



November 4, 2021

Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File No. SR-CboeBZX-2021-019, Amendment No. 3

Dear Secretary:

On November 4, 2021, Cboe BZX Exchange, Inc. (the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) Amendment No. 3 to SR-CboeBZX-2021-019 in order to clarify certain points and add additional details. This Amendment No. 3 to SR-CboeBZX-2021-019 amends and replaces in its entirety the Amendment No. 2 filed on October 1, 2021 and the proposal as originally submitted on March 1, 2021. The Exchange submitted proposal SR-CboeBZX-2021-019 in order to list and trade shares of the VanEck Bitcoin Trust under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. In order to provide notice for public review of this Amendment No. 3, in addition to posting on the Exchange’s public website, the Exchange is filing this comment letter with the Commission.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kyle Murray', with a large, stylized flourish at the end.

Kyle Murray
Vice President, Associate General Counsel

Required fields are shown with yellow backgrounds and asterisks.

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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. * SR 2021 - * 019

Amendment No. (req. for Amendments *) 3

Filing by Cboe BZX Exchange, Inc.

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input type="checkbox"/>	Amendment * <input checked="" type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input checked="" type="checkbox"/>	Section 19(b)(3)(A) * <input type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
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Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	Rule		
			<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)	

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010
Section 806(e)(1) *

Section 806(e)(2) *

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934
Section 3C(b)(2) *

Exhibit 2 Sent As Paper Document

Exhibit 3 Sent As Paper Document

Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name * Last Name *

Title *

E-mail *

Telephone * Fax

Signature

Pursuant to the requirements of the Securities Exchange of 1934, Cboe BZX Exchange, Inc. has duty caused this filing to be signed on its behalf by the undersigned thereunto duty authorized.

Date

(Title *)

By

(Name *)

NOTE: Clicking the signature block at right will initiate digitally signing the form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Kyle Murray Date: 2021.11.04
08:23:31 -05'00'

Required fields are shown with yellow backgrounds and astericks.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EDFS website.

Form 19b-4 Information *

Add Remove View

21-019 Amendment No. 3 (VanEck Bi

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change *

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21-019 Amendment No. 3 (VanEck Bi

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 1A - Notice of Proposed Rule Change, Security-Based Swap Submission, or Advanced Notice by Clearing Agencies *

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2- Notices, Written Comments, Transcripts, Other Communications

Add Remove View

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit Sent As Paper Document

Exhibit 3 - Form, Report, or Questionnaire

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit Sent As Paper Document

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

Add Remove View

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item 1 and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) is filing with the Securities and Exchange Commission (“Commission”) a proposed rule change to list and trade shares of the VanEck Bitcoin Trust (the “Trust”),³ under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. The shares of the Trust are referred to herein as the “Shares.”

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

(a) The Exchange’s President (or designee) pursuant to delegated authority approved the proposed rule change on March 1, 2021.

(b) Please refer questions and comments on the proposed rule change to Patrick Sexton, Executive Vice President, General Counsel and Corporate Secretary, (312) 786-7467, or Kyle Murray, Vice President, Associate General Counsel, (913) 815-7121.

3. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change.

(a) Purpose

This Amendment No. 3 to SR-CboeBZX-2021-019 amends and replaces in its

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Trust was formed as a Delaware statutory trust on December 17, 2020 and is operated as a grantor trust for U.S. federal tax purposes. The Trust has no fixed termination date.

entirety Amendment No. 2 to the proposal as submitted on October 1, 2021 and as originally submitted on March 1, 2021. The Exchange submits this Amendment No. 3 in order to clarify certain points and add additional details to the proposal.

The Exchange proposes to list and trade the Shares under BZX Rule 14.11(e)(4),⁴ which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.⁵ VanEck Digital Assets, LLC is the sponsor of the Trust (“Sponsor”). The Shares will be registered with the Commission by means of the Trust’s registration statement on Form S-1 (the “Registration Statement”).⁶

Background

Bitcoin is a digital asset based on the decentralized, open source protocol of the peer-to-peer computer network launched in 2009 that governs the creation, movement, and ownership of bitcoin and hosts the public ledger, or “blockchain,” on which all bitcoin transactions are recorded (the “Bitcoin Network” or “Bitcoin”). The decentralized nature of the Bitcoin Network allows parties to transact directly with one another based on cryptographic proof instead of relying on a trusted third party. The protocol also lays

⁴ The Commission approved BZX Rule 14.11(e)(4) in Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR-BATS-2011-018).

⁵ All statements and representations made in this filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange.

⁶ See draft Registration Statement on Form S-1, dated December 30, 2020 submitted to the Commission by the Sponsor on behalf of the Trust. The descriptions of the Trust, the Shares, and the Benchmark contained herein are based, in part, on information in the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

out the rate of issuance of new bitcoin within the Bitcoin Network, a rate that is reduced by half approximately every four years with an eventual hard cap of 21 million. It's generally understood that the combination of these two features – a systemic hard cap of 21 million bitcoin and the ability to transact trustlessly with anyone connected to the Bitcoin Network – gives bitcoin its value.⁷

The first rule filing proposing to list an exchange-traded product to provide exposure to bitcoin in the U.S. was submitted by the Exchange on June 30, 2016.⁸ At that time, blockchain technology, and digital assets that utilized it, were relatively new to the broader public. The market cap of all bitcoin in existence at that time was approximately \$10 billion. No registered offering of digital asset securities or shares in an investment vehicle with exposure to bitcoin or any other cryptocurrency had yet been conducted, and the regulated infrastructure for conducting a digital asset securities offering had not begun to develop.⁹ Similarly, regulated U.S. bitcoin futures contracts did not exist. The Commodity Futures Trading Commission (the “CFTC”) had determined that bitcoin is a

⁷ For additional information about bitcoin and the Bitcoin Network, [see](https://bitcoin.org/en/getting-started) <https://bitcoin.org/en/getting-started>; <https://www.fidelitydigitalassets.com/articles/addressing-bitcoin-criticisms>; and <https://www.vaneck.com/education/investment-ideas/investing-in-bitcoin-and-digital-assets/>.

⁸ See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018). This proposal was subsequently disapproved by the Commission. See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the “Winklevoss Order”).

⁹ Digital assets that are securities under U.S. law are referred to throughout this proposal as “digital asset securities.” All other digital assets, including bitcoin, are referred to interchangeably as “cryptocurrencies” or “virtual currencies.” The term “digital assets” refers to all digital assets, including both digital asset securities and cryptocurrencies, together.

commodity,¹⁰ but had not engaged in significant enforcement actions in the space. The New York Department of Financial Services (“NYDFS”) adopted its final BitLicense regulatory framework in 2015, but had only approved four entities to engage in activities relating to virtual currencies (whether through granting a BitLicense or a limited-purpose trust charter) as of June 30, 2016.¹¹ While the first over-the-counter bitcoin fund launched in 2013, public trading was limited and the fund had only \$60 million in assets.¹² There were very few, if any, traditional financial institutions engaged in the space, whether through investment or providing services to digital asset companies. In January 2018, the Staff of the Commission noted in a letter to the Investment Company Institute and SIFMA that it was not aware, at that time, of a single custodian providing fund custodial services for digital assets.¹³

¹⁰ See “In the Matter of Coinflip, Inc.” (“Coinflip”) (CFTC Docket 15-29 (September 17, 2015)) (order instituting proceedings pursuant to Sections 6(c) and 6(d) of the CEA, making findings and imposing remedial sanctions), in which the CFTC stated:

“Section 1a(9) of the CEA defines ‘commodity’ to include, among other things, ‘all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in.’ 7 U.S.C. § 1a(9). The definition of a ‘commodity’ is broad. See, e.g., Board of Trade of City of Chicago v. SEC, 677 F. 2d 1137, 1142 (7th Cir. 1982). Bitcoin and other virtual currencies are encompassed in the definition and properly defined as commodities.”

¹¹ A list of virtual currency businesses that are entities regulated by the NYDFS is available on the NYDFS website. See https://www.dfs.ny.gov/apps_and_licensing/virtual_currency_businesses/regulated_entities

¹² Data as of March 31, 2016 according to publicly available filings. See Bitcoin Investment Trust Form S-1, dated May 27, 2016, available: <https://www.sec.gov/Archives/edgar/data/1588489/000095012316017801/filename1.htm>.

¹³ See letter from Dalia Blass, Director, Division of Investment Management, U.S. Securities and Exchange Commission to Paul Schott Stevens, President & CEO, Investment Company Institute and Timothy W. Cameron, Asset Management

Fast forward to the fourth quarter of 2021 and the digital assets financial ecosystem, including bitcoin, has progressed significantly. The development of a regulated market for digital asset securities has significantly evolved, with market participants having conducted registered public offerings of both digital asset securities¹⁴ and shares in investment vehicles holding bitcoin futures,¹⁵ including Bitcoin Futures ETFs, as discussed further below. Additionally, licensed and regulated service providers have emerged to provide fund custodial services for digital assets, among other services. For example, in December 2020, the Commission adopted a conditional no-action position permitting certain special purpose broker-dealers to custody digital asset securities under Rule 15c3-3 under the Exchange Act (the “Custody Statement”);¹⁶ in September 2020, the Staff of the Commission released a no-action letter permitting certain broker-dealers to operate a non-custodial Alternative Trading System (“ATS”) for digital asset securities, subject to specified conditions;¹⁷ in October 2019, the Staff of the

Group – Head, Securities Industry and Financial Markets Association (January 18, 2018), available at <https://www.sec.gov/divisions/investment/noaction/2018/cryptocurrency-011818.htm>.

¹⁴ See Prospectus supplement filed pursuant to Rule 424(b)(1) for INX Tokens (Registration No. 333-233363), available at: https://www.sec.gov/Archives/edgar/data/1725882/000121390020023202/ea125858-424b1_inxlimited.htm.

¹⁵ See Prospectus filed by Stone Ridge Trust VI on behalf of NYDIG Bitcoin Strategy Fund Registration, available at: <https://www.sec.gov/Archives/edgar/data/1764894/000119312519309942/d693146d497.htm>.

¹⁶ See Securities Exchange Act Release No. 90788, 86 FR 11627 (February 26, 2021) (File Number S7-25-20) (Custody of Digital Asset Securities by Special Purpose Broker-Dealers).

¹⁷ See letter from Elizabeth Baird, Deputy Director, Division of Trading and Markets, U.S. Securities and Exchange Commission to Kris Dailey, Vice

Commission granted temporary relief from the clearing agency registration requirement to an entity seeking to establish a securities clearance and settlement system based on distributed ledger technology,¹⁸ and multiple transfer agents who provide services for digital asset securities registered with the Commission.¹⁹

Outside the Commission's purview, the regulatory landscape has changed significantly since 2016, and cryptocurrency markets have grown and evolved as well. The market for bitcoin is approximately 100 times larger, having recently reached a market cap of over \$1 trillion. As of November 3, 2021, bitcoin's market cap is greater than companies such as Tesla Inc., Berkshire Hathaway Inc., and NVIDIA Corporation. CFTC regulated bitcoin futures trading volume and open interest on Chicago Mercantile Exchange ("CME") ("Bitcoin Futures") has grown significantly, especially since the launch of Bitcoin Futures ETFs, as defined below, which the Exchange believes represents a regulated market of significant size, as further discussed below.²⁰ The CFTC has exercised its regulatory jurisdiction in bringing a number of enforcement actions

President, Risk Oversight & Operational Regulation, Financial Industry Regulatory Authority (September 25, 2020), available at: <https://www.sec.gov/divisions/marketreg/mr-noaction/2020/finra-ats-role-in-settlement-of-digital-asset-security-trades-09252020.pdf>

¹⁸ See letter from Jeffrey S. Mooney, Associate Director, Division of Trading and Markets, U.S. Securities and Exchange Commission to Charles G. Cascarilla & Daniel M. Burstein, Paxos Trust Company, LLC (October 28, 2019), available at: <https://www.sec.gov/divisions/marketreg/mr-noaction/2019/paxos-trust-company-102819-17a.pdf>

¹⁹ See, e.g., Form TA-1/A filed by Tokensoft Transfer Agent LLC (CIK: 0001794142) on January 8, 2021, available at: https://www.sec.gov/Archives/edgar/data/1794142/000179414219000001/xsIFTA1X01/primary_doc.xml.

²⁰ Unless otherwise noted, all statistics and charts included in this proposal are sourced from <https://www.cmegroup.com/trading/bitcoin-futures.html>.

related to bitcoin and against trading platforms that offer cryptocurrency trading.²¹ The U.S. Office of the Comptroller of the Currency (the “OCC”) has made clear that federally-chartered banks are able to provide custody services for cryptocurrencies and other digital assets.²² The OCC recently granted conditional approval of two charter conversions by state-chartered trust companies to national banks, both of which provide cryptocurrency custody services.²³ NYDFS has granted no fewer than twenty-five BitLicenses, including to established public payment companies like PayPal Holdings, Inc. and Square, Inc., and limited purpose trust charters to entities providing cryptocurrency custody services, including the Trust's Custodian. The U.S. Treasury Financial Crimes Enforcement Network (“FinCEN”) has released extensive guidance regarding the applicability of the Bank Secrecy Act (“BSA”) and implementing regulations to virtual currency businesses,²⁴ and has proposed rules imposing

²¹ The CFTC’s annual report for Fiscal Year 2020 (which ended on September 30, 2020) noted that the CFTC “continued to aggressively prosecute misconduct involving digital assets that fit within the CEA’s definition of commodity” and “brought a record setting seven cases involving digital assets.” See CFTC FY2020 Division of Enforcement Annual Report, available at: https://www.cftc.gov/media/5321/DOE_FY2020_AnnualReport_120120/download. Additionally, the CFTC filed on October 1, 2020, a civil enforcement action against the owner/operators of the BitMEX trading platform, which was one of the largest bitcoin derivative exchanges. See CFTC Release No. 8270-20 (October 1, 2020) available at: <https://www.cftc.gov/PressRoom/PressReleases/8270-20>.

²² See OCC News Release 2021-2 (January 4, 2021) available at: <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-2.html>.

²³ See OCC News Release 2021-6 (January 13, 2021) available at: <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-6.html> and OCC News Release 2021-19 (February 5, 2021) available at: <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-19.html>.

²⁴ See FinCEN Guidance FIN-2019-G001 (May 9, 2019) (Application of FinCEN’s Regulations to Certain Business Models Involving Convertible Virtual Currencies) available at: <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>

requirements on entities subject to the BSA that are specific to the technological context of virtual currencies.²⁵ In addition, the Treasury's Office of Foreign Assets Control (“OFAC”) has brought enforcement actions over apparent violations of the sanctions laws in connection with the provision of wallet management services for digital assets.²⁶

In addition to the regulatory developments laid out above, more traditional financial market participants have embraced and continue to embrace cryptocurrency:

²⁵ See U.S. Department of the Treasury Press Release: “The Financial Crimes Enforcement Network Proposes Rule Aimed at Closing Anti-Money Laundering Regulatory Gaps for Certain Convertible Virtual Currency and Digital Asset Transactions” (December 18, 2020), available at: <https://home.treasury.gov/news/press-releases/sm1216>.

²⁶ See U.S. Department of the Treasury Enforcement Release: “OFAC Enters Into \$98,830 Settlement with BitGo, Inc. for Apparent Violations of Multiple Sanctions Programs Related to Digital Currency Transactions” (December 30, 2020) available at: https://home.treasury.gov/system/files/126/20201230_bitgo.pdf.

large insurance companies,²⁷ asset managers,²⁸ university endowments,²⁹ pension funds,³⁰ and even historically bitcoin skeptical fund managers³¹ are allocating to bitcoin. The largest over-the-counter bitcoin fund previously filed a Form 10 registration statement, which the Staff of the Commission reviewed and which took effect automatically, and is

²⁷ On December 10, 2020, Massachusetts Mutual Life Insurance Company (MassMutual) announced that it had purchased \$100 million in bitcoin for its general investment account. See MassMutual Press Release “Institutional Bitcoin provider NYDIG announces minority stake purchase by MassMutual” (December 10, 2020) available at: <https://www.massmutual.com/about-us/news-and-press-releases/press-releases/2020/12/institutional-bitcoin-provider-nydig-announces-minority-stake-purchase-by-massmutual>.

²⁸ See e.g., “BlackRock’s Rick Rieder says the world’s largest asset manager has ‘started to dabble’ in bitcoin” (February 17, 2021) available at: <https://www.cnbc.com/2021/02/17/blackrock-has-started-to-dabble-in-bitcoin-says-rick-rieder.html> and “Guggenheim’s Scott MinerD Says Bitcoin Should Be Worth \$400,000” (December 16, 2020) available at: <https://www.bloomberg.com/news/articles/2020-12-16/guggenheim-s-scott-minerd-says-bitcoin-should-be-worth-400-000>.

²⁹ See e.g., “Harvard and Yale Endowments Among Those Reportedly Buying Crypto” (January 25, 2021) available at: <https://www.bloomberg.com/news/articles/2021-01-26/harvard-and-yale-endowments-among-those-reportedly-buying-crypto>.

³⁰ See e.g., “Virginia Police Department Reveals Why its Pension Fund is Betting on Bitcoin” (February 14, 2019) available at: <https://finance.yahoo.com/news/virginia-police-department-reveals-why-194558505.html>.

³¹ See e.g., “Bridgewater: Our Thoughts on Bitcoin” (January 28, 2021) available at: <https://www.bridgewater.com/research-and-insights/our-thoughts-on-bitcoin> and “Paul Tudor Jones says he likes bitcoin even more now, rally still in the ‘first inning’” (October 22, 2020) available at: <https://www.cnbc.com/2020/10/22/paul-tudor-jones-says-he-likes-bitcoin-even-more-now-rally-still-in-the-first-inning.html>.

now a reporting company.³² Established companies like Tesla, Inc.,³³ MicroStrategy Incorporated,³⁴ and Square, Inc.,³⁵ among others, have recently announced substantial investments in bitcoin in amounts as large as \$1.5 billion (Tesla) and \$425 million (MicroStrategy). The foregoing examples illustrate that bitcoin has gained mainstream usage and recognition.

Despite these developments, access for U.S. retail investors to gain exposure to bitcoin via a transparent and U.S. regulated, U.S. exchange-traded vehicle remains limited. Instead current options include: (i) paying a potentially high premium (and high management fees) to buy over-the-counter bitcoin funds (“OTC Bitcoin Funds”), to the advantage of more sophisticated investors that are able to create shares at net asset value (“NAV”) directly with the issuing trust; (ii) facing the technical risk, complexity and generally high fees associated with buying spot bitcoin; (iii) purchasing shares of operating companies that they believe will provide proxy exposure to bitcoin with limited

³² See Letter from Division of Corporation Finance, Office of Real Estate & Construction to Barry E. Silbert, Chief Executive Officer, Grayscale Bitcoin Trust (January 31, 2020) <https://www.sec.gov/Archives/edgar/data/1588489/000000000020000953/filename1.pdf>

³³ See Form 10-K submitted by Tesla, Inc. for the fiscal year ended December 31, 2020 at 23: https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000156459021004599/tsla-10k_20201231.htm

³⁴ See Form 10-Q submitted by MicroStrategy Incorporated for the quarterly period ended September 30, 2020 at 8: https://www.sec.gov/ix?doc=/Archives/edgar/data/1050446/000156459020047995/mstr-10q_20200930.htm

³⁵ See Form 10-Q submitted by Square, Inc. for the quarterly period ended September 30, 2020 at 51: <https://www.sec.gov/ix?doc=/Archives/edgar/data/1512673/000151267320000012/sq-20200930.htm>

disclosure about the associated risks; or (iv) through the purchase of Bitcoin Futures ETFs, which represent a sub-optimal structure for long-term investors that will cost them collectively tens of millions of dollars every year, as further discussed below. Meanwhile, investors in many other countries, including Canada³⁶ and Brazil, are able to use more traditional exchange listed and traded products (including exchange-traded funds holding physical bitcoin) to gain exposure to bitcoin, disadvantaging U.S. investors and leaving them with more risky means of getting bitcoin exposure.³⁷ Additionally, investors in other countries, specifically Canada, generally pay lower fees than U.S. retail investors that invest in OTC Bitcoin Funds due to the fee pressure that results from increased competition among available bitcoin investment options. Without an approved and regulated spot bitcoin ETP in the U.S. as a viable alternative, U.S. investors could seek to purchase shares of non-U.S. bitcoin vehicles in order to get access to bitcoin exposure. Given the separate regulatory regime and the potential difficulties associated with any international litigation, such an arrangement would create more risk exposure for U.S. investors than they would otherwise have with a U.S. exchange listed ETP. Further to this point, the lack of a U.S.-listed spot bitcoin ETP is not preventing U.S. funds from gaining

³⁶ The Exchange notes that the Purpose Bitcoin ETF, a retail physical bitcoin ETP launched in Canada, reportedly reached \$768 million in assets under management as of August 31, 2021 (“AUM”), demonstrating the demand for a North American market listed bitcoin exchange-traded product (“ETP”). The Purpose Bitcoin ETF also offers a class of units that is U.S. dollar denominated, which could appeal to U.S. investors.

³⁷ The Exchange notes that securities regulators in a number of other countries have either approved or otherwise allowed the listing and trading of bitcoin ETPs. Specifically, these funds include the Purpose Bitcoin ETF, Bitcoin ETF, VanEck Vectors Bitcoin ETN, WisdomTree Bitcoin ETP, Bitcoin Tracker One, BTCetc bitcoin ETP, Amun Bitcoin ETP, Amun Bitcoin Suisse ETP, 21Shares Short Bitcoin ETP, CoinShares Physical Bitcoin ETP.

exposure to bitcoin - several U.S. exchange-traded funds are using Canadian bitcoin ETPs to gain exposure to spot bitcoin. In addition to the benefits to U.S. investors articulated throughout this proposal, approving this proposal (and others like it) would provide U.S. exchange-traded funds with a U.S.-listed and regulated product to provide such access rather than relying on either flawed products or products listed and primarily regulated in other countries.

Bitcoin Futures ETFs

The Exchange and Sponsor applaud the Commission for allowing the recent launch of the ETFs registered under the Investment Company Act of 1940, as amended (the “1940 Act”), that provide exposure to bitcoin primarily through CME Bitcoin Futures (“Bitcoin Futures ETFs”). Allowing such products to list and trade is a productive first step in providing transparent, exchange-listed tools for expressing a view on bitcoin for U.S. investors and traders. However, as has been reported by numerous outlets, the structure of such products provides negative outcomes for buy and hold investors as compared to an ETP that would hold actual bitcoin instead of derivatives contracts (“Spot Bitcoin ETPs”).³⁸ Specifically, the cost of rolling CME Bitcoin Futures contracts (which has reached as high as 17% annually³⁹ excluding a fund’s management fees and borrowing costs, if any) will cause the Bitcoin Futures ETFs to lag the

³⁸ See e.g., “Bitcoin ETF’s Success Could Come at Fundholders’ Expense,” Wall Street Journal (October 24, 2021), available at: <https://www.wsj.com/articles/bitcoin-etfs-success-could-come-at-fundholders-expense-11635080580>; “Physical Bitcoin ETF Prospects Accelerate,” ETF.com (October 25, 2021), available at: https://www.etf.com/sections/blog/physical-bitcoin-etf-prospects-shine?nopaging=1&_cf_chl_jschl_tk_=pmd JsK.fjXz9eAQW9zol0qpzhXDrrl pIVdoCloLXbLjl44-1635476946-0-gqNtZGzNApCjcnBszQql.

³⁹ Id.

performance of bitcoin itself and, at over a billion dollars in assets under management, would cost U.S. investors hundreds of millions of dollars on an annual basis. Such rolling costs would not be required for Spot Bitcoin ETPs that hold bitcoin. Further, Bitcoin Futures ETFs have grown so rapidly that they face potentially running into CME position limits, which would force a Bitcoin Futures ETF to invest in non-futures assets for bitcoin exposure and cause potential investor confusion and lack of certainty about what such Bitcoin Futures ETFs are actually holding to try to get exposure to bitcoin, not to mention completely changing the risk profile associated with such an ETF. While Bitcoin Futures ETFs represent a useful trading tool, they are clearly a sub-optimal structure for U.S. investors that are looking for long-term exposure to bitcoin that will, based on the calculations above, unnecessarily cost U.S. investors millions of dollars every year and the Exchange believes that any proposal to list and trade a Spot Bitcoin ETP should be reviewed by the Commission with this important investor protection context in mind.

As discussed further below, the Commission's primary test in determining whether to approve or disapprove a series of Commodity-Based Trust Shares, a product type which includes Spot Bitcoin ETPs, is whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size in the underlying asset. Previous disapproval orders have made clear that a regulated market of significant size is generally a futures and/or options market rather than the spot commodity markets, which are often unregulated.⁴⁰ Leaving aside the analysis of that

⁴⁰ See Winklevoss Order at 37593, specifically footnote 202, which includes the language from numerous approval orders for which the underlying futures markets formed the basis for approving series of ETPs that hold physical metals, including gold, silver, palladium, platinum, and precious metals more broadly;

standard for now,⁴¹ Cboe believes it would be inconsistent to allow the listing and trading of Bitcoin Futures ETFs that hold primarily CME Bitcoin Futures while simultaneously disapproving Spot Bitcoin ETPs on the basis that the CME Bitcoin Futures market is not a regulated market of significant size. If the CME Bitcoin Futures market were not, in the opinion of the Commission, a regulated market of significant size, permitting Bitcoin Futures ETFs that trade on such market would seem to be inconsistent with the requirement under the Act of being designed to “prevent fraudulent and manipulative acts and practices” as articulated in the Winklevoss Order and other disapproval orders.⁴² One may argue that the 1940 Act provides certain investor protections that could mitigate some of these concerns, but the investor protection mechanisms under the 1940 Act relate primarily to the composition of a 1940 Act fund's board of directors, limitations on leverage and transactions with affiliates, among others. Those requirements – which primarily relate to a 1940 Act fund's internal structure and operations, rather than to the markets for the assets which the 1940 Act fund trades – would not confer additional

and 37600, specifically where the Commission provides that “when the spot market is unregulated – the requirement of preventing fraudulent and manipulative acts may possibly be satisfied by showing that the ETP listing market has entered into a surveillance-sharing agreement with a regulated market of significant size in derivatives related to the underlying asset.” The Exchange believes that these citations are particularly helpful in making clear that the spot market for a spot commodity ETP need not be “regulated” in order for a spot commodity ETP to be approved by the Commission, and in fact that it’s been the common historical practice of the Commission to rely on such derivatives markets as the regulated market of significant size because such spot commodities markets are largely unregulated.

⁴¹ As further outlined below, both the Exchange and the Sponsor believe that the CME Bitcoin Futures market represents a regulated market of significant size and that this proposal and others like it should be approved on this basis.

⁴² 15 U.S.C. 78f(b)(5). For additional detail, see Winklevoss Order at 37600.

protections to investors in relation to the underlying CME Bitcoin Futures market that would justify different regulatory outcomes for Bitcoin Futures ETFs and Spot Bitcoin ETPs.⁴³

Further to this point, part of the analysis of the regulated market of significant size test is whether an underlying market is sufficiently large to support an ETP is whether trading in the ETP is likely to be the predominant influence on prices in the market of significant size.⁴⁴ According to publicly available data, the largest Bitcoin Futures ETF represents 3,233 contracts⁴⁵ of the total 8,683 contracts of open interest in November CME Bitcoin Futures⁴⁶ as of 10/27/21 (roughly 37% of open interest). This seems to directly contradict the previously articulated standards by the Commission in the disapproval orders issued for Spot Bitcoin ETPs related to whether the trading in the ETP would be the predominant influence on prices in that market.⁴⁷ While it is difficult at this point to assess the direct impact on pricing of the CME Bitcoin Futures based on the launch of the Bitcoin Futures ETFs, such circumstances, especially related to the generally predictable trading behaviors of an ETF, seem to have the potential to represent a significant influence over pricing in the market. Allowing Spot Bitcoin ETPs to come to market will alleviate these concerns because such ETPs would primarily be transacting in

⁴³ The largest OTC Bitcoin Funds holding spot Bitcoin today are not 1940 Act Funds.

⁴⁴ See Winklevoss Order at 37594.

⁴⁵ See Fund Holdings Information available at <https://www.proshares.com/funds/bito.html>.

⁴⁶ See Volume and Open Interest data available at <https://www.cmegroup.com/markets/cryptocurrencies/bitcoin/bitcoin.volume.html>

⁴⁷ See Winklevoss Order at 37594-37595.

the spot bitcoin market on a more limited basis (acquiring spot bitcoin as needed and not rolling contracts on a monthly basis). As further discussed below, research indicates that the CME Bitcoin Futures market is a regulated market of significant size that generally leads price discovery across USD-based trading in bitcoin futures and spot markets globally.

To the extent the Commission may view differential treatment of Bitcoin Futures ETFs and Spot Bitcoin ETPs as warranted based on the Commission's concerns about the custody of physical Bitcoin that a Spot Bitcoin ETP would hold (compared to cash-settled futures contracts),⁴⁸ the Sponsor believes this concern is mitigated to a significant degree by the custodial arrangements that the Trust has contracted with Gemini Trust Company, LLC (the "Custodian") to provide. In the Custody Statement, the Commission stated that the fourth step that a broker-dealer could take to shield traditional securities customers and others from the risks and consequences of digital asset security fraud, theft, or loss is to establish, maintain, and enforce reasonably designed written policies, procedures, and controls for safekeeping and demonstrating the broker-dealer has exclusive possession or control over digital asset securities that are consistent with industry best practices to protect against the theft, loss, and unauthorized and accidental use of the private keys necessary to access and transfer the digital asset securities the broker-dealer holds in custody. While Bitcoin is not a security and Gemini is not a broker-dealer, the Sponsor believes that similar considerations apply to the Custodian's

⁴⁸ See, e.g., Division of Investment Management Staff, Staff Statement on Funds Registered Under the Investment Company Act Investing in the Bitcoin Futures Market, May 11, 2021 ("The Bitcoin futures market also has not presented the custody challenges associated with some cryptocurrency-based investing because the futures are cash-settled").

holding of the Trust's Bitcoin. After diligent investigation, the Sponsor believes that the Custodian's policies, procedures, and controls for safekeeping, exclusively possessing, and controlling the Trust's Bitcoin holdings are consistent with industry best practices to protect against the theft, loss, and unauthorized and accidental use of the private keys. As one of the first two institutions to be granted a trust company charter by the New York Department of Financial Services in 2015, the Sponsor notes that the Custodian is subject to extensive regulation and has one of the longest track records in the industry of providing custodial services for digital asset private keys in a regulated environment. The Custodian has represented to the Trust that it has never suffered a loss of Bitcoin belonging to customers. Under the circumstances, therefore, to the extent the Commission believes that its concerns about the risks of spot Bitcoin custody justifies differential treatment of a Bitcoin Futures ETF versus a Spot Bitcoin ETP, the Sponsor believes that the fact that the Custodian employs the same types of policies, procedures, and safeguards in handling spot Bitcoin that the Commission has stated that broker-dealers should implement with respect to digital asset securities would appear to weaken the justification for treating a Bitcoin Futures ETF compared to a Spot Bitcoin ETP differently due to spot Bitcoin custody concerns.

Based on the foregoing, the Exchange and Sponsor believe that any objective review of the Spot Bitcoin ETPs to the already listed and traded Bitcoin Futures ETFs would lead to the conclusion that Spot Bitcoin ETPs should be available to U.S. investors and, as such, this proposal and other comparable proposals to list and trade Spot Bitcoin ETPs should be approved by the Commission. Stated simply, U.S. investors will lose hundreds of millions of dollars on an annual basis from holding Bitcoin Futures ETFs

which could be prevented by the Commission approving Spot Bitcoin ETPs.

Additionally, any concerns related to preventing fraudulent and manipulative acts and practices related to Spot Bitcoin ETPs would apply equally to the spot markets underlying the futures contracts held by a Bitcoin Futures ETF. While the 1940 Act does offer certain investor protections, those protections do not relate to mitigating potential manipulation of the holdings of an ETF in a way that warrants distinction between Bitcoin Futures ETFs and Spot Bitcoin ETPs. To be clear, both the Exchange and Sponsor believe that the CME Bitcoin Futures market is a regulated market of significant size and that such manipulation concerns are mitigated, as described extensively below.

After allowing the listing and trading of Bitcoin Futures ETFs that hold primarily CME Bitcoin Futures, however, the only consistent outcome would be approving Spot Bitcoin ETPs on the basis that the CME Bitcoin Futures market is a regulated market of significant size. Including in the analysis the significant and preventable losses to U.S. investors that comes with Bitcoin Futures ETFs, disapproving Spot Bitcoin ETPs seems even more arbitrary and capricious. Given the current landscape, approving this proposal (and others like it) and allowing Spot Bitcoin ETPs to be listed and traded alongside Bitcoin Futures ETFs would establish a consistent regulatory approach, provide U.S. investors with choice in product structures for bitcoin exposure, and offer flexibility in the means of gaining exposure to bitcoin through transparent, regulated, U.S. exchange-listed vehicles.

OTC Bitcoin Funds and Investor Protection

Over the past 1.5 years, U.S. investor exposure to bitcoin through OTC Bitcoin Funds has grown into the tens of billions of dollars. With that growth, so too has grown

the potential risk to U.S. investors. As described below, premium and discount volatility, high fees, insufficient disclosures, and technical hurdles are putting U.S. investor money at risk on a daily basis that could potentially be eliminated through access to a bitcoin ETP. The Exchange understands the Commission's previous focus on potential manipulation of a bitcoin ETP in prior disapproval orders, but now believes that such concerns have been sufficiently mitigated and that the growing and quantifiable investor protection concerns should be the central consideration as the Commission reviews this proposal. As such, the Exchange believes that approving this proposal (and comparable proposals submitted hereafter) provides the Commission with the opportunity to allow U.S. investors with access to bitcoin in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks associated with investing in operating companies that are imperfect proxies for bitcoin exposure; and (iv) providing an alternative to custodial spot bitcoin.

(i) OTC Bitcoin Funds and Premium Volatility

OTC Bitcoin Funds are generally designed to provide exposure to bitcoin in a manner similar to the Shares. However, unlike the Shares, OTC Bitcoin Funds are unable to freely offer creation and redemption in a way that incentivizes market participants to keep their shares trading in line with their NAV⁴⁹ and, as such, frequently trade at a price

⁴⁹ Because OTC Bitcoin Funds are not listed on an exchange, they are also not subject to the same transparency and regulatory oversight by a listing exchange as the Shares would be. In the case of the Trust, the existence of a surveillance-sharing agreement between the Exchange and the Bitcoin Futures market results in increased investor protections compared to OTC Bitcoin Funds.

that is out of line with the value of their assets held. Historically, OTC Bitcoin Funds have traded at a significant premium to NAV.⁵⁰

Trading at a premium (or potentially a discount) is not unique to OTC Bitcoin Funds and is not in itself problematic, however the AUM for OTC Bitcoin Funds has grown significantly in the past 18 months. In fact, the largest OTC Bitcoin Fund has grown to \$39.7 billion in AUM⁵¹ and has historically traded at a discount or premium ranging from roughly a fifteen percent discount to a forty percent premium, though it has seen premiums at times above one hundred percent.⁵² As of October 29th, 2021, the discount was approximately 13%, meaning that the total value of the shares was \$5.3 billion less than the fund's total assets on that day. In other words, this shortfall represents an unrealized loss of approximately \$5.3 billion due to the lack of redemption options. These numbers are only associated with a single OTC Bitcoin Fund – as more and more OTC Bitcoin Funds come to market and more investor assets flood into them to get access to bitcoin exposure, the potential dollars at risk will only increase.

⁵⁰ The inability to trade in line with NAV may at some point result in OTC Bitcoin Funds trading at a discount to their NAV. While that has not historically been the case, such a scenario would give rise to nearly identical potential issues related to trading at a premium as described below.

⁵¹ As of October 29, 2021, according to information provided through Grayscale's twitter account. Compare to an AUM of approximately \$2.6 billion on February 26, 2020, the date on which the Commission issued the most recent disapproval order for a bitcoin ETP. See Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR-NYSEArca-2019-39) (the "Wilshire Phoenix Disapproval"). While the price of one bitcoin has increased approximately 579% in the intervening period, the total AUM has increased by approximately 1428%, indicating that the increase in AUM was created beyond just price appreciation in bitcoin.

⁵² See "Traders Piling Into Overvalued Crypto Funds Risk a Painful Exit" (February 4, 2021) available at: <https://www.bloomberg.com/news/articles/2021-02-04/bitcoin-one-big-risk-when-investing-in-crypto-funds>

This raises significant investor protection issues in several ways. First, the most obvious issue is that investors are buying shares of a fund that experiences significant volatility in its premium and discount outside of the fluctuations in price of the underlying asset. Even operating within the normal premium and discount range, it's possible for an investor to buy shares of an OTC Bitcoin Fund only to have those shares quickly lose 10% or more in dollar value excluding any movement of the price of bitcoin. That is to say – the price of bitcoin could have stayed exactly the same from market close on one day to market open the next, yet the value of the shares held by the investor decreased only because of the fluctuation of the premium. As more investment vehicles, including mutual funds and ETFs, seek to gain exposure to bitcoin, the easiest option for a buy and hold strategy for such vehicles is often an OTC Bitcoin Fund, meaning that even investors that do not directly buy OTC Bitcoin Funds can be disadvantaged by extreme premiums (or discounts) and premium volatility.

These extreme premiums and discounts also create potential investor protection issues because of the limited access to direct interaction with the OTC Bitcoin Fund. Generally speaking, only accredited investors are able to create shares with the issuing trust, which means that they are able to buy shares directly from the trust at NAV (by either delivering cash or bitcoin). This provides more sophisticated parties with the opportunity to take advantage of the premium/discount volatility through arbitrage trades, sometimes at the expense of retail investors that purchase shares on the OTC markets.

As noted above, the existence of the premiums and discounts as well as the premium collection opportunity is not unique to OTC Bitcoin Funds and does not in itself

warrant the approval of an exchange traded product.⁵³ What makes this situation unique is that such a premium can exist in a product with \$31 billion in assets under management,⁵⁴ that billions of retail investor dollars are constantly under threat of premium volatility,⁵⁵ and that premium and discount volatility is generally captured by more sophisticated investors, often on a riskless basis. The Exchange understands the Commission's focus on potential manipulation of a bitcoin ETP in prior disapproval orders, but now believes that current circumstances warrant that this direct, quantifiable investor protection issue should be the central consideration as the Commission determines whether to approve this proposal.

(ii) *Spot and Proxy Exposure*

Exposure to bitcoin through an ETP also presents certain advantages for retail investors compared to buying spot bitcoin directly. The most notable advantage from the Sponsor's perspective is the use of the Custodian, as further described below, to custody the Trust's bitcoin assets. The Sponsor has carefully selected the Custodian, chartered as a limited purpose trust company and regulated by NYDFS, due to its manner of holding the Trust's bitcoin. According to the Sponsor, this includes, among others, the use of "cold"

⁵³ The Exchange notes, for example, that similar premiums and premium volatility exist for other non-bitcoin cryptocurrency related over-the-counter funds, but that the size and investor interest in those funds does not give rise to the same investor protection concerns that exist for OTC Bitcoin Funds.

⁵⁴ At \$31 billion in AUM, the largest OTC Bitcoin Fund would be the 44th largest out of roughly 2,600 U.S. listed ETPs.

⁵⁵ The Exchange notes that in two recent incidents, the premium dropped from 28.28% to 12.29% from the close on 3/19/20 to the close on 3/20/20 and from 38.40% to 21.05% from the close on 5/13/19 to the close on 5/14/19. Similarly, over the period of 12/21/20 to 1/21/21, the premium went from 40.18% to 2.79%. While the price of bitcoin appreciated significantly during this period and NAV per share increased by 41.25%, the price per share increased by only 3.58%.

(offline) storage to hold private keys and the employment by the Custodian of a certain degree of cybersecurity measures and operational best practices. By contrast, an individual retail investor holding bitcoin through a cryptocurrency exchange lacks these protections. Typically, retail exchanges hold most, if not all, retail investors' bitcoin in "hot" (Internet-connected) storage and do not make any commitments to indemnify retail investors or to observe any particular cybersecurity standard. Meanwhile, a retail investor holding spot bitcoin directly in a self-hosted wallet may suffer from inexperience in private key management (*e.g.*, insufficient password protection, lost key, etc.), which could cause them to lose some or all of their bitcoin holdings. In the Custodian, the Sponsor believes that the Trust has engaged a regulated and licensed entity highly experienced in bitcoin custody, with dedicated, trained employees and procedures to manage the private keys to the Trust's bitcoin, and which is accountable for failures. Thus, with respect to custody of the Trust's bitcoin assets, the Trust presents advantages from an investment protection standpoint for retail investors compared to owning spot bitcoin directly.

Finally, as described in the Background section above, recently a number of operating companies engaged in unrelated businesses – such as Tesla (a car manufacturer) and MicroStrategy (an enterprise software company) – have announced investments as large as \$5.3 billion in bitcoin.⁵⁶ Without access to bitcoin exchange-traded products, retail investors seeking investment exposure to bitcoin may end up

⁵⁶ See MicroStrategy recently announced that it has purchased an additional 5,000 bitcoin bringing its total holdings to 114,042 bitcoin. See: <https://www.marketwatch.com/story/microstrategy-buys-more-than-5-000-bitcoins-in-3-weeks-while-it-sells-its-own-stock-11631550478>

purchasing shares in these companies in order to gain the exposure to bitcoin that they seek.⁵⁷ In fact, mainstream financial news networks have written a number of articles providing investors with guidance for obtaining bitcoin exposure through publicly traded companies (such as MicroStrategy, Tesla, and bitcoin mining companies, among others) instead of dealing with the complications associated with buying spot bitcoin in the absence of a bitcoin ETP.⁵⁸ Such operating companies, however, are imperfect bitcoin proxies and provide investors with partial bitcoin exposure paired with a host of additional risks associated with whichever operating company they decide to purchase. Additionally, the disclosures provided by the aforementioned operating companies with respect to risks relating to their bitcoin holdings are generally substantially smaller than the registration statement of a bitcoin ETP, including the Registration Statement, typically amounting to a few sentences of narrative description and a handful of risk factors.⁵⁹ In other words, investors seeking bitcoin exposure through publicly traded companies are gaining only partial exposure to bitcoin and are not fully benefitting from

⁵⁷ In August 2017, the Commission's Office of Investor Education and Advocacy warned investors about situations where companies were publicly announcing events relating to digital coins or tokens in an effort to affect the price of the company's publicly traded common stock. See https://www.sec.gov/oiea/investor-alerts-and-bulletins/ia_icorelatedclaims

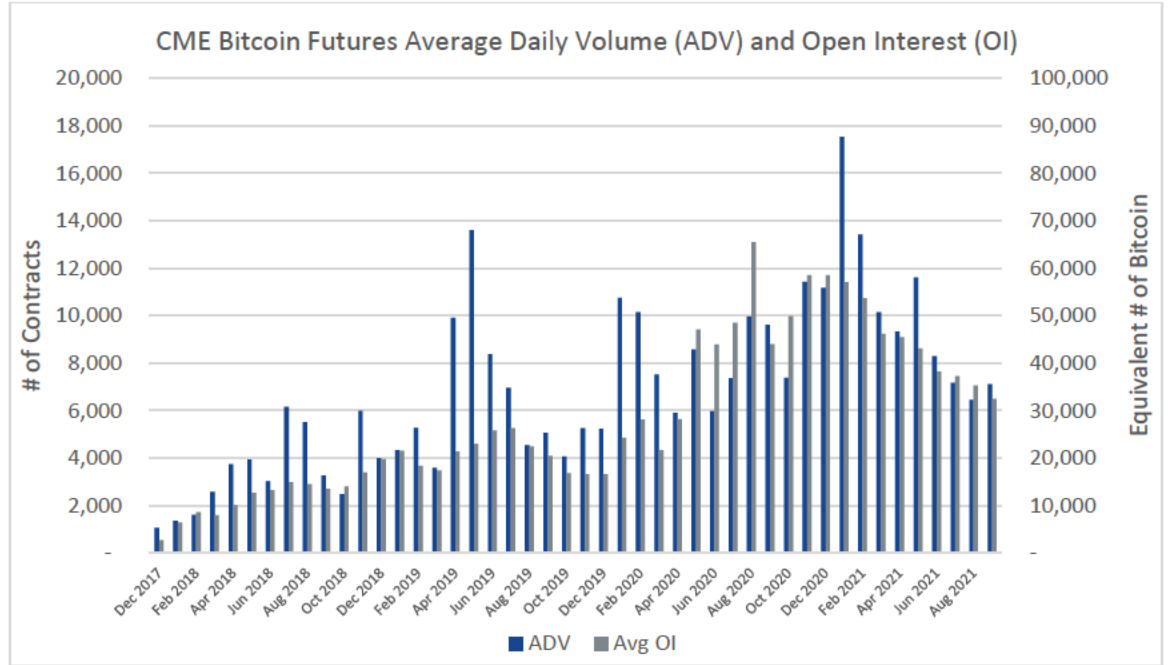
⁵⁸ See e.g., “7 public companies with exposure to bitcoin” (February 8, 2021) available at: <https://finance.yahoo.com/news/7-public-companies-with-exposure-to-bitcoin-154201525.html>; and “Want to get in the crypto trade without holding bitcoin yourself? Here are some investing ideas” (February 19, 2021) available at: <https://www.cnbc.com/2021/02/19/ways-to-invest-in-bitcoin-without-holding-the-cryptocurrency-yourself-.html>.

⁵⁹ See, e.g., Tesla 10-K for the year ended December 31, 2020, which mentions bitcoin just nine times: https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000156459021004599/tsla-10k_20201231.htm

the risk disclosures and associated investor protections that come from the securities registration process.

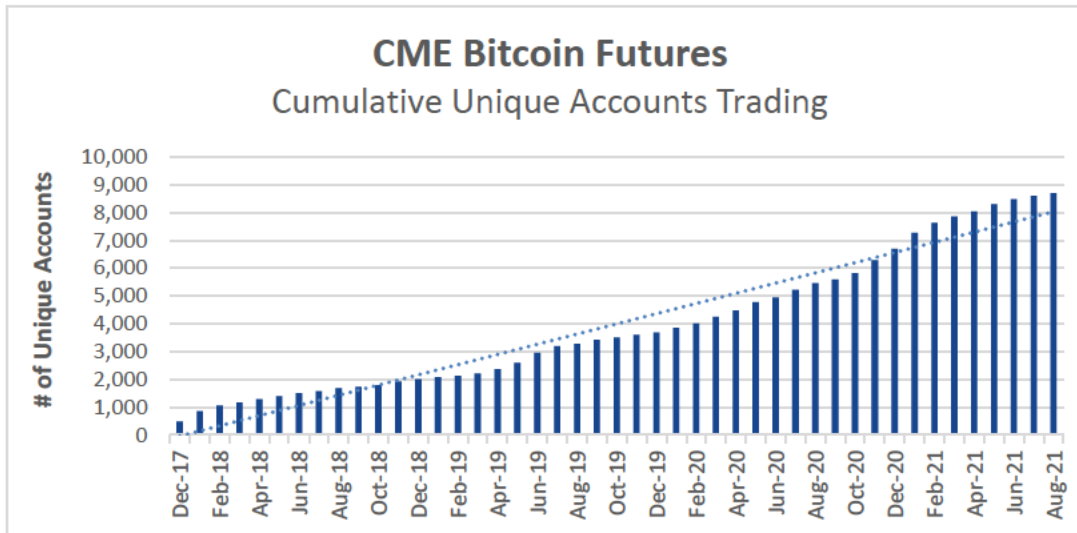
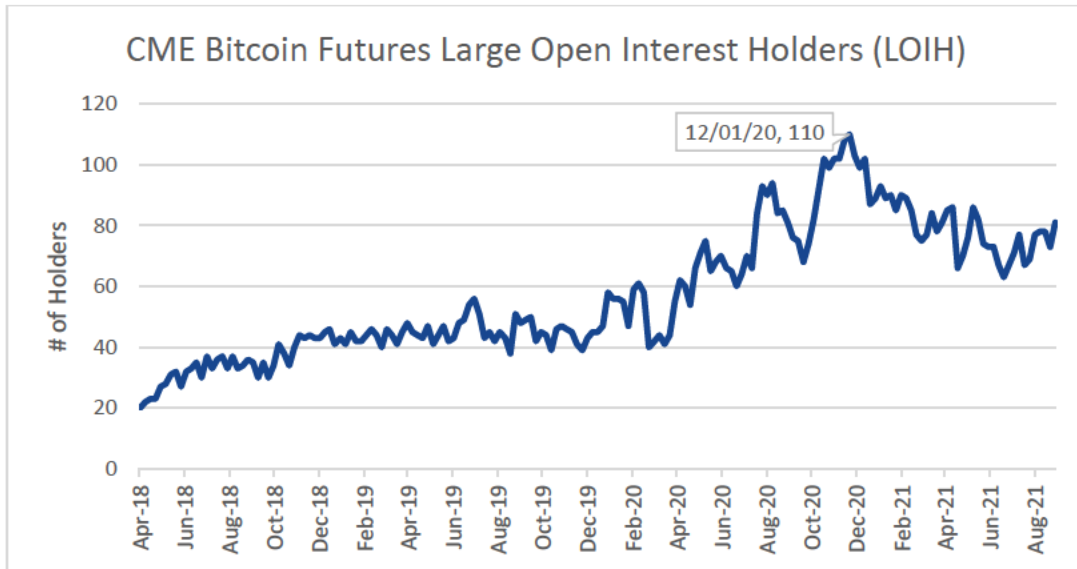
Bitcoin Futures

CME began offering trading in Bitcoin Futures in 2017. Each contract represents five bitcoin and is based on the CME CF Bitcoin Reference Rate.⁵⁸ The contracts trade and settle like other cash-settled commodity futures contracts. Nearly every measurable metric related to Bitcoin Futures has trended consistently up since launch and/or accelerated upward in the past year. For example, there was approximately \$12 billion in trading in Bitcoin Futures in August 2021 compared to \$3.9 billion, \$4.5 billion, and \$9 billion in total trading in August 2017, August 2018, and August 2019, respectively. Bitcoin Futures traded over \$500 million and represented \$1.5 billion in open interest compared to \$115 million in December 2019. This general upward trend in trading volume and open interest is captured in the following chart. (Source: CME, Bloomberg 8/31/21)



Similarly, the number of large open interest holders⁶⁰ has continued to increase even as the price of bitcoin has risen, as have the number of unique accounts trading Bitcoin Futures.

⁶⁰ A large open interest holder in Bitcoin Futures is an entity that holds at least 25 contracts, which is the equivalent of 125 bitcoin. At a price of approximately \$46,996 per bitcoin on 8/31/21, more than 80 firms had outstanding positions of greater than \$5.8 million in Bitcoin Futures.



The Sponsor further believes that academic research corroborates the overall trend outlined above and supports the thesis that the Bitcoin Futures pricing leads the spot market and, thus, a person attempting to manipulate the Shares would also have to trade on that market to manipulate the ETP. Specifically, the Sponsor believes that such research indicates that bitcoin futures lead the bitcoin spot market in price formation.⁶¹

⁶¹ See Hu, Y., Hou, Y. and Oxley, L. (2019). “What role do futures markets play in Bitcoin pricing? Causality, cointegration and price discovery from a time-varying perspective” (available at:

Section 6(b)(5) and the Applicable Standards

The Commission has approved numerous series of Trust Issued Receipts,⁶² including Commodity-Based Trust Shares,⁶³ to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices;⁶⁴ and (ii) the requirement that an exchange proposal be designed, in

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7481826/>). This academic research paper concludes that “There exist no episodes where the Bitcoin spot markets dominates the price discovery processes with regard to Bitcoin futures. This points to a conclusion that the price formation originates solely in the Bitcoin futures market. We can, therefore, conclude that the Bitcoin futures markets dominate the dynamic price discovery process based upon time-varying information share measures. Overall, price discovery seems to occur in the Bitcoin futures markets rather than the underlying spot market based upon a time-varying perspective.”

⁶² See Exchange Rule 14.11(f).

⁶³ Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

⁶⁴ As the Exchange has stated in a number of other public documents, it continues to believe that bitcoin is resistant to price manipulation and that “other means to prevent fraudulent and manipulative acts and practices” exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of bitcoin trading render it difficult and prohibitively costly to manipulate the price of bitcoin. The fragmentation across bitcoin platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of bitcoin prices through continuous trading activity challenging. To the extent that there are bitcoin exchanges engaged in or allowing wash trading or other activity intended to manipulate the price of bitcoin on other markets, such pricing does not normally impact prices on other exchange because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the bitcoin markets and the presence of arbitrageurs in those markets means that the manipulation of the price of bitcoin price on any single venue

general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that it has sufficiently demonstrated that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal. Specifically, the Exchange lays out below why it believes that the significant increase in trading volume in Bitcoin Futures, the growth of liquidity at the inside in the spot market for bitcoin, and certain features of the Shares and the Benchmark mitigate potential manipulation concerns to the point that the investor protection issues that have arisen from the rapid growth of over-the-counter bitcoin funds since the Commission last reviewed an exchange proposal to list and trade a bitcoin ETP, including premium volatility and management fees, should be the central consideration as the Commission determines whether to approve this proposal.

(i) Designed to Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place⁶⁵ with a regulated

would require manipulation of the global bitcoin price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular bitcoin exchange or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

⁶⁵ As previously articulated by the Commission, “The standard requires such surveillance-sharing agreements since “they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully

market of significant size.⁶⁶ Both the Exchange and CME are members of the Intermarket Surveillance Group (the “ISG”).⁶⁷ The only remaining issue to be addressed is whether the Bitcoin Futures market constitutes a market of significant size, which the Exchange believes that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood

investigate a manipulation if it were to occur.” The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.” The Commission has historically held that joint membership in ISG constitutes such a surveillance sharing agreement. See Wilshire Phoenix Disapproval.

⁶⁶ As noted above, the precedent makes clear that the spot market for a series of Commodity-Based Trust Shares need not be “regulated” in order to be consistent with the requirement under the Act that the exchange proposal be designed to “prevent fraudulent and manipulative acts and practices,” and in fact that it’s been the common historical practice of the Commission to rely on such derivatives markets as the regulated market of significant size because such spot commodities markets are largely unregulated. Specifically, the precedent includes language from numerous approval orders for which the underlying futures markets formed the basis for approving series of ETPs that hold commodities including physical metals, including gold, silver, palladium, platinum, and precious metals more broadly. The Commission also provides that “when the spot market is unregulated – the requirement of preventing fraudulent and manipulative acts may possibly be satisfied by showing that the ETP listing market has entered into a surveillance-sharing agreement with a regulated market of significant size in derivatives related to the underlying asset.” The precedent indicates that common historical practice of the Commission is to rely on such derivatives markets as the regulated market of significant size because such spot commodities markets are largely unregulated. See supra note 39.

⁶⁷ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.⁶⁸

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.⁶⁹

(a) *Manipulation of the ETP*

The significant growth in Bitcoin Futures across each of trading volumes, open interest, large open interest holders, and total market participants since the Wilshire Phoenix Disapproval was issued are reflective of that market’s growing influence on the spot price, which according to the academic research cited above, was already leading the spot price in 2018 and 2019. Where Bitcoin Futures lead the price in the spot market such that a potential manipulator of the bitcoin spot market (beyond just the constituents of the Benchmark⁷⁰) would have to participate in the Bitcoin Futures market, it follows that a

⁶⁸ See Wilshire Phoenix Disapproval.

⁶⁹ See Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a “cannot be manipulated” standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met. *Id.* at 37582.

⁷⁰ As further described below, the “Benchmark” for the Fund is the MVIS® CryptoCompare Bitcoin Benchmark Rate. The current exchange composition of

potential manipulator of the Shares would similarly have to transact in the Bitcoin Futures market because the Benchmark is based on spot prices. Further, the Trust only allows for in-kind creation and redemption, which, as further described below, reduces the potential for manipulation of the Shares through manipulation of the Benchmark or any of its individual constituents, again emphasizing that a potential manipulator of the Shares would have to manipulate the entirety of the bitcoin spot market, which is led by the Bitcoin Futures market. As such, the Exchange believes that part (a) of the significant market test outlined above is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the Shares.

(b) Predominant Influence on Prices in Spot and Bitcoin Futures

The Exchange also believes that trading in the Shares would not be the predominant force on prices in the Bitcoin Futures market (or spot market) for a number of reasons, including the significant volume in the Bitcoin Futures market, the size of bitcoin's market cap (approximately \$1.1 trillion), and the significant liquidity available in the spot market. In addition to the Bitcoin Futures market data points cited above, the spot market for bitcoin is also very liquid. According to data from CoinRoutes from February 2021, the cost to buy or sell \$5 million worth of bitcoin averages roughly 10 basis points with a market impact of 30 basis points.⁷¹ For a \$10 million market order, the

the Benchmark is Bitstamp, Coinbase, Gemini, itBit and Kraken, which are the same constituents that compose the CME CF Bitcoin Reference Rate.

⁷¹ These statistics are based on samples of bitcoin liquidity in USD (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase Pro, Gemini, Bitstamp, Kraken, LMAX Exchange, BinanceUS, and OKCoin during February 2021.

cost to buy or sell is roughly 20 basis points with a market impact of 50 basis points. Stated another way, a market participant could enter a market buy or sell order for \$10 million of bitcoin and only move the market 0.5%. More strategic purchases or sales (such as using limit orders and executing through OTC bitcoin trade desks) would likely have less obvious impact on the market – which is consistent with MicroStrategy, Tesla, and Square being able to collectively purchase billions of dollars in bitcoin. As such, the combination of Bitcoin Futures leading price discovery, the overall size of the bitcoin market, and the ability for market participants, including authorized participants creating and redeeming in-kind with the Trust, to buy or sell large amounts of bitcoin without significant market impact will help prevent the Shares from becoming the predominant force on pricing in either the bitcoin spot or Bitcoin Futures markets, satisfying part (b) of the test outlined above.

(c) Other Means to Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange believes that such conditions are present. Specifically, the significant liquidity in the spot market and the impact of market orders on the overall price of bitcoin mean that attempting to move the price of bitcoin is costly and has grown more expensive over the past year. In January 2020, for example, the cost to buy or sell \$5 million worth of bitcoin averaged roughly 30 basis points (compared to 10 basis points in 2/2021) with a

market impact of 50 basis points (compared to 30 basis points in 2/2021).⁷² For a \$10 million market order, the cost to buy or sell was roughly 50 basis points (compared to 20 basis points in 2/2021) with a market impact of 80 basis points (compared to 50 basis points in 2/2021). As the liquidity in the bitcoin spot market increases, it follows that the impact of \$5 million and \$10 million orders will continue to decrease the overall impact in spot price.

Additionally, offering only in-kind creation and redemption will provide unique protections against potential attempts to manipulate the Shares. While the Sponsor believes that the Benchmark which it uses to value the Trust's bitcoin is itself resistant to manipulation based on the methodology further described below, the fact that creations and redemptions are only available in-kind makes the manipulability of the Benchmark significantly less important. Specifically, because the Trust will not accept cash to buy bitcoin in order to create new shares or, barring a forced redemption of the Trust or under other extraordinary circumstances, be forced to sell bitcoin to pay cash for redeemed shares, the price that the Sponsor uses to value the Trust's bitcoin is not particularly important.⁷³ When authorized participants are creating with the Trust, they need to deliver a certain number of bitcoin per share (regardless of the valuation used) and when they're redeeming, they can similarly expect to receive a certain number of bitcoin per share. As such, even if the price used to value the Trust's bitcoin is manipulated (which

⁷² These statistics are based on samples of bitcoin liquidity in USD (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase Pro, Gemini, Bitstamp, Kraken, LMAX Exchange, BinanceUS, and OKCoin during February 2021.

⁷³ While the Benchmark will not be particularly important for the creation and redemption process, it will be used for calculating fees.

the Sponsor believes that its methodology is resistant to), the ratio of bitcoin per Share does not change and the Trust will either accept (for creations) or distribute (for redemptions) the same number of bitcoin regardless of the value. This not only mitigates the risk associated with potential manipulation, but also discourages and disincentivizes manipulation of the Benchmark because there is little financial incentive to do so.

VanEck Bitcoin Trust

Delaware Trust Company is the trustee (“Trustee”). The State Street Bank and Trust Company will be the administrator (“Administrator”) and transfer agent (“Transfer Agent”). Van Eck Securities Corporation will be the marketing agent (“Marketing Agent”) in connection with the creation and redemption of “Baskets” of Shares. Van Eck Securities Corporation (“VanEck”) provides assistance in the marketing of the Shares. The Custodian, Gemini Trust Company, LLC, will be responsible for custody of the Trust’s bitcoin.

According to the Registration Statement, each Share will represent a fractional undivided beneficial interest in the Trust’s net assets. The Trust’s assets will consist of bitcoin held by the Custodian on behalf of the Trust. The Trust generally does not intend to hold cash or cash equivalents. However, there may be situations where the Trust will unexpectedly hold cash on a temporary basis.

According to the Registration Statement, the Trust is neither an investment company registered under the Investment Company Act of 1940, as amended,⁷⁴ nor a commodity pool for purposes of the Commodity Exchange Act (“CEA”), and neither the Trust nor the Sponsor is subject to regulation as a commodity pool operator or a

⁷⁴ 15 U.S.C. 80a-1.

commodity trading adviser in connection with the Shares.

When the Trust sells or redeems its Shares, it will do so in “in-kind” transactions in blocks of 50,000 Shares (a “Creation Basket”) at the Trust’s NAV. Authorized participants will deliver, or facilitate the delivery of, bitcoin to the Trust’s account with the Custodian in exchange for Shares when they purchase Shares, and the Trust, through the Custodian, will deliver bitcoin to such authorized participants when they redeem Shares with the Trust. Authorized participants may then offer Shares to the public at prices that depend on various factors, including the supply and demand for Shares, the value of the Trust’s assets, and market conditions at the time of a transaction. Shareholders who buy or sell Shares during the day from their broker may do so at a premium or discount relative to the NAV of the Shares of the Trust.

Investment Objective

According to the Registration Statement and as further described below, the investment objective of the Trust is for the Shares to reflect the performance of the MVIS® CryptoCompare Bitcoin Benchmark Rate less the expenses of the Trust’s operations. In seeking to achieve its investment objective, the Trust will hold bitcoin and will value its Shares daily based on the reported MVIS® CryptoCompare Bitcoin Benchmark Rate and process all creations and redemptions in-kind in transactions with authorized participants. The Trust is not actively managed.

The Benchmark

As described in the Registration Statement, the Fund will use the Benchmark to calculate the Trust's NAV. The Benchmark is designed to be a robust price for bitcoin in USD and there is no component other than bitcoin in the index. The underlying exchanges are sourced from the industry leading CryptoCompare Exchange Benchmark review report. CryptoCompare Exchange Benchmark was established in 2019 as a tool designed to bring clarity to the digital asset exchange sector by providing a framework for assessing risk and in turn bringing transparency and accountability to a complex and rapidly evolving market.⁷⁵ The current exchange composition of the Benchmark is Bitstamp, Coinbase, Gemini, itBit and Kraken, which are the same constituents that compose the CME CF Bitcoin Reference Rate.

In calculating the MVIS® CryptoCompare Bitcoin Benchmark Rate, the methodology captures trade prices and sizes from exchanges and examines twenty three-minute periods leading up to 4:00 p.m. EST. It then calculates an equal-weighted average of the volume-weighted median price of these twenty three-minute periods, removing the

⁷⁵ The CryptoCompare Exchange Benchmark methodology utilizes a combination of qualitative and quantitative metrics to analyze a comprehensive data set across eight categories of evaluation legal/regulation, KYC/transaction risk, data provision, security, team/exchange, asset quality/diversity, market quality and negative events. The CryptoCompare Exchange Benchmark review report assigns a grade to each exchange which helps identify what it believes to be the lowest risk exchanges in the industry. Based on the CryptoCompare Exchange Benchmark, MVIS initially selects the top five exchanges by rank for inclusion in the MVIS® CryptoCompare Bitcoin Benchmark Rate. If an eligible exchange is downgraded by two or more notches in a semi-annual review and is no longer in the top five by rank, it is replaced by the highest ranked non-component exchange. Adjustments to exchange coverage are announced four business days prior to the first business day of each of March and September at 23:00 CET. The MVIS® CryptoCompare Bitcoin Benchmark Rate is rebalanced at 16:00:00 GMT/BST on the last business day of each of February and August.

highest and lowest contributed prices. Using twenty consecutive three-minute segments over a sixty-minute period means malicious actors would need to sustain efforts to manipulate the market over an extended period of time, or would need to replicate efforts multiple times across exchanges, potentially triggering review. This extended period also supports authorized participant activity by capturing volume over a longer time period, rather than forcing authorized participants to mark an individual close or auction. The use of a median price reduces the ability of outlier prices to impact the NAV, as it systematically excludes those prices from the NAV calculation. The use of a volume-weighted median (as opposed to a traditional median) serves as an additional protection against attempts to manipulate the NAV by executing a large number of low-dollar trades, because any manipulation attempt would have to involve a majority of global spot bitcoin volume in a three-minute window to have any influence on the NAV. As discussed in the Registration Statement, removing the highest and lowest prices further protects against attempts to manipulate the NAV, requiring bad actors to act on multiple exchanges at once to have any ability to influence the price.

Availability of Information

In addition to the price transparency of the Benchmark, the Trust will provide information regarding the Trust's bitcoin holdings as well as additional data regarding the Trust. The Trust will provide an Intraday Indicative Value ("IIV") per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.). The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that

value during Regular Trading Hours to reflect changes in the value of the Trust's bitcoin holdings during the trading day.

The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours by one or more major market data vendors. In addition, the IIV will be available through on-line information services.

The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV and the reported closing price; (b) the BZX Official Closing Price⁷⁶ in relation to the NAV as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV; (c) data in chart form displaying the frequency distribution of discounts and premiums of the Official Closing Price against the NAV, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The Trust will also disseminate the Trust's holdings on a daily basis on the Trust's website. The price of bitcoin will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours. Information about the Benchmark, including key elements of how the Benchmark is calculated, will be publicly available at www.mvis-indices.com/.

⁷⁶ As defined in Rule 11.23(a)(3), the term "BZX Official Closing Price" shall mean the price disseminated to the consolidated tape as the market center closing trade.

The NAV for the Trust will be calculated by the Administrator once a day and will be disseminated daily to all market participants at the same time. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the Consolidated Tape Association (“CTA”).

Quotation and last sale information for bitcoin is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters, as well as the Benchmark. Information relating to trading, including price and volume information, in bitcoin is available from major market data vendors and from the exchanges on which bitcoin are traded. Depth of book information is also available from bitcoin exchanges. The normal trading hours for bitcoin exchanges are 24 hours per day, 365 days per year.

The Bitcoin Custodian

Gemini Trust Company, LLC serves as the Trust's Custodian and is a fiduciary under § 100 of the New York Banking Law. The Custodian is authorized to serve as the Trust's custodian under the Trust Agreement and pursuant to the terms and provisions of the Custody Agreement. The Custodian's services (i) allow bitcoin to be deposited from a public blockchain address to the Trust's bitcoin account and (ii) allow bitcoin to be withdrawn from the bitcoin account to a public blockchain address as instructed by the Trust. The Custody Agreement requires the Custodian to hold the Trust's bitcoin in cold storage, unless required to facilitate withdrawals as a temporary measure. The Custodian will use segregated cold storage bitcoin addresses for the Trust which are separate from the bitcoin addresses that the Custodian uses for its other customers and which are directly verifiable via the Bitcoin Blockchain. The Custodian will safeguard the private keys to the bitcoin associated with the Trust's bitcoin account. The Custodian will at all times record and identify in its books and records that such bitcoins constitute the property of the Trust. The Custodian will not withdraw the Trust's bitcoin from the Trust's account with the Custodian, or loan, hypothecate, pledge or otherwise encumber the Trust's bitcoin, without the Trust's instruction.

If the Custody Agreement terminates, the Sponsor may appoint another custodian and the Trust may enter into a custodian agreement with such custodian.

Net Asset Value

NAV means the total assets of the Trust including, but not limited to, all bitcoin and cash, if any, less total liabilities of the Trust, each determined on the basis of generally accepted accounting principles. The Administrator will determine the NAV of

the Trust on each day that the Exchange is open for regular trading, as promptly as practical after 4:00 p.m. EST. The NAV of the Trust is the aggregate value of the Trust's assets less its estimated accrued but unpaid liabilities (which include accrued expenses). In determining the Trust's NAV, the Administrator values the bitcoin held by the Trust based on the price set by the MVIS® CryptoCompare Bitcoin Benchmark Rate as of 4:00 p.m. EST. The Administrator also determines the NAV per Share.

Creation and Redemption of Shares

According to the Registration Statement, on any business day, an authorized participant may place an order to create one or more baskets. Purchase orders must be placed by 4:00 p.m. Eastern Time, or the close of regular trading on the Exchange, whichever is earlier. The day on which an order is received is considered the purchase order date. The total deposit of bitcoin required is an amount of bitcoin that is in the same proportion to the total assets of the Trust, net of accrued expenses and other liabilities, on the date the order to purchase is properly received, as the number of Shares to be created under the purchase order is in proportion to the total number of Shares outstanding on the date the order is received. Each night, the Sponsor will publish the amount of bitcoin that will be required in exchange for each creation order. The Administrator determines the required deposit for a given day by dividing the number of bitcoin held by the Trust as of the opening of business on that business day, adjusted for the amount of bitcoin constituting estimated accrued but unpaid fees and expenses of the Trust as of the opening of business on that business day, by the quotient of the number of Shares outstanding at the opening of business divided by 50,000. The procedures by which an

authorized participant can redeem one or more Creation Baskets mirror the procedures for the creation of Creation Baskets.

Rule 14.11(e)(4) – Commodity-Based Trust Shares

The Shares will be subject to BZX Rule 14.11(e)(4), which sets forth the initial and continued listing criteria applicable to Commodity-Based Trust Shares. The Exchange will obtain a representation that the Trust’s NAV will be calculated daily and that these values and information about the assets of the Trust will be made available to all market participants at the same time. The Exchange notes that, as defined in Rule 14.11(e)(4)(C)(i), the Shares will be: (a) issued by a trust that holds a specified commodity⁷⁷ deposited with the trust; (b) issued by such trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity; and (c) when aggregated in the same specified minimum number, may be redeemed at a holder’s request by such trust which will deliver to the redeeming holder the quantity of the underlying commodity.

Upon termination of the Trust, the Shares will be removed from listing. The Trustee, Delaware Trust Company, is a trust company having substantial capital and surplus and the experience and facilities for handling corporate trust business, as required under Rule 14.11(e)(4)(E)(iv)(a) and that no change will be made to the trustee without prior notice to and approval of the Exchange. The Exchange also notes that, pursuant to Rule 14.11(e)(4)(F), neither the Exchange nor any agent of the Exchange shall have any

⁷⁷ For purposes of Rule 14.11(e)(4), the term commodity takes on the definition of the term as provided in the Commodity Exchange Act. As noted above, the CFTC has opined that Bitcoin is a commodity as defined in Section 1a(9) of the Commodity Exchange Act. See Coinflip.

liability for damages, claims, losses or expenses caused by any errors, omissions or delays in calculating or disseminating any underlying commodity value, the current value of the underlying commodity required to be deposited to the Trust in connection with issuance of Commodity-Based Trust Shares; resulting from any negligent act or omission by the Exchange, or any agent of the Exchange, or any act, condition or cause beyond the reasonable control of the Exchange, its agent, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission or delay in the reports of transactions in an underlying commodity. Finally, as required in Rule 14.11(e)(4)(G), the Exchange notes that any registered market maker (“Market Maker”) in the Shares must file with the Exchange in a manner prescribed by the Exchange and keep current a list identifying all accounts for trading in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, which the registered Market Maker may have or over which it may exercise investment discretion. No registered Market Maker shall trade in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, in an account in which a registered Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by this Rule. In addition to the existing obligations under Exchange rules regarding the production of books and records (see, e.g., Rule 4.2), the registered Market Maker in Commodity-Based Trust Shares shall make available to the Exchange such books, records or other information pertaining to transactions by such

entity or registered or non-registered employee affiliated with such entity for its or their own accounts for trading the underlying physical commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, as may be requested by the Exchange.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. The Exchange will halt trading in the Shares under the conditions specified in BZX Rule 11.18. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the bitcoin underlying the Shares; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Rule 14.11(e)(4)(E)(ii), which sets forth circumstances under which trading in the Shares may be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. BZX will allow trading in the Shares during all trading sessions on the Exchange. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in BZX Rule 11.11(a) the minimum price variation for quoting and entry of orders in securities traded on the Exchange is \$0.01 where the price is greater than \$1.00 per share or \$0.0001 where the price is less than \$1.00 per share.

Surveillance

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. The Exchange may obtain information regarding trading in the Shares and Bitcoin Futures via ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.⁷⁸

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (i) the procedures for the creation and redemption of Baskets (and that the Shares are not individually redeemable); (ii) BZX Rule 3.7, which imposes suitability obligations on

⁷⁸ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

Exchange members with respect to recommending transactions in the Shares to customers; (iii) how information regarding the IIV and the Trust's NAV are disseminated; (iv) the risks involved in trading the Shares outside of Regular Trading Hours⁷⁹ when an updated IIV will not be calculated or publicly disseminated; (v) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (vi) trading information.

In addition, the Information Circular will advise members, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Shares. Members purchasing the Shares for resale to investors will deliver a prospectus to such investors. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

(b) Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act⁸⁰ in general and Section 6(b)(5) of the Act⁸¹ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

⁷⁹ Regular Trading Hours is the time between 9:30 a.m. and 4:00 p.m. Eastern Time.

⁸⁰ 15 U.S.C. 78f.

⁸¹ 15 U.S.C. 78f(b)(5).

The Commission has approved numerous series of Trust Issued Receipts,⁸² including Commodity-Based Trust Shares,⁸³ to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices;⁸⁴ and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest.

⁸² See Exchange Rule 14.11(f).

⁸³ Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

⁸⁴ As the Exchange has stated in a number of other public documents, it continues to believe that bitcoin is resistant to price manipulation and that "other means to prevent fraudulent and manipulative acts and practices" exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of bitcoin trading render it difficult and prohibitively costly to manipulate the price of bitcoin. The fragmentation across bitcoin platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of bitcoin prices through continuous trading activity challenging. To the extent that there are bitcoin exchanges engaged in or allowing wash trading or other activity intended to manipulate the price of bitcoin on other markets, such pricing does not normally impact prices on other exchange because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the bitcoin markets and the presence of arbitrageurs in those markets means that the manipulation of the price of bitcoin price on any single venue would require manipulation of the global bitcoin price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular bitcoin exchange or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

The Exchange believes that the proposal is, in particular, designed to protect investors and the public interest. Over the past 1.5 years, U.S. investor exposure to bitcoin through OTC Bitcoin Funds has grown into the tens of billions of dollars. With that growth, so too has grown the potential risk to U.S. investors. Premium and discount volatility, high fees, insufficient disclosures, and technical hurdles are putting U.S. investor money at risk on a daily basis that could potentially be eliminated through access to a bitcoin ETP. The Exchange understands the Commission's previous focus on potential manipulation of a bitcoin ETP in prior disapproval orders, but now believes that such concerns have been sufficiently mitigated and that the growing and quantifiable investor protection concerns should be the central consideration as the Commission reviews this proposal. As such, the Exchange believes that this proposal acts to limit the risk to U.S. investors that are increasingly seeking exposure to bitcoin by providing direct, 1-for-1 exposure to bitcoin in a regulated, transparent, exchange-traded vehicle, specifically by: (i) reducing premium volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks associated with investing in operating companies that are imperfect proxies for bitcoin exposure; and (iv) providing an alternative to custodial spot bitcoin.

The Exchange also believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that it has sufficiently demonstrated that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal. Specifically, the Exchange believes that the significant increase in trading volume in Bitcoin Futures, the growth of liquidity

at the inside in the spot market for bitcoin, and certain features of the Shares and the Benchmark mitigate potential manipulation concerns to the point that the investor protection issues that have arisen from the rapid growth of over-the-counter bitcoin funds since the Commission last reviewed an exchange proposal to list and trade a bitcoin ETP, including premium volatility and management fees, should be the central consideration as the Commission determines whether to approve this proposal.

(i) Designed to Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place⁸⁵ with a regulated market of significant size. Both the Exchange and CME are members of ISG.⁸⁶ The only remaining issue to be addressed is whether the Bitcoin Futures market constitutes a market of significant size, which the Exchange believes that it does. The terms

⁸⁵ As previously articulated by the Commission, “The standard requires such surveillance-sharing agreements since “they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.” The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.” The Commission has historically held that joint membership in ISG constitutes such a surveillance sharing agreement. See Wilshire Phoenix Disapproval.

⁸⁶ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

“significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.⁸⁷

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.⁸⁸

(a) *Manipulation of the ETP*

The significant growth in Bitcoin Futures across each of trading volumes, open interest, large open interest holders, and total market participants since the Wilshire Phoenix Disapproval was issued are reflective of that market’s growing influence on the spot price, which according to the academic research cited above, was already leading the spot price in 2018 and 2019. Where Bitcoin Futures lead the price in the spot market such that a potential manipulator of the bitcoin spot market (beyond just the constituents of the

⁸⁷ See Wilshire Phoenix Disapproval.

⁸⁸ See Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a “cannot be manipulated” standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met. *Id.* at 37582.

Benchmark⁸⁹) would have to participate in the Bitcoin Futures market, it follows that a potential manipulator of the Shares would similarly have to transact in the Bitcoin Futures market because the Benchmark is based on spot prices. Further, the Trust only allows for in-kind creation and redemption, which, as further described below, reduces the potential for manipulation of the Shares through manipulation of the Benchmark or any of its individual constituents, again emphasizing that a potential manipulator of the Shares would have to manipulate the entirety of the bitcoin spot market, which is led by the Bitcoin Futures market. As such, the Exchange believes that part (a) of the significant market test outlined above is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the Shares.

(b) Predominant Influence on Prices in Spot and Bitcoin Futures

The Exchange also believes that trading in the Shares would not be the predominant force on prices in the Bitcoin Futures market (or spot market) for a number of reasons, including the significant volume in the Bitcoin Futures market, the size of bitcoin's market cap (approximately \$1.1 trillion), and the significant liquidity available in the spot market. In addition to the Bitcoin Futures market data points cited above, the spot market for bitcoin is also very liquid. According to data from CoinRoutes from February 2021, the cost to buy or sell \$5 million worth of bitcoin averages roughly 10

⁸⁹ As further described below, the "Benchmark" for the Fund is the MVIS® CryptoCompare Bitcoin Benchmark Rate. The current exchange composition of the Benchmark is Bitstamp, Coinbase, Gemini, itBit and Kraken, which are the same constituents that compose the CME CF Bitcoin Reference Rate.

basis points with a market impact of 30 basis points.⁹⁰ For a \$10 million market order, the cost to buy or sell is roughly 20 basis points with a market impact of 50 basis points. Stated another way, a market participant could enter a market buy or sell order for \$10 million of bitcoin and only move the market 0.5%. More strategic purchases or sales (such as using limit orders and executing through OTC bitcoin trade desks) would likely have less obvious impact on the market – which is consistent with MicroStrategy, Tesla, and Square being able to collectively purchase billions of dollars in bitcoin. As such, the combination of Bitcoin Futures leading price discovery, the overall size of the bitcoin market, and the ability for market participants, including authorized participants creating and redeeming in-kind with the Trust, to buy or sell large amounts of bitcoin without significant market impact will help prevent the Shares from becoming the predominant force on pricing in either the bitcoin spot or Bitcoin Futures markets, satisfying part (b) of the test outlined above.

(c) Other Means to Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange believes that such conditions are present. Specifically, the significant liquidity in the spot market and the impact of market orders on the overall price of bitcoin mean

⁹⁰ These statistics are based on samples of bitcoin liquidity in USD (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase Pro, Gemini, Bitstamp, Kraken, LMAX Exchange, BinanceUS, and OKCoin during February 2021.

that attempting to move the price of bitcoin is costly and has grown more expensive over the past year. In January 2020, for example, the cost to buy or sell \$5 million worth of bitcoin averaged roughly 30 basis points (compared to 10 basis points in 2/2021) with a market impact of 50 basis points (compared to 30 basis points in 2/2021).⁹¹ For a \$10 million market order, the cost to buy or sell was roughly 50 basis points (compared to 20 basis points in 2/2021) with a market impact of 80 basis points (compared to 50 basis points in 2/2021). As the liquidity in the bitcoin spot market increases, it follows that the impact of \$5 million and \$10 million orders will continue to decrease the overall impact in spot price.

Additionally, offering only in-kind creation and redemption will provide unique protections against potential attempts to manipulate the Shares. While the Sponsor believes that the Benchmark which it uses to value the Trust's bitcoin is itself resistant to manipulation based on the methodology further described below, the fact that creations and redemptions are only available in-kind makes the manipulability of the Benchmark significantly less important. Specifically, because the Trust will not accept cash to buy bitcoin in order to create new shares or, barring a forced redemption of the Trust or under other extraordinary circumstances, be forced to sell bitcoin to pay cash for redeemed shares, the price that the Sponsor uses to value the Trust's bitcoin is not particularly important.⁹² When authorized participants are creating with the Trust, they need to

⁹¹ These statistics are based on samples of bitcoin liquidity in USD (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase Pro, Gemini, Bitstamp, Kraken, LMAX Exchange, BinanceUS, and OKCoin during February 2021.

⁹² While the Benchmark will not be particularly important for the creation and redemption process, it will be used for calculating fees.

deliver a certain number of bitcoin per share (regardless of the valuation used) and when they're redeeming, they can similarly expect to receive a certain number of bitcoin per share. As such, even if the price used to value the Trust's bitcoin is manipulated (which the Sponsor believes that its methodology is resistant to), the ratio of bitcoin per Share does not change and the Trust will either accept (for creations) or distribute (for redemptions) the same number of bitcoin regardless of the value. This not only mitigates the risk associated with potential manipulation, but also discourages and disincentivizes manipulation of the Benchmark because there is little financial incentive to do so.

Commodity-Based Trust Shares

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed on the Exchange pursuant to the initial and continued listing criteria in Exchange Rule 14.11(e)(4). The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. The Exchange may obtain information

regarding trading in the Shares and listed bitcoin derivatives via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

Availability of Information

The Exchange also believes that the proposal promotes market transparency in that a large amount of information is currently available about bitcoin and will be available regarding the Trust and the Shares. In addition to the price transparency of the Benchmark, the Trust will provide information regarding the Trust's bitcoin holdings as well as additional data regarding the Trust. The Trust will provide an IIV per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.). The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the value of the Trust's bitcoin holdings during the trading day.

The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours by one or more major market data vendors. In addition, the IIV will be available through on-line information services.

The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV and the reported closing price; (b) the BZX Official Closing Price in relation to the NAV as of the time the NAV is calculated and a calculation of the

premium or discount of such price against such NAV; (c) data in chart form displaying the frequency distribution of discounts and premiums of the Official Closing Price against the NAV, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The Trust will also disseminate the Trust's holdings on a daily basis on the Trust's website. The price of bitcoin will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours. Information about the Benchmark, including key elements of how the Benchmark is calculated, will be publicly available at www.mvis-indices.com/.

The NAV for the Trust will be calculated by the Administrator once a day and will be disseminated daily to all market participants at the same time. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA.

Quotation and last sale information for bitcoin is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters, as well as the Benchmark. Information relating to trading, including price and volume information, in bitcoin is available from major market data vendors and from the exchanges on which bitcoin are traded. Depth of book information is also available from bitcoin exchanges. The normal trading hours for bitcoin exchanges are 24 hours per day, 365 days per year.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

4. 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 purpose

of the Act. The Exchange notes that the proposed rule change, rather will facilitate the listing and trading of an additional exchange-traded product that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

6. Extension of Time Period for Commission Action

Not applicable.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rule of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

Exhibit 1: Completed Notice of the Proposed Rule Change for publication in the Federal Register.

Exhibit 2 – 5: Not applicable.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34- ; File No. SR-CboeBZX-2021-019]

[Insert date]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change to List and Trade Shares of the VanEck Bitcoin Trust, Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on [insert date], Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. 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

Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) is filing with the Securities and Exchange Commission (“Commission”) a proposed rule change to list and trade shares of the VanEck Bitcoin Trust (the “Trust”),³ under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Trust was formed as a Delaware statutory trust on December 17, 2020 and is operated as a grantor trust for U.S. federal tax purposes. The Trust has no fixed termination date.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/), at the Exchange's Office of the Secretary, 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 Exchange 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 Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

This Amendment No. 3 to SR-CboeBZX-2021-019 amends and replaces in its entirety Amendment No. 2 to the proposal as submitted on October 1, 2021 and as originally submitted on March 1, 2021. The Exchange submits this Amendment No. 3 in order to clarify certain points and add additional details to the proposal.

The Exchange proposes to list and trade the Shares under BZX Rule 14.11(e)(4),⁴ which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.⁵ VanEck Digital Assets, LLC is the sponsor of the Trust ("Sponsor"). The

⁴ The Commission approved BZX Rule 14.11(e)(4) in Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR-BATS-2011-018).

⁵ All statements and representations made in this filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange.

Shares will be registered with the Commission by means of the Trust's registration statement on Form S-1 (the "Registration Statement").⁶

Background

Bitcoin is a digital asset based on the decentralized, open source protocol of the peer-to-peer computer network launched in 2009 that governs the creation, movement, and ownership of bitcoin and hosts the public ledger, or "blockchain," on which all bitcoin transactions are recorded (the "Bitcoin Network" or "Bitcoin"). The decentralized nature of the Bitcoin Network allows parties to transact directly with one another based on cryptographic proof instead of relying on a trusted third party. The protocol also lays out the rate of issuance of new bitcoin within the Bitcoin Network, a rate that is reduced by half approximately every four years with an eventual hard cap of 21 million. It's generally understood that the combination of these two features – a systemic hard cap of 21 million bitcoin and the ability to transact trustlessly with anyone connected to the Bitcoin Network – gives bitcoin its value.⁷

The first rule filing proposing to list an exchange-traded product to provide exposure to bitcoin in the U.S. was submitted by the Exchange on June 30, 2016.⁸ At that

⁶ See draft Registration Statement on Form S-1, dated December 30, 2020 submitted to the Commission by the Sponsor on behalf of the Trust. The descriptions of the Trust, the Shares, and the Benchmark contained herein are based, in part, on information in the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

⁷ For additional information about bitcoin and the Bitcoin Network, see <https://bitcoin.org/en/getting-started>; <https://www.fidelitydigitalassets.com/articles/addressing-bitcoin-criticisms>; and <https://www.vaneck.com/education/investment-ideas/investing-in-bitcoin-and-digital-assets/>.

⁸ See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018). This proposal was subsequently disapproved by the

time, blockchain technology, and digital assets that utilized it, were relatively new to the broader public. The market cap of all bitcoin in existence at that time was approximately \$10 billion. No registered offering of digital asset securities or shares in an investment vehicle with exposure to bitcoin or any other cryptocurrency had yet been conducted, and the regulated infrastructure for conducting a digital asset securities offering had not begun to develop.⁹ Similarly, regulated U.S. bitcoin futures contracts did not exist. The Commodity Futures Trading Commission (the “CFTC”) had determined that bitcoin is a commodity,¹⁰ but had not engaged in significant enforcement actions in the space. The New York Department of Financial Services (“NYDFS”) adopted its final BitLicense regulatory framework in 2015, but had only approved four entities to engage in activities relating to virtual currencies (whether through granting a BitLicense or a limited-purpose trust charter) as of June 30, 2016.¹¹ While the first over-the-counter bitcoin fund launched

Commission. See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the “Winklevoss Order”).

⁹ Digital assets that are securities under U.S. law are referred to throughout this proposal as “digital asset securities.” All other digital assets, including bitcoin, are referred to interchangeably as “cryptocurrencies” or “virtual currencies.” The term “digital assets” refers to all digital assets, including both digital asset securities and cryptocurrencies, together.

¹⁰ See “In the Matter of Coinflip, Inc.” (“Coinflip”) (CFTC Docket 15-29 (September 17, 2015)) (order instituting proceedings pursuant to Sections 6(c) and 6(d) of the CEA, making findings and imposing remedial sanctions), in which the CFTC stated:

“Section 1a(9) of the CEA defines ‘commodity’ to include, among other things, ‘all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in.’ 7 U.S.C. § 1a(9). The definition of a ‘commodity’ is broad. See, e.g., Board of Trade of City of Chicago v. SEC, 677 F. 2d 1137, 1142 (7th Cir. 1982). Bitcoin and other virtual currencies are encompassed in the definition and properly defined as commodities.”

¹¹ A list of virtual currency businesses that are entities regulated by the NYDFS is available on the NYDFS website. See https://www.dfs.ny.gov/apps_and_licensing/virtual_currency_businesses/regulate

in 2013, public trading was limited and the fund had only \$60 million in assets.¹² There were very few, if any, traditional financial institutions engaged in the space, whether through investment or providing services to digital asset companies. In January 2018, the Staff of the Commission noted in a letter to the Investment Company Institute and SIFMA that it was not aware, at that time, of a single custodian providing fund custodial services for digital assets.¹³

Fast forward to the fourth quarter of 2021 and the digital assets financial ecosystem, including bitcoin, has progressed significantly. The development of a regulated market for digital asset securities has significantly evolved, with market participants having conducted registered public offerings of both digital asset securities¹⁴ and shares in investment vehicles holding bitcoin futures,¹⁵ including Bitcoin Futures ETFs, as discussed further below. Additionally, licensed and regulated service providers

[d entities](#)

¹² Data as of March 31, 2016 according to publicly available filings. See Bitcoin Investment Trust Form S-1, dated May 27, 2016, available: <https://www.sec.gov/Archives/edgar/data/1588489/000095012316017801/filenam e1.htm>.

¹³ See letter from Dalia Blass, Director, Division of Investment Management, U.S. Securities and Exchange Commission to Paul Schott Stevens, President & CEO, Investment Company Institute and Timothy W. Cameron, Asset Management Group – Head, Securities Industry and Financial Markets Association (January 18, 2018), available at <https://www.sec.gov/divisions/investment/noaction/2018/cryptocurrency-011818.htm>.

¹⁴ See Prospectus supplement filed pursuant to Rule 424(b)(1) for INX Tokens (Registration No. 333-233363), available at: https://www.sec.gov/Archives/edgar/data/1725882/000121390020023202/ea125858-424b1_inxlimited.htm.

¹⁵ See Prospectus filed by Stone Ridge Trust VI on behalf of NYDIG Bitcoin Strategy Fund Registration, available at: <https://www.sec.gov/Archives/edgar/data/1764894/000119312519309942/d693146d497.htm>.

have emerged to provide fund custodial services for digital assets, among other services. For example, in December 2020, the Commission adopted a conditional no-action position permitting certain special purpose broker-dealers to custody digital asset securities under Rule 15c3-3 under the Exchange Act (the “Custody Statement”);¹⁶ in September 2020, the Staff of the Commission released a no-action letter permitting certain broker-dealers to operate a non-custodial Alternative Trading System (“ATS”) for digital asset securities, subject to specified conditions;¹⁷ in October 2019, the Staff of the Commission granted temporary relief from the clearing agency registration requirement to an entity seeking to establish a securities clearance and settlement system based on distributed ledger technology,¹⁸ and multiple transfer agents who provide services for digital asset securities registered with the Commission.¹⁹

Outside the Commission's purview, the regulatory landscape has changed significantly since 2016, and cryptocurrency markets have grown and evolved as well.

¹⁶ See Securities Exchange Act Release No. 90788, 86 FR 11627 (February 26, 2021) (File Number S7-25-20) (Custody of Digital Asset Securities by Special Purpose Broker-Dealers).

¹⁷ See letter from Elizabeth Baird, Deputy Director, Division of Trading and Markets, U.S. Securities and Exchange Commission to Kris Dailey, Vice President, Risk Oversight & Operational Regulation, Financial Industry Regulatory Authority (September 25, 2020), available at: <https://www.sec.gov/divisions/marketreg/mr-noaction/2020/finra-ats-role-in-settlement-of-digital-asset-security-trades-09252020.pdf>

¹⁸ See letter from Jeffrey S. Mooney, Associate Director, Division of Trading and Markets, U.S. Securities and Exchange Commission to Charles G. Cascarilla & Daniel M. Burstein, Paxos Trust Company, LLC (October 28, 2019), available at: <https://www.sec.gov/divisions/marketreg/mr-noaction/2019/paxos-trust-company-102819-17a.pdf>

¹⁹ See, e.g., Form TA-1/A filed by Tokensoft Transfer Agent LLC (CIK: 0001794142) on January 8, 2021, available at: https://www.sec.gov/Archives/edgar/data/1794142/000179414219000001/xsIFTA1X01/primary_doc.xml.

The market for bitcoin is approximately 100 times larger, having recently reached a market cap of over \$1 trillion. As of November 3, 2021, bitcoin's market cap is greater than companies such as Tesla Inc., Berkshire Hathaway Inc., and NVIDIA Corporation. CFTC regulated bitcoin futures trading volume and open interest on Chicago Mercantile Exchange ("CME") ("Bitcoin Futures") has grown significantly, especially since the launch of Bitcoin Futures ETFs, as defined below, which the Exchange believes represents a regulated market of significant size, as further discussed below.²⁰ The CFTC has exercised its regulatory jurisdiction in bringing a number of enforcement actions related to bitcoin and against trading platforms that offer cryptocurrency trading.²¹ The U.S. Office of the Comptroller of the Currency (the "OCC") has made clear that federally-chartered banks are able to provide custody services for cryptocurrencies and other digital assets.²² The OCC recently granted conditional approval of two charter conversions by state-chartered trust companies to national banks, both of which provide cryptocurrency custody services.²³ NYDFS has granted no fewer than twenty-five

²⁰ Unless otherwise noted, all statistics and charts included in this proposal are sourced from <https://www.cmegroup.com/trading/bitcoin-futures.html>.

²¹ The CFTC's annual report for Fiscal Year 2020 (which ended on September 30, 2020) noted that the CFTC "continued to aggressively prosecute misconduct involving digital assets that fit within the CEA's definition of commodity" and "brought a record setting seven cases involving digital assets." See CFTC FY2020 Division of Enforcement Annual Report, available at: https://www.cftc.gov/media/5321/DOE_FY2020_AnnualReport_120120/download. Additionally, the CFTC filed on October 1, 2020, a civil enforcement action against the owner/operators of the BitMEX trading platform, which was one of the largest bitcoin derivative exchanges. See CFTC Release No. 8270-20 (October 1, 2020) available at: <https://www.cftc.gov/PressRoom/PressReleases/8270-20>.

²² See OCC News Release 2021-2 (January 4, 2021) available at: <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-2.html>.

²³ See OCC News Release 2021-6 (January 13, 2021) available at: <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-6.html> and

BitLicenses, including to established public payment companies like PayPal Holdings, Inc. and Square, Inc., and limited purpose trust charters to entities providing cryptocurrency custody services, including the Trust's Custodian. The U.S. Treasury Financial Crimes Enforcement Network (“FinCEN”) has released extensive guidance regarding the applicability of the Bank Secrecy Act (“BSA”) and implementing regulations to virtual currency businesses,²⁴ and has proposed rules imposing requirements on entities subject to the BSA that are specific to the technological context of virtual currencies.²⁵ In addition, the Treasury's Office of Foreign Assets Control (“OFAC”) has brought enforcement actions over apparent violations of the sanctions laws in connection with the provision of wallet management services for digital assets.²⁶

In addition to the regulatory developments laid out above, more traditional financial market participants have embraced and continue to embrace cryptocurrency: large insurance companies,²⁷ asset managers,²⁸ university endowments,²⁹ pension funds,³⁰

OCC News Release 2021-19 (February 5, 2021) available at:
<https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-19.html>.

²⁴ See FinCEN Guidance FIN-2019-G001 (May 9, 2019) (Application of FinCEN’s Regulations to Certain Business Models Involving Convertible Virtual Currencies) available at: <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>

²⁵ See U.S. Department of the Treasury Press Release: “The Financial Crimes Enforcement Network Proposes Rule Aimed at Closing Anti-Money Laundering Regulatory Gaps for Certain Convertible Virtual Currency and Digital Asset Transactions” (December 18, 2020), available at:
<https://home.treasury.gov/news/press-releases/sm1216>.

²⁶ See U.S. Department of the Treasury Enforcement Release: “OFAC Enters Into \$98,830 Settlement with BitGo, Inc. for Apparent Violations of Multiple Sanctions Programs Related to Digital Currency Transactions” (December 30, 2020) available at:
https://home.treasury.gov/system/files/126/20201230_bitgo.pdf.

²⁷ On December 10, 2020, Massachusetts Mutual Life Insurance Company (MassMutual) announced that it had purchased \$100 million in bitcoin for its

and even historically bitcoin skeptical fund managers³¹ are allocating to bitcoin. The largest over-the-counter bitcoin fund previously filed a Form 10 registration statement, which the Staff of the Commission reviewed and which took effect automatically, and is now a reporting company.³² Established companies like Tesla, Inc.,³³ MicroStrategy

general investment account. See MassMutual Press Release “Institutional Bitcoin provider NYDIG announces minority stake purchase by MassMutual” (December 10, 2020) available at: <https://www.massmutual.com/about-us/news-and-press-releases/press-releases/2020/12/institutional-bitcoin-provider-nydig-announces-minority-stake-purchase-by-massmutual>.

²⁸ See e.g., “BlackRock’s Rick Rieder says the world’s largest asset manager has ‘started to dabble’ in bitcoin” (February 17, 2021) available at: <https://www.cnbc.com/2021/02/17/blackrock-has-started-to-dabble-in-bitcoin-says-rick-rieder.html> and “Guggenheim’s Scott MinerD Says Bitcoin Should Be Worth \$400,000” (December 16, 2020) available at: <https://www.bloomberg.com/news/articles/2020-12-16/guggenheim-s-scott-minerd-says-bitcoin-should-be-worth-400-000>.

²⁹ See e.g., “Harvard and Yale Endowments Among Those Reportedly Buying Crypto” (January 25, 2021) available at: <https://www.bloomberg.com/news/articles/2021-01-26/harvard-and-yale-endowments-among-those-reportedly-buying-crypto>.

³⁰ See e.g., “Virginia Police Department Reveals Why its Pension Fund is Betting on Bitcoin” (February 14, 2019) available at: <https://finance.yahoo.com/news/virginia-police-department-reveals-why-194558505.html>.

³¹ See e.g., “Bridgewater: Our Thoughts on Bitcoin” (January 28, 2021) available at: <https://www.bridgewater.com/research-and-insights/our-thoughts-on-bitcoin> and “Paul Tudor Jones says he likes bitcoin even more now, rally still in the ‘first inning’” (October 22, 2020) available at: <https://www.cnbc.com/2020/10/22/-paul-tudor-jones-says-he-likes-bitcoin-even-more-now-rally-still-in-the-first-inning.html>.

³² See Letter from Division of Corporation Finance, Office of Real Estate & Construction to Barry E. Silbert, Chief Executive Officer, Grayscale Bitcoin Trust (January 31, 2020) <https://www.sec.gov/Archives/edgar/data/1588489/000000000020000953/filename1.pdf>

³³ See Form 10-K submitted by Tesla, Inc. for the fiscal year ended December 31, 2020 at 23: https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000156459021004599/tsla-10k_20201231.htm

Incorporated,³⁴ and Square, Inc.,³⁵ among others, have recently announced substantial investments in bitcoin in amounts as large as \$1.5 billion (Tesla) and \$425 million (MicroStrategy). The foregoing examples illustrate that bitcoin has gained mainstream usage and recognition.

Despite these developments, access for U.S. retail investors to gain exposure to bitcoin via a transparent and U.S. regulated, U.S. exchange-traded vehicle remains limited. Instead current options include: (i) paying a potentially high premium (and high management fees) to buy over-the-counter bitcoin funds (“OTC Bitcoin Funds”), to the advantage of more sophisticated investors that are able to create shares at net asset value (“NAV”) directly with the issuing trust; (ii) facing the technical risk, complexity and generally high fees associated with buying spot bitcoin; (iii) purchasing shares of operating companies that they believe will provide proxy exposure to bitcoin with limited disclosure about the associated risks; or (iv) through the purchase of Bitcoin Futures ETFs, which represent a sub-optimal structure for long-term investors that will cost them collectively tens of millions of dollars every year, as further discussed below. Meanwhile, investors in many other countries, including Canada³⁶ and Brazil, are able to use more

³⁴ See Form 10-Q submitted by MicroStrategy Incorporated for the quarterly period ended September 30, 2020 at 8:
https://www.sec.gov/ix?doc=/Archives/edgar/data/1050446/000156459020047995/mstr-10q_20200930.htm

³⁵ See Form 10-Q submitted by Square, Inc. for the quarterly period ended September 30, 2020 at 51:
<https://www.sec.gov/ix?doc=/Archives/edgar/data/1512673/000151267320000012/sq-20200930.htm>

³⁶ The Exchange notes that the Purpose Bitcoin ETF, a retail physical bitcoin ETP launched in Canada, reportedly reached \$768 million in assets under management as of August 31, 2021 (“AUM”), demonstrating the demand for a North American market listed bitcoin exchange-traded product (“ETP”). The Purpose Bitcoin ETF also offers a class of units that is U.S. dollar denominated, which could appeal to

traditional exchange listed and traded products (including exchange-traded funds holding physical bitcoin) to gain exposure to bitcoin, disadvantaging U.S. investors and leaving them with more risky means of getting bitcoin exposure.³⁷ Additionally, investors in other countries, specifically Canada, generally pay lower fees than U.S. retail investors that invest in OTC Bitcoin Funds due to the fee pressure that results from increased competition among available bitcoin investment options. Without an approved and regulated spot bitcoin ETP in the U.S. as a viable alternative, U.S. investors could seek to purchase shares of non-U.S. bitcoin vehicles in order to get access to bitcoin exposure. Given the separate regulatory regime and the potential difficulties associated with any international litigation, such an arrangement would create more risk exposure for U.S. investors than they would otherwise have with a U.S. exchange listed ETP. Further to this point, the lack of a U.S.-listed spot bitcoin ETP is not preventing U.S. funds from gaining exposure to bitcoin - several U.S. exchange-traded funds are using Canadian bitcoin ETPs to gain exposure to spot bitcoin. In addition to the benefits to U.S. investors articulated throughout this proposal, approving this proposal (and others like it) would provide U.S. exchange-traded funds with a U.S.-listed and regulated product to provide such access rather than relying on either flawed products or products listed and primarily regulated in other countries.

Bitcoin Futures ETFs

U.S. investors.

³⁷ The Exchange notes that securities regulators in a number of other countries have either approved or otherwise allowed the listing and trading of bitcoin ETPs. Specifically, these funds include the Purpose Bitcoin ETF, Bitcoin ETF, VanEck Vectors Bitcoin ETN, WisdomTree Bitcoin ETP, Bitcoin Tracker One, BTCcet bitcoin ETP, Amun Bitcoin ETP, Amun Bitcoin Suisse ETP, 21Shares Short Bitcoin ETP, CoinShares Physical Bitcoin ETP.

The Exchange and Sponsor applaud the Commission for allowing the recent launch of the ETFs registered under the Investment Company Act of 1940, as amended (the “1940 Act”), that provide exposure to bitcoin primarily through CME Bitcoin Futures (“Bitcoin Futures ETFs”). Allowing such products to list and trade is a productive first step in providing transparent, exchange-listed tools for expressing a view on bitcoin for U.S. investors and traders. However, as has been reported by numerous outlets, the structure of such products provides negative outcomes for buy and hold investors as compared to an ETP that would hold actual bitcoin instead of derivatives contracts (“Spot Bitcoin ETPs”).³⁸ Specifically, the cost of rolling CME Bitcoin Futures contracts (which has reached as high as 17% annually³⁹ excluding a fund’s management fees and borrowing costs, if any) will cause the Bitcoin Futures ETFs to lag the performance of bitcoin itself and, at over a billion dollars in assets under management, would cost U.S. investors hundreds of millions of dollars on an annual basis. Such rolling costs would not be required for Spot Bitcoin ETPs that hold bitcoin. Further, Bitcoin Futures ETFs have grown so rapidly that they face potentially running into CME position limits, which would force a Bitcoin Futures ETF to invest in non-futures assets for bitcoin exposure and cause potential investor confusion and lack of certainty about what such Bitcoin Futures ETFs are actually holding to try to get exposure to bitcoin, not to

³⁸ See e.g., “Bitcoin ETF’s Success Could Come at Fundholders’ Expense,” Wall Street Journal (October 24, 2021), available at: <https://www.wsj.com/articles/bitcoin-etfs-success-could-come-at-fundholders-expense-11635080580>; “Physical Bitcoin ETF Prospects Accelerate,” ETF.com (October 25, 2021), available at: https://www.etf.com/sections/blog/physical-bitcoin-etf-prospects-shine?nopaging=1&_cf_chl_jschl_tk_=pmd JsK.fjXz9eAQW9zol0qpzhXDrrl pIVdoCloLXbLjl44-1635476946-0-gqNtZGzNApCjcnBszQql.

³⁹ Id.

mention completely changing the risk profile associated with such an ETF. While Bitcoin Futures ETFs represent a useful trading tool, they are clearly a sub-optimal structure for U.S. investors that are looking for long-term exposure to bitcoin that will, based on the calculations above, unnecessarily cost U.S. investors millions of dollars every year and the Exchange believes that any proposal to list and trade a Spot Bitcoin ETP should be reviewed by the Commission with this important investor protection context in mind.

As discussed further below, the Commission's primary test in determining whether to approve or disapprove a series of Commodity-Based Trust Shares, a product type which includes Spot Bitcoin ETPs, is whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size in the underlying asset. Previous disapproval orders have made clear that a regulated market of significant size is generally a futures and/or options market rather than the spot commodity markets, which are often unregulated.⁴⁰ Leaving aside the analysis of that standard for now,⁴¹ Cboe believes it would be inconsistent to allow the listing and trading

⁴⁰ See Winklevoss Order at 37593, specifically footnote 202, which includes the language from numerous approval orders for which the underlying futures markets formed the basis for approving series of ETPs that hold physical metals, including gold, silver, palladium, platinum, and precious metals more broadly; and 37600, specifically where the Commission provides that “when the spot market is unregulated – the requirement of preventing fraudulent and manipulative acts may possibly be satisfied by showing that the ETP listing market has entered into a surveillance-sharing agreement with a regulated market of significant size in derivatives related to the underlying asset.” The Exchange believes that these citations are particularly helpful in making clear that the spot market for a spot commodity ETP need not be “regulated” in order for a spot commodity ETP to be approved by the Commission, and in fact that it's been the common historical practice of the Commission to rely on such derivatives markets as the regulated market of significant size because such spot commodities markets are largely unregulated.

⁴¹ As further outlined below, both the Exchange and the Sponsor believe that the CME Bitcoin Futures market represents a regulated market of significant size and

of Bitcoin Futures ETFs that hold primarily CME Bitcoin Futures while simultaneously disapproving Spot Bitcoin ETPs on the basis that the CME Bitcoin Futures market is not a regulated market of significant size. If the CME Bitcoin Futures market were not, in the opinion of the Commission, a regulated market of significant size, permitting Bitcoin Futures ETFs that trade on such market would seem to be inconsistent with the requirement under the Act of being designed to “prevent fraudulent and manipulative acts and practices” as articulated in the Winklevoss Order and other disapproval orders.⁴² One may argue that the 1940 Act provides certain investor protections that could mitigate some of these concerns, but the investor protection mechanisms under the 1940 Act relate primarily to the composition of a 1940 Act fund's board of directors, limitations on leverage and transactions with affiliates, among others. Those requirements – which primarily relate to a 1940 Act fund's internal structure and operations, rather than to the markets for the assets which the 1940 Act fund trades – would not confer additional protections to investors in relation to the underlying CME Bitcoin Futures market that would justify different regulatory outcomes for Bitcoin Futures ETFs and Spot Bitcoin ETPs.⁴³

Further to this point, part of the analysis of the regulated market of significant size test is whether an underlying market is sufficiently large to support an ETP is whether trading in the ETP is likely to be the predominant influence on prices in the market of

that this proposal and others like it should be approved on this basis.

⁴² 15 U.S.C. 78f(b)(5). For additional detail, see Winklevoss Order at 37600.

⁴³ The largest OTC Bitcoin Funds holding spot Bitcoin today are not 1940 Act Funds.

significant size.⁴⁴ According to publicly available data, the largest Bitcoin Futures ETF represents 3,233 contracts⁴⁵ of the total 8,683 contracts of open interest in November CME Bitcoin Futures⁴⁶ as of 10/27/21 (roughly 37% of open interest). This seems to directly contradict the previously articulated standards by the Commission in the disapproval orders issued for Spot Bitcoin ETPs related to whether the trading in the ETP would be the predominant influence on prices in that market.⁴⁷ While it is difficult at this point to assess the direct impact on pricing of the CME Bitcoin Futures based on the launch of the Bitcoin Futures ETFs, such circumstances, especially related to the generally predictable trading behaviors of an ETF, seem to have the potential to represent a significant influence over pricing in the market. Allowing Spot Bitcoin ETPs to come to market will alleviate these concerns because such ETPs would primarily be transacting in the spot bitcoin market on a more limited basis (acquiring spot bitcoin as needed and not rolling contracts on a monthly basis). As further discussed below, research indicates that the CME Bitcoin Futures market is a regulated market of significant size that generally leads price discovery across USD-based trading in bitcoin futures and spot markets globally.

To the extent the Commission may view differential treatment of Bitcoin Futures ETFs and Spot Bitcoin ETPs as warranted based on the Commission's concerns about the custody of physical Bitcoin that a Spot Bitcoin ETP would hold (compared to cash-

⁴⁴ See Winklevoss Order at 37594.

⁴⁵ See Fund Holdings Information available at <https://www.proshares.com/funds/bito.html>.

⁴⁶ See Volume and Open Interest data available at <https://www.cmegroup.com/markets/cryptocurrencies/bitcoin/bitcoin.volume.html>.

⁴⁷ See Winklevoss Order at 37594-37595.

settled futures contracts),⁴⁸ the Sponsor believes this concern is mitigated to a significant degree by the custodial arrangements that the Trust has contracted with Gemini Trust Company, LLC (the “Custodian”) to provide. In the Custody Statement, the Commission stated that the fourth step that a broker-dealer could take to shield traditional securities customers and others from the risks and consequences of digital asset security fraud, theft, or loss is to establish, maintain, and enforce reasonably designed written policies, procedures, and controls for safekeeping and demonstrating the broker-dealer has exclusive possession or control over digital asset securities that are consistent with industry best practices to protect against the theft, loss, and unauthorized and accidental use of the private keys necessary to access and transfer the digital asset securities the broker-dealer holds in custody. While Bitcoin is not a security and Gemini is not a broker-dealer, the Sponsor believes that similar considerations apply to the Custodian's holding of the Trust's Bitcoin. After diligent investigation, the Sponsor believes that the Custodian's policies, procedures, and controls for safekeeping, exclusively possessing, and controlling the Trust's Bitcoin holdings are consistent with industry best practices to protect against the theft, loss, and unauthorized and accidental use of the private keys. As one of the first two institutions to be granted a trust company charter by the New York Department of Financial Services in 2015, the Sponsor notes that the Custodian is subject to extensive regulation and has one of the longest track records in the industry of providing custodial services for digital asset private keys in a regulated environment. The

⁴⁸ See, e.g., Division of Investment Management Staff, Staff Statement on Funds Registered Under the Investment Company Act Investing in the Bitcoin Futures Market, May 11, 2021 (“The Bitcoin futures market also has not presented the custody challenges associated with some cryptocurrency-based investing because the futures are cash-settled”).

Custodian has represented to the Trust that it has never suffered a loss of Bitcoin belonging to customers. Under the circumstances, therefore, to the extent the Commission believes that its concerns about the risks of spot Bitcoin custody justifies differential treatment of a Bitcoin Futures ETF versus a Spot Bitcoin ETP, the Sponsor believes that the fact that the Custodian employs the same types of policies, procedures, and safeguards in handling spot Bitcoin that the Commission has stated that broker-dealers should implement with respect to digital asset securities would appear to weaken the justification for treating a Bitcoin Futures ETF compared to a Spot Bitcoin ETP differently due to spot Bitcoin custody concerns.

Based on the foregoing, the Exchange and Sponsor believe that any objective review of the Spot Bitcoin ETPs to the already listed and traded Bitcoin Futures ETFs would lead to the conclusion that Spot Bitcoin ETPs should be available to U.S. investors and, as such, this proposal and other comparable proposals to list and trade Spot Bitcoin ETPs should be approved by the Commission. Stated simply, U.S. investors will lose hundreds of millions of dollars on an annual basis from holding Bitcoin Futures ETFs which could be prevented by the Commission approving Spot Bitcoin ETPs.

Additionally, any concerns related to preventing fraudulent and manipulative acts and practices related to Spot Bitcoin ETPs would apply equally to the spot markets underlying the futures contracts held by a Bitcoin Futures ETF. While the 1940 Act does offer certain investor protections, those protections do not relate to mitigating potential manipulation of the holdings of an ETF in a way that warrants distinction between Bitcoin Futures ETFs and Spot Bitcoin ETPs. To be clear, both the Exchange and Sponsor believe that the CME Bitcoin Futures market is a regulated market of significant

size and that such manipulation concerns are mitigated, as described extensively below. After allowing the listing and trading of Bitcoin Futures ETFs that hold primarily CME Bitcoin Futures, however, the only consistent outcome would be approving Spot Bitcoin ETPs on the basis that the CME Bitcoin Futures market is a regulated market of significant size. Including in the analysis the significant and preventable losses to U.S. investors that comes with Bitcoin Futures ETFs, disapproving Spot Bitcoin ETPs seems even more arbitrary and capricious. Given the current landscape, approving this proposal (and others like it) and allowing Spot Bitcoin ETPs to be listed and traded alongside Bitcoin Futures ETFs would establish a consistent regulatory approach, provide U.S. investors with choice in product structures for bitcoin exposure, and offer flexibility in the means of gaining exposure to bitcoin through transparent, regulated, U.S. exchange-listed vehicles.

OTC Bitcoin Funds and Investor Protection

Over the past 1.5 years, U.S. investor exposure to bitcoin through OTC Bitcoin Funds has grown into the tens of billions of dollars. With that growth, so too has grown the potential risk to U.S. investors. As described below, premium and discount volatility, high fees, insufficient disclosures, and technical hurdles are putting U.S. investor money at risk on a daily basis that could potentially be eliminated through access to a bitcoin ETP. The Exchange understands the Commission's previous focus on potential manipulation of a bitcoin ETP in prior disapproval orders, but now believes that such concerns have been sufficiently mitigated and that the growing and quantifiable investor protection concerns should be the central consideration as the Commission reviews this proposal. As such, the Exchange believes that approving this proposal (and comparable

proposals submitted hereafter) provides the Commission with the opportunity to allow U.S. investors with access to bitcoin in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks associated with investing in operating companies that are imperfect proxies for bitcoin exposure; and (iv) providing an alternative to custodial spot bitcoin.

(i) OTC Bitcoin Funds and Premium Volatility

OTC Bitcoin Funds are generally designed to provide exposure to bitcoin in a manner similar to the Shares. However, unlike the Shares, OTC Bitcoin Funds are unable to freely offer creation and redemption in a way that incentivizes market participants to keep their shares trading in line with their NAV⁴⁹ and, as such, frequently trade at a price that is out of line with the value of their assets held. Historically, OTC Bitcoin Funds have traded at a significant premium to NAV.⁵⁰

Trading at a premium (or potentially a discount) is not unique to OTC Bitcoin Funds and is not in itself problematic, however the AUM for OTC Bitcoin Funds has grown significantly in the past 18 months. In fact, the largest OTC Bitcoin Fund has grown to \$39.7 billion in AUM⁵¹ and has historically traded at a discount or premium

⁴⁹ Because OTC Bitcoin Funds are not listed on an exchange, they are also not subject to the same transparency and regulatory oversight by a listing exchange as the Shares would be. In the case of the Trust, the existence of a surveillance-sharing agreement between the Exchange and the Bitcoin Futures market results in increased investor protections compared to OTC Bitcoin Funds.

⁵⁰ The inability to trade in line with NAV may at some point result in OTC Bitcoin Funds trading at a discount to their NAV. While that has not historically been the case, such a scenario would give rise to nearly identical potential issues related to trading at a premium as described below.

⁵¹ As of October 29, 2021, according to information provided through Grayscale's twitter account. Compare to an AUM of approximately \$2.6 billion on February

ranging from roughly a fifteen percent discount to a forty percent premium, though it has seen premiums at times above one hundred percent.⁵² As of October 29th, 2021, the discount was approximately 13%, meaning that the total value of the shares was \$5.3 billion less than the fund's total assets on that day. In other words, this shortfall represents an unrealized loss of approximately \$5.3 billion due to the lack of redemption options. These numbers are only associated with a single OTC Bitcoin Fund – as more and more OTC Bitcoin Funds come to market and more investor assets flood into them to get access to bitcoin exposure, the potential dollars at risk will only increase.

This raises significant investor protection issues in several ways. First, the most obvious issue is that investors are buying shares of a fund that experiences significant volatility in its premium and discount outside of the fluctuations in price of the underlying asset. Even operating within the normal premium and discount range, it's possible for an investor to buy shares of an OTC Bitcoin Fund only to have those shares quickly lose 10% or more in dollar value excluding any movement of the price of bitcoin. That is to say – the price of bitcoin could have stayed exactly the same from market close on one day to market open the next, yet the value of the shares held by the investor decreased only because of the fluctuation of the premium. As more investment vehicles, including mutual funds and ETFs, seek to gain exposure to bitcoin, the easiest option for

26, 2020, the date on which the Commission issued the most recent disapproval order for a bitcoin ETP. See Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR-NYSEArca-2019-39) (the "Wilshire Phoenix Disapproval"). While the price of one bitcoin has increased approximately 579% in the intervening period, the total AUM has increased by approximately 1428%, indicating that the increase in AUM was created beyond just price appreciation in bitcoin.

⁵² See "Traders Piling Into Overvalued Crypto Funds Risk a Painful Exit" (February 4, 2021) available at: <https://www.bloomberg.com/news/articles/2021-02-04/bitcoin-one-big-risk-when-investing-in-crypto-funds>

a buy and hold strategy for such vehicles is often an OTC Bitcoin Fund, meaning that even investors that do not directly buy OTC Bitcoin Funds can be disadvantaged by extreme premiums (or discounts) and premium volatility.

These extreme premiums and discounts also create potential investor protection issues because of the limited access to direct interaction with the OTC Bitcoin Fund. Generally speaking, only accredited investors are able to create shares with the issuing trust, which means that they are able to buy shares directly from the trust at NAV (by either delivering cash or bitcoin). This provides more sophisticated parties with the opportunity to take advantage of the premium/discount volatility through arbitrage trades, sometimes at the expense of retail investors that purchase shares on the OTC markets.

As noted above, the existence of the premiums and discounts as well as the premium collection opportunity is not unique to OTC Bitcoin Funds and does not in itself warrant the approval of an exchange traded product.⁵³ What makes this situation unique is that such a premium can exist in a product with \$31 billion in assets under management,⁵⁴ that billions of retail investor dollars are constantly under threat of premium volatility,⁵⁵ and that premium and discount volatility is generally captured by

⁵³ The Exchange notes, for example, that similar premiums and premium volatility exist for other non-bitcoin cryptocurrency related over-the-counter funds, but that the size and investor interest in those funds does not give rise to the same investor protection concerns that exist for OTC Bitcoin Funds.

⁵⁴ At \$31 billion in AUM, the largest OTC Bitcoin Fund would be the 44th largest out of roughly 2,600 U.S. listed ETPs.

⁵⁵ The Exchange notes that in two recent incidents, the premium dropped from 28.28% to 12.29% from the close on 3/19/20 to the close on 3/20/20 and from 38.40% to 21.05% from the close on 5/13/19 to the close on 5/14/19. Similarly, over the period of 12/21/20 to 1/21/20, the premium went from 40.18% to 2.79%. While the price of bitcoin appreciated significantly during this period and NAV per share increased by 41.25%, the price per share increased by only 3.58%.

more sophisticated investors, often on a riskless basis. The Exchange understands the Commission's focus on potential manipulation of a bitcoin ETP in prior disapproval orders, but now believes that current circumstances warrant that this direct, quantifiable investor protection issue should be the central consideration as the Commission determines whether to approve this proposal.

(ii) *Spot and Proxy Exposure*

Exposure to bitcoin through an ETP also presents certain advantages for retail investors compared to buying spot bitcoin directly. The most notable advantage from the Sponsor's perspective is the use of the Custodian, as further described below, to custody the Trust's bitcoin assets. The Sponsor has carefully selected the Custodian, chartered as a limited purpose trust company and regulated by NYDFS, due to its manner of holding the Trust's bitcoin. According to the Sponsor, this includes, among others, the use of "cold" (offline) storage to hold private keys and the employment by the Custodian of a certain degree of cybersecurity measures and operational best practices. By contrast, an individual retail investor holding bitcoin through a cryptocurrency exchange lacks these protections. Typically, retail exchanges hold most, if not all, retail investors' bitcoin in "hot" (Internet-connected) storage and do not make any commitments to indemnify retail investors or to observe any particular cybersecurity standard. Meanwhile, a retail investor holding spot bitcoin directly in a self-hosted wallet may suffer from inexperience in private key management (*e.g.*, insufficient password protection, lost key, etc.), which could cause them to lose some or all of their bitcoin holdings. In the Custodian, the Sponsor believes that the Trust has engaged a regulated and licensed entity highly experienced in bitcoin custody, with dedicated, trained employees and procedures to

manage the private keys to the Trust's bitcoin, and which is accountable for failures.

Thus, with respect to custody of the Trust's bitcoin assets, the Trust presents advantages from an investment protection standpoint for retail investors compared to owning spot bitcoin directly.

Finally, as described in the Background section above, recently a number of operating companies engaged in unrelated businesses – such as Tesla (a car manufacturer) and MicroStrategy (an enterprise software company) – have announced investments as large as \$5.3 billion in bitcoin.⁵⁶ Without access to bitcoin exchange-traded products, retail investors seeking investment exposure to bitcoin may end up purchasing shares in these companies in order to gain the exposure to bitcoin that they seek.⁵⁷ In fact, mainstream financial news networks have written a number of articles providing investors with guidance for obtaining bitcoin exposure through publicly traded companies (such as MicroStrategy, Tesla, and bitcoin mining companies, among others) instead of dealing with the complications associated with buying spot bitcoin in the absence of a bitcoin ETP.⁵⁸ Such operating companies, however, are imperfect bitcoin

⁵⁶ See MicroStrategy recently announced that it has purchased an additional 5,000 bitcoin bringing its total holdings to 114,042 bitcoin. See: <https://www.marketwatch.com/story/microstrategy-buys-more-than-5-000-bitcoins-in-3-weeks-while-it-sells-its-own-stock-11631550478>

⁵⁷ In August 2017, the Commission's Office of Investor Education and Advocacy warned investors about situations where companies were publicly announcing events relating to digital coins or tokens in an effort to affect the price of the company's publicly traded common stock. See https://www.sec.gov/oiea/investor-alerts-and-bulletins/ia_icorelatedclaims

⁵⁸ See e.g., “7 public companies with exposure to bitcoin” (February 8, 2021) available at: <https://finance.yahoo.com/news/7-public-companies-with-exposure-to-bitcoin-154201525.html>; and “Want to get in the crypto trade without holding bitcoin yourself? Here are some investing ideas” (February 19, 2021) available at: <https://www.cnbc.com/2021/02/19/ways-to-invest-in-bitcoin-without-holding-the-cryptocurrency-yourself-.html>.

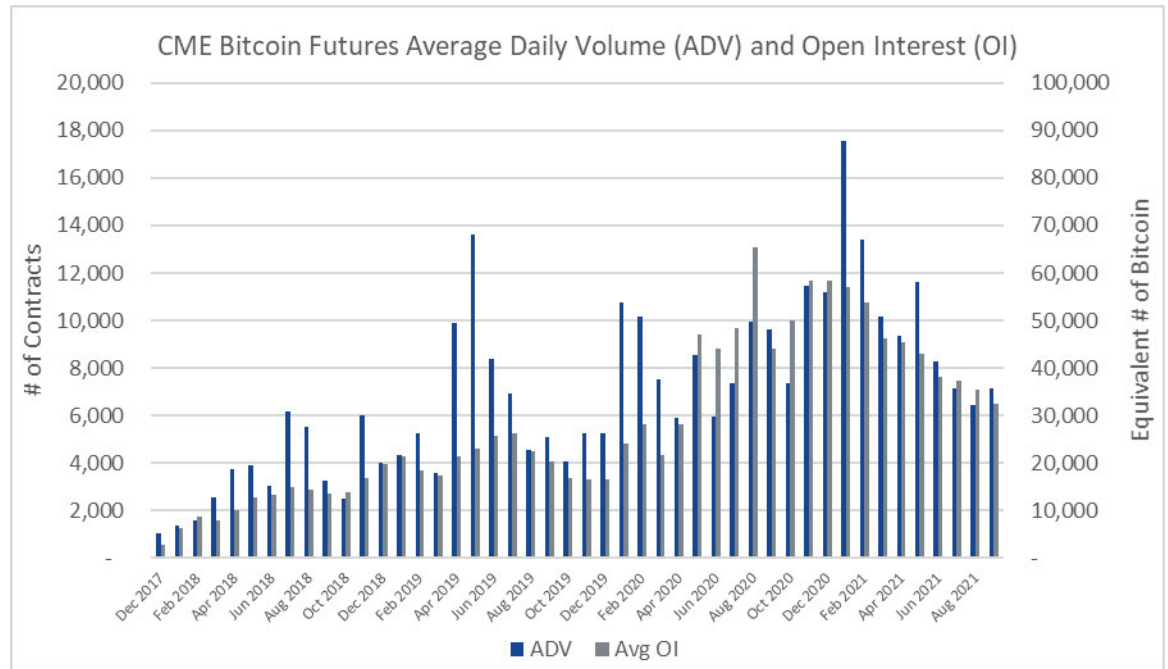
proxies and provide investors with partial bitcoin exposure paired with a host of additional risks associated with whichever operating company they decide to purchase. Additionally, the disclosures provided by the aforementioned operating companies with respect to risks relating to their bitcoin holdings are generally substantially smaller than the registration statement of a bitcoin ETP, including the Registration Statement, typically amounting to a few sentences of narrative description and a handful of risk factors.⁵⁹ In other words, investors seeking bitcoin exposure through publicly traded companies are gaining only partial exposure to bitcoin and are not fully benefitting from the risk disclosures and associated investor protections that come from the securities registration process.

Bitcoin Futures

CME began offering trading in Bitcoin Futures in 2017. Each contract represents five bitcoin and is based on the CME CF Bitcoin Reference Rate.⁵⁸ The contracts trade and settle like other cash-settled commodity futures contracts. Nearly every measurable metric related to Bitcoin Futures has trended consistently up since launch and/or accelerated upward in the past year. For example, there was approximately \$12 billion in trading in Bitcoin Futures in August 2021 compared to \$3.9 billion, \$4.5 billion, and \$9 billion in total trading in August 2017, August 2018, and August 2019, respectively. Bitcoin Futures traded over \$500 million and represented \$1.5 billion in open interest compared to \$115 million in December 2019. This general upward trend in trading

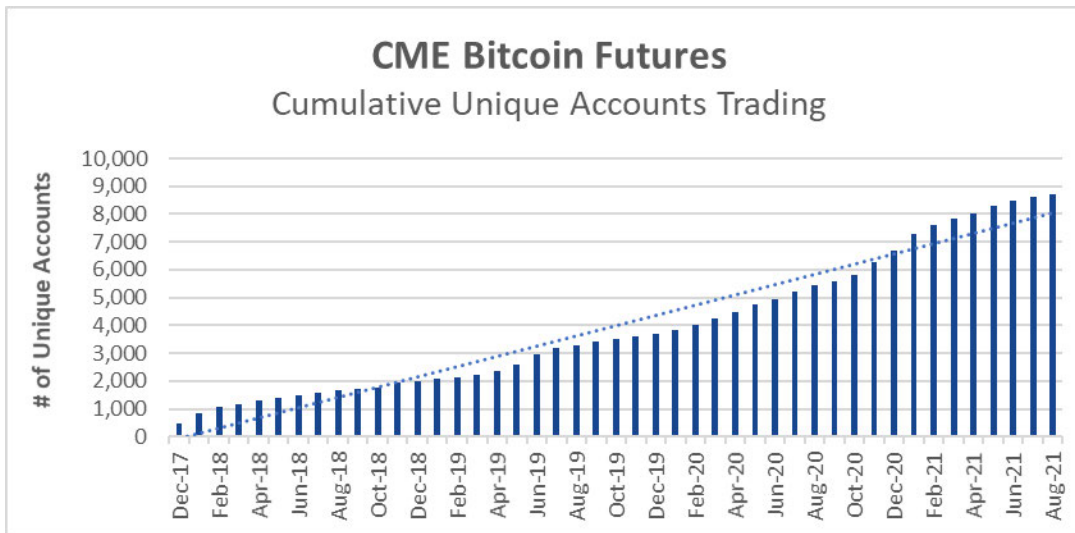
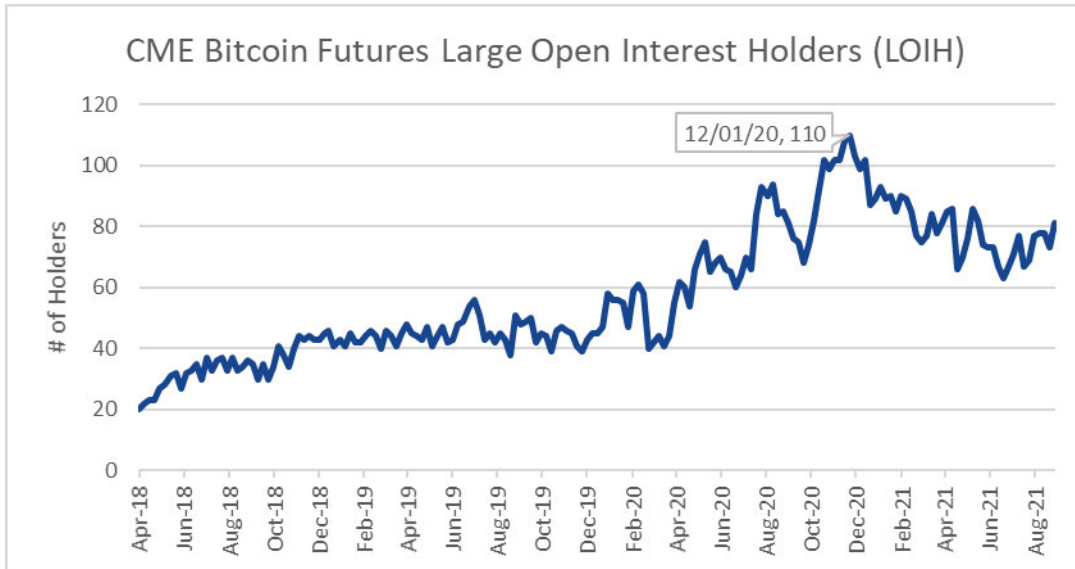
⁵⁹ See, e.g., Tesla 10-K for the year ended December 31, 2020, which mentions bitcoin just nine times:
https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000156459021004599/tsla-10k_20201231.htm

volume and open interest is captured in the following chart. (Source: CME, Bloomberg 8/31/21)



Similarly, the number of large open interest holders⁶⁰ has continued to increase even as the price of bitcoin has risen, as have the number of unique accounts trading Bitcoin Futures.

⁶⁰ A large open interest holder in Bitcoin Futures is an entity that holds at least 25 contracts, which is the equivalent of 125 bitcoin. At a price of approximately \$46,996 per bitcoin on 8/31/21, more than 80 firms had outstanding positions of greater than \$5.8 million in Bitcoin Futures.



The Sponsor further believes that academic research corroborates the overall trend outlined above and supports the thesis that the Bitcoin Futures pricing leads the spot market and, thus, a person attempting to manipulate the Shares would also have to trade on that market to manipulate the ETP. Specifically, the Sponsor believes that such research indicates that bitcoin futures lead the bitcoin spot market in price formation.⁶¹

⁶¹ See Hu, Y., Hou, Y. and Oxley, L. (2019). “What role do futures markets play in Bitcoin pricing? Causality, cointegration and price discovery from a time-varying perspective” (available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7481826/>). This academic

Section 6(b)(5) and the Applicable Standards

The Commission has approved numerous series of Trust Issued Receipts,⁶² including Commodity-Based Trust Shares,⁶³ to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices;⁶⁴ and (ii) the requirement that an exchange proposal be designed, in

research paper concludes that “There exist no episodes where the Bitcoin spot markets dominates the price discovery processes with regard to Bitcoin futures. This points to a conclusion that the price formation originates solely in the Bitcoin futures market. We can, therefore, conclude that the Bitcoin futures markets dominate the dynamic price discovery process based upon time-varying information share measures. Overall, price discovery seems to occur in the Bitcoin futures markets rather than the underlying spot market based upon a time-varying perspective.”

⁶² See Exchange Rule 14.11(f).

⁶³ Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

⁶⁴ As the Exchange has stated in a number of other public documents, it continues to believe that bitcoin is resistant to price manipulation and that “other means to prevent fraudulent and manipulative acts and practices” exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of bitcoin trading render it difficult and prohibitively costly to manipulate the price of bitcoin. The fragmentation across bitcoin platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of bitcoin prices through continuous trading activity challenging. To the extent that there are bitcoin exchanges engaged in or allowing wash trading or other activity intended to manipulate the price of bitcoin on other markets, such pricing does not normally impact prices on other exchange because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the bitcoin markets and the presence of arbitrageurs in those markets means that the manipulation of the price of bitcoin price on any single venue would require manipulation of the global bitcoin price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in

general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that it has sufficiently demonstrated that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal. Specifically, the Exchange lays out below why it believes that the significant increase in trading volume in Bitcoin Futures, the growth of liquidity at the inside in the spot market for bitcoin, and certain features of the Shares and the Benchmark mitigate potential manipulation concerns to the point that the investor protection issues that have arisen from the rapid growth of over-the-counter bitcoin funds since the Commission last reviewed an exchange proposal to list and trade a bitcoin ETP, including premium volatility and management fees, should be the central consideration as the Commission determines whether to approve this proposal.

(i) Designed to Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place⁶⁵ with a regulated

order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular bitcoin exchange or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

⁶⁵ As previously articulated by the Commission, “The standard requires such surveillance-sharing agreements since “they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.” The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities

market of significant size.⁶⁶ Both the Exchange and CME are members of the Intermarket Surveillance Group (the “ISG”).⁶⁷ The only remaining issue to be addressed is whether the Bitcoin Futures market constitutes a market of significant size, which the Exchange believes that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing

for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.” The Commission has historically held that joint membership in ISG constitutes such a surveillance sharing agreement. See Wilshire Phoenix Disapproval.

⁶⁶ As noted above, the precedent makes clear that the spot market for a series of Commodity-Based Trust Shares need not be “regulated” in order to be consistent with the requirement under the Act that the exchange proposal be designed to “prevent fraudulent and manipulative acts and practices,” and in fact that it’s been the common historical practice of the Commission to rely on such derivatives markets as the regulated market of significant size because such spot commodities markets are largely unregulated. Specifically, the precedent includes language from numerous approval orders for which the underlying futures markets formed the basis for approving series of ETPs that hold commodities including physical metals, including gold, silver, palladium, platinum, and precious metals more broadly. The Commission also provides that “when the spot market is unregulated – the requirement of preventing fraudulent and manipulative acts may possibly be satisfied by showing that the ETP listing market has entered into a surveillance-sharing agreement with a regulated market of significant size in derivatives related to the underlying asset.” The precedent indicates that common historical practice of the Commission is to rely on such derivatives markets as the regulated market of significant size because such spot commodities markets are largely unregulated. See supra note 39.

⁶⁷ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.⁶⁸

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.⁶⁹

(a) *Manipulation of the ETP*

The significant growth in Bitcoin Futures across each of trading volumes, open interest, large open interest holders, and total market participants since the Wilshire Phoenix Disapproval was issued are reflective of that market’s growing influence on the spot price, which according to the academic research cited above, was already leading the spot price in 2018 and 2019. Where Bitcoin Futures lead the price in the spot market such that a potential manipulator of the bitcoin spot market (beyond just the constituents of the Benchmark⁷⁰) would have to participate in the Bitcoin Futures market, it follows that a potential manipulator of the Shares would similarly have to transact in the Bitcoin Futures market because the Benchmark is based on spot prices. Further, the Trust only

⁶⁸ See Wilshire Phoenix Disapproval.

⁶⁹ See Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a “cannot be manipulated” standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met. *Id.* at 37582.

⁷⁰ As further described below, the “Benchmark” for the Fund is the MVIS® CryptoCompare Bitcoin Benchmark Rate. The current exchange composition of the Benchmark is Bitstamp, Coinbase, Gemini, itBit and Kraken, which are the same constituents that compose the CME CF Bitcoin Reference Rate.

allows for in-kind creation and redemption, which, as further described below, reduces the potential for manipulation of the Shares through manipulation of the Benchmark or any of its individual constituents, again emphasizing that a potential manipulator of the Shares would have to manipulate the entirety of the bitcoin spot market, which is led by the Bitcoin Futures market. As such, the Exchange believes that part (a) of the significant market test outlined above is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the Shares.

(b) Predominant Influence on Prices in Spot and Bitcoin Futures

The Exchange also believes that trading in the Shares would not be the predominant force on prices in the Bitcoin Futures market (or spot market) for a number of reasons, including the significant volume in the Bitcoin Futures market, the size of bitcoin's market cap (approximately \$1.1 trillion), and the significant liquidity available in the spot market. In addition to the Bitcoin Futures market data points cited above, the spot market for bitcoin is also very liquid. According to data from CoinRoutes from February 2021, the cost to buy or sell \$5 million worth of bitcoin averages roughly 10 basis points with a market impact of 30 basis points.⁷¹ For a \$10 million market order, the cost to buy or sell is roughly 20 basis points with a market impact of 50 basis points. Stated another way, a market participant could enter a market buy or sell order for \$10 million of bitcoin and only move the market 0.5%. More strategic purchases or sales (such as using limit orders and executing through OTC bitcoin trade desks) would likely

⁷¹ These statistics are based on samples of bitcoin liquidity in USD (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase Pro, Gemini, Bitstamp, Kraken, LMAX Exchange, BinanceUS, and OKCoin during February 2021.

have less obvious impact on the market – which is consistent with MicroStrategy, Tesla, and Square being able to collectively purchase billions of dollars in bitcoin. As such, the combination of Bitcoin Futures leading price discovery, the overall size of the bitcoin market, and the ability for market participants, including authorized participants creating and redeeming in-kind with the Trust, to buy or sell large amounts of bitcoin without significant market impact will help prevent the Shares from becoming the predominant force on pricing in either the bitcoin spot or Bitcoin Futures markets, satisfying part (b) of the test outlined above.

(c) Other Means to Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange believes that such conditions are present. Specifically, the significant liquidity in the spot market and the impact of market orders on the overall price of bitcoin mean that attempting to move the price of bitcoin is costly and has grown more expensive over the past year. In January 2020, for example, the cost to buy or sell \$5 million worth of bitcoin averaged roughly 30 basis points (compared to 10 basis points in 2/2021) with a market impact of 50 basis points (compared to 30 basis points in 2/2021).⁷² For a \$10 million market order, the cost to buy or sell was roughly 50 basis points (compared to 20 basis points in 2/2021) with a market impact of 80 basis points (compared to 50 basis

⁷² These statistics are based on samples of bitcoin liquidity in USD (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase Pro, Gemini, Bitstamp, Kraken, LMAX Exchange, BinanceUS, and OKCoin during February 2021.

points in 2/2021). As the liquidity in the bitcoin spot market increases, it follows that the impact of \$5 million and \$10 million orders will continue to decrease the overall impact in spot price.

Additionally, offering only in-kind creation and redemption will provide unique protections against potential attempts to manipulate the Shares. While the Sponsor believes that the Benchmark which it uses to value the Trust's bitcoin is itself resistant to manipulation based on the methodology further described below, the fact that creations and redemptions are only available in-kind makes the manipulability of the Benchmark significantly less important. Specifically, because the Trust will not accept cash to buy bitcoin in order to create new shares or, barring a forced redemption of the Trust or under other extraordinary circumstances, be forced to sell bitcoin to pay cash for redeemed shares, the price that the Sponsor uses to value the Trust's bitcoin is not particularly important.⁷³ When authorized participants are creating with the Trust, they need to deliver a certain number of bitcoin per share (regardless of the valuation used) and when they're redeeming, they can similarly expect to receive a certain number of bitcoin per share. As such, even if the price used to value the Trust's bitcoin is manipulated (which the Sponsor believes that its methodology is resistant to), the ratio of bitcoin per Share does not change and the Trust will either accept (for creations) or distribute (for redemptions) the same number of bitcoin regardless of the value. This not only mitigates the risk associated with potential manipulation, but also discourages and disincentivizes manipulation of the Benchmark because there is little financial incentive to do so.

VanEck Bitcoin Trust

⁷³ While the Benchmark will not be particularly important for the creation and redemption process, it will be used for calculating fees.

Delaware Trust Company is the trustee (“Trustee”). The State Street Bank and Trust Company will be the administrator (“Administrator”) and transfer agent (“Transfer Agent”). Van Eck Securities Corporation will be the marketing agent (“Marketing Agent”) in connection with the creation and redemption of “Baskets” of Shares. Van Eck Securities Corporation (“VanEck”) provides assistance in the marketing of the Shares. The Custodian, Gemini Trust Company, LLC, will be responsible for custody of the Trust’s bitcoin.

According to the Registration Statement, each Share will represent a fractional undivided beneficial interest in the Trust’s net assets. The Trust’s assets will consist of bitcoin held by the Custodian on behalf of the Trust. The Trust generally does not intend to hold cash or cash equivalents. However, there may be situations where the Trust will unexpectedly hold cash on a temporary basis.

According to the Registration Statement, the Trust is neither an investment company registered under the Investment Company Act of 1940, as amended,⁷⁴ nor a commodity pool for purposes of the Commodity Exchange Act (“CEA”), and neither the Trust nor the Sponsor is subject to regulation as a commodity pool operator or a commodity trading adviser in connection with the Shares.

When the Trust sells or redeems its Shares, it will do so in “in-kind” transactions in blocks of 50,000 Shares (a “Creation Basket”) at the Trust’s NAV. Authorized participants will deliver, or facilitate the delivery of, bitcoin to the Trust’s account with the Custodian in exchange for Shares when they purchase Shares, and the Trust, through the Custodian, will deliver bitcoin to such authorized participants when they redeem

⁷⁴ 15 U.S.C. 80a-1.

Shares with the Trust. Authorized participants may then offer Shares to the public at prices that depend on various factors, including the supply and demand for Shares, the value of the Trust's assets, and market conditions at the time of a transaction.

Shareholders who buy or sell Shares during the day from their broker may do so at a premium or discount relative to the NAV of the Shares of the Trust.

Investment Objective

According to the Registration Statement and as further described below, the investment objective of the Trust is for the Shares to reflect the performance of the MVIS® CryptoCompare Bitcoin Benchmark Rate less the expenses of the Trust's operations. In seeking to achieve its investment objective, the Trust will hold bitcoin and will value its Shares daily based on the reported MVIS® CryptoCompare Bitcoin Benchmark Rate and process all creations and redemptions in-kind in transactions with authorized participants. The Trust is not actively managed.

The Benchmark

As described in the Registration Statement, the Fund will use the Benchmark to calculate the Trust's NAV. The Benchmark is designed to be a robust price for bitcoin in USD and there is no component other than bitcoin in the index. The underlying exchanges are sourced from the industry leading CryptoCompare Exchange Benchmark review report. CryptoCompare Exchange Benchmark was established in 2019 as a tool designed to bring clarity to the digital asset exchange sector by providing a framework for assessing risk and in turn bringing transparency and accountability to a complex and rapidly evolving market.⁷⁵ The current exchange composition of the Benchmark is Bitstamp, Coinbase, Gemini, itBit and Kraken, which are the same constituents that compose the CME CF Bitcoin Reference Rate.

In calculating the MVIS® CryptoCompare Bitcoin Benchmark Rate, the methodology captures trade prices and sizes from exchanges and examines twenty three-minute periods leading up to 4:00 p.m. EST. It then calculates an equal-weighted average of the volume-weighted median price of these twenty three-minute periods, removing the

⁷⁵ The CryptoCompare Exchange Benchmark methodology utilizes a combination of qualitative and quantitative metrics to analyze a comprehensive data set across eight categories of evaluation legal/regulation, KYC/transaction risk, data provision, security, team/exchange, asset quality/diversity, market quality and negative events. The CryptoCompare Exchange Benchmark review report assigns a grade to each exchange which helps identify what it believes to be the lowest risk exchanges in the industry. Based on the CryptoCompare Exchange Benchmark, MVIS initially selects the top five exchanges by rank for inclusion in the MVIS® CryptoCompare Bitcoin Benchmark Rate. If an eligible exchange is downgraded by two or more notches in a semi-annual review and is no longer in the top five by rank, it is replaced by the highest ranked non-component exchange. Adjustments to exchange coverage are announced four business days prior to the first business day of each of March and September at 23:00 CET. The MVIS® CryptoCompare Bitcoin Benchmark Rate is rebalanced at 16:00:00 GMT/BST on the last business day of each of February and August.

highest and lowest contributed prices. Using twenty consecutive three-minute segments over a sixty-minute period means malicious actors would need to sustain efforts to manipulate the market over an extended period of time, or would need to replicate efforts multiple times across exchanges, potentially triggering review. This extended period also supports authorized participant activity by capturing volume over a longer time period, rather than forcing authorized participants to mark an individual close or auction. The use of a median price reduces the ability of outlier prices to impact the NAV, as it systematically excludes those prices from the NAV calculation. The use of a volume-weighted median (as opposed to a traditional median) serves as an additional protection against attempts to manipulate the NAV by executing a large number of low-dollar trades, because any manipulation attempt would have to involve a majority of global spot bitcoin volume in a three-minute window to have any influence on the NAV. As discussed in the Registration Statement, removing the highest and lowest prices further protects against attempts to manipulate the NAV, requiring bad actors to act on multiple exchanges at once to have any ability to influence the price.

Availability of Information

In addition to the price transparency of the Benchmark, the Trust will provide information regarding the Trust's bitcoin holdings as well as additional data regarding the Trust. The Trust will provide an Intraday Indicative Value ("IIV") per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.). The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that

value during Regular Trading Hours to reflect changes in the value of the Trust's bitcoin holdings during the trading day.

The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours by one or more major market data vendors. In addition, the IIV will be available through on-line information services.

The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV and the reported closing price; (b) the BZX Official Closing Price⁷⁶ in relation to the NAV as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV; (c) data in chart form displaying the frequency distribution of discounts and premiums of the Official Closing Price against the NAV, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The Trust will also disseminate the Trust's holdings on a daily basis on the Trust's website. The price of bitcoin will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours. Information about the Benchmark, including key elements of how the Benchmark is calculated, will be publicly available at www.mvis-indices.com/.

The NAV for the Trust will be calculated by the Administrator once a day and will be disseminated daily to all market participants at the same time. Quotation and last-

⁷⁶ As defined in Rule 11.23(a)(3), the term "BZX Official Closing Price" shall mean the price disseminated to the consolidated tape as the market center closing trade.

sale information regarding the Shares will be disseminated through the facilities of the Consolidated Tape Association (“CTA”).

Quotation and last sale information for bitcoin is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters, as well as the Benchmark. Information relating to trading, including price and volume information, in bitcoin is available from major market data vendors and from the exchanges on which bitcoin are traded. Depth of book information is also available from bitcoin exchanges. The normal trading hours for bitcoin exchanges are 24 hours per day, 365 days per year.

The Bitcoin Custodian

Gemini Trust Company, LLC serves as the Trust's Custodian and is a fiduciary under § 100 of the New York Banking Law. The Custodian is authorized to serve as the Trust's custodian under the Trust Agreement and pursuant to the terms and provisions of the Custody Agreement. The Custodian's services (i) allow bitcoin to be deposited from a public blockchain address to the Trust's bitcoin account and (ii) allow bitcoin to be withdrawn from the bitcoin account to a public blockchain address as instructed by the Trust. The Custody Agreement requires the Custodian to hold the Trust's bitcoin in cold storage, unless required to facilitate withdrawals as a temporary measure. The Custodian will use segregated cold storage bitcoin addresses for the Trust which are separate from the bitcoin addresses that the Custodian uses for its other customers and which are directly verifiable via the Bitcoin Blockchain. The Custodian will safeguard the private keys to the bitcoin associated with the Trust's bitcoin account. The Custodian will at all times record and identify in its books and records that such bitcoins constitute the property of the Trust. The Custodian will not withdraw the Trust's bitcoin from the Trust's account with the Custodian, or loan, hypothecate, pledge or otherwise encumber the Trust's bitcoin, without the Trust's instruction.

If the Custody Agreement terminates, the Sponsor may appoint another custodian and the Trust may enter into a custodian agreement with such custodian.

Net Asset Value

NAV means the total assets of the Trust including, but not limited to, all bitcoin and cash, if any, less total liabilities of the Trust, each determined on the basis of generally accepted accounting principles. The Administrator will determine the NAV of

the Trust on each day that the Exchange is open for regular trading, as promptly as practical after 4:00 p.m. EST. The NAV of the Trust is the aggregate value of the Trust's assets less its estimated accrued but unpaid liabilities (which include accrued expenses). In determining the Trust's NAV, the Administrator values the bitcoin held by the Trust based on the price set by the MVIS® CryptoCompare Bitcoin Benchmark Rate as of 4:00 p.m. EST. The Administrator also determines the NAV per Share.

Creation and Redemption of Shares

According to the Registration Statement, on any business day, an authorized participant may place an order to create one or more baskets. Purchase orders must be placed by 4:00 p.m. Eastern Time, or the close of regular trading on the Exchange, whichever is earlier. The day on which an order is received is considered the purchase order date. The total deposit of bitcoin required is an amount of bitcoin that is in the same proportion to the total assets of the Trust, net of accrued expenses and other liabilities, on the date the order to purchase is properly received, as the number of Shares to be created under the purchase order is in proportion to the total number of Shares outstanding on the date the order is received. Each night, the Sponsor will publish the amount of bitcoin that will be required in exchange for each creation order. The Administrator determines the required deposit for a given day by dividing the number of bitcoin held by the Trust as of the opening of business on that business day, adjusted for the amount of bitcoin constituting estimated accrued but unpaid fees and expenses of the Trust as of the opening of business on that business day, by the quotient of the number of Shares outstanding at the opening of business divided by 50,000. The procedures by which an

authorized participant can redeem one or more Creation Baskets mirror the procedures for the creation of Creation Baskets.

Rule 14.11(e)(4) – Commodity-Based Trust Shares

The Shares will be subject to BZX Rule 14.11(e)(4), which sets forth the initial and continued listing criteria applicable to Commodity-Based Trust Shares. The Exchange will obtain a representation that the Trust's NAV will be calculated daily and that these values and information about the assets of the Trust will be made available to all market participants at the same time. The Exchange notes that, as defined in Rule 14.11(e)(4)(C)(i), the Shares will be: (a) issued by a trust that holds a specified commodity⁷⁷ deposited with the trust; (b) issued by such trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity; and (c) when aggregated in the same specified minimum number, may be redeemed at a holder's request by such trust which will deliver to the redeeming holder the quantity of the underlying commodity.

Upon termination of the Trust, the Shares will be removed from listing. The Trustee, Delaware Trust Company, is a trust company having substantial capital and surplus and the experience and facilities for handling corporate trust business, as required under Rule 14.11(e)(4)(E)(iv)(a) and that no change will be made to the trustee without prior notice to and approval of the Exchange. The Exchange also notes that, pursuant to Rule 14.11(e)(4)(F), neither the Exchange nor any agent of the Exchange shall have any liability for damages, claims, losses or expenses caused by any errors, omissions or

⁷⁷ For purposes of Rule 14.11(e)(4), the term commodity takes on the definition of the term as provided in the Commodity Exchange Act. As noted above, the CFTC has opined that Bitcoin is a commodity as defined in Section 1a(9) of the Commodity Exchange Act. See Coinflip.

delays in calculating or disseminating any underlying commodity value, the current value of the underlying commodity required to be deposited to the Trust in connection with issuance of Commodity-Based Trust Shares; resulting from any negligent act or omission by the Exchange, or any agent of the Exchange, or any act, condition or cause beyond the reasonable control of the Exchange, its agent, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission or delay in the reports of transactions in an underlying commodity. Finally, as required in Rule 14.11(e)(4)(G), the Exchange notes that any registered market maker (“Market Maker”) in the Shares must file with the Exchange in a manner prescribed by the Exchange and keep current a list identifying all accounts for trading in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, which the registered Market Maker may have or over which it may exercise investment discretion. No registered Market Maker shall trade in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, in an account in which a registered Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by this Rule. In addition to the existing obligations under Exchange rules regarding the production of books and records (see, e.g., Rule 4.2), the registered Market Maker in Commodity-Based Trust Shares shall make available to the Exchange such books, records or other information pertaining to transactions by such entity or registered or non-registered employee affiliated with such entity for its or their

own accounts for trading the underlying physical commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, as may be requested by the Exchange.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. The Exchange will halt trading in the Shares under the conditions specified in BZX Rule 11.18. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the bitcoin underlying the Shares; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Rule 14.11(e)(4)(E)(ii), which sets forth circumstances under which trading in the Shares may be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. BZX will allow trading in the Shares during all trading sessions on the Exchange. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in BZX Rule 11.11(a) the minimum price variation for quoting and entry of orders in securities traded on the Exchange is \$0.01 where the price is greater than \$1.00 per share or \$0.0001 where the price is less than \$1.00 per share.

Surveillance

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. The Exchange may obtain information regarding trading in the Shares and Bitcoin Futures via ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.⁷⁸

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (i) the procedures for the creation and redemption of Baskets (and that the Shares are not individually redeemable); (ii) BZX Rule 3.7, which imposes suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers; (iii) how information regarding the IIV and the Trust's NAV are

⁷⁸ For a list of the current members and affiliate members of ISG, [see www.isgportal.com](http://www.isgportal.com).

disseminated; (iv) the risks involved in trading the Shares outside of Regular Trading Hours⁷⁹ when an updated IIV will not be calculated or publicly disseminated; (v) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (vi) trading information.

In addition, the Information Circular will advise members, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Shares. Members purchasing the Shares for resale to investors will deliver a prospectus to such investors. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act⁸⁰ in general and Section 6(b)(5) of the Act⁸¹ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Commission has approved numerous series of Trust Issued Receipts,⁸² including Commodity-Based Trust Shares,⁸³ to be listed on U.S. national securities

⁷⁹ Regular Trading Hours is the time between 9:30 a.m. and 4:00 p.m. Eastern Time.

⁸⁰ 15 U.S.C. 78f.

⁸¹ 15 U.S.C. 78f(b)(5).

⁸² See Exchange Rule 14.11(f).

exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices;⁸⁴ and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest.

The Exchange believes that the proposal is, in particular, designed to protect investors and the public interest. Over the past 1.5 years, U.S. investor exposure to bitcoin through OTC Bitcoin Funds has grown into the tens of billions of dollars. With that growth, so too has grown the potential risk to U.S. investors. Premium and discount volatility, high fees, insufficient disclosures, and technical hurdles are putting U.S.

⁸³ Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

⁸⁴ As the Exchange has stated in a number of other public documents, it continues to believe that bitcoin is resistant to price manipulation and that "other means to prevent fraudulent and manipulative acts and practices" exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of bitcoin trading render it difficult and prohibitively costly to manipulate the price of bitcoin. The fragmentation across bitcoin platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of bitcoin prices through continuous trading activity challenging. To the extent that there are bitcoin exchanges engaged in or allowing wash trading or other activity intended to manipulate the price of bitcoin on other markets, such pricing does not normally impact prices on other exchange because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the bitcoin markets and the presence of arbitrageurs in those markets means that the manipulation of the price of bitcoin price on any single venue would require manipulation of the global bitcoin price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular bitcoin exchange or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

investor money at risk on a daily basis that could potentially be eliminated through access to a bitcoin ETP. The Exchange understands the Commission's previous focus on potential manipulation of a bitcoin ETP in prior disapproval orders, but now believes that such concerns have been sufficiently mitigated and that the growing and quantifiable investor protection concerns should be the central consideration as the Commission reviews this proposal. As such, the Exchange believes that this proposal acts to limit the risk to U.S. investors that are increasingly seeking exposure to bitcoin by providing direct, 1-for-1 exposure to bitcoin in a regulated, transparent, exchange-traded vehicle, specifically by: (i) reducing premium volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks associated with investing in operating companies that are imperfect proxies for bitcoin exposure; and (iv) providing an alternative to custodial spot bitcoin.

The Exchange also believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that it has sufficiently demonstrated that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal. Specifically, the Exchange believes that the significant increase in trading volume in Bitcoin Futures, the growth of liquidity at the inside in the spot market for bitcoin, and certain features of the Shares and the Benchmark mitigate potential manipulation concerns to the point that the investor protection issues that have arisen from the rapid growth of over-the-counter bitcoin funds since the Commission last reviewed an exchange proposal to list and trade a bitcoin ETP,

including premium volatility and management fees, should be the central consideration as the Commission determines whether to approve this proposal.

(i) Designed to Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place⁸⁵ with a regulated market of significant size. Both the Exchange and CME are members of ISG.⁸⁶ The only remaining issue to be addressed is whether the Bitcoin Futures market constitutes a market of significant size, which the Exchange believes that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and

⁸⁵ As previously articulated by the Commission, “The standard requires such surveillance-sharing agreements since “they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.” The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.” The Commission has historically held that joint membership in ISG constitutes such a surveillance sharing agreement. See Wilshire Phoenix Disapproval.

⁸⁶ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

detering misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.⁸⁷

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.⁸⁸

(a) *Manipulation of the ETP*

The significant growth in Bitcoin Futures across each of trading volumes, open interest, large open interest holders, and total market participants since the Wilshire Phoenix Disapproval was issued are reflective of that market’s growing influence on the spot price, which according to the academic research cited above, was already leading the spot price in 2018 and 2019. Where Bitcoin Futures lead the price in the spot market such that a potential manipulator of the bitcoin spot market (beyond just the constituents of the Benchmark⁸⁹) would have to participate in the Bitcoin Futures market, it follows that a potential manipulator of the Shares would similarly have to transact in the Bitcoin Futures market because the Benchmark is based on spot prices. Further, the Trust only

⁸⁷ See Wilshire Phoenix Disapproval.

⁸⁸ See Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a “cannot be manipulated” standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met. Id. at 37582.

⁸⁹ As further described below, the “Benchmark” for the Fund is the MVIS® CryptoCompare Bitcoin Benchmark Rate. The current exchange composition of the Benchmark is Bitstamp, Coinbase, Gemini, itBit and Kraken, which are the same constituents that compose the CME CF Bitcoin Reference Rate.

allows for in-kind creation and redemption, which, as further described below, reduces the potential for manipulation of the Shares through manipulation of the Benchmark or any of its individual constituents, again emphasizing that a potential manipulator of the Shares would have to manipulate the entirety of the bitcoin spot market, which is led by the Bitcoin Futures market. As such, the Exchange believes that part (a) of the significant market test outlined above is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the Shares.

(b) Predominant Influence on Prices in Spot and Bitcoin Futures

The Exchange also believes that trading in the Shares would not be the predominant force on prices in the Bitcoin Futures market (or spot market) for a number of reasons, including the significant volume in the Bitcoin Futures market, the size of bitcoin's market cap (approximately \$1.1 trillion), and the significant liquidity available in the spot market. In addition to the Bitcoin Futures market data points cited above, the spot market for bitcoin is also very liquid. According to data from CoinRoutes from February 2021, the cost to buy or sell \$5 million worth of bitcoin averages roughly 10 basis points with a market impact of 30 basis points.⁹⁰ For a \$10 million market order, the cost to buy or sell is roughly 20 basis points with a market impact of 50 basis points. Stated another way, a market participant could enter a market buy or sell order for \$10 million of bitcoin and only move the market 0.5%. More strategic purchases or sales (such as using limit orders and executing through OTC bitcoin trade desks) would likely

⁹⁰ These statistics are based on samples of bitcoin liquidity in USD (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase Pro, Gemini, Bitstamp, Kraken, LMAX Exchange, BinanceUS, and OKCoin during February 2021.

have less obvious impact on the market – which is consistent with MicroStrategy, Tesla, and Square being able to collectively purchase billions of dollars in bitcoin. As such, the combination of Bitcoin Futures leading price discovery, the overall size of the bitcoin market, and the ability for market participants, including authorized participants creating and redeeming in-kind with the Trust, to buy or sell large amounts of bitcoin without significant market impact will help prevent the Shares from becoming the predominant force on pricing in either the bitcoin spot or Bitcoin Futures markets, satisfying part (b) of the test outlined above.

(c) Other Means to Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange believes that such conditions are present. Specifically, the significant liquidity in the spot market and the impact of market orders on the overall price of bitcoin mean that attempting to move the price of bitcoin is costly and has grown more expensive over the past year. In January 2020, for example, the cost to buy or sell \$5 million worth of bitcoin averaged roughly 30 basis points (compared to 10 basis points in 2/2021) with a market impact of 50 basis points (compared to 30 basis points in 2/2021).⁹¹ For a \$10 million market order, the cost to buy or sell was roughly 50 basis points (compared to 20 basis points in 2/2021) with a market impact of 80 basis points (compared to 50 basis

⁹¹ These statistics are based on samples of bitcoin liquidity in USD (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase Pro, Gemini, Bitstamp, Kraken, LMAX Exchange, BinanceUS, and OKCoin during February 2021.

points in 2/2021). As the liquidity in the bitcoin spot market increases, it follows that the impact of \$5 million and \$10 million orders will continue to decrease the overall impact in spot price.

Additionally, offering only in-kind creation and redemption will provide unique protections against potential attempts to manipulate the Shares. While the Sponsor believes that the Benchmark which it uses to value the Trust's bitcoin is itself resistant to manipulation based on the methodology further described below, the fact that creations and redemptions are only available in-kind makes the manipulability of the Benchmark significantly less important. Specifically, because the Trust will not accept cash to buy bitcoin in order to create new shares or, barring a forced redemption of the Trust or under other extraordinary circumstances, be forced to sell bitcoin to pay cash for redeemed shares, the price that the Sponsor uses to value the Trust's bitcoin is not particularly important.⁹² When authorized participants are creating with the Trust, they need to deliver a certain number of bitcoin per share (regardless of the valuation used) and when they're redeeming, they can similarly expect to receive a certain number of bitcoin per share. As such, even if the price used to value the Trust's bitcoin is manipulated (which the Sponsor believes that its methodology is resistant to), the ratio of bitcoin per Share does not change and the Trust will either accept (for creations) or distribute (for redemptions) the same number of bitcoin regardless of the value. This not only mitigates the risk associated with potential manipulation, but also discourages and disincentivizes manipulation of the Benchmark because there is little financial incentive to do so.

Commodity-Based Trust Shares

⁹² While the Benchmark will not be particularly important for the creation and redemption process, it will be used for calculating fees.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed on the Exchange pursuant to the initial and continued listing criteria in Exchange Rule 14.11(e)(4). The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. The Exchange may obtain information regarding trading in the Shares and listed bitcoin derivatives via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

Availability of Information

The Exchange also believes that the proposal promotes market transparency in that a large amount of information is currently available about bitcoin and will be available regarding the Trust and the Shares. In addition to the price transparency of the Benchmark, the Trust will provide information regarding the Trust's bitcoin holdings as well as additional data regarding the Trust. The Trust will provide an IIV per Share

updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.).

The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the value of the Trust's bitcoin holdings during the trading day.

The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours by one or more major market data vendors. In addition, the IIV will be available through on-line information services.

The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV and the reported closing price; (b) the BZX Official Closing Price in relation to the NAV as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV; (c) data in chart form displaying the frequency distribution of discounts and premiums of the Official Closing Price against the NAV, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The Trust will also disseminate the Trust's holdings on a daily basis on the Trust's website. The price of bitcoin will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours. Information about the Benchmark, including key elements of how the Benchmark is calculated, will be publicly available at www.mvis-indices.com/.

The NAV for the Trust will be calculated by the Administrator once a day and will be disseminated daily to all market participants at the same time. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA.

Quotation and last sale information for bitcoin is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters, as well as the Benchmark. Information relating to trading, including price and volume information, in bitcoin is available from major market data vendors and from the exchanges on which bitcoin are traded. Depth of book information is also available from bitcoin exchanges. The normal trading hours for bitcoin exchanges are 24 hours per day, 365 days per year

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

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 purpose of the Act. The Exchange notes that the proposed rule change, rather will facilitate the listing and trading of an additional exchange-traded product that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

- A. by order approve or disapprove such proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

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-CboeBZX-2021-019 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-CboeBZX-2021-019. 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, D.C. 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeBZX-2021-019 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.⁹³

Secretary

⁹³ 17 CFR 200.30-3(a)(12).