

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-95622; File No. SR-CboeBZX-2022-031)

August 29, 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 ARK 21Shares Bitcoin ETF under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

On May 13, 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 ARK 21Shares Bitcoin ETF (“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 June 1, 2022.<sup>3</sup> The Commission has received no comments on the proposed rule change.

On July 12, 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>

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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. 94982 (May 25, 2022), 87 FR 33250 (“Notice”).

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

<sup>5</sup> See Securities Exchange Act Release No. 95257, 87 FR 42530 (July 15, 2022). The Commission designated August 30, 2022, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

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.

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 is to seek to track the performance of bitcoin, as measured by the performance of the S&P Bitcoin Index (“Index”), adjusted for the Trust’s expenses and other liabilities.<sup>8</sup> Each Share will represent a fractional undivided beneficial interest in the bitcoin held by the Trust. 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.<sup>9</sup>

In seeking to achieve its investment objective, the Trust will hold bitcoin and will value the Shares daily based on the Index. The Index is a U.S. dollar-denominated composite reference rate for the price of bitcoin. The Index price is currently sourced from the following platforms:

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

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

<sup>8</sup> See id. at 33269. 21Shares US LLC (“Sponsor”) is the sponsor of the Trust, Delaware Trust Company is the trustee, and The Bank of New York Mellon will be the administrator (“Administrator”) and transfer agent. Foreside Global Services, LLC will be the marketing agent in connection with the creation and redemption of Shares. ARK Investment Management LLC will provide assistance in the marketing of the Shares. Coinbase Custody Trust Company, LLC (“Custodian”), will be responsible for custody of the Trust’s bitcoin. See id. at 33250, 33268.

<sup>9</sup> See id. at 33268-69.

Binance, Bitfinex, Bitflyer, Bittrex, Bitstamp, Coinbase Pro, Gemini, HitBTC, Huobi, Kraken, KuCoin, and Poloniex.<sup>10</sup> The Index methodology is intended to determine the fair market value for bitcoin by determining the principal market for bitcoin as of 4:00 p.m. E.T. daily.<sup>11</sup>

The Net Asset Value (“NAV”) of the Trust 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 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 Index as of 4:00 p.m. E.T. The Administrator determines 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. E.T.<sup>12</sup>

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<sup>10</sup> The underlying platforms are sourced by Lukka Inc. (“Data Provider”), an independent third-party digital asset data company engaged by the Sponsor, based on a combination of qualitative and quantitative metrics to analyze a comprehensive data set and evaluate factors including legal/regulation, Know-Your-Customer/transaction risk, data provision, security, team/exchange, asset quality/diversity, market quality, and negative events. As the digital ecosystem continues to evolve, the Data Provider can add or remove platforms based on the processes established by Lukka’s Pricing Integrity Oversight Board. See id. at 33269 and n.72.

<sup>11</sup> The Index methodology uses a ranking approach that considers several characteristics of the trading platforms, including oversight and intra-day trading volume. Specifically, to rank the credibility and quality of each trading platform, the Data Provider dynamically assigns a Base Exchange Score (“BES”) to the key characteristics for each platform. The BES reflects the fundamentals of a platform and determines which platform should be designated as the principal market at a given point of time. This score is determined by computing a weighted average of the values assigned to four different trading platform characteristics: (i) oversight; (ii) microstructure efficiency; (iii) data transparency; and (iv) data integrity. The methodology then applies a five-step weighting process for identifying a principal trading platform and the last price on that platform. Following this weighting process, an executed trading platform price is assigned for bitcoin as of 4:00 p.m. E.T. See id. at 33269.

<sup>12</sup> See id. at 33271.

The Trust will 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. E.T. 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.<sup>13</sup>

When the Trust sells or redeems its Shares, it will do so in “in-kind” transactions in blocks of 5,000 Shares. 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.<sup>14</sup>

II. Proceedings to Determine Whether to Approve or Disapprove SR-CboeBZX-2022-031 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.

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<sup>13</sup> See id. at 33270.

<sup>14</sup> See id. at 33269.

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

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 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. Based on data and analysis provided and the academic research cited by the Exchange,<sup>19</sup> do commenters agree with the Exchange that the Chicago Mercantile Exchange (“CME”) on

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<sup>16</sup> Id.

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

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

<sup>19</sup> See id. at 33256-61, 33261 n.59.

which bitcoin futures contracts trade (“CME Bitcoin Futures”) represents a regulated market of significant size related to spot bitcoin?<sup>20</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 the CME to manipulate the Shares? Do commenters agree with the Exchange’s assertion that the combination of (a) CME Bitcoin Futures leading price discovery; (b) the overall size of the bitcoin market; and (c) the ability for market participants to buy or sell large amounts of bitcoin without significant market impact, helps to prevent the Shares from becoming the predominant force on pricing in either the spot bitcoin or CME Bitcoin Futures markets?<sup>21</sup>

3. 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 comprehensive surveillance-sharing agreement with a regulated market of significant size related to spot bitcoin.<sup>22</sup> In support of its assertion, the Exchange provides data and analysis<sup>23</sup> to indicate that the spot bitcoin market is “increasingly efficient,” with “higher liquidity” and a “higher degree of consensus among investors regarding the price of [b]itcoin,” making it “less susceptible to manipulation.”<sup>24</sup> Do commenters believe the Exchange has shown that the bitcoin market is resistant to price 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

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<sup>20</sup> See id. at 33262.

<sup>21</sup> See id.

<sup>22</sup> See id. at 33261 n.62.

<sup>23</sup> See id. at 33262-68.

<sup>24</sup> See id. at 33264-66.

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>25</sup>

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-2022-031 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.

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<sup>25</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 Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

All submissions should refer to File Number SR-CboeBZX-2022-031. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All



submissions should refer to File Number SR-CboeBZX-2022-031 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>26</sup>

J. Matthew DeLesDernier  
Deputy Secretary

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<sup>26</sup> 17 CFR 200.30-3(a)(57).