SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-89834; File No. SR-NYSEArca-2020-54)

September 11, 2020

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change to Amend NYSE Arca Rule 5.3-E to Exempt Issuers of Certain Derivative and Special Purpose Securities 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

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 ("Act")[2] and Rule 19b-4 thereunder,[3] notice is hereby given that, on August 28, 2020, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III 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 amend NYSE Arca Rule 5.3-E 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 asset of another company. The proposed 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.

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

2 15 U.S.C. 78a.

3 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 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.

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[4] 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 a transaction that does not require shareholder approval under Rule 17a-8[5] (Mergers of affiliated companies) under 1940 Act ("Rule 17a-8"). 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 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 the requirements under Rule 17a-8, the Exchange believes that these concerns are limited with respect to the holders of such securities. Therefore, if shareholder approval is not required under Rule 17a-8, 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

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4 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").

5 17 CRF 270.17a-8.

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.[6] Rule 17a-8 specifies that in connection with the 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.[7] Because 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.[8] 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

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

7 17 CRF 270.17a-8.

8 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.

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.

The Exchange further believes that it is appropriate to exempt an issuer of 1940 Act Securities from the shareholder approval requirements of NYSE Arca Rule 5.3-E(d)(9) in the very limited circumstance where a company issues securities in connection with the acquisition of the stock or assets of an affiliated company in a transaction that does not require shareholder approval under Rule 17a-8. In fact, Rule 17a-8 already considered whether shareholders of 1940 Act Securities should have the right to vote on a transaction that falls under this rule and enumerates circumstances when shareholder approval is required and when it is not. Specifically, Rule17a-8 exempts the acquiring company from obtaining shareholder approval in such scenario if: (i) no policy of the acquiring company that could not be changed without a vote of its outstanding voting securities is materially different from a policy of the merged company, (ii) no advisory contract between the acquiring company and any investment adviser thereof is materially different from an advisory contract between the merged company and any investment adviser thereof, except for the identity of the investment companies as a party to the contract, (iii) directors of the acquiring company, who are not interested persons of the acquiring company, and who were elected by the shareholders of the acquiring company, will comprise a majority of the directors of the merged company, who are not interested persons of the merged company, and (iv) any distribution fees (as a percentage of the company's average net assets)

authorized to be paid by the merged company pursuant to a plan adopted in accordance with Rule 12b-1 under the 1940 Act are no greater than the distribution fee (as a percentage of the company's average net assets) authorized to be paid by the acquiring company, pursuant to such plan. Given that the 1940 Act already prescribes when an issuer of 1940 Act Securities must obtain shareholder approval in the context of a merger of affiliated companies, the Exchange believes it is appropriate to exempt issuers of 1940 Act Securities from having to comply with NYSE Arca Rule 5.3-E(d)(9) when completing a transaction that does not require shareholder approval under Rule 17a-8.

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 and such issuance would not require shareholder approval under Rule 17a-8. 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,[9] in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,[10] 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

9 15 U.S.C. 78f(b).

10 15 U.S.C. 78f(b)(5).

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 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 that are completing a transaction that does not require shareholder approval under Rule 17a-8. 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.

In addition to requiring the board determinations described above, Rule 17a-8 also exempts the acquiring company from having to obtain shareholder approval prior to merging with an affiliated company provided certain conditions are met. Specifically, Rule 17a-8 exempts the acquiring company from obtaining shareholder approval in such scenario if: (i) no policy of the acquiring company that could not be changed without a vote of its outstanding voting securities is materially different from a policy of the merged company, (ii) no advisory contract between the acquiring company and any investment adviser thereof is materially different from an advisory contract between the merged company and any investment adviser thereof, except for the identity of the investment companies as a party to the contract, (iii) directors of the acquiring company, who are not interested persons of the acquiring company, and who were elected by the shareholders of the acquiring company, will comprise a majority of the directors of the merged company, who are not interested persons of the merged company, and (iv) any distribution fees (as a percentage of the company's average net assets) authorized to be paid by the merged company pursuant to a plan adopted in accordance with Rule 12b-1 under

the 1940 Act are no greater than the distribution fee (as a percentage of the company's average net assets) authorized to be paid by the acquiring company, pursuant to such plan.

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 transaction in compliance with Rule 17a-8, 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. 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 within such longer period 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 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, DC 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, 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-NYSEArca-2020-54 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.[11]

J. Matthew DeLesDernier
Assistant Secretary

[11] 17 CFR 200.30-3(a)(12).