

3(d) under the Act. (On November 29, 2021, the Board, including a majority of disinterested Board members, approved clarifying amendments to the plan in accordance with rule 18f-3.) Also on November 12, 2021, the Board, including a majority of disinterested Board members, adopted a plan for the distribution of Units ("Rule 12b-1 Plan). On November 29, 2021, the Board, including a majority of disinterested Board members, approved clarifying amendments to the Rule 12b-1 Plan in accordance with rule 12b-1.

#### Applicants' Legal Analysis

1. Section 18(f)(1) of the Act provides, in relevant part, that an open-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. 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.

2. Section 12(b) of the Act makes it unlawful, with certain exceptions, for any registered open-end investment company to act as a distributor of securities, except through an underwriter, in contravention of such rules as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. Rule 12b-1 under the Act provides that an open-end investment company that engages in financing any activity that is primarily intended to result in the sale of its shares will be deemed to be acting as a distributor of securities of which it is the issuer, unless it adopts a written plan that meets certain requirements.

3. Applicants state that the issuance and sale of multiple classes of Units of Fortune V may be deemed to be prohibited by section 18(f)(1) of the Act and to violate section 18(i). Applicants also state that the use of Sub-Account assets to finance the distribution of the Contracts may be deemed to violate section 12(b) of the Act.

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 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(f)(1) and 18(i) to the

extent that the proposed issuance and sale of multiple classes of Units of Fortune V with varying Covered Expenses may be deemed: (1) To result in the issuance of a "senior security" within the meaning of section 18(g) of the Act and thus be prohibited by section 18(f)(1); and (2) to violate the equal voting provisions of section 18(i) of the Act. In addition, Applicants request an exemption under section 6(c) of the Act from section 12(b), to the extent that Fortune V may be deemed to be acting as a distributor of its own securities within the meaning of rule 12b-1 under the Act, solely with respect to the initial shareholder approval requirement in rule 12b-1(b) as it applies to the Rule 12b-1 Plan adopted on November 12, 2021 and amended on November 29, 2021. Applicants state that, for the reasons discussed below, they satisfy the standard for relief under section 6(c) of the Act.

5. Applicants state that the different classes of Units provide the Applicants with the flexibility to offer different liquidity options and death benefits to Contract owners. Further, Applicants assert that being limited to a single liquidity option may adversely affect Fortune V's ability to maintain and attract retirement assets and maintain significant economies of scale.

6. Applicants submit that the proposed allocation of Covered Expenses and voting rights relating to the Covered Expenses applicable to the classes of Units in Fortune V is equitable and will not discriminate against any group of participants. Applicants state that Fortune V will comply with the requirements of rule 18f-3 under the Act. Applicants further state that Fortune V will disclose in its prospectus the fees, charges, estimated expenses and other characteristics of each class of Units offered for sale by the prospectus, as is required for open-end investment companies offering multiple classes under Form N-1A; and Fortune V will disclose expenses borne by Contract owners during the reporting period in annual and semi-annual reports as if it were an open-end investment company registered on Form N-1A.

7. Applicants further state that the Board has adopted the Rule 12b-1 Plan which complies with rule 12b-1 under the Act except for the initial shareholder approval requirement in rule 12b-1(b)(1). Applicants state that, when the Fortune V was established under the laws of Puerto Rico in 2007, it was exempt from the Act pursuant to section 6(a)(1) thereof, and only became subject to section 12(b) on May 24, 2021, long after the Contracts were offered and sold

to the Contract owners. Applicants state that the Rule 12b-1 Plan does not change the rights or benefits of Contract owners, but reflects the current terms and provisions of the Contracts. Applicants also note that the Rule 12b-1 Plan was adopted prior to any public offering of shares of Fortune V as a registered investment company.

#### Applicants' Conditions

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

1. Fortune V will disclose in its prospectus the estimated expenses and other characteristics of each class of Units offered for sale by the prospectus, as is required for open-end, multiple class funds under Form N-1A. Fortune V will disclose expenses borne by Contract owners during the reporting period in annual and semi-annual reports as if it were an open-end management investment company registered on Form N-1A.

2. Fortune V will comply with rule 18f-3 under the Act.

3. Fortune V will comply with section 12(b) of the Act and rule 12b-1 under the Act (except with respect to the initial shareholder approval requirement in rule 12b-1(b)(1) for the Rule 12b-1 Plan adopted on November 12, 2021 and amended on November 29, 2021).

For the Commission, by the Division of Investment Management, under delegated authority.

**J. Matthew DeLesDernier,**  
Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meetings

**TIME AND DATE:** 2:00 p.m. on Thursday, December 9, 2021.

**PLACE:** The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

**STATUS:** This meeting will be closed to the public.

**MATTERS TO BE CONSIDERED:** Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

In the event that the time, date, or location of this meeting changes, an announcement of the change, along with

the new time, date, and/or place of the meeting will be posted on the Commission's website at <https://www.sec.gov>.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

The subject matter of the closed meeting will consist of the following topics:

- Institution and settlement of injunctive actions;
- Institution and settlement of administrative proceedings;
- Resolution of litigation claims; and
- Other matters relating to examinations and enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting agenda items that may consist of adjudicatory, examination, litigation, or regulatory matters.

**CONTACT PERSON FOR MORE INFORMATION:** For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551-5400.

(Authority: 5 U.S.C. 552b.)

Dated: December 2, 2021.

**Vanessa A. Countryman,**  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93678; File No. SR-NSCC-2021-014]

### Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Enhance the Transparency of the Calculation of the Backtesting Charge

November 30, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 23, 2021, National Securities Clearing Corporation ("NSCC") 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 clearing agency. NSCC filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(4) thereunder.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change of NSCC consists of modifications to Procedure XV (Clearing Fund Formula and Other Matters) of the NSCC Rules & Procedures ("Rules") to provide additional transparency into the calculation of the Backtesting Charge that may be collected by NSCC as part of Members' Required Fund Deposits to the Clearing Fund by clarifying that such calculation does not include amounts already collected from a Member as a Backtesting Charge, as described in greater detail below.<sup>5</sup>

#### II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency 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 these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

##### (A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

###### (a) Purpose

NSCC is proposing amendments to the Rules that would provide additional transparency into the calculation of the Backtesting Charge by clarifying that such calculation does not include amounts already collected from a Member as a Backtesting Charge. NSCC is not proposing to change how it calculates Members' backtesting coverage or any applicable Backtesting Charge and is proposing only to include additional transparency in the Rules in describing those calculations, as described in greater detail below.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(4).

<sup>5</sup> Terms not defined herein are defined in the Rules, available at [http://dtcc.com/-/media/Files/Downloads/legal/rules/nsccl\\_rules.pdf](http://dtcc.com/-/media/Files/Downloads/legal/rules/nsccl_rules.pdf).

#### Overview of NSCC's Clearing Fund and the Backtesting Charge

As part of its market risk management strategy, NSCC manages its credit exposure to Members by determining the appropriate Required Fund Deposits to the Clearing Fund and monitoring its sufficiency, as provided for in the Rules.<sup>6</sup> The Required Fund Deposit serves as each Member's margin. The objective of a Member's Required Fund Deposit is to mitigate potential losses to NSCC associated with liquidating a Member's portfolio in the event NSCC ceases to act for that Member (hereinafter referred to as a "default").<sup>7</sup> The aggregate of all Members' Required Fund Deposits constitutes the Clearing Fund of NSCC. NSCC would access its Clearing Fund should a defaulting Member's own Required Fund Deposit be insufficient to satisfy losses to NSCC caused by the liquidation of that Member's portfolio. Pursuant to the Rules, each Member's Required Fund Deposit consists of a number of applicable components, each of which is calculated to address specific risks faced by NSCC, as identified within Procedure XV of the Rules.<sup>8</sup>

NSCC employs daily backtesting to determine the adequacy of each Member's Required Fund Deposit. NSCC compares the Required Fund Deposit<sup>9</sup> for each Member with the simulated liquidation gains/losses using the actual positions in the Member's portfolio, and the actual historical security returns. NSCC investigates the cause(s) of any backtesting deficiencies. As a part of this investigation, NSCC pays particular attention to Members with backtesting deficiencies that bring the results for that Member below the 99 percent confidence target (*i.e.*, greater than two backtesting deficiency days in a rolling twelve-month period) to determine if there is an identifiable cause of repeat backtesting deficiencies. NSCC also evaluates whether multiple Members may experience backtesting

<sup>6</sup> See Rule 4 (Clearing Fund) and Procedure XV (Clearing Fund Formula and Other Matters), *id.* NSCC's market risk management strategy is designed to comply with Rule 17Ad-22(e)(4) under the Act, where these risks are referred to as "credit risks." 17 CFR 240.17Ad-22(e)(4).

<sup>7</sup> The Rules identify when NSCC may cease to act for a Member and the types of actions NSCC may take. For example, NSCC may suspend a firm's membership with NSCC or prohibit or limit a Member's access to NSCC's services in the event that a Member defaults on a financial or other obligation to NSCC. See Rule 46 (Restrictions on Access to Services) of the Rules, *supra* note 6.

<sup>8</sup> *Supra* note 6.

<sup>9</sup> For backtesting comparisons, NSCC uses the Required Fund Deposit amount without regard to the actual collateral posted by the Member.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.