



8011-01
SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-86760; File No. SR-NYSEArca-2019-33)

August 26, 2019

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, Regarding Changes to Investments of the First Trust TCW Unconstrained Plus Bond ETF

On May 6, 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 modify investments of the First Trust TCW Unconstrained Plus Bond ETF, the shares of which are currently listed and traded on the Exchange pursuant to NYSE Arca Rule 8.600-E. On May 16, 2019, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register on May 28, 2019.³

On July 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 Commission is

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 85903 (May 21, 2019), 84 FR 24576 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 86299, 84 FR 32804 (July 9, 2019). The Commission designated August 26, 2019, as the date by which it should approve, disapprove, or institute proceedings to determine whether to approve or disapprove the proposed rule change.

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. Description of the Proposal⁷

The Exchange proposes to make certain changes to the investments of the First Trust TCW Unconstrained Plus Bond ETF (“Fund”), the shares (“Shares”) of which are currently listed and traded on the Exchange under NYSE Arca Rule 8.600-E, which governs the listing and trading of Managed Fund Shares on the Exchange. According to the Exchange, the Shares of the Fund commenced trading on the Exchange on June 5, 2018 pursuant to the generic listing standards in Commentary .01 to NYSE Arca Rule 8.600-E.

The Shares are offered by First Trust Exchange-Traded Fund VIII (“Trust”), which is registered with the Commission as an open-end management investment company.⁸ The Fund is a series of the Trust. First Trust Advisors L.P. is the investment adviser (“Adviser”) to the Fund. TCW Investment Management Company LLC (“TCW” or “Sub-Adviser”), serves as the Fund’s

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 and sub-adviser, creation and redemption procedures, availability of information, trading rules and halts, and surveillance procedures, can be found in the Notice (see supra note 3) and the Registration Statement (see infra note 8), as applicable.

⁸ The Exchange represents that the Trust is registered under the Investment Company Act of 1940 (“1940 Act”). On May 29, 2018, the Trust filed with the Commission its registration statement (“Registration Statement”) on Form N-1A under the Securities Act of 1933 and under the 1940 Act relating to the Fund (File Nos. 333-210186 and 811-23147). In addition, the Exchange represents that the Trust has obtained an order from the Commission granting certain exemptive relief under the 1940 Act. See Investment Company Act Release No. 30029 (April 10, 2012) (File No. 812-13795).

investment sub-adviser.⁹ First Trust Portfolios L.P. is the distributor for the Fund's Shares. The Bank of New York Mellon acts as the administrator, custodian, and transfer agent for the Fund.

A. Principal Investments of the Fund

According to the Exchange, the investment objective of the Fund is to seek to maximize long-term total return. Under normal market conditions,¹⁰ the Fund intends to invest at least 80% of its net assets (including investment borrowings) in a portfolio of "Fixed Income Securities".

In managing the Fund's portfolio, TCW intends to employ a flexible approach that allocates the Fund's investments across a range of global investment opportunities and actively manage exposure to interest rates, credit sectors, and currencies. TCW seeks to utilize

⁹ According to the Exchange, the Adviser and Sub-Adviser are not registered as broker-dealers. The Adviser is affiliated with First Trust Portfolios L.P., a broker-dealer, and has implemented and will maintain a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition of, and/or changes to, the portfolio. The Sub-Adviser is affiliated with multiple broker-dealers and has implemented and will maintain a fire wall with respect to its broker-dealer affiliates regarding access to information concerning the composition of, and/or changes to, the portfolio. In the event (a) the Adviser or the Sub-Adviser becomes registered as a broker-dealer or newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, it will implement and maintain a fire wall with respect to relevant personnel and any 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.

¹⁰ The term "normal market conditions" is defined in NYSE Arca Rule 8.600-E(c)(5). On a temporary basis, including for defensive purposes, during the initial invest-up period (i.e., the six-week period following the commencement of trading of Shares on the Exchange) and during periods of high cash inflows or outflows (i.e., rolling periods of seven calendar days during which inflows or outflows of cash, in the aggregate, exceed 10% of the Fund's net assets as of the opening of business on the first day of such periods), the Fund may depart from its principal investment strategies; for example, it may hold a higher than normal proportion of its assets in cash. During such periods, the Fund may not be able to achieve its investment objective. The Fund may adopt a defensive strategy when the Adviser and/or the Sub-Adviser believes securities in which the Fund normally invests have elevated risks due to market, political or economic factors and in other extraordinary circumstances.

independent, bottom-up research to identify securities that are undervalued and that offer a superior risk/return profile. Pursuant to this investment strategy, the Fund may invest in the following Fixed Income Securities, which may be represented by derivatives relating to such securities, as discussed below:

- securities issued or guaranteed by the U.S. government or its agencies, instrumentalities, or U.S. government-sponsored entities (“U.S. government securities”);
- Treasury Inflation Protected Securities (“TIPS”);
- the following non-agency, non-government-sponsored entity (“GSE”), and privately-issued mortgage-related and other asset-backed securities: residential mortgage-backed securities (“RMBS”), commercial mortgage-backed securities (“CMBS”), asset-backed securities (“ABS”), and collateralized loan obligations (“CLOs” and, together with such RMBS, CMBS, and ABS, collectively, “Private ABS/MBS”);¹¹
- Agency RMBS, agency CMBS, and agency ABS;
- domestic corporate bonds;
- Fixed Income Securities issued by non-U.S. corporations and non-U.S. governments;

¹¹ In the Notice, the Exchange states that “Private ABS/MBS” are non-agency, non-GSE, and privately-issued mortgage-related and other asset-backed securities as stated in Commentary .01(b)(5) to NYSE Arca Rule 8.600-E.

- bank loans, including first lien senior secured floating rate bank loans (“Senior Loans”), secured and unsecured loans, second lien or more junior loans, and bridge loans;
- fixed income convertible securities;
- fixed income preferred securities; and
- municipal bonds.

In addition, the Fund may invest in agency RMBS and CMBS by investing in to-be-announced transactions. The Fund may hold cash and cash equivalents,¹² as well as the following short-term instruments with maturities of three months or more: certificates of deposit; bankers’ acceptances; repurchase agreements and reverse repurchase agreements; bank time deposits; and commercial paper. The Fund also may enter into short sales of any securities in which the Fund may invest.

The Fund may utilize exchange-listed and over-the-counter (“OTC”) traded derivatives instruments for duration/yield curve management and/or hedging purposes, for risk management purposes, or as part of its investment strategies. The Fund will use derivative instruments primarily to hedge interest rate risk, actively manage interest rate exposure, hedge foreign currency risk, and actively manage foreign currency exposure. The Fund may also use derivative instruments to enhance returns, as a substitute for, or to gain exposure to, a position in an underlying asset, to reduce transaction costs, to maintain full market exposure, to manage cash flows, or to preserve capital. Derivatives may also be used to hedge risks associated with the Fund’s other portfolio investments. The Fund will not use derivative instruments to gain

¹² According to the Exchange, cash equivalents are the short-term instruments with maturities of less than 3 months enumerated in Commentary .01(c) to NYSE Arca Rule 8.600-E.

exposure to Private ABS/MBS, and derivative instruments linked to such securities will be used for hedging purposes only. Derivatives that the Fund may enter into are the following: futures on interest rates, currencies, Fixed Income Securities, and fixed income indices; exchange-traded and OTC options on interest rates, currencies, Fixed Income Securities, and fixed income indices; swap agreements on interest rates, currencies, Fixed Income Securities, and fixed income indices; credit default swaps; and currency forward contracts.

B. Other Investments of the Fund

While the Fund, under normal market conditions, invests at least 80% of its net assets in the Principal Investments described above, the Fund may invest its remaining assets in the following “Non-Principal Investments.”

The Fund may invest in exchange-traded common stock, exchange-traded preferred stock, exchange-traded real estate investment trusts (“REITs”), and securities of other investment companies registered under the 1940 Act, including money market funds, exchange-traded funds (“ETFs”), open-end funds (other than money market funds and other ETFs), and U.S. exchange-traded closed-end funds.¹³ In addition, the Fund may hold exchange-traded notes (“ETNs”),¹⁴

¹³ According to the Exchange, the term “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. While the Fund may invest in inverse ETFs, the Fund will not invest in leveraged (e.g., 2X, -2X, 3X, or -3X) ETFs.

¹⁴ ETNs are Index-Linked Securities (as described in NYSE Arca Rule 5.2-E(j)(6)). While the Fund may invest in inverse ETNs, the Fund will not invest in leveraged or inverse leveraged ETNs (e.g., 2X or -3X).

exchange-traded or OTC “Work Out Securities,”¹⁵ and exchange-traded or OTC equity securities issued upon conversion of fixed income convertible securities.

C. Investment Restrictions of the Fund¹⁶

As stated in the Notice, the Fund proposes to not invest more than 2% of its total assets in any one Fixed Income Security (excluding U.S. government securities and TIPS) on a per CUSIP basis. The Fund’s holdings in derivative instruments for hedging purposes would be excluded from the determination of compliance with this 2% limitation. The total gross notional value of the Fund’s holdings in derivative instruments used to gain exposure to a specific asset is limited to 2% of the Fund’s total assets.

Additionally, the Fund proposes to invest up to 50% of its total assets in the aggregate in Private ABS/MBS, provided that the Fund (1) may not invest more than 30% of its total assets in non-agency RMBS; (2) may not invest more than 25% of its total assets in non-agency CMBS and CLOs; and (3) may not invest more than 25% of its total assets in non-agency ABS.

With respect to the Fund’s investments in up to 30% of its total assets in Private ABS/MBS that exceed the 20% of the weight of the fixed income portion of the Fund’s portfolio that may be invested in Private ABS/MBS under Commentary .01(b)(5) to NYSE Arca Rule 8.600-E,¹⁷ the following restrictions will apply:

¹⁵ According to the Exchange, For purposes of this filing, Work Out Securities are U.S. or foreign equity securities of any type acquired in connection with restructurings related to issuers of Fixed Income Securities held by the Fund. Work Out Securities are generally traded OTC, but may be traded on a U.S. or foreign exchange.

¹⁶ The Exchange represents that the Fund will not invest in securities or other financial instruments that have not been described in the Notice.

¹⁷ Commentary .01(b)(5) to NYSE Arca Rule 8.600-E provides that non-agency, non-GSE, and privately-issued mortgage-related and other asset-backed securities components of a portfolio shall not account, in the aggregate, for more than 20% of the weight of the fixed income portion of the portfolio.

- Non-agency RMBS shall have an average loan maturity of 84 months or more;
- Non-agency CMBS and CLOs shall have an average loan maturity of 60 months or more; and
- Non-agency ABS shall have an average loan maturity of 12 months or more.¹⁸

The Exchange proposes that up to 25% of the Fund's assets may be invested in OTC derivatives that are used to reduce currency, interest rate, or credit risk arising from the Fund's investments. The Fund's investments in OTC derivatives other than OTC derivatives used to hedge the Fund's portfolio against currency, interest rate, or credit risk will be limited to 20% of the assets in the Fund's portfolio. For purposes of these percentage limitations on OTC derivatives, the weight of such OTC derivatives will be calculated as the aggregate gross notional value of such OTC derivatives.

The Fund's holdings of bank loans will not exceed 15% of the Fund's total assets, and the Fund's holdings of bank loans other than Senior Loans will not exceed 5% of the Fund's total assets.

The Fund's holdings in fixed income convertible securities and in equity securities issued upon conversion of such convertible securities will not exceed 10% of the Fund's total assets.

The Fund's holdings in Work Out Securities will not exceed 5% of the Fund's total assets.

The Fund's investments, including derivatives, will be consistent with the Fund's investment objective and will not be used to enhance leverage (although certain derivatives and other investments may result in leverage). That is, the Fund's investments will not be used to

¹⁸ Information relating to average loan maturity for non-agency RMBS, non-agency CMBS, CLOs, and non-agency ABS is widely available from major market data vendors such as Bloomberg.

seek performance that is the multiple or inverse multiple (e.g., 2X or -3X) of the Fund's primary broad-based securities benchmark index (as defined in Form N-1A).

D. Impact on Arbitrage Mechanism

According to the Exchange, the Adviser and the Sub-Adviser believe there will be minimal, if any, impact to the arbitrage mechanism as a result of the Fund's use of derivatives and Private ABS/MBS. The Adviser and the Sub-Adviser understand that market makers and participants should be able to value derivatives and Private ABS/MBS as long as the positions are disclosed with relevant information. The Adviser and the Sub-Adviser believe that the price at which Shares of the Fund trade will continue to be disciplined by arbitrage opportunities created by the ability to purchase or redeem Shares of the Fund at their net asset value ("NAV"), which should ensure that Shares of the Fund will not trade at a material discount or premium in relation to their NAV.

The Adviser and Sub-Adviser do not believe there will be any significant impacts to the settlement or operational aspects of the Fund's arbitrage mechanism due to the use of derivatives and Private ABS/MBS.

E. The Proposed Modifications to the Shares' Listing Rule

The Exchange represents, among other things, that the Fund will not comply with the requirement in Commentary .01(b)(1) to NYSE Arca Rule 8.600-E that components that in the aggregate account for at least 75% of the fixed income weight of the portfolio each shall have a minimum original principal amount outstanding of \$100 million or more. Instead, the Exchange proposes that components that in the aggregate account for at least 50% of the fixed income weight of the portfolio each shall have a minimum original principal amount outstanding of \$50 million or more. As noted above, the Fund may not invest more than 2% of its total assets in any

one Fixed Income Security (excluding U.S. government securities and TIPS) on a per CUSIP basis. In addition, at least 50% of the weight of the Fund's portfolio would continue to be subject to a substantial minimum (i.e., \$50 million) original principal amount outstanding. The Exchange believes this limitation would provide significant additional diversification to the Fund's investments in Fixed Income Securities, and reduce concerns that the Fund's investments in such securities would be readily susceptible to market manipulation.

The Exchange also 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 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 cannot satisfy the criteria in Commentary .01(b)(4).¹⁹ 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). As noted above, the Fund may not invest more than 2% of its total assets in any one Fixed Income Security (excluding U.S. government securities and TIPS) on a per CUSIP basis. The Exchange believes this limitation would provide additional diversification to the Fund's investments in Private ABS/MBS, and reduce concerns that the Fund's investment in such securities would be readily susceptible to market manipulation.

Finally, the Exchange represents that the Fund will not comply with the requirement in Commentary .01(b)(5) to NYSE Arca Rule 8.600-E that Private ABS/MBS in the Fund's portfolio account, in the aggregate, for no more than 20% of the weight of the fixed income portion of the Fund's portfolio.²⁰ The Exchange proposes that, in order to enable the portfolio to

¹⁹ See Commentary .01(b)(4) to NYSE Arca Rule 8.600-E.

²⁰ See note 17, *supra*.

be more diversified and provide the Fund with an opportunity to earn higher returns, the Fund may invest up to 50% of its total assets in the aggregate in Private ABS/MBS, consistent with the investment restrictions proposed above. The Exchange believes these limitations would provide additional diversification to the Fund's Private ABS/MBS investments and reduce concerns that the Fund's investment in such securities would be readily susceptible to market manipulation.

The Exchange notes that, other than the exceptions proposed in the Notice, 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-2019-33, as Modified by Amendment No. 1, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act²¹ 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,²² 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

²¹ 15 U.S.C. 78s(b)(2)(B).

²² 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.”²³

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,²⁴ in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following questions and asks commenters to submit data where appropriate to support their views.

If the listing rules for the Shares were amended as proposed, including the average loan maturity thresholds for Private ABS/MBS, would the listing rule continue to ensure that a substantial portion of the Fund’s portfolio consists of Fixed Income Securities for which information is publicly available? If not, are there reasons why it may not be necessary that information be publicly available for Private ABS/MBS (as distinguished from other types of Fixed Income Securities)?

Has the Exchange adequately supported the use of the proposed average loan maturity thresholds for Private ABS/MBS? Why or why not? What further information regarding these thresholds would be useful to market participants?

Does the Fund’s proposal to not invest more than 2% of its total assets in any one Fixed Income Security on a per CUSIP basis mitigate concerns that the Fund’s investment in such securities would be readily susceptible to market manipulation. Why or why not?

Would the proposed increased investments in Private ABS/MBS by the Fund increase the susceptibility of the Shares to manipulation? If so, why; if not, why not? If the Fund’s permitted

²³ 15 U.S.C. 78f(b)(5).

²⁴ See Notice, supra note 3.

investments were expanded to the extent proposed, would any other restrictions on the Fund's permitted investments be appropriate in order for the proposed rule change to be consistent with 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.²⁵

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.

²⁵ 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).

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-2019-33 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-2019-33. 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-2019-33 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.²⁶

Jill M. Peterson
Assistant Secretary

²⁶ 17 CFR 200.30-3(a)(57).

[FR Doc. 2019-18750 Filed: 8/29/2019 8:45 am; Publication Date: 8/30/2019]