

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-87385; File No. SR-NYSEArca-2019-51)

October 23, 2019

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change Regarding Investments of the Janus Henderson Mortgage-Backed Securities ETF Currently Listed and Traded on the Exchange under NYSE Arca Rule 8.600-E

On July 9, 2019, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) 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 make certain changes to the investments of the Janus Henderson Mortgage-Backed Securities ETF (“Fund”), the shares (“Shares”) of which are currently listed and traded on the Exchange under NYSE Arca Rule 8.600-E. The proposed rule change was published for comment in the Federal Register on July 25, 2019.³

On September 3, 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 approve or disapprove the proposed rule change.⁵ The Commission has received no comment letters on the proposal. The

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 86417 (July 19, 2019), 84 FR 35910 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 86855, 84 FR 47337 (September 9, 2019). The Commission designated October 23, 2019, as the date by which it should approve, disapprove, or institute proceedings to determine whether to approve or disapprove the proposed rule change.

Commission is publishing this order to institute proceedings under Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.

I. Exchange's Description of the Proposal⁷

The Exchange proposes to make certain changes to the investments of the Fund. According to the Exchange, the Shares of the Fund commenced listing and trading on the Exchange on September 12, 2018 pursuant to the generic listing standards under Commentary .01 to NYSE Arca Rule 8.600-E, which governs the listing and trading of Managed Fund Shares⁸ on the Exchange.

The Fund is a series of Janus Detroit Street Trust ("Trust").⁹ Janus Capital Management LLC is the Fund's investment adviser ("Adviser").¹⁰ State Street Bank and Trust Company is the

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ The Commission notes that additional information regarding, among other things, the Shares, Fund, investment objective, permitted investments, investment strategies and methodology, investment restrictions, investment adviser, creation and redemption procedures, availability of information, trading rules and halts, and surveillance procedures, can be found in the Notice (see supra note **Error! Bookmark not defined.**) and the Registration Statement (see infra note 9), as applicable.

⁸ A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 ("1940 Act") organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies.

⁹ The Trust is registered under the 1940 Act. On February 28, 2019, the Trust filed with the Commission a registration statement on Form N-1A under the Securities Act of 1933 and the 1940 Act relating to the Fund (File Nos. 333-207814 and 811-23112) ("Registration Statement"). In addition, the Exchange represents that the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. See Investment Company Act Release No. 31540 (March 30, 2015).

¹⁰ The Exchange represents that the Adviser is not registered as a broker-dealer, but is affiliated with a broker-dealer and has implemented and will maintain a fire wall with respect to such broker-dealer affiliate regarding access to information concerning the composition of, and/or changes to, the portfolio. In the event (a) the Adviser becomes registered as a broker-dealer or newly affiliated with one or more broker-dealers, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a

custodian and transfer agent for the Fund, and ALPS Distributors, Inc. is the distributor for the Fund's Shares.

A. Principal Investments of the Fund

According to the Exchange, the Fund's investment objective is to seek a high level of total return consisting of income and capital appreciation. Under normal market conditions,¹¹ the Fund invests at least 80% of its net assets in a portfolio of mortgage-related fixed income instruments of varying maturities. The mortgage-related fixed income instruments in which the Fund may invest are the following: residential mortgage-backed securities; commercial mortgage-backed securities; collateralized mortgage obligations; stripped mortgage-backed securities; mortgage pass-through securities; and other securities representing an interest in or secured by or related to mortgages, including asset-backed securities ("ABS").¹²

Under normal market conditions, the Fund will invest at least 80% of its net assets in mortgage-related securities issued by the U.S. government and its agencies, such as the Government National Mortgage Association (Ginnie Mae), the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac). The

broker-dealer, it will implement and maintain a fire wall with respect to its relevant personnel or its broker-dealer affiliate regarding access to information concerning the composition of, and/or changes to, the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding such portfolio.

¹¹ The term "normal market conditions" is defined in NYSE Arca Rule 8.600-E(c)(5).

¹² The Fund will typically invest in asset-backed securities backed by pools of home equity loans and other mortgage-related debt. Asset-backed securities are collateralized by pools of obligations or assets. Asset-backed securities may take the form of commercial paper, notes, or pass-through certificates, and may be structured as floaters, inverse floaters, interest-only, and principal-only obligations.

Fund will typically enter into “to be announced” or “TBA” commitments when purchasing mortgage-backed securities. The Fund also may invest in exchange-traded funds (“ETFs”).¹³

B. Other Investments of the Fund

While the Fund, under normal market conditions, will invest at least 80% of its assets in the mortgage-related securities issued by the U.S. government and its agencies as described above under Principal Investments, the Fund may invest up to 20% of its assets in the securities and financial instruments described below.

The Fund may hold cash and cash equivalents.¹⁴ In addition, the Fund may hold the following fixed income securities (“Fixed Income Securities”):

- U.S. government securities;
- industrial development bonds;
- inflation-indexed bonds, including municipal inflation-indexed bonds and corporate inflation-indexed bonds; or in derivatives that are linked to these securities;
- municipal lease obligations;
- pass-through securities;
- variable and floating rate obligations (including “inverse floaters”);
- subordinated or junior debt;
- corporate bonds, debentures, notes, and other similar corporate debt instruments;

¹³ For purposes of this filing, “ETFs” are Investment Company Units (as described in NYSE Arca Rule 5.2-E(j)(3)); Portfolio Depositary Receipts (as described in NYSE Arca Rule 8.100-E); and Managed Fund Shares (as described in NYSE Arca Rule 8.600-E). All ETFs will be listed and traded in the U.S. on a national securities exchange.

¹⁴ For purposes of this filing, cash equivalents include the securities included in Commentary .01(c) to NYSE Arca Rule 8.600-E.

- non-agency, or privately-issued, residential and commercial mortgage-backed securities, and other mortgage-related securities.¹⁵

The Fund may enter into mortgage dollar rolls and may invest in TBA transactions. The Fund may enter into short sales of any securities in which the Fund may invest.

The Fund also may hold the following listed derivative instruments: futures, options (including options on futures), and swaps on commodities, currencies, U.S. and non-U.S. equity securities, fixed income securities as defined in Commentary .01(b) to Rule 8.600-E, interest rates, U.S. Treasuries, or a basket or index of any of the foregoing. Such listed derivatives will comply with the criteria in Commentary .01(d) of NYSE Arca Rule 8.600-E.

The Fund may hold the following over-the-counter (“OTC”) derivative instruments: forwards, options, and OTC total return swaps on commodities, currencies, U.S. and non-U.S. equity securities, fixed income securities as defined in Commentary .01(b) to Rule 8.600-E, interest rates, or a basket or index of any of the foregoing. The Fund also may hold OTC credit default swaps and may enter into OTC options on swap agreements.

The Fund may invest in securities of non-exchange-traded investment company securities, subject to applicable limitations under Section 12(d)(1) of the 1940 Act, and may invest in private placements, restricted securities, and Rule 144A securities. The Fund will not invest in securities or other financial instruments that have not been described in this proposed rule change.

¹⁵ Non-agency, or privately-issued, residential and commercial MBS, and other mortgage-related securities and other asset-backed securities are referred to herein as “Private ABS/MBS.”

C. Application of Generic Listing Requirements

The Exchange represents that it is submitting this proposed rule change because the portfolio for the Fund will not meet all of the “generic” listing requirements of Commentary .01 to NYSE Arca Rule 8.600-E applicable to the listing of Managed Fund Shares. The Fund’s portfolio would meet all such requirements except for those set forth in Commentaries .01(a)¹⁶ and Commentary .01(b)(4)¹⁷ to NYSE Arca Rule 8.600-E.

The Fund may invest in non-exchange-traded investment company securities, which are equity securities. Because such securities have a net asset value based on the value of securities and financial assets the investment company holds, the Exchange believes it is both unnecessary and inappropriate to apply to such investment company securities the criteria in Commentary .01(a)(1). The Exchange notes that the Commission has previously approved the listing of Managed Fund Shares with similar investment objectives and strategies where such funds were permitted to invest in the shares of other registered investment companies that are not ETFs or money market funds.

In addition, the Exchange represents that the Fund will not comply with the requirements in Commentary .01(b)(4) to NYSE Arca Rule 8.600-E that component securities that in the

¹⁶ Commentary .01(a)(1) to NYSE Arca Rule 8.600-E (U.S. Component Stocks) requires that the component stocks of the equity portion of a portfolio that are U.S. Component Stocks meet certain criteria initially and on a continuing basis.

¹⁷ Commentary .01(b)(4) to NYSE Arca Rule 8.600-E provides that component securities that in the aggregate account for at least 90% of the fixed income weight of the portfolio must be either: (a) from issuers that are required to file reports pursuant to Sections 13 and 15(d) of the Act; (b) from issuers that have a worldwide market value of its outstanding common equity held by non-affiliates of \$700 million or more; (c) from issuers that have outstanding securities that are notes, bonds debentures, or evidence of indebtedness having a total remaining principal amount of at least \$1 billion; (d) exempted securities as defined in Section 3(a)(12) of the Act; or (e) from issuers that are a government of a foreign country or a political subdivision of a foreign country.

aggregate account for at least 90% of the fixed income weight of the portfolio meet one of the criteria specified in Commentary .01(b)(4), because certain Private ABS/MBS by their nature cannot satisfy the criteria in Commentary .01(b)(4).¹⁸ Instead, the Exchange proposes that the Fund's investments in Fixed Income Securities other than Private ABS/MBS will be required to comply with the requirements of Commentary .01(b)(4). The Exchange believes that excluding Private ABS/MBS from the 90% calculation in Commentary .01(b)(4) is consistent with the Act because the Fund's portfolio will minimize the risk to the overall Fund associated with any particular holding of the Fund as a result of the diversification provided by the investments and the Adviser's selection process, which closely monitors investments to ensure maintenance of credit and liquidity standards. Further, the Exchange believes that this alternative limitation is appropriate because Commentary .01(b)(4) to NYSE Arca Rule 8.600-E is not designed for structured finance vehicles such as Private ABS/MBS. The Exchange notes that the Commission has previously approved the listing of Managed Fund Shares with similar investment objectives and strategies without imposing requirements that a certain percentage of such funds' securities meet one of the criteria comparable to those set forth in Commentary .01(b)(4).

The Adviser represents that the proposed exceptions from the requirements of Commentary .01 to NYSE Arca Rule 8.600-E described above are consistent with the Fund's investment objective and will further assist the Adviser to achieve such investment objective. Deviations from the generic requirements are necessary for the Fund to achieve its investment

¹⁸ According to the Exchange, Private ABS/MBS are generally issued by special purpose vehicles in amounts smaller than the minimum dollar threshold set forth in Commentary .01(b)(4), so the criteria in Commentary .01(b)(4) to NYSE Arca Rule 8.600-E regarding an issuer's market capitalization and the remaining principal amount of an issuer's securities are typically unavailable with respect to Private ABS/MBS, even though such Private ABS/MBS may own significant assets.

objective in a manner that is cost-effective and that maximizes investors' returns. Further, the proposed alternative requirements are narrowly tailored to allow the Fund to achieve its investment objective in manner that is consistent with the principles of Section 6(b)(5) of the Act. As a result, the Exchange represents that it is in the public interest to approve listing and trading of Shares of the Fund on the Exchange pursuant to the requirements set forth herein.

The Exchange represents that, other than Commentaries .01(a) and (b)(4) to NYSE Arca Rule 8.600-E, as described above, the Fund's portfolio will meet all other requirements of NYSE Arca Rule 8.600-E.

II. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEArca-2019-51 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹⁹ to determine whether the proposed rule change 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. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,²⁰ 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 Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be "designed

¹⁹ 15 U.S.C. 78s(b)(2)(B).

²⁰ Id.

to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and “to protect investors and the public interest.”²¹

The Commission asks that commenters address the sufficiency of the Exchange’s statements in support of the proposal, which are set forth in the Notice,²² in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks commenters’ views regarding whether the Exchange has adequately described and provided clear information about the proposed portfolio for the Commission to make a determination under Section 6(b)(5) of the Act.

III. 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 proposal is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to 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.²³

²¹ 15 U.S.C. 78f(b)(5).

²² See Notice, supra note 3.

²³ Section 19(b)(2) of the Act, as amended by the Securities Acts 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 Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal 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, 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-NYSEArca-2019-51 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-2019-51. 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-2019-51 and should be submitted by [insert date 21 days from date of 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.²⁴

Jill M. Peterson
Assistant Secretary

²⁴ 17 CFR 200.30-3(a)(57).