

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-83320; File No. SR-NYSEArca-2018-35)

May 24, 2018

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Peritus High Yield ETF

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 May 14, 2018, NYSE Arca, Inc. (“Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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 change certain representations made in the respective proposed rule changes previously filed with the Commission pursuant to Rule 19b-4 relating to the Peritus High Yield ETF (the “Fund”). Shares of the Fund are currently listed and traded on the Exchange under NYSE Arca Rule 8.600-E. The proposed rule 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.

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

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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

The Commission has approved the listing and trading on the Exchange of shares (“Shares”) of the Fund, under NYSE Arca Rule 8.600-E(j)(3) (formerly NYSE Arca Equities Rule 8.600), which governs the listing and trading of Managed Fund Shares.⁴ The Fund’s Shares are currently listed and traded on the Exchange under NYSE Arca Rule 8.600-E.⁵ The Shares are offered by AdvisorShares Trust (“Trust”).⁶

⁴ A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1) (the “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. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Rule 5.2-E(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

⁵ The Commission previously approved the listing and trading of the Shares of the Fund. See Securities Exchange Act Release Nos. 63329 (November 17, 2010), 75 FR 71260 (November 24, 2010) (SR-NYSEArca-2010-86) (Order Granting Approval of Proposed Rule Change Relating to the Listing and Trading of Shares of the Peritus High Yield ETF) (“Approval Order”); 63041 (October 5, 2010), 75 FR 62905 (October 13, 2010) (SR-NYSEArca-2010-86) (Notice of Filing of Proposed Rule Change Relating to the Listing and Trading of Shares of the Peritus High Yield ETF) (“Notice”). The Exchange subsequently filed with the Commission several proposed rule changes relating to changes in the Fund’s holdings. See Securities Exchange Act Release Nos. 66818 (April 17, 2012), 77 FR 24233 (April 23, 2012) (SR-NYSEArca-2012-33) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change relating to the Peritus High Yield ETF); 70284 (August 29, 2013), 78 FR 54715 (September 5, 2013) (SR-NYSEArca-2013-83) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Investments in Leveraged Loans by the Peritus High Yield ETF); 72433 (June 19, 2014), 79 FR 36114 (June 25, 2014) (SR-NYSEArca-2014-69) (Notice of Filing and

The Trust has filed a combined prospectus and proxy statement (the “Proxy Statement”) with the Commission on Form N-14 describing a “Plan of Reorganization” pursuant to which, following approval of the Fund’s shareholders, all or substantially all of the assets and all of the stated liabilities included in the financial statements of the Fund would be transferred to a new series of Exchange Listed Funds Trust, described below. According to the Proxy Statement, the investment objective of the Fund will be the same following implementation of the Plan of Reorganization (“Reorganization”).⁷ Following shareholder approval and closing of the Reorganization, investors will receive shares of beneficial interest of such new series of Exchange Listed Funds Trust (and cash with respect to any fractional shares held, if any) with an aggregate net asset value equal to the aggregate net asset value of the Shares of the Fund of the Trust calculated as of the close of business on the business day before the closing of the Reorganization. The name of the Fund will remain unchanged.

In this proposed rule change, the Exchange proposes to change certain representations made in the proposed rule changes previously filed with the Commission pursuant to Rule 19b-4

Immediate Effectiveness of Proposed Rule Change Relating to Holdings in Equity Securities by the Peritus High Yield ETF); 73181 (September 23, 2014), 79 FR 58001 (September 26, 2014) (SR-NYSEArca-2014-103) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to an Increase in the Number of Securities Held by the Peritus High Yield ETF). (The Approval Order, Notice and other proposed rule changes referenced above are referred to collectively herein as the “Releases”).

⁶ The Trust is registered under the 1940 Act. On November 1, 2017, the Trust filed with the Commission an amendment to its registration statement on Form N-1A under the Securities Act of 1933 (15 U.S.C. 77a) (“1933 Act”) and the 1940 Act relating to the Fund (File Nos. 333-157876 and 811-22110). In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. See Investment Company Act Release No. 29291 (May 28, 2010) (File No. 812-13677) (“Exemptive Order”).

⁷ See registration statement on Form N-14 under the 1933 Act, dated April 13, 2018 (File No. 333-223505) (“Proxy Statement”).

relating to the Fund, as described above,⁸ which changes would be implemented as a result of the Plan of Reorganization.⁹

Peritus High Yield ETF

The Notice stated that the Fund is offered by AdvisorShares Trust. Following the Reorganization, the Fund's trust will be Exchange Listed Funds Trust. The Fund's investment adviser is AdvisorShares Investments, LLC. Following the Reorganization, the Fund's investment adviser will be Exchange Traded Concepts, LLC.¹⁰ The Fund's sub-adviser, Peritus I Asset Management, LLC, will remain the sub-adviser for the Fund following the Reorganization.

⁸ See note 4 [sic], supra.

⁹ The Fund's investment adviser, AdvisorShares Investments, LLC, represents that it will manage the Fund in the manner described in the proposed rule changes for the Fund as referenced in note 4, supra, and the changes described herein will not be implemented until this proposed rule change is operative.

¹⁰ Exchange Traded Concepts, LLC and Peritus I Asset Management, LLC are not registered as a broker-dealer or affiliated with a broker-dealer. In the event (a) Exchange Traded Concepts, LLC or Peritus I Asset Management, LLC becomes registered as a broker-dealer or newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser becomes registered as a broker-dealer or newly affiliated with a broker-dealer, it will implement and maintain a fire wall with respect to its relevant personnel or such broker-dealer affiliate regarding access to information concerning the composition and/or changes to the Fund's portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio. In addition, personnel who make decisions on the Fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the Fund's portfolio.

An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the "Advisers Act"). As a result, with respect to the Fund, Exchange Traded Concepts, LLC and Peritus I Asset Management, LLC, as adviser and sub-adviser, respectively, and their related personnel, are subject to the provisions of Rule 204A-1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A-1 under the Advisers Act. In addition, Rule 206(4)-7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment

The investment objective of the Fund will remain unchanged. In addition, the Fund's portfolio meets and will continue to meet the representations regarding the Fund's investments as described in the Releases.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)¹¹ that an exchange have rules that are 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, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices, and is designed to promote just and equitable principles of trade and to protect investors and the public interest.

Exchange Listed Funds Trust has filed the Proxy Statement describing the Reorganization pursuant to which, following approval of the Fund's shareholders, all assets of the Fund would be transferred to a corresponding fund of the Exchange Listed Funds Trust, which will have the name Peritus High Yield ETF. This filing proposes to reflect organizational and administrative changes that would be implemented as a result of the Reorganization, including changes to the trust entity issuing shares of the Fund and the adviser to the Fund. As

adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

¹¹ 15 U.S.C. 78f (b)(5).

noted above, Exchange Traded Concepts, LLC and Peritus I Asset Management, LLC are not registered as a broker-dealer or affiliated with a broker-dealer. In the event (a) Exchange Listed Funds Trust or Peritus I Asset Management, LLC becomes registered as a broker-dealer or newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser becomes registered as a broker-dealer or newly affiliated with a broker-dealer, it will implement and maintain a fire wall with respect to its relevant personnel or such broker-dealer affiliate regarding access to information concerning the composition 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. According to the Proxy Statement, the investment objective of the Fund will be the same following implementation of the Reorganization. The Exchange believes these changes will not adversely impact investors or Exchange trading. In addition, the Fund's portfolio meets and will continue to meet the representations regarding the Fund's investments as described in the Releases.

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 Exchange believes the proposed rule change will enhance competition and benefit of investors and the marketplace by permitting continued listing and trading of Shares of the Fund following implementation of the changes described above that would follow the Reorganization, which changes would not impact the investment objective of the Fund.

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

Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; or (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹² and Rule 19b-4(f)(6) thereunder.¹³

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. Because the vote on the Reorganization will occur before the end of the operative delay, waiver of the operative delay would allow the Exchange to begin implementing the two organizational and administrative changes described above to immediately upon shareholder approval of the Reorganization. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest and hereby waives the 30-day operative delay and designates the proposed rule change to be operative upon filing.¹⁴

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

¹⁴ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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-2018-35 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-2018-35. 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-2018-35 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.¹⁵

Eduardo A. Aleman
Assistant Secretary

¹⁵ 17 CFR 200.30-3(a)(12).