

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-94126; File No. SR-NYSEArca-2021-89)

February 1, 2022

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 Bitwise Bitcoin ETP Trust under NYSE Arca Rule 8.201-E

On October 14, 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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares (“Shares”) of the Bitwise Bitcoin ETP 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 November 3, 2021.<sup>3</sup>

On December 15, 2021, 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. 93445 (Oct. 28, 2021), 86 FR 60695 (“Notice”). No comments have been received on the proposed rule change.

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

<sup>5</sup> See Securities Exchange Act Release No. 93790, 86 FR 72300 (Dec. 21, 2021). The Commission designated February 1, 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 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 seek to provide exposure to the value of bitcoin held by the Trust, less the expenses of the Trust's operations.<sup>8</sup> The Shares will represent units of undivided beneficial ownership of the Trust.<sup>9</sup> Under normal circumstances, the Trust's only asset will be bitcoin, and, under limited circumstances, cash.<sup>10</sup> The Trust will not use derivatives that may subject the Trust to counterparty and credit risks.<sup>11</sup>

The Trust's net asset value ("NAV") and NAV per Share will be determined by the Administrator once each Exchange trading day as of 4:00 p.m. E.T., or as soon thereafter as practicable, by reference to the CF Bitcoin-Dollar US Settlement Price ("CME US Reference Rate").<sup>12</sup> The Administrator will calculate the NAV by multiplying the number of bitcoin held by the Trust by the CME US Reference Rate for such day, and subtracting the accrued but unpaid

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

<sup>8</sup> See id. at 60696. Bitwise Investment Advisers, LLC ("Sponsor") is the sponsor of the Trust, and Delaware Trust Company is the trustee. The Trust will engage a third party custodian to maintain custody of the Trust's bitcoin assets. The Trust also will engage a third party service provider to serve as the administrator ("Administrator") and transfer agent of the Trust. See id.

<sup>9</sup> See id. at 60699.

<sup>10</sup> See id. at 60696. The Trust may sell bitcoin and temporarily hold cash as part of a liquidation of the Trust or to pay certain extraordinary expenses not assumed by the Sponsor. According to the Exchange, the Trust also may, from time to time, passively receive, by virtue of holding bitcoin, certain additional digital assets or rights to receive such digital assets through a fork of the Blockchain or an airdrop of assets. See id. n.12.

<sup>11</sup> See id. at 60696.

<sup>12</sup> See id. at 60696, 60699.

expenses and liabilities of the Trust.<sup>13</sup> The CME US Reference Rate is a daily reference rate of the U.S. dollar price of one bitcoin, calculated at 4:00 p.m. E.T.<sup>14</sup>

The CME US Reference Rate aggregates during a calculation window the trade flow of several spot bitcoin trading platforms into the U.S. dollar price of one bitcoin as of its calculation time. The current constituent bitcoin platforms of the CME US Reference Rate are Bitstamp, Coinbase, Gemini, itBit, and Kraken (“Constituent Platforms”). In calculating the CME US Reference Rate, the methodology creates a joint list of certain trade prices and sizes from the Constituent Platforms. 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 intervals. The CME US Reference Rate is the equally weighted average of the volume-weighted medians of all intervals.<sup>15</sup>

The Trust will provide website disclosure of its holdings daily.<sup>16</sup> In addition, each trading day, the Exchange will calculate and disseminate an intraday trust value (“ITV”) every 15 seconds during the NYSE Arca Core Trading Session.<sup>17</sup> The ITV will be calculated throughout the trading day by using the prior day’s holdings at close of business and the most recently

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<sup>13</sup> See id. at 60699.

<sup>14</sup> The Exchange states that the CME US Reference Rate utilizes the same methodology as the CME CF Bitcoin Reference Rate, which is calculated at 4:00 p.m. London time and is used to settle bitcoin futures on the CME. See id. at 60696 n.11; 60698-99.

<sup>15</sup> See id. at 60699.

<sup>16</sup> See id. at 60715.

<sup>17</sup> See id. at 60699. The ITV will also be widely disseminated by one or more major market data vendors during the NYSE Arca Core Trading Session. See id.

reported price level of the CME Bitcoin Real Time Price<sup>18</sup> as reported by Bloomberg, L.P., or another reporting service, or another price of bitcoin derived from updated bids and offers indicative of the spot price of bitcoin.<sup>19</sup>

The Trust will create and redeem Shares from time to time, but only in one or more Creation Units. A Creation Unit will initially consist of at least 25,000 Shares, but may be subject to change.<sup>20</sup> The Trust will process all creations and redemptions in-kind, and accrue all ordinary fees in bitcoin (rather than cash), as a way of seeking to ensure that the Trust holds the desired amount of bitcoin-per-share. The Trust will not purchase or sell bitcoin, other than if the Trust liquidates or must pay expenses not contractually assumed by the Sponsor. Instead, financial institutions authorized to create and redeem Shares (“Authorized Participants”) will deliver, or cause to be delivered, bitcoin to the Trust in exchange for Shares of the Trust, and the Trust will deliver bitcoin to Authorized Participants when those Authorized Participants redeem Shares of the Trust.<sup>21</sup>

II. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEArca-2021-89 and Grounds for Disapproval under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>22</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

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<sup>18</sup> The CME Bitcoin Real Time Price is a continuous real-time bitcoin price index published by the CME Group and Crypto Facilities Ltd. using data from the Constituent Platforms. See id.

<sup>19</sup> See id.

<sup>20</sup> See id.

<sup>21</sup> See id. at 60696.

<sup>22</sup> 15 U.S.C. 78s(b)(2)(B).

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>23</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>24</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>25</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

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<sup>23</sup>

Id.

<sup>24</sup>

15 U.S.C. 78f(b)(5).

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See Notice, supra note 3.

markets, the bitcoin markets' susceptibility to manipulation, and thus the suitability of bitcoin as an underlying asset for an exchange-traded product ("ETP")?

2. The Exchange asserts that "the exclusive use of in-kind creations, redemptions and fee accruals, in all situations except when the Trust is required to liquidate or to pay extraordinary expenses, provides long-term investors in the Trust with redundant but strong protection."<sup>26</sup> The Exchange further asserts that "[t]he in-kind structure ensures that the Trust maintains the appropriate amount of bitcoin-per-Share in all scenarios, regardless of the U.S. dollar calculation of NAV or the CME US Reference Rate."<sup>27</sup> What are commenters' views of these assertions?

3. The Exchange asserts that, "through extensive statistical analysis and careful consideration of third-party evaluations of these markets, the Sponsor has demonstrated that the CME [bitcoin futures] Market leads the bitcoin spot market and the unregulated bitcoin futures market, such that it is reasonably likely that a person attempting to manipulate the ETP would also have to trade on the CME [bitcoin futures] Market."<sup>28</sup> The Exchange further asserts "both existing academic literature and the Sponsor's own studies show that the CME [bitcoin futures] Market leads price discovery relative to the bitcoin spot market."<sup>29</sup> Do commenters agree or disagree?

- Specifically, what are commenters' views of the Sponsor's methodology used to arrive at this conclusion? The Exchange describes how the Sponsor used data from the CME Group and Coin Metrics, supplemented with data from CoinAPI,

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<sup>26</sup> See id. at 60700.

<sup>27</sup> See id.

<sup>28</sup> See id. at 60704.

<sup>29</sup> See id. at 60716.

to perform pairwise information share/component share (“IS/CS”) price discovery analysis and pairwise time-shift lead-lag (“TSLL”) analysis between the CME bitcoin futures market and 10 bitcoin spot markets and seven unregulated futures markets.<sup>30</sup> What are commenters’ views on, for example, the Sponsor’s choices for, and level of explanation of: the sources for the tick-level trade data; the aggregation (if any) the Sponsor performed on the tick-level trade data; the spot and unregulated futures trading platforms the Sponsor included in its pairwise analyses; the particular IS/CS and TSLL paradigms used to perform its pairwise analyses; the full-period and monthly results of its pairwise analyses; the statistical significance of the results; and the sensitivity of the results to the Sponsor’s methodological choices?

- What are commenters’ views on how the Commission should weigh the Sponsor’s pairwise results compared to the previous academic and industry lead-lag studies that the Sponsor cites?<sup>31</sup> What are commenters’ views on the accuracy of the Sponsor’s summaries of such past studies?
- What are commenters’ views on the robustness of the Sponsor’s two-dimensional, pairwise results? Do commenters believe the Exchange has adequately addressed the extent of any relationship between prices on unregulated bitcoin futures markets and the CME bitcoin futures market, the bitcoin spot markets, and/or the Constituent Platforms, or where price formation

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<sup>30</sup> See id. at 60704-11.

<sup>31</sup> See id. at 60705-07.

occurs when the entirety of bitcoin futures markets, not just the CME, is considered?

- What are commenters' views on whether the Sponsor's lead-lag results sufficiently demonstrate a reasonable likelihood that a would-be manipulator of the proposed ETP would have to trade on the CME bitcoin futures market to successfully manipulate the proposed ETP? Do commenters believe that the Exchange has adequately explained and/or demonstrated how the Sponsor's market-level, statistical results provide sufficient evidence of the likely trading behavior of a would-be manipulator?

4. The Exchange asserts that "the Sponsor's analysis shows that trading in the Trust is unlikely to become the predominant influence on prices in the CME [bitcoin futures] Market, even when assuming aggressive estimates of first-year flows of \$4.7 billion and average daily trading volume of \$143 million."<sup>32</sup> Do commenters agree or disagree?

- Specifically, what are commenters' views of the Exchange's estimates of the Trust's first-year flows? What are commenters' views of the methodology used to arrive at those estimates?<sup>33</sup> Do commenters agree with the Exchange that "it is unlikely that a bitcoin ETP will experience the highest first-year flows in history,"<sup>34</sup> and that the 2020 inflows to the Grayscale Bitcoin Trust (GBTC) of \$4.7 billion is an "aggressive" working estimate for first-year flows into a new bitcoin ETP?<sup>35</sup>

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<sup>32</sup> See id. at 60711.

<sup>33</sup> See id. at 60711-12.

<sup>34</sup> See id. at 60711.

<sup>35</sup> See id. at 60712.



- The Exchange describes how the Sponsor correlated the daily and weekly flows into GBTC with the corresponding daily or weekly price of bitcoin (calculated using the 4:00 p.m. E.T. bitcoin reference rate from Coin Metrics), and concludes that “there is no meaningful relationship between daily and weekly flows into GBTC and changes in the price of bitcoin.”<sup>36</sup> What are commenters’ views on the data sources used, methodology selected, and results obtained by the Sponsor? The Exchange states that the Sponsor concluded from this analysis that “it is unlikely that the aggressive estimate of first-year flows into a bitcoin ETP (\$4.7 billion) would cause it to become the predominant influence on prices in the CME [bitcoin futures] Market.”<sup>37</sup> What are commenters’ views on how well the Sponsor’s analysis of the historical correlation between GBTC inflows and the spot price of bitcoin predicts the future impact of inflows into the proposed ETP on prices in the CME bitcoin futures market?
- What are commenters’ views of the Exchange’s estimate of the likely average daily trading volume of the Shares (\$143 million)? What are commenters’ views on the methodology used to arrive at that estimate (which was based on an assessment of GBTC’s and SPDR Gold (GLD)’s ratios of average daily trading volume to assets under management)?<sup>38</sup> Do commenters agree with the Exchange that \$143 million is an “aggressive” working estimate for average daily trading volume of a new bitcoin ETP?<sup>39</sup>

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<sup>36</sup> See id. at 60712-13.

<sup>37</sup> See id. at 60713.

<sup>38</sup> See id. at 60713-14.

<sup>39</sup> See id. at 60714.

- The Exchange states that “[g]iven that the average daily trading volume of the CME [bitcoin futures] Market in 2020 was 174% higher at \$392 million than the Sponsor’s aggressive estimate of a new bitcoin ETP’s potential trading volume of \$143 million, the Sponsor found that it is unlikely that trading in a new bitcoin ETP will cause such ETP to become the predominant influence on prices in the CME [bitcoin futures] Market.”<sup>40</sup> Do commenters agree or disagree with the Sponsor’s conclusion? Why or why not?

### 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>41</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

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<sup>40</sup> See id. at 60715.

<sup>41</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).

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-NYSEArca-2021-89 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-2021-89. 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-2021-89 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>42</sup>

J. Matthew DeLesDernier

Assistant Secretary

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<sup>42</sup> 17 CFR 200.30-3(a)(57).