SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 33794; 812–14383]

FS Energy and Power Fund and FS/EIG Advisor, LLC

January 29, 2020.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of an application under Section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from Sections 18(a)(2), 18(c), 18(i) and Section 61(a) of the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain closed-end management investment companies that have elected to be regulated as business development companies (''BDCs'') to issue multiple classes of shares with varying sales loads and asset-based service and/or distribution fees.

APPLICANTS: FS Energy and Power Fund (the ''Current Fund'') and FS/EIG Advisor, LLC (the ''Investment Adviser'').

FILING DATES: The application was filed on October 24, 2014 and amended on August 17, 2018, February 1, 2019, June 28, 2019, and January 29, 2020.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail.

Hearing requests should be received by the Commission by 5:30 p.m. on February 24, 2020, and should be accompanied by proof of service on the applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to Rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090; Applicants: c/o Michael C. Forman, CEO, Stephen S. Sypherd, General Counsel and Secretary, FS Energy and Power Fund, 201 Rouse Boulevard, Philadelphia, PA 19112.

FOR FURTHER INFORMATION CONTACT: Asen Parachkevov, Senior Counsel, or David Joire, Senior Special Counsel, at (202) 551–6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. The Current Fund is an externally managed, non-diversified, closed-end management investment company that has elected to be regulated as a BDC under the Act.[1] The Current Fund's investment objective is to generate current income and long-term capital appreciation.

2. The Investment Adviser is registered as an investment adviser under the Investment Advisers Act of 1940 and serves as investment adviser to the Current Fund.

3. Applicants seek an order to permit the Funds (defined below) to offer investors multiple classes of shares of beneficial interest (''Shares'') with varying sales loads and asset-based service and/or distribution fees.

4. Applicants request that the order also apply to any continuously offered registered closed-end management investment company that elects to be regulated as a BDC that has been previously organized or that may be organized in the future for which the Investment Adviser or any entity controlling, controlled by, or under common control with the Investment Adviser, or any successor in interest to any such entity,[2] acts as investment adviser which periodically offers to repurchase its Shares pursuant to Rule 13e–4 under the Securities Exchange Act of 1934 (''Exchange Act'') and Section 23(c)(2) of the Act (each, a ''Future Fund'' and together with the Current Fund, the ''Funds'').[3]

5. As a BDC, the Current Fund is organized as a closed-end investment company, but offers its Shares continuously, similar to an open-end management investment company. On November 17, 2016, the Current Fund ceased the public offering of Shares to new investors. The Current Fund has only issued one class of Shares, but anticipates, if it recommences the public offering, that it will offer additional classes of Shares. Shares of the Funds will not be offered or traded in a secondary market and will not be listed on any securities exchange and do not trade on an over-the–counter system.[4]

6. Each Fund is seeking the ability to offer multiple classes of Shares that may charge differing front-end sales loads, contingent deferred sales charges (''CDSCs''), an early withdrawal charge (''Repurchase Fee''), and/or annual asset-based service and/or distribution fees. Each class of Shares will comply with the provisions of Rule 2310 of the Financial Industry Regulatory Authority, Inc. (''FINRA'') Manual (''FINRA Rule 2310'').[5]

7. Any Share of a Fund that is subject to asset-based service or distribution fees shall convert to a class with no asset based service or distribution fees upon such Share reaching the applicable sales charge cap determined in accordance with FINRA Rule 2310. Further, if a class of Shares were to be listed on an exchange in the future, all other then-existing classes of Shares of the listing Fund will be converted into the listed class, without the imposition of any sales load, fee or other charge.

8. In order to provide a limited degree of liquidity to shareholders, Applicants state that each Fund may from time to time offer to repurchase Shares in accordance with Rule 13e–4 under the Exchange Act and Section 23(c)(2) of the Act. Applicants state further that repurchases of each Fund's Shares will be made at such times, in such amounts and on such terms as may be determined by the applicable Fund's board of trustees in its sole discretion.

9. Each Fund will disclose in its prospectus the fees, expenses and other characteristics of each class of Shares offered for sale by the prospectus, as is required for open-end, multiple-class funds under Form N–1A. As if it were an open-end management investment company, each Fund will disclose fund expenses in shareholder reports,[6] and

[1] Section 2(a)(48) of the Act defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in Sections 55(a)(1) through 55(a)(3) of the Act and makes available significant managerial assistance with respect to the issuers of such securities.

[2] For purposes of the requested order, ''successor'' is limited to any entity that results from a reorganization into another jurisdiction or a change in the type of a business organization.

[3] Any Fund relying on this relief in the future will do so in compliance with the terms and conditions of the application. Applicants represent that each entity presently intending to rely on the requested relief is listed as an applicant.

[4] Applicants are not requesting relief with respect to any Fund listed on a securities exchange. Any Fund which relies on the relief requested herein will cease relying on such relief upon the listing of any class of its Shares on a securities exchange.

[5] Any reference to FINRA Rule 2310 includes any successor or replacement rule that may be adopted by FINRA.

[6] *See* Shareholder Reports and Quarterly Portfolio Disclosure of Registered Management Investment

disclose in its prospectus any arrangements that result in breakpoints in, or elimination of, sales loads.[7] Each Fund will also comply with any requirements the Commission or FINRA may adopt regarding disclosure at the point of sale and in transaction confirmations about the costs and conflicts of interest arising out of the distribution of open-end management investment company shares, and regarding prospectus disclosure of sales loads and revenue sharing arrangements as if those requirements applied to the Fund.[8] Each Fund will contractually require that any distributor of a Fund's Shares comply with such requirements in connection with the distribution of such Fund's shares.

10. Distribution fees will be paid pursuant to a plan of distribution adopted by each Fund in compliance with Rules 12b–1 and 17d–3 under the Act, as if those rules applied to closed–end funds electing to be regulated as BDCs, with respect to a class (a ''Distribution Plan'').

11. Each Fund will allocate all expenses incurred by it among the various classes of Shares based on the respective net assets of the Fund attributable to each such class, except that the net asset value and expenses of each class will reflect the expenses associated with the Distribution Plan of that class (if any), shareholder servicing fees attributable to a particular class (including transfer agency fees, if any) and any other incremental expenses of that class. Expenses of the Fund allocated to a particular class of the Fund's Shares will be borne on a pro rata basis by each outstanding Share of that class. Applicants state that each Fund will comply with the provisions of Rule 18f–3 under the Act as if it were an open-end management investment company.

12. Any Fund that imposes a CDSC will comply with the provisions of Rule 6c–10 (except to the extent a Fund will comply with FINRA Rule 2310 rather than FINRA Rule 2341, as such rule may be amended (''FINRA Rule 2341'')), as if that rule applied to BDCs. With respect to any waiver of, scheduled variation in, or elimination of the CDSC, a Fund will comply with the requirements of Rule 22d–1 under the Act as if the Fund were an open-end management investment company. Each Fund also will disclose CDSCs in accordance with the requirements of Form N–1A concerning CDSCs as if the Fund were an open-end management investment company.

13. Funds may impose a Repurchase Fee at a rate no greater than 2% of the shareholder's repurchase proceeds if the interval between the date of purchase of the Shares and the valuation date with respect to the repurchase of such Shares is less than a specified period. Any Repurchase Fee will apply equally to all shareholders of the applicable Fund, regardless of class, consistent with Section 18 of the Act and Rule 18f–3 under the Act. To the extent a Fund determines to waive, impose scheduled variations of, or eliminate any Repurchase Fees, it will do so consistently with the requirements of Rule 22d–1 under the Act as if the Repurchase Fee were a CDSC and as if the Fund were an open-end investment company and the Fund's waiver of, scheduled variation in, or elimination of, the Repurchase Fee will apply uniformly to all shareholders of the Fund.

Applicants' Legal Analysis

Multiple Classes of Shares

1. Section 18(a)(2) of the Act provides that a closed-end investment company may not issue or sell a senior security that is a stock unless certain requirements are met. Applicants state that the creation of multiple classes of shares of the Funds may violate Section 18(a)(2), which is made applicable to BDCs through Section 61(a) of the Act, because the Funds may not meet such requirements with respect to a class of shares that may be a senior security.

2. Section 18(c) of the Act provides, in relevant part, that a closed-end investment company may not issue or sell any senior security if, immediately thereafter, the company has outstanding more than one class of senior security. Applicants state that the creation of multiple classes of Shares of the Funds may be prohibited by Section 18(c), which is made applicable to BDCs through Section 61(a) of the Act, as a class may have priority over another class as to payment of dividends because shareholders of different classes would pay different fees and expenses.

3. Section 18(i) of the Act provides that each share of stock issued by a registered management investment company will be a voting stock and have equal voting rights with every other outstanding voting stock. Applicants state that multiple classes of shares of the Funds may violate Section 18(i) of the Act, which is made applicable to BDCs through Section 61(a) of the Act, because each class would be entitled to exclusive voting rights with respect to matters solely related to that class.

4. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction or any class or classes of persons, securities or transactions from any provision of the Act, or from any rule or regulation under the Act, if and to the extent such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants request an exemption under Section 6(c) from Sections 18(a)(2), 18(c) and 18(i) (which are made applicable to BDCs by Section 61(a) of the Act) to permit the Funds to issue multiple classes of Shares.

5. Applicants submit that the proposed allocation of expenses relating to distribution and voting rights among multiple classes is equitable and will not discriminate against any group or class of shareholders. Applicants submit that the proposed arrangements would permit a Fund to facilitate the distribution of its Shares and provide investors with a broader choice of fee options. Applicants assert that the proposed BDC multiple class structure does not raise the concerns underlying Section 18 of the Act to any greater degree than open-end management investment companies' multiple class structures that are permitted by Rule 18f–3 under the Act.

Applicants' Condition

Applicants agree that any order granting the requested relief will be subject to the following condition:

1. Each Fund will comply with the provisions of Rules 6c–10 (except to the extent a Fund will comply with FINRA Rule 2310 rather than FINRA Rule 2341), 12b–1, 17d–3, 18f–3, 22d–1, and, where applicable, 11a–3 under the 1940 Act, as amended from time to time, or any successor rules thereto, as if those rules applied to BDCs. In addition, each Fund will comply with FINRA Rule 2310, as amended from time to time, or any successor rule thereto, and will make available to any distributor of a Fund's shares all of the information necessary to permit the distributor to prepare client account statements in compliance with FINRA Rule 2231.

Companies, Investment Co. Act Rel. No. 26372 (Feb. 27, 2004) (adopting release).

[7] *See* Disclosure of Breakpoint Discounts by Mutual Funds, Investment Co. Act Rel. No. 26464 (June 7, 2004) (adopting release).

[8] *See* Confirmation Requirements and Point of Sale Disclosure Requirements for Transactions in Certain Mutual Funds and Other Securities, and Other Confirmation Requirement Amendments, and Amendments to the Registration Form for Mutual Funds, Investment Co. Act Rel. No. 26341 (Jan. 29, 2004) (proposing release).

By the Commission.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–02032 Filed 2–3–20; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88078; File No. SR–NASDAQ–2019–060]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; 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 Rules 4120 and 4753

January 29, 2020.

I. Introduction

On July 18, 2019, The Nasdaq Stock Market LLC (''Exchange'' or ''Nasdaq'') 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 Rules 4120 and 4753 to permit the Exchange to declare a regulatory halt in a security that traded in the over-the-counter (''OTC'') market prior to its initial pricing on the Exchange, allow for the initial pricing of such a security through the IPO Cross, and establish a new tie-breaker for determining the Current Reference Price and the Cross price for such a security. The proposed rule change was published for comment in the **Federal Register** on August 6, 2019.[3] On September 19, 2019, 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 rule change.[5] On September 19, 2019, the Exchange also filed Amendment No. 1 to the proposed rule change, which amended and superseded the proposed rule change as originally filed.[6] On November 1, 2019, the Commission published notice of Amendment No. 1 and instituted proceedings under Section 19(b)(2)(B) of the Act [7] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.[8] The Commission received no comment letters on the proposal. On January 10, 2020, the Exchange filed Amendment No. 2 to the proposed rule change, which amended and superseded the proposed rule change, as modified by Amendment No. 1.[9] 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.

II. Description of the Proposal

Currently, a security that traded in the OTC market immediately prior to listing on the Exchange is released for initial trading on the Exchange by utilizing the Opening Cross pursuant to Rule 4752(d).[10] The Exchange proposes to amend Rule 4120 to permit the Exchange to declare a regulatory halt [11] in a security that traded in the OTC market prior to its initial pricing on the Exchange.[12] The Exchange also proposes to amend Rules 4120 and 4753 to allow for the initial pricing on the Exchange of such a security through the IPO Cross (described in Rules 4120(c)(8) and 4753) if a broker-dealer serving in the role of financial advisor to the issuer is willing to perform the functions under Rule 4120(c)(8) that are performed by an underwriter in an initial public offering.[13] If the issuer does not retain a financial advisor, the initial pricing on the Exchange of such a security will continue to be effected through the Opening Cross.[14] Moreover, the Exchange proposes to adopt Rules 4753(a)(3)(A)(iv)(e) and 4753(b)(2)(D)(v) to provide that, in the case of the initial pricing of a security that traded in the OTC market pursuant to FINRA Form 211 immediately prior to its initial pricing, the fourth tie-breaker used in calculating each of the Current Reference Price disseminated in the Nasdaq Order Imbalance Indicator for purposes of the IPO Cross and the price at which the IPO Cross will occur will be the price that is closest to the most recent transaction price in the OTC market.[15]

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 86537 (July 31, 2019), 84 FR 38321.

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 87012, 84 FR 50490 (September 25, 2019). The Commission designated November 4, 2019 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[6] In Amendment No. 1, the Exchange revised the proposal to: (1) clarify that when a security previously traded in the OTC market is initially priced using the IPO Cross, the fourth tie-breaker for each of the Current Reference Price disseminated in the Nasdaq Order Imbalance Indicator and the price at which the Cross will occur will be the price that is closest to the most recent transaction price in the OTC market; (2) specify that, for purposes of this proposed rule change, the use of the term ''regulatory halt'' refers to Nasdaq's authority to halt trading in a security under Rule 4120(a)(7); (3) clarify that, currently, a security that traded in the OTC market immediately prior to listing on Nasdaq is released for initial trading on Nasdaq through the Opening Cross under Rule 4752(d) and, pursuant to the proposal, if such an issuer does not retain a financial advisor, the initial pricing will continue to be effected through the Opening Cross; (4) include additional justification in support of the proposed rule change; and (5) make technical and conforming changes. Amendment No. 1 is available at *https://www.sec.gov/comments/sr-nasdaq-2019-060/srnasdaq2019060-6163792-192369.pdf.*

[7] 15 U.S.C. 78s(b)(2)(B).

[8] *See* Securities Exchange Act Release No. 87445, 84 FR 60130 (November 7, 2019).

[9] In Amendment No. 2, the Exchange further revised the proposal to: (1) clarify that the proposal will not allow a company transferring from the OTC market to concurrently raise capital in the IPO Cross; (2) clarify that the proposal can be beneficial because Rule 4120(c)(8) will provide for extended quoting activity prior to the launch of a security; and (3) make technical and conforming changes. Amendment No. 2 is available at *https://www.sec.gov/comments/sr-nasdaq-2019-060/srnasdaq2019060-6637710-203487.pdf.*

[10] *See* Amendment 2, *supra* note 9, at 4 n.4.

[11] For purposes of this proposed rule change, the term ''regulatory halt'' refers to Nasdaq's authority to halt trading in a security under Rule 4120(a)(7). *See id.* at 4 n.3.

[12] The Exchange states that its proposal will facilitate a more orderly start to trading by permitting the Exchange to declare a regulatory halt in a security that traded in the OTC market prior to its initial pricing on the Exchange, before trading on the Exchange begins, which the Exchange believes will avoid potential price disparities or anomalies that may occur during any unlisted trading privileges (''UTP'') trading before the first transaction on the primary listing exchange. *See id.* at 7.

[13] Rule 4120(c)(9) currently provides that the IPO Cross process is available for the initial pricing of a security that has not been listed on a national securities exchange or traded in the OTC market pursuant to FINRA Form 211 immediately prior to the initial pricing where a broker-dealer serving in the role of financial advisor to the issuer is willing to perform the functions under Rule 4120(c)(8) that are performed by an underwriter with respect to an initial public offering. The Exchange states that the IPO Cross will be a better mechanism to open trading in securities that traded in the OTC market given that these companies may attract significant interest upon listing on the Exchange from investors who previously could not invest in such securities. *See id.* at 8. The Exchange states that the initial interest in such securities upon listing on the Exchange makes it beneficial to provide the issuer's financial advisor with additional time by extending quoting activity prior to launch and to allow significant financial advisor involvement in determining when to launch trading. *See id.* at 8–9. The Exchange also represents that its proposal will not allow a company transferring from the OTC market to concurrently raise capital in the IPO Cross. *See id.* at 8 n.12.

[14] *See id.* at 4 n.4.

[15] The Exchange states that the most recent transaction price in the OTC market is predictive of the price that will develop upon the listing of the security on the Exchange. *See id.* at 8. This proposed change to the fourth tie-breaker will not affect the pricing of a security if the issuer does not retain a financial advisor. *See id.* at 4 n.5.