. 1,[25] in addition to any other comments they may wish to submit about the proposed rule change.

Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEArca-2020-54 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, D.C. 20549-1090.

All submissions should refer to File Number SR-NYSEArca-2020-54. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, D.C. 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting

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[25] See supra note 6.

comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2020-54 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2020-28008 Filed: 12/18/2020 8:45 am; Publication Date: 12/21/2020]

[26] 17 CFR 200.30-3(a)(12) and 17 CFR 200.30-3(a)(57).