

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-91618; File No. SR-NYSE-2021-20)

April 20, 2021

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Amending Section 102.04 of the NYSE Listed Company Manual to Establish Limits on Investments in Unregistered Investment Vehicles by Listed Closed End Funds

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on April 9, 2021, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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 amend Section 102.04 of the NYSE Listed Company Manual (“Manual”) to establish limits on investments in unregistered investment vehicles by listed closed end funds. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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 self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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.

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

1. Purpose

The Exchange will generally authorize the listing of a closed-end management investment company (a “Fund”) registered under the Investment Company Act of 1940 (the “Investment Company Act”) pursuant to the provisions of Section 102.04(A) of the Manual. Section 102.04(A) does not include any explicit restrictions on the kinds of investments a listed Fund may include in its portfolio. The Exchange proposes to amend Section 102.04(A) to provide for a limited ability of listed Funds to invest in private fund vehicles that are not themselves registered under the Investment Company Act, including alternative asset classes such as hedge funds and private equity funds. The SEC has amended its own rules with respect to mutual funds to formally establish permitted levels of investments by mutual funds in illiquid investment categories. The longstanding guidance from SEC staff has been that mutual funds should not exceed a 15% limitation on illiquid investments, including private funds. In 2016, the Commission adopted Investment Company Act Rule 22e-4(b)(1)(iv) to codify this policy.⁴ In light of this development in the SEC’s regulation of mutual funds and the continuing interest demonstrated by issuers, the Exchange now proposes to amend Section 102.04(A) to provide for a limited ability of Funds to invest in private funds.

⁴ 17 CFR 270.22e-4(b)(1)(iv).

The proposed amendment to Section 102.04(A) of the Manual would include a new definition of “Private Funds.” A “Private Fund” for purposes of Section 102.04(A) as amended would mean (1) in the case of an entity organized under the laws of the United States or any state therein, a limited partnership, limited liability company, trust, corporation or similar incorporated or unincorporated entity that would be an investment company under Section 3(a) of the Investment Company Act but for the exception provided from that definition by either Sections 3(c)(1) or 3(c)(7) of the Investment Company Act and (2) in the case of an entity not organized under the laws of the United States or any state, an entity that is only permitted to offer its securities in the United States in a private offering that complies with Section 7(d) and either 3(c)(1) or 3(c)(7) of the Investment Company Act and the interpretations of the SEC thereunder.

The Exchange proposes to exclude from the definition of Private Funds any funds that are issuers of collateralized debt obligations (“CDOs”) or collateralized loan obligations (“CLOs”). The issuers of CDOs and CLOs are private investment vehicles not registered under the Investment Company Act, and differ from hedge funds and private equity funds in material respects. Most importantly, there is an active secondary trading market for CDOs and CLOs and there are services that report trading prices for those markets. As a result, there is a significant degree of transparency in the valuation of CDOs and CLOs, as the market typically values them based on general market prices for debt issuances with the same credit rating and seniority as the tranches included in the specific CDO or CLO. Considering the greater liquidity and transparency of CDOs and CLOs, the Exchange proposes to exclude investments in those asset classes from its definition of Private Funds and, thus, does not propose to apply to CDOs and CLOs the proposed limits on listed Funds’ investments in Private Funds.

Accordingly, the Exchange proposes that a “Private Fund” not include any entity that meets the following requirements:

- (i) the entity is engaged in the business of purchasing, or otherwise acquiring, and holding Eligible Assets (as defined below) (and in activities related or incidental thereto);
- (ii) all securities issued by the entity are either (A) initially sold to qualified institutional buyers as defined in Rule 144A under the Securities Act or to persons involved in the organization or operation of the issuer or an affiliate, as defined in Rule 405 under the Securities Act, of such a person or (B) fixed-income securities or other securities which entitle their holders to receive payments that depend primarily on the cash flow from Eligible Assets;
- (iii) the entity appoints a trustee that meets the requirements of Section 26(a)(1) of the Investment Company Act and that is not affiliated, as defined in Rule 405 under the Securities Act, with such entity or with any person involved in the organization or operation of such entity, which does not offer or provide credit or credit enhancement to such entity and that executes an agreement or instrument concerning such entity’s securities containing provisions to the effect set forth in Section 26(a)(3) of the Investment Company Act;
- (iv) the entity takes reasonable steps to cause the trustee to have a perfected security interest or ownership interest valid against third parties in those Eligible Assets that principally generate the cash flow needed to pay the fixed-income security holders, *provided* that such assets otherwise required to be held by the trustee may be released to the extent needed at the time for the operation of the issuer; and

- (v) the entity takes actions necessary for the cash flows derived from Eligible Assets for the benefit of the holders of fixed-income securities to be deposited periodically in a segregated account that is maintained or controlled by the trustee consistent with the rating (if any) of the outstanding fixed-income securities.

“Eligible Assets” means financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to security holders.

Proposed Limitations on Investments in Private Funds

Under the proposed amended form of Section 102.04(A), the Exchange would not authorize the initial listing of any Fund where, at the time of original listing

(A) Private Funds on an aggregated basis represent more than 15% of the Fund’s net assets

(B) any single Private Fund represents more than 5% of the Fund’s net assets; or

(C) the Fund invests or intends to invest in Private Funds and has not adopted and does not maintain fundamental policies (as such term is used in the Investment Company Act of 1940) providing that:

(i) such Fund may not at any time make an additional investment in a Private Fund if, immediately after giving effect to such investment, Private Funds would represent more than 15% of such Fund’s net assets or such individual Private Fund would represent more than 5% of such Fund’s net assets; and

(ii) if at any time such Fund (a) holds more than 15% of its net assets in Private Funds or (b) violates its fundamental policy prohibiting any additional investment in a Private Fund such that, immediately after giving effect to such investment,

such individual Private Fund would represent more than 5% of such Fund's net assets:

- the Fund must immediately inform the Exchange of such occurrence and publicly disclose such occurrence in a manner consistent with the Exchange's immediate release policy as set forth in Sections 202.05 and 202.06 of the Manual;
- management must report such an occurrence to the Fund's board of directors within one business day of the occurrence, with an explanation of the extent and causes of the occurrence, and how the Fund plans, as the case may be, to (i) reduce its investments in Private Funds to no more than 15% of its net assets within a reasonable period of time, or (ii) reduce its investment in the individual Private Fund with respect to which it has exceeded the ownership interest permitted by the applicable fundamental policy to a level no greater than its ownership interest immediately prior to the transaction giving rise to such condition, in each case within a reasonable period of time; and
- if the amount, as the case may be, of (i) the Fund's investments in Private Funds is still above 15% of its net assets, or (ii) the Fund's investment in the individual Private Fund with respect to which it has exceeded the investment limit of its fundamental policy is still above its ownership interest immediately prior to the transaction giving rise to such condition, in each case 30 days from the occurrence (and at each consecutive 30 day period thereafter), the Fund's board of directors, including a majority of

directors who are not interested persons (as such term is defined in Section 2(a)(19) of the Investment Company Act of 1940) of the Fund, must assess whether the plan presented to it pursuant to the requirements set forth above continues to be in the best interest of the Fund.

Any listed Fund in good standing may commence investing in Private Funds, but may do so only if it first adopts the required fundamental policies described above. The Fund must consult with the Exchange before taking this action. Any such Fund will also be subject to the ongoing requirements with respect to investments in Private Funds set forth above.

Today Exchange rules do not restrict the investment by listed Funds in Private Funds. The proposed amendment to Section 102.04(A) would amend the Exchange's listing rules to restrict the investment by Funds in Private Funds, such as hedge funds and private equity funds, which are illiquid and consequently difficult to value. The Exchange notes that the SEC has addressed identical concerns about the inclusion of illiquid asset classes in mutual fund portfolios by adopting a rule imposing a 15% limitation on the acquisition of such assets by mutual funds. By adopting an identical restriction for listed Funds, the Exchange believes that it is similarly appropriately addressing these concerns for listed Funds. Furthermore, the Exchange notes that its own proposal goes further than the restriction the SEC has imposed upon mutual funds by also requiring a diversification in any listed Fund's holdings of Private Funds. The Exchange believes that the proposed 5% limitation on any individual Private Fund investment would limit the materiality of any individual Private Fund investment with respect to the Fund portfolio as a whole and that this provision provides a significant additional protection for investors in listed Funds over and above the protection provided to mutual fund investors by the comparable rule under the Investment Company Act.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,⁵ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁶ in particular, because it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest. The Exchange believes that the proposal protects investors and the public interest because it strictly limits both the aggregate investment by listed Funds in Private Funds and the percentage any individual Private Fund investment may represent in a listed Fund's portfolio. The Exchange believes that these restrictions appropriately address concerns about the illiquidity of Private Fund investments by limiting the materiality of Private Fund investments to a listed Fund's portfolio both in the aggregate and for any individual Private Fund investment. The Exchange notes that the 15% aggregate investment limit in the proposal is the same as the limit applied by the SEC to mutual funds under Investment Company Act rules, while the 5% limit on individual investments in the proposal is an augmentation of the SEC's limitations with respect to mutual funds. The Exchange believes that it is consistent with the protection of investors and the public interest to exempt CDOs and CLOs from these restrictions, as there is a more active trading market for CDOs and CLOs than for Private Funds and there is more consistency and transparency in valuing them.

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

The Exchange does not believe that the proposed rule change would impose any burden

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(5).

on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The purpose of the proposal is to enhance competition by providing a listing market for Funds that wish to have the ability to invest in Private Funds, while appropriately restricting Funds in pursuing that strategy to protect investors. The proposed amendment would not impose any burden on competition between newly-listed Funds and those that are already listed, as currently-listed Funds that are in good standing would be eligible to invest in Private Funds on the same terms as newly-listed Funds. Other listing venues can adopt similar rules if they so desire. As such, the Exchange does not believe that the proposal imposes any burden on competition.

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

Within 45 days of the date of publication of this notice in the Federal Register or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be 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 email to rule-comments@sec.gov. Please include File Number SR-NYSE-2021-20 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NYSE-2021-20. This file number should be included on the subject line if email 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, DC 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-NYSE-2021-20 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.⁷

J. Matthew DeLesDernier
Assistant Secretary

⁷ 17 CFR 200.30-3(a)(12).