

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93191; File No. SR-NYSEArca-2021-57)

September 29, 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 NYDIG Bitcoin ETF under NYSE Arca Rule 8.201-E

On June 30, 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 NYDIG Bitcoin ETF (“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 July 19, 2021.³

On August 23, 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. 92395 (July 13, 2021), 86 FR 38129 (July 19, 2021) (“Notice”). Comments on the proposed rule change can be found at: <https://www.sec.gov/comments/sr-nysearca-2021-57/srnysearca202157.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 92722 (Aug. 23, 2021), 86 FR 48268 (Aug. 27, 2021). The Commission designated October 17, 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 is to reflect the performance of the price of bitcoin less the expenses of the Trust's operations.⁸ The Trust will not seek to reflect the performance of any benchmark or index. In seeking to achieve its investment objective, the Trust will only hold bitcoin.⁹ The Trust generally does not intend to hold cash or cash equivalents. However, the Trust may hold cash and cash equivalents on a temporary basis to pay extraordinary expenses.¹⁰

The net asset value ("NAV") of the Trust will be determined in accordance with Generally Accepted Accounting Principles ("GAAP") 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 typically be determined as of 4:00 p.m. E.T. on each day that the Exchange is open for regular trading ("Business Day"). The Administrator will calculate the NAV of the Trust once each Exchange trading day. The Exchange's Core Trading Session closes

⁷ See Notice, supra note 3.

⁸ See id. at 38129. NYDIG Asset Management LLC ("Sponsor") is the sponsor of the Trust, and Delaware Trust Company is the trustee. U.S. Bancorp Fund Services, LLC ("Administrator") is the transfer agent and the administrator of the Trust. The bitcoin custodian for the Trust is NYDIG Trust Company LLC ("Bitcoin Custodian"). The Bitcoin Custodian is chartered as a limited purpose trust company by the New York State Department of Financial Services ("NYDFS") and is authorized by NYDFS to provide digital asset custody services. Both the Sponsor and the Bitcoin Custodian are indirect wholly-owned subsidiaries of New York Digital Investment Group LLC. See id.

⁹ See id.

¹⁰ See id. at 38130. The Trust will enter into a cash custody agreement with U.S. Bank N.A. under which U.S. Bank N.A. will act as custodian of the Trust's cash and cash equivalents. See id.

at 4:00 p.m. E.T. 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. The NAV for the Trust’s Shares will be disseminated daily to all market participants at the same time.¹¹

The Trust will disseminate an intraday indicative value (“IIV”) per Share updated every 15 seconds. The IIV will be calculated by using the same methodology that the Trust uses to determine NAV, which is to follow GAAP. Generally, GAAP requires the fair value of an asset that is traded on a market to be measured by reference to orderly transactions on an active market. Among all active markets with orderly transactions, the market that is used to determine the fair value of an asset is the principal market. The Sponsor expects that the principal market will initially generally be the NYDFS-regulated trading venue with the highest trading volume and level of activity.¹²

The Trust will create and redeem Shares from time to time, but only in one or more blocks of 10,000 Shares (“Creation Baskets”). Creation Baskets will only be made in exchange for delivery to the Trust or the distribution by the Trust of the amount of bitcoin represented by the Shares being created or redeemed, the amount of which will be based on the quantity of bitcoin attributable to each Share of the Trust (net of accrued but unpaid Sponsor fees, extraordinary expenses or liabilities) being created or redeemed determined as of 4:00 p.m. E.T. on the day the order is properly received.¹³

¹¹ See id. at 38130-32.

¹² See id. at 38132.

¹³ See id.

II. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEArca-2021-57 and Grounds for Disapproval under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹⁴ 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,¹⁵ 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."¹⁶

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,¹⁷ 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:

¹⁴ 15 U.S.C. 78s(b)(2)(B).

¹⁵ Id.

¹⁶ 15 U.S.C. 78f(b)(5).

¹⁷ See Notice, supra note 3.

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. The Exchange asserts that the "significant increase in trading volume and open interest in the bitcoin futures market, growth of liquidity in the spot market for bitcoin, and certain features of the Shares mitigate the manipulation concerns expressed by the Commission when it last reviewed exchange proposals to list a bitcoin exchange-traded product."¹⁸ The Exchange concludes "that, on the whole, the manipulation concerns previously articulated by the Commission have since been significantly mitigated, and do not exceed those that exist in the markets for other commodities that underly [sic] securities listed on U.S. national securities exchanges."¹⁹ Do commenters agree or disagree? Are the changes that the Exchange identifies sufficient to support the determination that 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 "Trust would provide investors with exposure to bitcoin in a manner that may be more efficient, more convenient and more regulated than the purchase of bitcoin or other investment products that provide exposure to bitcoin."²⁰ The Exchange asserts

¹⁸ See id. at 38134.

¹⁹ See id.

²⁰ See id.

that “investors in [over-the-counter] bitcoin funds . . . have historically borne significantly higher fees and expenses than those that would be borne by investors in the Trust” and that investors holding bitcoin often face “credit risk” and “risk of loss or theft of their bitcoin.”²¹ What are commenters’ views regarding the Exchange’s assertions? Do these reasons provide an appropriate basis for the determination that the proposal is consistent with the applicable requirements of Section 6(b)(5) of the Act?

4. The Exchange asserts that the Chicago Mercantile Exchange (“CME”) represents a regulated market of significant size relating to bitcoin.²² The Exchange states that “proprietary research, including lead-lag analyses, . . . demonstrates that prices in the CME bitcoin futures market . . . lead prices in the bitcoin spot market, including non-U.S. bitcoin spot markets.” According to the Exchange, “[t]his finding supports the thesis that a market participant attempting to manipulate the Shares would have to trade on that market.”²³ The Exchange, however, does not provide any information regarding the proprietary research. What are commenters’ views regarding these assertions?

5. According to the Exchange, “the bitcoin futures market is one of the primary venues that market participants use to transact large exposures to bitcoin,” and, “[i]n contrast to the efficient leverage offered through the futures market, many bitcoin spot trading venues require full pre-funding of trading, which means it would be highly capital intensive to ‘spoofer’ or ‘layer’ order books on spot trading venues.”²⁴ The Exchange therefore concludes that if a market participant

²¹ See id.

²² See id.

²³ See id. at 38135.

²⁴ See id.

intended to manipulate the price of bitcoin, and thereby the Shares, the bitcoin futures market is the one that would be manipulated first.²⁵ Do commenters agree with the Exchange’s analysis and conclusion?

6. What are commenters’ views of the Exchange’s assertion that (a) the significant volume in the bitcoin futures market; (b) the overall size of the bitcoin market; (c) the significant liquidity available in the bitcoin spot markets; and (d) the ability of market participants to buy or sell large amounts of bitcoin without significant market impact demonstrate that the Shares would not become the predominant force on pricing in either the bitcoin spot or futures markets?²⁶

7. What are commenters’ views on the Exchange’s statements that “the cost to buy or sell \$5 million worth of bitcoin averages roughly 20 basis points” and that, “[f]or a \$10 million market order, the cost to buy or sell is roughly 40 basis points.”²⁷ What are commenters’ views of the Exchange’s assertion that these metrics are comparable to the liquidity of existing commodity exchange-traded products?²⁸ What are commenters’ views on the Exchange’s assertion that the fact that “the Trust receives and holds only bitcoin . . . substantially reduces the potential for manipulation of the number of Shares created or redeemed, which therefore substantially reduces the potential for shareholders to be harmed by manipulation.”²⁹

²⁵ See id.

²⁶ See id. at 38136.

²⁷ See id.

²⁸ See id.

²⁹ See id. at 38135.

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.³⁰

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. Please include File Number SR-NYSEArca-2021-57 on the subject line.

³⁰ 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).

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-2021-57. 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-2021-57 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.³¹

J. Matthew DeLesDernier
Assistant Secretary

³¹ 17 CFR 200.30-3(a)(57).