

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-92714; File No. SR-NYSEArca-2021-37)

August 20, 2021

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to List and Trade Shares of the First Trust SkyBridge Bitcoin ETF Trust under NYSE Arca Rule 8.201-E

On May 6, 2021, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the First Trust SkyBridge Bitcoin ETF Trust (“Trust”) under NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares). The proposed rule change was published for comment in the Federal Register on May 27, 2021.³

On July 7, 2021, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ This order institutes proceedings under Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 91962 (May 21, 2021), 86 FR 28646 (May 27, 2021) (“Notice”). Comments on the proposed rule change can be found at: <https://www.sec.gov/comments/sr-nysearca-2021-37/srnysearca202137.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 92333 (July 7, 2021), 86 FR 36826 (July 13, 2021). The Commission designated August 25, 2021, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

⁶ 15 U.S.C. 78s(b)(2)(B).

I. Summary of the Proposal

As described in more detail in the Notice,⁷ the Exchange proposes to list and trade the Shares of the Trust under NYSE Arca Rule 8.201-E, which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.

The investment objective of the Trust would be for the Shares to reflect the performance of the value of bitcoin, less the Trust's liabilities and expenses.⁸ The Trust will not seek to reflect the performance of any benchmark or index. In order to pursue its investment objective, the Trust will seek to purchase and sell such number of bitcoin so that the total value of the bitcoin held by the Trust is as close to 100% of the net assets of the Trust as is reasonably practicable to achieve.⁹

The Shares represent units of fractional undivided beneficial interest in, and ownership of, the Trust. The Trust will hold only bitcoins, which the Bitcoin Custodian will custody on behalf of the Trust. The Trust generally will not hold cash or cash equivalents; however, the Trust may hold cash and cash equivalents on a temporary basis to pay extraordinary expenses.¹⁰

⁷ See Notice, supra note 3.

⁸ See id. at 28652. First Trust Advisors L.P. is the sponsor of the Trust, and Delaware Trust Company is the trustee. The sub-adviser for the Trust is SkyBridge Capital II, LLC. The Bank of New York Mellon ("Administrator") is the transfer agent and the administrator of the Trust. The bitcoin custodian for the Trust is NYDIG Trust Company LLC ("Bitcoin Custodian"). See id. at 28646.

⁹ See id. at 28652.

¹⁰ See id. at 28652, 28654. The Administrator acts as custodian of the Trust's cash and cash equivalents. See id. at 28654. While the Trust may from time to time incur certain extraordinary, non-recurring expenses that must be paid in U.S. dollars or other fiat currency, such events would only impact the amount of bitcoin represented by a Share of the Trust. See id. at 28655.

The net asset value (“NAV”) of the Trust will be determined in accordance with Generally Accepted Accounting Principles as the total value of bitcoin held by the Trust, plus any cash or other assets, less any liabilities including accrued but unpaid expenses. The NAV of the Trust will be determined as of 4:00 p.m., E.T. on each day that the Shares trade on the Exchange (“Business Day”).¹¹ The Trust will use the CF Bitcoin US Settlement Price (“Reference Rate”) to calculate the Trust’s NAV.¹² The Reference Rate serves as a once-a-day benchmark rate of the U.S. dollar price of bitcoin (USD/BTC), calculated as of 4:00 p.m., E.T. The Reference Rate aggregates the trade flow of several bitcoin platforms during an observation window between 3:00 p.m. and 4:00 p.m., E.T., into the U.S. dollar price of one bitcoin at 4:00 p.m., E.T. The current constituent bitcoin platforms of the Reference Rate are Bitstamp, Coinbase, Gemini, itBit, and Kraken (“Constituent Platforms”). In calculating the Reference Rate, the methodology creates a joint list of certain trade prices and sizes from the Constituent Platforms between 3:00 p.m. and 4:00 p.m., E.T. The methodology then divides this list into a number of equally sized time intervals, and it calculates the volume-weighted median trade price for each of those time intervals. The Reference Rate is the equally weighted average of the volume-weighted median trade prices of all intervals.¹³

The Trust’s website, as well as one or more major market data vendors, will provide an intra-day indicative value (“IIV”) per Share updated every 15 seconds, as calculated by the

¹¹ The Trust’s daily activities will generally not be reflected in the NAV determined for the Business Day on which the transactions are effected (the trade date), but rather on the following Business Day. See id. at 28654.

¹² The Reference Rate is not affiliated with the Sponsor and is administered by CF Benchmarks Ltd. See id. at 28654.

¹³ See id. at 28654-55.

Exchange or a third party financial data provider during the Exchange’s Core Trading Session (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 the Exchange’s Core Trading Session to reflect changes in the value of the Trust’s NAV during the trading day.¹⁴

The Trust will issue and redeem Shares to Authorized Participants on an ongoing basis in blocks of 50,000 Shares (“Creation Units”). The creation and redemption of Creation Units will be effected in “in-kind” transactions based on the quantity of bitcoin attributable to each Share. The creation and redemption of Creation Units require the delivery to the Trust, or the distribution by the Trust, of the number of bitcoins represented by the Creation Units being created or redeemed.¹⁵

II. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEArca-2021-37 and Grounds for Disapproval under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹⁶ 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.

¹⁴ See id. at 28659.

¹⁵ See id. at 28658-59.

¹⁶ 15 U.S.C. 78s(b)(2)(B).

Pursuant to Section 19(b)(2)(B) of the Act,¹⁷ 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.”¹⁸

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,¹⁹ 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. What are commenters’ views of the Exchange’s assertions that the regulatory and financial landscape relating to bitcoin and other digital assets have changed significantly since 2016?²⁰ Are the changes that the Exchange identifies sufficient to support the determination that

¹⁷ Id.

¹⁸ 15 U.S.C. 78f(b)(5).

¹⁹ See Notice, supra note 3.

²⁰ See id. at 28647-48.

the proposal to list and trade the Shares is designed to protect investors and the public interest and is consistent with the other applicable requirements of Section 6(b)(5) of the Act?

3. The Exchange states that the listing and trading of the Shares would provide “an opportunity for U.S. investors to gain exposure to bitcoin in a regulated and transparent exchange-traded vehicle that limits risks” and asserts that concerns regarding potential manipulation of a bitcoin exchange-traded product “have been sufficiently mitigated and may be outweighed by growing and quantifiable investor protection concerns related to [over-the-counter bitcoin funds].”²¹ What are commenters’ views regarding such assertions?

4. The Exchange asserts that the Chicago Mercantile Exchange (“CME”), either alone as the sole market for bitcoin futures or as a group of markets together with the Constituent Platforms, represents a regulated market of significant size.²² Further, the Exchange states that CME is “the primary market for bitcoin futures, and compares favorably with other markets that were deemed to be markets of significant size in precedents.”²³ Do commenters agree? What of the Exchange’s assertion that, through CME CF Bitcoin Reference Rate, “the CME and the Exchange would be able, in the case of any suspicious trades, to discover all material trade information, including the identities of the customers placing the trades”?²⁴

5. The Exchange states that any would-be manipulator of bitcoin prices would be reasonably likely to do so through the Commodity Futures Trading Commission-regulated

²¹ See id. at 28649.

²² See id. at 28656, 28661.

²³ See id. at 28656.

²⁴ See id. at 28657.

bitcoin futures (“Bitcoin Futures”) market, i.e., CME.²⁵ Among other things, the Exchange asserts that, “because the Bitcoin Futures market is in effect the ‘cheapest’ route to manipulate bitcoin, it is highly likely such manipulators would attempt to do so there rather than any spot market.”²⁶ Do commenters agree with this assertion?

6. What are commenters’ views on the Exchange’s assertion that (a) Bitcoin Futures’ important role in price discovery; (b) the overall size of the bitcoin market; (c) the ability for market participants to buy or sell large amounts of bitcoin without significant market impact; and (d) the results from a study conducted by CF Benchmarks regarding “slippage” help demonstrate that the Shares would not become the predominant force on pricing in either the bitcoin spot or Bitcoin Futures markets?²⁷

7. What are commenters’ views on the Exchange’s statement that 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 increasingly expensive?²⁸ What are commenters’ views on whether “offering only in-kind creation and redemption will provide unique protections against potential attempts to manipulate the Shares” and that the price the Sponsor uses to value the Trust’s bitcoin “is not particularly important”?²⁹ What are commenters’ views on the assertion that because the Reference Rate is determined exclusively based on its Constituent Platforms,

²⁵ See id. at 28656-57.

²⁶ See id. at 28657.

²⁷ See id. at 28658.

²⁸ See id.

²⁹ See id.

“use of the Reference Rate would mitigate the effects of potential manipulation of the bitcoin market”³⁰

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.³¹

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

³⁰ See id. at 28661.

³¹ 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).

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEArca-2021-37 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEArca-2021-37. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All

submissions should refer to File Number SR-NYSEArca-2021-37 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.³²

Jill M. Peterson
Assistant Secretary

³² 17 CFR 200.30-3(a)(57).