SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93467; File No. SR-NASDAQ-2021-083)

October 29, 2021

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Exempt Certain Categories of Investment Companies Registered under the Investment Company Act of 1940 from the Requirements to Obtain Shareholder Approval Prior to the Issuance of Securities in Connection with Acquisitions of the Stock or Assets of an Affiliated Registered Investment Company Under Certain Conditions

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on October 21, 2021, The Nasdaq Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to exempt certain categories of investment companies registered under the Investment Company Act of 1940 (the "1940 Act") 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 text of the proposed rule change is available on the Exchange's Website at https://listingcenter.nasdaq.com/rulebook/nasdaq/rules, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

2 17 CFR 240.19b-4.

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

In its filing with the Commission, the Exchange 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 these 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 aspects of such statements.

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

1. Purpose

The Exchange proposes to amend Nasdaq Rule 5615 to exempt certain categories of investment companies registered under the 1940 Act 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 proposal is substantially similar to a recent rule change made by NYSE Arca, Inc. ("Arca").[3]

Nasdaq proposes a minor restructuring of the subparagraphs in Nasdaq Rule 5615(a)(1) relating to the current exemptions to the corporate governance requirements for asset-backed issuers and other passive issuers. Specifically, renumbering the corporate governance requirements set forth in Nasdaq Rule 5615(a)(1) to Nasdaq Rule 5615(a)(1)(A), renumbering the current exemption for asset-backed issuers from Nasdaq Rule 5615(a)(1)(A) to Nasdaq Rule

3 See Securities Exchange Act No. 91901 (May 14, 2021) 86 FR 27487 (May 20, 2021) (SR-NYSEArca-2020-54) (Order approving of a proposed rule change, as modified by amendment no. 2, to amend NYSE Arca Rule 5.3E to exempt registered investment companies that list certain categories of 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 registered investment company (the "Arca Approval Order")).

5615(a)(1)(A)(i), and renumbering the current exemption for other passive issuers from Nasdaq Rule 5615(a)(1)(B) to Nasdaq Rule 5615(a)(1)(A)(ii). Nasdaq also proposes to amend Nasdaq Rule 5615(a) by adding new subsection (1)(C), as well as inserting a new second paragraph under Nasdaq Rule 5615(a)(5) between the existing two paragraphs. Nasdaq Rule 5615(a)(5) will provide the proposed exemptions for certain management investment companies,[4] while Nasdaq Rule 5615(a)(1)(C) will provide for the proposed exemption of Nasdaq Rule 5615(a)(1) applicable to issuers of Portfolio Depository Receipts, as provided under Nasdaq Rule 5705(a).

By way of background, Nasdaq Rule 5635(a) requires issuers to obtain shareholder approval in connection with the acquisition of the stock or assets of another company, in the following circumstances:

> (1) where, due to the present or potential issuance of common stock, including shares issued pursuant to an earn-out provision or similar type of provision, or securities convertible into or exercisable for common stock, other than a public offering for cash:
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> (A) the common stock has or will have upon issuance voting power equal to or in excess of 20% of the voting power outstanding before the issuance of stock or securities convertible into or exercisable for common stock; or
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> (B) the number of shares of common stock to be issued is or will be equal to or in excess of 20% of the number of shares of common stock outstanding before the issuance of the stock or securities; or
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> (2) any director, officer or Substantial Shareholder (as defined by Nasdaq Rule 5635(e)(3)) of the 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

[4] See infra footnote 6.

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.

Nasdaq Rule 5615 exempts certain categories of issuers from certain corporate governance requirements.

Now, the Exchange proposes to amend Nasdaq Rule 5615(a) to exempt certain categories of investment companies registered under the 1940 Act from the requirement to comply with Nasdaq Rule 5635(a) in connection with the acquisition of the stock or assets of an affiliated registered investment company in a transaction that complies with Rule 17a-8[5] (Mergers of affiliated companies) ("Rule 17a-8") under the 1940 Act and does not otherwise require shareholder approval under the 1940 Act and the rules thereunder or any other Exchange rule.[6] Specifically, the Exchange proposes to exempt from the shareholder approval provision described herein Portfolio Depository Receipts, as provided under Nasdaq Rule 5705(a)(1) by the addition of subsection (C) to Nasdaq Rule 5615(a)(1), as well as amending Nasdaq Rule 5615(a)(5) by inserting a new second paragraph between the existing two paragraphs to exempt

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5 17 CFR 270.17a-8.

6 The Exchange proposes to exempt both Portfolio Depository Receipts (Nasdaq Rule 5705(a) and certain management investment companies that are Index Fund Shares (Nasdaq Rule 5705(b), Managed Fund Shares (Nasdaq Rule 5735), Managed Portfolio Shares (Nasdaq Rule 5760), Exchange Traded Fund Shares (Nasdaq Rule 5704), and Proxy Portfolio Shares (Nasdaq Rule 5750) (collectively, with Portfolio Depository Receipts, the "1940 Act Securities"). Each of the listed categories are issued by an entity organized under the 1940 Act. In proposing this exemption, the Exchange notes that the adopting release for Rule 17a-8 specifically noted that nothing in Rule 17a-8 relieves a fund of its obligation to obtain shareholder approval as may be required by state law or a fund's organizational documents. See Investment Company Act Release No. 25666 at Footnote 18.

from the shareholder approval provision described herein management investment companies that are Index Fund Shares (as defined in Nasdaq Rule 5705(b)), Managed Fund Shares (as defined in Nasdaq Rule 5735), Managed Portfolio Shares (as defined in Nasdaq Rule 5760), Exchange Traded Fund Shares (as defined in Nasdaq Rule 5704), and Proxy Portfolio Shares (as defined in Nasdaq Rule 5750), respectively.[7]

In general, the 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 Nasdaq Rule 5635(a)(2) 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. For the reasons described below, as well as the protections embedded in Rule 17a-8, the Exchange believes that these concerns are limited with respect to 1940 Act 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 and voting 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 registered investment company. As described above, the proposed exemption will only

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[7] Index Fund Shares listed pursuant to Nasdaq Rule 5705(b) are substantively similar to Investment Company Units listed pursuant to Arca Rule 5.2-E(j)(3). Similarly, Proxy Portfolio Shares listed pursuant Nasdaq Rule 5750 are substantively similar to Active Proxy Portfolio Shares listed pursuant to Arca Rule 8.601-E.

apply to issuers of investment companies organized under the 1940 Act. Sections 17(a)(1)-(2) of the 1940 Act prohibit, among other things, certain transactions between registered investment companies and affiliated persons.[8] Rule 17a-8 provides an exemption from Sections 17(a)(1)-(2) for certain mergers of affiliated companies provided that the board of directors of each investment company, 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.[9] Because the shares issued by the acquiring investment company are issued at a price equal to the fund's net asset value,[10] the board of directors is able to make an affirmative determination that the merger is not dilutive to existing shareholders.[11] With respect to potential concerns about voting dilution, holders of Portfolio Depository Receipts and management investment companies that are Index Fund Shares, Managed Fund Shares, Managed Portfolio Shares, Exchange Traded Fund Shares, and Proxy Portfolio Shares either do not have the right to elect directors at annual meetings or have the right to elect directors only in very limited circumstances.

The Exchange believes that the same provisions of Rule 17a-8 that protect against

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8 15 U.S.C. 80a-17(a)(1)-(2). See also the definition of "affiliated person" in the 1940 Act at 15 U.S.C 80a-2(a)(3).

9 17 CFR 270.17a-8.

10 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.

11 The Exchange notes that the shares are issued at a fund's net asset value when the fund is registered. Rule 17a-8 also includes requirements to protect against dilution when the fund to be acquired is unregistered. Notwithstanding these requirements applicable when a fund is unregistered, the Exchange's exemption will only apply when each fund that is a party to the merger is registered.

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 of each merging company must make an affirmative decision that the transaction is in the best interest of its respective company and that the transaction will not result in dilution for existing shareholders, the Exchange believes there is reduced concern that existing shareholders will be disenfranchised as a result of the Exchange's proposed exemption.

Under Rule 17a-8, an affiliated merger must be approved by a majority of the outstanding voting securities of the merging company that is not the surviving company unless certain conditions are met. However, Rule 17a-8 does not require the surviving company (i.e., the fund issuing shares in the merger) to obtain the approval of its shareholders. When 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 to approve the merger.[12] Importantly, the Commission ultimately did not include a requirement of approval of shareholders of the surviving company in its final rule.

Given that Rule 17a-8 does not require a surviving company 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 Nasdaq Rule 5615(a)(1). As described above, the Exchange only proposes to exempt issuers of 1940 Act Securities from having to comply with Nasdaq Rule 5615(a)(1) if they are

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12 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?"

issuing shares to acquire the stock or assets of an affiliated registered investment company. Notwithstanding the proposed exemption, the Exchange notes that other provisions of Exchange rules or the 1940 Act and the rules thereunder may require shareholder approval and will still apply. In particular, the Exchange notes that the adopting release for Rule 17a-8 specifically noted that nothing in Rule 17a-8 relieves a fund of its obligation to obtain shareholder approval as may be required by state law or a fund's organizational documents.[13] Thus, an issuer of a 1940 Act Security may still be required to obtain shareholder approval in connection with the acquisition of the stock or assets of an affiliated company even if such transaction complies with Rule 17a-8 if such transaction would require shareholder approval under other applicable Exchange Rules, another provision of the 1940 Act or the rules and regulations thereunder, state law, or a fund's organizational documents.

Based on the above proposed changes, Nasdaq proposes to amend Nasdaq Rule 5615(a) by adding new subsection (1)(C), as well as inserting a new second paragraph under Nasdaq Rule 5615(a)(5) between the existing two paragraphs. Nasdaq Rule 5615(a)(5) will provide the proposed exemptions for certain management investment companies,[14] while Nasdaq Rule 5615(a)(1)(C) will provide for the proposed exemption of Nasdaq Rule 5615(a)(1) applicable to issuers of Portfolio Depository Receipts, as provided under Nasdaq Rule 5705(a).

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act[15] in general and Section 6(b)(5) of the Act[16] in particular in that it is designed to prevent fraudulent

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13 See supra footnote 6.

14 Id.

15 15 U.S.C. 78f.

16 15 U.S.C. 78f(b)(5).

and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in 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. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[17] requirement that the rules of an exchange not be 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 protections afforded by Rule 17a-8, mean that (i) there is limited risk of 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 have a reduced risk of being 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. With respect to potential concerns about voting dilution, holders of Portfolio Depository Receipts and management investment companies that are Index Fund Shares, Managed Fund Shares, Managed Portfolio Shares, Exchange Traded Fund Shares, and Proxy Portfolio Shares either do not have the right to elect directors at annual meetings or have the right to elect directors only in very limited circumstances.

The Exchange further believes its proposal is consistent with the protection of investors because its proposal is limited to registered investment companies that are organized under the 1940 Act. In the case of a merger of affiliated investment companies, the board of directors of

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17 Id.

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. Where the shares issued by the surviving investment company are issued at a price equal to the fund's net asset value, the board of directors is able to conclude that the interests of shareholders in such a transaction will not be diluted. With respect to voting dilution, the Exchange notes that holders of 1940 Act Securities have very limited voting rights, including no right to vote on the annual election of a board of directors.

The Exchange believes that the same provisions of Rule 17a-8 that protect against 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 of each merging company must make an affirmative determination that the transaction is in the best interest of its investment company that the transaction will not result in dilution for existing shareholders, there is reduced concern that existing shareholders will be disenfranchised as a result of the Exchange's proposed exemption.

The Exchange notes that while shareholders of the non-surviving company must approve the merger under certain circumstances, Rule 17a-8 does not require the shareholders of the surviving company to approve the transaction. Accordingly, the Exchange believes it is appropriate to exempt issuers of 1940 Act Securities from the requirements of Nasdaq Rule 5615 in this same limited circumstance.

Notwithstanding the proposed exemption described above, the Exchange notes that other

provisions of Exchange rules or the 1940 Act and the rules thereunder may require shareholder approval and will still apply. In particular, the Exchange notes that the adopting release for Rule 17a-8 specifically noted that nothing in Rule 17a-8 relieves a fund of its obligation to obtain shareholder approval as may be required by state law or a fund's organizational documents.[18]

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 registered investment company, as opposed to all issuers of securities listed pursuant to Nasdaq Rule 5700, 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.

Lastly, the Exchange believes that the proposal is reasonable as it is substantially similar to a recent rule amendment made by Arca.[19]

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 purpose 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. Further, the proposed rule change is substantively similar to Arca Rule 5.3E.

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

No written comments were either solicited or received.

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18 See supra footnote 6.

19 See supra footnote 3.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[20] and Rule 19b-4(f)(6) thereunder.[21]

A proposed rule change filed under Rule 19b-4(f)(6)[22] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),[23] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange states that waiver of the operative delay will provide certain investment companies registered under the 1940 Act immediate relief from certain shareholder approval requirements if the conditions of the rule as described above are met.

The Commission previously approved a substantively similar rule change for Arca and found it consistent with the Section 6(b)(5) of the Act.[24] For these reasons, the Commission

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20 15 U.S.C. 78s(b)(3)(A).

21 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has complied with this requirement.

22 17 CFR 240.19b-4(f)(6).

23 17 CFR 240.19b-4(f)(6)(iii).

24 See supra note **Error! Bookmark not defined.**.

believes that the proposed rule change presents no novel issues and that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[25]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[26] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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-NASDAQ-2021-083 on the subject line.

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25 For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

26 15 U.S.C. 78s(b)(2)(B).

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-NASDAQ-2021-083. 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 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-NASDAQ-2021-083, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

J. Matthew DeLesDernier
Assistant Secretary

[27] 17 CFR 200.30-3(a)(12).