

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-95093; File No. SR-NYSE-2022-11)

June 13, 2022

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, to Amend the NYSE Listed Company Manual to Provide a Limited Exemption from the Shareholder Approval Requirements for Closed-End Management Investment Companies with Equity Securities Listed Under Section 102.04 of the Listed Company Manual

I. Introduction

On February 23, 2022, New York Stock Exchange LLC (“Exchange” or “NYSE”) 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 Section 312.03 of the NYSE Listing Company Manual (“LCM” or “Manual”) to provide an exemption from certain shareholder approval requirements of that rule for listed registered closed-end management investment companies (“closed-end funds”) and business development companies (“BDCs”) under certain circumstances. On March 8, 2022, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the proposed rule change in its entirety. The proposed rule change, as amended by Amendment No. 1, was published for comment in the Federal Register on March 15, 2022.³ The Commission has received no comments on the proposed rule change. On April 26, 2022, pursuant to Section 19(b)(2) of the Exchange Act,⁴ the Commission designated a longer period within which to

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 94388 (March 9, 2022), 87 FR 14589 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ This order institutes proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act⁶ to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposal, as Modified by Amendment No. 1

Section 312.03(b)(i) of the Manual requires listed issuers to obtain shareholder approval prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, in any transaction or series of related transactions, to a director, officer or substantial security holder of the company (each a “Related Party”) if the number of shares of common stock to be issued, or if the number of shares of common stock into which the securities may be convertible or exercisable, exceeds either one percent of the number of shares of common stock or one percent of the voting power outstanding before the issuance.⁷ However, shareholder approval will not be required if such transaction is a cash sale for a price that is at least the Minimum Price.⁸

⁵ See Securities Exchange Act Release No. 94795, 87 FR 25689 (May 2, 2022). The Commission designated June 13, 2022, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change, as modified by Amendment No. 1.

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See NYSE LCM Section 312.03(b)(i).

⁸ See id. “Minimum Price” means a price that is the lower of: (i) the Official Closing Price immediately preceding the signing of the binding agreement; or (ii) the average Official Closing Price for the five trading days immediately preceding the signing of the binding agreement. See NYSE LCM Section 312.04(h). “Official Closing Price” of the issuer’s common stock means the official closing price on the Exchange as reported to the Consolidated Tape immediately preceding the signing of a binding agreement to issue the securities. See NYSE LCM Section 312.04(i).

According to the Exchange, Section 312.03(b)(ii) of the Manual provides that shareholder approval is also required prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, where such securities are issued as consideration in a transaction or series of related transactions in which a Related Party has a five percent or greater interest (or such persons collectively have a ten percent 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 common stock, could result in an issuance that exceeds either five percent of the number of shares of common stock or five percent of the voting power outstanding before the issuance.⁹

The Exchange further states that Section 312.03(b)(iii) of the Manual provides that any sale of stock to an employee, director or service provider is also subject to the equity compensation rules in Section 303A.08 of the Manual.¹⁰ For example, according to the Exchange, a sale of stock to any such parties at a discount to the then market price would be treated as equity compensation under Section 303A.08 notwithstanding that shareholder approval may not be required under Section 312.03(b) or 312.03(c) of the Manual.¹¹

⁹ See Notice, supra note 3, at 14590; NYSE LCM Section 312.03(b)(ii).

¹⁰ See Notice, supra note 3, at 14590; NYSE LCM Section 312.03(b)(iii).

¹¹ See id. Consequently, the company would be required to either: (i) obtain shareholder approval of such sale, or (ii) issue such shares under an equity compensation plan that had previously been approved by shareholders and for which shareholder approval under Section 303A.08 of the Manual is not otherwise required. Moreover, shareholder approval is required if any of the subparagraphs of Section 312.03 require such approval, notwithstanding the fact that the transaction does not require approval under Section 312.03(b) or one or more of the other subparagraphs of Section 312.03. See NYSE LCM Section 312.03(b)(iii).

According to the Exchange, Section 312.03(c) of the Manual also requires listed issuers to obtain shareholder approval prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, in any transaction or series of related transactions if:

(1) the common stock has, or will have upon issuance, voting power equal to or in excess of 20 percent of the voting power outstanding before the issuance of such stock or of securities convertible into or exercisable for common stock; or (2) the number of shares of common stock to be issued is, or will be upon issuance, equal to or in excess of 20 percent of the number of shares of common stock outstanding before the issuance of the common stock or of securities convertible into or exercisable for common stock.¹²

The Exchange states that it proposes to exempt closed-end funds and BDCs with equity securities listed under Section 102.04 of the Manual¹³ from having to comply with the shareholder approval requirements in Sections 312.03(b) and (c) of the Manual in connection with the acquisition of the stock or assets of an affiliated registered investment company in a

¹² See Notice, supra note 3, at 14590; NYSE LCM Section 312.03(c). However, shareholder approval will not be required for any such issuance involving: any public offering for cash; or any other financing (that is not a public offering for cash) in which the company is selling securities for cash, if such financing involves a sale of common stock, or securities convertible into or exercisable for common stock, at a price at least as great as the Minimum Price, provided that if the securities in such financing are issued in connection with an acquisition of the stock or assets of another company, shareholder approval will be required if the issuance of such securities alone or when combined with any other present or potential issuance of common stock, or securities convertible into common stock in connection with such acquisition, is equal to or exceeds either 20 percent of the number of shares of common stock or 20 percent of the voting power outstanding before the issuance. See NYSE LCM Section 312.03(c).

¹³ See NYSE LCM Section 102.04 (providing minimum numerical standards for closed-end management investment companies registered under the Investment Company Act of 1940 (“1940 Act”) and closed-end management investment companies that have filed an election to be treated as a BDC under the 1940 Act).

transaction that complies with Rule 17a-8 under the 1940 Act (“Rule 17a-8”)¹⁴ and does not otherwise require shareholder approval under the 1940 Act or the rules thereunder or any other Exchange rule.¹⁵ In support of its proposal, the Exchange states it believes Rule 17a-8 provides protections that obviate the need for a shareholder approval requirement in these circumstances.¹⁶

Sections 17(a)(1) and (2) of the 1940 Act prohibit, among other things, certain transactions between registered investment companies and affiliated persons.¹⁷ Rule 17a-8¹⁸ provides an exemption from Sections 17(a)(1) and (2) of the 1940 Act for certain mergers of affiliated companies, provided, among other things, the board of directors of each investment company, including a majority of the directors that are not interested persons of the respective investment company or of any other company or series participating in the transaction, must determine that (i) participation in the merger is in the best interests of its respective investment company, and (ii) the interests of the company’s existing shareholders will not be diluted as a result of the transaction.¹⁹ In addition, under Rule 17a-8, an affiliated merger must be approved

¹⁴ 17 CFR 270.17a-8.

¹⁵ See Notice, supra note 3, at 14590; proposed NYSE LCM Section 312.03(f).

¹⁶ See Notice, supra note 3, at 14590.

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

¹⁸ Section 57(i) of the 1940 Act makes Rule 17a-8 applicable to BDCs. See 15 U.S.C. 80a-56(i) (providing that “. . . the rules and regulations of the Commission under subsections (a) and (d) of section 17 applicable to registered closed-end investment companies shall be deemed to apply to transactions subject to subsections (a) and (d) of this section”); see also Investment Company Act Release No. 26520 (July 27, 2004), 69 FR 46378 at nn. 9 & 27 (noting that certain rules, including Rule 17a-8, “apply to investment companies, including registered investment companies and business development companies, if they rely on these rules”).

¹⁹ 17 CFR 270.17a-8(a)(2).

by a majority of the outstanding voting securities of the merging company that is not the surviving company unless certain conditions are met.²⁰ The Exchange states in its filing that Rule 17a-8 does not require the surviving company to obtain shareholder approval in connection with the merger of an affiliated company.²¹

The Exchange asserts that, 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 the provisions of Rule 17a-8 protect against dilution and 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.²²

Notwithstanding the proposed exemption, the Exchange states that if other provisions of Exchange rules and the 1940 Act and the rules thereunder require shareholder approval, those will still apply.²³ The Exchange also states 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.²⁴

²⁰ 17 CFR 270.17a-8(a)(3).

²¹ See Notice, supra note 3, at 14590.

²² See id.

²³ See id. at 14591.

²⁴ See id. at 14591, n.10 (citing Investment Company Act Release No. 25666 (July 18, 2002), 67 FR 48512 (July 24, 2002) at n.18).

III. Proceedings to Determine Whether to Approve or Disapprove SR- NYSE-2022-11, 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 Act²⁵ 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, as modified by Amendment No. 1. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved.

Pursuant to Section 19(b)(2)(B) of the Exchange Act,²⁶ 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 and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.²⁷

As discussed above, the Exchange is proposing to exempt closed-end funds and BDCs from the requirement to obtain shareholder approval prior to issuances of securities in connection with the acquisition of stock or assets of an affiliated company, provided that the transaction complies with Rule 17a-8, which requires, among other things, that the board of directors of each

²⁵ 15 U.S.C. 78s(b)(2)(B).

²⁶ Id.

²⁷ 15 U.S.C. 78f(b)(5).

company participating in such a merger determines 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. Although the Commission previously approved a similar exemption for exchange-traded funds ("ETFs"),²⁸ there are differences between ETFs and closed-end funds and BDCs. Shares of closed-end funds and BDCs often trade at prices that are less than, or at a "discount" to, the fund's net asset value per share. In contrast, ETFs may trade at a discount but often to a much lesser degree than closed-end funds and BDCs. Due to these circumstances, shareholders of closed-end funds and BDCs may have an interest in expressing their views on a proposal by management to merge the closed-end fund or BDC into an affiliated fund. In addition, unlike shareholders of ETFs,²⁹ shareholders of closed-end funds and BDCs typically participate in annual shareholder meetings with respect to the election of directors and other matters. The Exchange's proposal therefore raises questions as to whether the elimination of the current ability of shareholders of closed-end funds and BDCs to vote on mergers with affiliated companies is consistent with Section 6(b)(5) of the Exchange Act, which requires the rules of the Exchange to, among other relevant provisions, protect investors and the public interest.³⁰

²⁸ The Commission previously approved NYSE Arca, Inc.'s proposal to exempt issuers of Unit Investment Trusts, Investment Company Units, Exchange-Traded Fund Shares, Portfolio Depositary Receipts, Managed Fund Shares, Active Proxy Portfolio Shares, and Managed Portfolio Shares from the requirement 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 in a transaction that complies with Rule 17a-8. See Securities Exchange Act Release No. 91901 (May 14, 2021), 86 FR 27487 (May 20, 2021).

²⁹ See id. at n.18.

³⁰ 15 U.S.C. 78f(b)(5).

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.”³¹ 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,³² 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.³³

For these reasons, the Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act³⁴ 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

³¹ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

³² See id.

³³ See id.

³⁴ 15 U.S.C. 78s(b)(2)(B).

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.³⁵

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].

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in Notice,³⁶ 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-NYSE-2022-11 on the subject line.

Paper Comments:

³⁵ 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).

³⁶ See Notice, supra note 3.

- 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-NYSE-2022-11. 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-NYSE-2022-11 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.³⁷

J. Matthew DeLesDernier
Assistant Secretary

³⁷ 17 CFR 200.30-3(a)(57).