

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-91901; File No. SR-NYSEArca-2020-54)

May 14, 2021

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, 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 Registered Investment Company

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”)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 issuers of certain investment companies, including Exchange Traded Funds (“ETFs”), 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. 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 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

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.

⁴ 15 U.S.C. 78s(b)(2).

rule change.⁵ On December 1, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, which superseded the proposed rule change as originally filed.⁶ On December 15, 2020, the Commission published notice of Amendment No. 1 and instituted proceedings under Section 19(b)(2)(B) of the Act⁷ to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.⁸ On March 12, 2021, the Commission extended the period for consideration of the proposed rule change to May 15, 2021.⁹ On March 25, 2021, the Exchange submitted Amendment No. 2 to the proposed rule change, which superseded the proposed rule change, as amended by Amendment No. 1.¹⁰ The Commission has received no comments on the proposed rule change. The Commission is publishing this notice to solicit comments on Amendment No. 2 from interested persons, and is approving the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

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.

⁶ Amendment No. 1 is available on the Commission's website at <https://www.sec.gov/comments/sr-nysearca-2020-54/srnysearca202054.htm>.

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ See Securities Exchange Act Release No. 90675, 85 FR 83121 (December 21, 2020).

⁹ See Securities Exchange Act Release No. 91309, 86 FR 14778 (March 18, 2021).

¹⁰ In Amendment No. 2, the Exchange: (1) revised the proposed rule text to state that the proposed exemption would apply in connection with the acquisition of the stock or assets of an affiliated registered investment company; (2) revised the proposed rule text to state that the proposed exemption would apply if the transaction does not otherwise require shareholder approval under the Investment Company Act of 1940 ("1940 Act") and the rules thereunder; (3) added a statement that Rule 17a-8 under the 1940 Act does not relieve a fund of its obligation to obtain shareholder approval as may be required by state law or a fund's organizational documents; (4) clarified the description of Rule 17a-8 and its requirements throughout the discussion; (5) added an explanation for why the proposal would not present concerns regarding voting dilution; and (6) made other clarifications, corrections, and technical changes. Amendment No. 2 is available on the Commission's website at <https://www.sec.gov/comments/sr-nysearca-2020-54/srnysearca202054.htm>.

II. Description of the Proposal, as Modified by Amendment No. 2

NYSE Arca Rule 5.3-E(d)(9) requires listed issuers to obtain shareholder approval in connection with the acquisition of the stock or assets of another company if: (i) 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) 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 investment companies registered under the 1940 Act,¹¹ that are listed on the Exchange as Unit Investment Trusts, Investment Company Units, Exchange-Traded Fund Shares, Portfolio Depositary Receipts, Managed Fund Shares, Active Proxy Portfolio Shares and Managed Portfolio Shares¹² (collectively, “1940 Act Securities”), from having to comply with the shareholder approval requirement in NYSE Arca

¹¹ The Exchange states that approximately 88% of securities listed on the Exchange are issued by investment companies registered under the 1940 Act. See Amendment No. 2, supra note 10, at n.6.

¹² See NYSE Arca 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) for a description of, and listing requirements applicable to, each category of security proposed to be exempted.

Rule 5.3-E(d)(9) 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 under the 1940 Act (Mergers of affiliated companies) (“Rule 17a-8”)¹³ and does not otherwise require shareholder approval under the 1940 Act or the rules thereunder or any other Exchange rule.¹⁴

Sections 17(a)(1) and (2) of the 1940 Act prohibit, among other things, certain transactions between registered investment companies and affiliated persons.¹⁵ Rule 17a-8 provides an exemption from Sections 17(a)(1) and (2) of the 1940 Act for certain mergers of affiliated companies, provided, among other things, that 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.¹⁶ In addition, 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.¹⁷

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 states that it believes the provisions of Rule

¹³ 17 CFR 270.17a-8.

¹⁴ See proposed Rule 5.3-E.

¹⁵ 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).

¹⁶ See Amendment No. 2, supra note 10; 17 CFR 270.17a-8(a)(2).

¹⁷ 17 CFR 270.17a-8(a)(3).

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.¹⁸ In addition, the Exchange explains that Rule 17a-8 does not require the surviving company to obtain shareholder approval in connection with the merger of an affiliated company. The Exchange states that it therefore believes that it is appropriate to exempt issuers of 1940 Act Securities from having to comply with the shareholder approval requirement in NYSE Arca Rule 5.3-E(d)(9) 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, which the Exchange states can be both time consuming and expensive.¹⁹

Notwithstanding the proposed exemption, the Exchange states that other provisions of Exchange rules or the 1940 Act and the rules thereunder may require shareholder approval and will still apply.²⁰ 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.²¹

¹⁸ See Amendment No. 2, supra note 10, at 6. With respect to voting dilution, the Exchange cited to a prior filing in which it stated that holders of derivative and special purpose securities either do not have the right to elect directors at annual meetings or have the right to elect directors only in very limited circumstances. See id. at n. 11 (citing Securities Exchange Act Release No. 83324 (May 24, 2018), 83 FR 25076 (May 31, 2018) (SR-NYSEArca-2018-31)).

¹⁹ See Amendment No. 2, supra note 10, at 5-6.

²⁰ See id. at 8.

²¹ See id. at n. 5 (citing Investment Company Act Release No. 25666, 67 FR 48511 (July 24, 2002) at n. 18).

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.²² In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,²³ 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 are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission finds that the Exchange's proposal to exempt issuers of 1940 Act Securities from the obligation to obtain shareholder approval pursuant to NYSE Arca Rule 5.3-E(d)(9) when they issue securities 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 is consistent with the Act. The corporate governance standards embodied in the listing standards of national securities exchanges, in particular, play an important role in ensuring that exchange-listed companies observe good governance practices, including safeguarding the interests of shareholders with respect to certain potentially dilutive transactions.²⁴ The Commission believes

²² 15 U.S.C. 78f(b). In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²³ 15 U.S.C. 78f(b)(5).

²⁴ See, e.g., Securities Exchange Act Release No. 48108 (June 30, 2003), 68 FR 39995 (July 3, 2003) (approving equity compensation shareholder approval rules of both the

the right of shareholders to vote in connection with the acquisition of the stock or assets of another company in circumstances that may give rise to dilution or where there may be conflicts of interests is an essential and important one.²⁵ The Commission, however, believes that, because of the requirements set forth in Rule 17a-8, the requirement to obtain shareholder approval under the Exchange's rules may not be necessary for issuers of 1940 Act Securities in connection with a transaction that complies with Rule 17a-8 and does not otherwise require shareholder approval under the 1940 Act and the rules thereunder or any other Exchange rule.²⁶

Specifically, as discussed above, in the case of a merger of affiliated registered investment companies, Rule 17a-8 requires with respect to each registered investment company participating in the merger that the board of directors, including a majority of the directors who

NYSE and the National Association of Securities Dealers, Inc. n/k/a NASDAQ); Securities Exchange Act Release No. 76814 (December 31, 2015), 81 FR 820 (January 7, 2016) (NYSE-2015-02) (approving amendments to the NYSE Listed Company Manual to exempt early stage companies from requirements to obtain shareholder approval in certain circumstances); Securities Exchange Act Release No. 84287 (September 26, 2018) 83 FR 49599 (October 2, 2018) (NASDAQ-2018-008) (approving a Nasdaq proposal to change to the definition of market value for purposes of the shareholder approval rule and eliminate the requirement for shareholder approval of issuances at less than book value but greater than market value). See also Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (approving registration of BATS Exchange, Inc. noting that qualitative listing requirements including shareholder approval rules are designed to ensure that companies trading on a national securities exchange will adequately protect the interest of public shareholders).

²⁵ See, e.g., Securities Exchange Act Release Nos. 86406 (July 18, 2019), 84 FR 35431, 35432 (July 23, 2019) (NYSE-2019-20); 57268 (February 4, 2008), 84 FR 7614, 7616 (February 8, 2008) (AMEX-2006-31).

²⁶ While Rule 17a-8 requires an affiliated merger to 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, Rule 17a-8 does not include a requirement for a registered investment company that is the surviving company to obtain shareholder approval in connection with the merger of an affiliated company. See 17 CFR 270.17a-8(a)(3).

are not interested persons of the registered investment company or any other company or series participating in the merger, determines that (i) participation in the merger is in the best interest of the registered investment company, and (ii) the interests of the registered investment company's existing shareholders will not be diluted as a result of the merger.²⁷ The Commission believes these requirements, including the requirement that a majority of directors who are not interested persons of the registered investment company or any other company or series participating in the merger make such determinations, should act as a safeguard for shareholders against dilution and conflicts of interest.²⁸ As a result of the requirements of Rule 17a-8, the 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 registered investment company that complies with Rule 17a-8 is sufficiently mitigated. For the same reasons, the Commission believes that the requirements of Rule 17a-8 should help to ensure that conflicts of interests are carefully considered by the board of directors and a majority of the directors who are not interested persons that are required to approve the acquisition, including in cases where shareholder approval would normally be required under the Exchange's rules if such transaction

²⁷ 17 CFR 270.17a-8(a)(2).

²⁸ The Commission previously stated when approving amendments to Rule 17a-8 that “[t]he rule will continue to require that each fund’s board (including a majority of disinterested directors) determine that the merger is in the best interests of the fund and will not dilute the interests of shareholders. These are critical determinations boards must carefully consider, particularly when the merger involves significant conflicts of interest.” See Investment Company Act Release No. 25666, July 18, 2002, 67 FR 48511 at 48513(July 24, 2002). The Commission also stated that directors must request and evaluate any information reasonably necessary to their determinations, and consider and give appropriate weight to all pertinent factors in making their findings under the rule, and in fulfilling the overall duty of care. Id. See also Rule 17a-8(a)(2)(ii).

involves a director, officer, or substantial shareholder of the listed company that has an interest in the company or assets to be acquired or the consideration to be paid.²⁹

The proposed exemption from the shareholder approval requirements in NYSE Arca Rule 5.3-E(d)(9) is limited in scope. In particular, the proposed exemption from NYSE Arca Rule 5.3-E(d)(9) is limited to issuers of 1940 Act Securities only in connection with the acquisition of the stock or assets of an affiliated registered investment company if such transaction complies with Rule 17a-8. Furthermore, notwithstanding the proposed exemption from the shareholder approval requirement in NYSE Arca Rule 5.3-E(d)(9), other provisions of the Exchange rules, or the 1940 Act and the rules thereunder will still apply and may require shareholder approval.³⁰ Further, the adopting release for Rule 17a-8 specifically stated 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.³¹ 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,

²⁹ The Commission notes that it also previously approved an NYSE rule proposal that exempted registered investment companies under the 1940 Act from a broker vote prohibition for election of directors. In approving the proposal the Commission concluded that the different regulatory regime for registered investment companies supports the exemption. See Securities Exchange Act Release No. 60215 (July 1, 2009), 74 FR 33293 (July 10, 2009) (SR-NYSE-2006-92), at 33303.

³⁰ See NYSEArca Rule 5.3-E(d), which sets forth the Exchange's shareholder approval requirements, including, among others, for issuances involving a change of control and equity compensation. If shareholder approval is not required under one provision of the Exchange's rule, it may still be required under another provision of the rule.

³¹ See supra note 21.

state law, or a fund's organizational documents.

IV. Solicitation of Comments on Amendment No. 2 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 2 to 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].

V. Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 2

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 2, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 2 in the Federal Register. In Amendment No. 2, the Exchange: (1) revised the proposed rule text to state that the proposed exemption would apply in connection with the acquisition of the stock or assets of an affiliated registered investment company; (2) revised the proposed rule text to state that the proposed exemption would apply if the transaction does not otherwise require shareholder approval under the 1940 Act and the rules thereunder; (3) added a statement that Rule 17a-8 does not relieve a fund of its obligation to obtain shareholder approval as may be required by state law or a fund's organizational documents; (4) clarified the description of Rule 17a-8 and its requirements throughout the discussion; (5) added an explanation for why the proposal would not present concerns regarding voting dilution; and (6) made other clarifications, corrections, and technical changes.³² Amendment No. 2 provided greater clarity to the proposal. The changes and additional clarifying information in Amendment No. 2 strengthen the proposal and assist the Commission in evaluating the Exchange's proposal and in determining that it is consistent with the Act. Accordingly, the Commission finds good

³² See supra note 10.

cause, pursuant to Section 19(b)(2) of the Act,³³ to approve the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act³⁴, that the proposed rule change (SR-NYSEArca-2020-54), as modified by Amendment No. 2, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁵

J. Matthew DeLesDernier
Assistant Secretary

³³ 15 U.S.C. 78s(b)(2).

³⁴ 15 U.S.C. 78s(b)(2).

³⁵ 17 CFR 200.30-3(a)(12).