

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-94907; File No. SR-CboeBZX-2022-006)

May 13, 2022

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to List and Trade Shares of the WisdomTree Bitcoin Trust under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

On January 25, 2022, Cboe BZX Exchange, Inc. (“BZX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares (“Shares”) of the WisdomTree Bitcoin Trust (“Trust”) under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. The proposed rule change was published for comment in the Federal Register on February 14, 2022.<sup>3</sup>

On March 18, 2022, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>5</sup> This order institutes proceedings under Section 19(b)(2)(B) of the Act<sup>6</sup> to determine whether to approve or disapprove the proposed rule change.

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

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

<sup>3</sup> See Securities Exchange Act Release No. 94184 (Feb. 8, 2022), 87 FR 8318 (“Notice”). The Commission has received no comments on the proposed rule change.

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 94476, 87 FR 16800 (Mar. 24, 2022). The Commission designated May 15, 2022, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

<sup>6</sup> 15 U.S.C. 78s(b)(2)(B).

I. Summary of the Proposal

As described in more detail in the Notice,<sup>7</sup> the Exchange proposes to list and trade the Shares of the Trust under BZX Rule 14.11(e)(4), which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.

The investment objective of the Trust would be to gain exposure to the price of bitcoin, less expenses and liabilities of the Trust's operation.<sup>8</sup> The Trust would hold bitcoin, and it would calculate the Trust's net asset value ("NAV") daily based on the value of bitcoin as reflected by the CF Bitcoin US Settlement Price ("Reference Rate"). The Reference Rate was created, and is administered, by CF Benchmarks Ltd., an independent entity. The Reference Rate aggregates the trade flow of several bitcoin platforms. The current platform composition of the Reference Rate is Bitstamp, Coinbase, Gemini, itBit, and Kraken. In calculating the Reference Rate, the methodology creates a joint list of the trade prices and sizes from the constituent platforms between 3:00 p.m. E.T. and 4:00 p.m. E.T. The methodology then divides this list into 12 equally-sized time intervals of 5 minutes and calculates the volume-weighted median trade price for each of those time intervals. The Reference Rate is the arithmetic mean of these 12 volume-weighted median trade prices.<sup>9</sup>

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<sup>7</sup> See Notice, supra note 3.

<sup>8</sup> See id. at 8329. WisdomTree Digital Commodity Services, LLC ("Sponsor") is the sponsor of the Trust, and Delaware Trust Company is the trustee. U.S. Bank, N.A. would serve as the custodian of the Trust ("Custodian"). U.S. Bancorp Fund Services, LLC dba U.S. Bank Global Fund Services would be the administrator and transfer agent ("Administrator") of the Trust. Foreside Fund Services LLC would be the marketing agent in connection with the creation and redemption of Shares. See id. at 8318-19, 8329.

<sup>9</sup> See id. at 8329-30.

Each Share would represent a fractional undivided beneficial interest in and ownership of the Trust. The Trust's assets would 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 would unexpectedly hold cash on a temporary basis.<sup>10</sup>

The Administrator would determine the NAV and NAV per Share of the Trust, on each day that the Exchange is open for regular trading, after 4:00 p.m. E.T. (often by 5:30 p.m. E.T. and almost always by 8:00 p.m. E.T.). The NAV of the Trust is the aggregate value of the Trust's assets less total liabilities of the Trust, each determined on the basis of generally accepted accounting principles. In determining the Trust's NAV, the Administrator values the bitcoin held by the Trust based on the price set by the Reference Rate as of 4:00 p.m. E.T.<sup>11</sup>

The Trust would provide information regarding the Trust's bitcoin holdings, as well as 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 would 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.<sup>12</sup>

When the Trust sells or redeems its Shares, it would do so in "in-kind" transactions in blocks of 50,000 Shares at the Trust's NAV. Authorized participants would deliver, or facilitate the delivery of, bitcoin to the Trust's account with the Custodian in exchange for Shares when

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<sup>10</sup> See id. at 8329.

<sup>11</sup> See id. at 8330.

<sup>12</sup> See id. at 8334.

they purchase Shares, and the Trust, through the Custodian, would deliver bitcoin to such authorized participants when they redeem Shares with the Trust.<sup>13</sup>

Although the Trust would not be an investment company registered under the Investment Company Act of 1940, as amended (“1940 Act”), the Exchange represents that:

- the Trust would qualify as an investment company under Accounting Standards Update 2013-08 and, as such, the Sponsor would ensure that the Trust’s financial statements would be audited at least annually by an independent registered public accounting firm and, as part of such audit, the auditor would be expected to perform procedures similar to those used for exchange-traded funds registered under the 1940 Act (“ETFs”);
- the Sponsor would facilitate the Trust’s compliance with the financial record keeping and reporting requirements under the Sarbanes-Oxley Act of 2002;
- the Trust’s Custodian would qualify as a “custodian” under the 1940 Act, and the Custodian would agree to exercise reasonable care, prudence, and diligence such as a person having responsibility for the safekeeping of property of the Trust would exercise;
- the Trust would be subject to the transparency requirements of Rule 6c-11 under the 1940 Act;
- the Sponsor would adopt procedures to ensure there are no transactions with affiliated persons that would be prohibited by Section 17 of 1940 Act and the applicable rules and regulations thereunder;
- the Trust would maintain a fidelity bond for the benefit of the Trust in the maximum amount required by Rule 17g-1 of the 1940 Act; and

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<sup>13</sup> See id. at 8329.

- the Sponsor or applicable service provider of the Trust would maintain the books and records of the Trust in satisfaction of the requirements of Section 31 of the 1940 Act.<sup>14</sup>

II. Proceedings to Determine Whether to Approve or Disapprove SR-CboeBZX-2022-006 and Grounds for Disapproval under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>15</sup> to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>16</sup> the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be "designed to prevent fraudulent and manipulative acts and practices" and "to protect investors and the public interest."<sup>17</sup>

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice,<sup>18</sup> in addition to any other

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<sup>14</sup> See id. at 8323-24.

<sup>15</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>16</sup> Id.

<sup>17</sup> 15 U.S.C. 78f(b)(5).

<sup>18</sup> See Notice, supra note 3.

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

1. What are commenters' views on whether the proposed Trust and Shares would be susceptible to manipulation? What are commenters' views generally on whether the Exchange's proposal is designed to prevent fraudulent and manipulative acts and practices? What are commenters' views generally with respect to the liquidity and transparency of the bitcoin markets, the bitcoin markets' susceptibility to manipulation, and thus the suitability of bitcoin as an underlying asset for an exchange-traded product?
2. What are commenters' views of the Exchange's assertion that regulatory and financial landscapes relating to bitcoin and other digital assets have changed significantly since 2016?<sup>19</sup> Are the changes that the Exchange identifies sufficient to support the determination that the proposed listing and trading of the Shares are consistent with the Act?
3. Based on data provided and the academic research cited by the Exchange,<sup>20</sup> do commenters agree with the Exchange that CME now represents a regulated market of significant size related to bitcoin?<sup>21</sup> What are commenters' views on whether there is a reasonable likelihood that a person attempting to manipulate the Shares would also have to trade on CME to manipulate the Shares? Do commenters agree with the Exchange's assertion that the combination of (a) CME Bitcoin Futures acting as the predominant influence on price discovery; (b) the overall size of the bitcoin market; and (c) the ability for market participants to buy or sell large

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<sup>19</sup> See id. at 8320-22.

<sup>20</sup> See id. at 8325-27, 8327 n.62.

<sup>21</sup> See id. at 8320.

amounts of bitcoin without significant market impact, helps to prevent the Shares from becoming the predominant force on pricing in either the bitcoin spot or CME Bitcoin Futures markets?<sup>22</sup>

4. The Exchange states 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 requirement to enter into a surveillance sharing agreement with a regulated market of significant size related to bitcoin.<sup>23</sup> In support of its assertion, the Exchange states that “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.”<sup>24</sup> The Exchange further states that potential manipulation concerns are mitigated by “the significant increase in trading volume in Bitcoin Futures[,] the growing body of evidence that the CME Bitcoin Futures market represents a regulated market of significant size..., the growth of liquidity at the inside in the spot market for bitcoin, and certain features of the Shares and the Reference Rate . . .”<sup>25</sup> What are commenters’ views regarding the Exchange’s argument?

5. The Exchange states that ETFs that provide exposure to bitcoin through CME Bitcoin Futures (“Bitcoin Futures ETFs”) are “a sub-optimal” for U.S. investors looking for long-term exposure to bitcoin and that any proposal to list and trade a Spot Bitcoin ETP should be reviewed by the Commission with this in mind.<sup>26</sup> The Exchange further states that it would be inconsistent to allow the listing and trading of Bitcoin Futures ETFs while simultaneously disapproving Spot

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<sup>22</sup> See id. at 8328.

<sup>23</sup> See id. at 8327 n.65.

<sup>24</sup> See id. at 8328.

<sup>25</sup> See id. at 8327; see also id. at 8332.

<sup>26</sup> See id. at 8323.

Bitcoin ETPs on the basis that the CME Bitcoin Futures market is not a regulated market of significant size. According to the Exchange, this would be “particularly true for the Trust, which will use the [Reference Rate] as its price source to calculate its daily [NAV], with inputs from the same bitcoin trading platforms . . . and materially the same methodology as is used to price CME Bitcoin Futures.”<sup>27</sup> Do commenters agree or disagree and why?

6. According to the Exchange, the Trust is structured “to operate as if certain 1940 Act provisions apply, providing transparency and investor protections such that a distinction between Bitcoin Futures ETFs and Spot Bitcoin ETPs is unwarranted.”<sup>28</sup> Does the representation that the Trust will “operate as if certain 1940 Act provisions apply” help mitigate the concerns the Commission previously expressed, including concerns pertaining to fraud and manipulation?

### III. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, and the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>29</sup>

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<sup>27</sup> See id.

<sup>28</sup> See id. at 8325.

<sup>29</sup> Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities



Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

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](mailto:rule-comments@sec.gov). Please include File Number SR-CboeBZX-2022-006 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-2022-006. 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

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Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

website viewing and printing in the Commission’s Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeBZX-2022-006 and should be submitted by [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>30</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>30</sup> 17 CFR 200.30-3(a)(57).