SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–94620; File No. SR–NYSEArca–2021–53]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 2, To List and Trade Shares of the Teucrium Bitcoin Futures Fund Under NYSE Arca Rule 8.200–E, Commentary .02 (Trust Issued Receipts)

April 6, 2022.

I. Introduction

On July 23, 2021, NYSE Arca, Inc. (''Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the Teucrium Bitcoin Futures Fund (''Fund'') under NYSE Arca Rule 8.200–E, Commentary .02 (Trust Issued Receipts). The proposed rule change was published for comment in the **Federal Register** on August 11, 2021.[3]

On September 15, 2021, pursuant to Section 19(b)(2) of the Exchange 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] On November 8, 2021, the Commission instituted proceedings under Section 19(b)(2)(B) of the Exchange Act [6] to determine whether to approve or disapprove the proposed rule change.[7] On January 25, 2022, the Commission designated a longer period for Commission action on the proposed rule change.[8] On March 7, 2022, the Exchange filed partial Amendment No. 2 to the proposed rule change.[9]

When an exchange files a proposed rule change,[10] the Commission must determine whether the proposed rule change is consistent with the statutory provisions, and the rules and regulations, that apply to national securities exchanges.[11] As discussed further below, the Commission is approving the proposed rule change, as modified by Amendment No. 2. In approving this proposed rule change, however, the Commission emphasizes—as it has with previous disapprovals of bitcoin-related ETPs [12]—that its action does not rest on an evaluation of whether bitcoin, or blockchain technology more generally, has utility or value as an innovation or an investment.

II. Description of the Proposed Rule Change, as Modified by Amendment No. 2

As described in more detail in the Notice and Amendment No. 2,[13] the Exchange proposes to list and trade the Shares of the Fund under NYSE Arca Rule 8.200–E, Commentary .02, which governs the listing and trading of Trust Issued Receipts on the Exchange.

According to the Exchange, the Chicago Mercantile Exchange, Inc. (''CME'') currently offers two bitcoin futures contracts, one contract representing five (5) bitcoins [14] (''BTC Contract'') and another contract representing one-tenth of one (0.10) bitcoin (''MBT Contract'').[15] Each BTC Contract and MBT Contract settles daily to the BTC Contract volume-weighted average price (''VWAP'') of all trades that occur between 2:59 p.m. and 3:00 p.m., Central Time, the settlement period, rounded to the nearest tradable tick.[16] BTC Contracts and MBT Contracts each expire on the last Friday of the contract month, and the final settlement value for each contract is based on the CME CF Bitcoin Reference Rate (''CME CF BRR'').[17]

The investment objective of the Fund is to have the daily changes in the net asset value (''NAV'') of the Shares reflect the daily changes in the price of a specified benchmark (''Benchmark'').[18] The Benchmark will be calculated using the closing settlement prices of BTC Contracts listed on the CME. In seeking to achieve the Fund's investment objective, the Sponsor will employ a ''neutral'' investment strategy that is intended to track the changes in the Benchmark.[19] The Fund will only invest in BTC Contracts and MBT Contracts (''Bitcoin Futures Contracts'') and in cash and cash equivalents.[20] The Fund will roll its futures positions on a regular basis and will never carry futures positions all the way to cash settlement.[21]

The NAV per Share of the Fund will be calculated by taking the current market value of its total assets, subtracting any liabilities, and dividing that total by the number of Shares. The administrator of the Fund will calculate the NAV once each trading day, as of the earlier of the close of the New York Stock Exchange or 4:00 p.m., Eastern Time.[22]

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 92573 (Aug. 5, 2021), 86 FR 44062 (''Notice''). Comments on the proposed rule change can be found at: *https://www.sec.gov/comments/sr-nysearca-2021-53/srnysearca202153.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 92999, 86 FR 52539 (Sept. 21, 2021).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 93534, 86 FR 63082 (Nov. 15, 2021).

[8] *See* Securities Exchange Act Release No. 94054, 87 FR 4974 (Jan. 31, 2022).

[9] The Exchange filed partial Amendment No. 1 to the proposed rule change on March 4, 2022, and withdrew partial Amendment No. 1 on March 7, 2022. In Amendment No. 2, the Exchange clarified, among others things, that under no circumstances will the Fund hold and/or invest in any assets other than BTC Contracts and MBT Contracts (each as defined below), cash, and cash equivalents; and provided additional representations that are commonly made by and/or required for futures-based exchange-traded products listed under NYSE Arca Rule 8.200–E, Commentary .02 (Trust Issued Receipts). Because Amendment No. 2 does not materially alter the substance of the proposed rule change, Amendment No. 2 is not subject to notice and comment. The full text of Amendment No. 2 is available on the Commission's website at: *https://www.sec.gov/comments/sr-nysearca-2021-53/srnysearca202153-20118884-271701.pdf* (''Amendment No. 2'').

[10] Such filings are made under Section 19(b)(1) of the Exchange Act, 15 U.S.C. 78s(b)(1), and Exchange Act Rule 19b–4, 17 CFR 240.19b–4.

[11] *See* Exchange Act Section 19(b)(2)(C), 15 U.S.C. 78s(b)(2)(C).

[12] *See, e.g.,* Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, To Amend NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares) and To List and Trade Shares of the United States Bitcoin and Treasury Investment Trust Under NYSE Arca Rule 8.201–E, Securities Exchange Act Release No. 88284 (Feb. 26, 2020), 85 FR 12595, 12597 (Mar. 3, 2020) (SR–NYSEArca–2019–39) (''USBT Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the NYDIG Bitcoin ETF Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares), Securities Exchange Act Release No. 94395 (Mar. 10, 2022), 87 FR 14932, 14934 (Mar. 16, 2022) (SR–NYSEArca–2021–57) (''NYDIG Order'').

[13] *See* Notice, *supra* note 3; Amendment No. 2, *supra* note 9.

[14] Bitcoins are digital assets that are issued and transferred via a decentralized, open-source protocol used by a peer-to-peer computer network through which transactions are recorded on a public transaction ledger known as the ''bitcoin blockchain.'' The bitcoin protocol governs the creation of new bitcoins and the cryptographic system that secures and verifies bitcoin transactions. *See, e.g.,* Notice, 86 FR at 44063.

[15] BTC Contracts began trading on the CME Globex trading platform on December 15, 2017, and are cash-settled in U.S. dollars. MBT Contracts began trading on the CME Globex trading platform on May 3, 2021, under the ticker symbol ''MBT'' and are also cash-settled in U.S. dollars. *See id.* at 44062.

[16] *See id.* at 44073.

[17] *See id.* The CME CF BRR aggregates the trade flow of major bitcoin spot platforms during a specific calculation window into a once-a-day reference rate of the U.S. dollar price of bitcoin. *See id.* at 44067 n.59.

[18] The Fund is a series of Teucrium Commodity Trust (''Trust''). The Fund is managed and controlled by Teucrium Trading, LLC (''Sponsor''). *See id.* at 44062.

[19] *See id.* at 44062–63.

[20] *See* Amendment No. 2, *supra* note 9, at 3.

[21] *See* Notice, 86 FR at 44062.

[22] *See id.* at 44073–74.

The Fund will create and redeem Shares from time to time, but only in one or more blocks of 12,500 Shares (''Creation Baskets''). The purchase and redemption price for Creation Baskets will be based on the NAV calculated at the end of the business day when a request for a purchase or redemption is received by the Fund.[23] Shares will generally be created and redeemed in cash.[24]

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the Exchange Act and rules and regulations thereunder applicable to a national securities exchange.[25] In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(5) of the Exchange Act,[26] which requires, among other things, that the Exchange's rules be designed to ''prevent fraudulent and manipulative acts and practices,'' to ''promote just and equitable principles of trade,'' to ''remove impediments to and perfect the mechanism of a free and open market and a national market system,'' and, ''in general, to protect investors and the public interest.'' The Commission also finds, with respect to the dissemination of quotation and last-trade information for the proposed ETP, that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 11A(a)(1)(C)(iii) of the Exchange Act,[27] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities.

When considering whether Arca's proposal to list and trade the Shares is designed to prevent fraudulent and manipulative acts and practices, the Commission applies the same standard it used in orders considering previous proposals to list bitcoin-based commodity trusts and bitcoin-based trust issued receipts.[28] As the Commission has explained, an exchange that lists bitcoin-based exchange-traded products (''ETPs'') can meet its obligations under Exchange Act Section 6(b)(5) by demonstrating that the exchange has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to the underlying or reference bitcoin assets.[29] The Winklevoss Order applied this standard to a commodity-trust ETP based on spot bitcoin, and the Commission has found that this standard is also appropriate for, and has applied the standard to, proposed ETPs based on bitcoin futures.[30]

In the analysis below, the Commission examines whether the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(5) of the Exchange Act by addressing: In Section III.A whether Arca has entered into a comprehensive surveillance-sharing agreement with a regulated market of significant size related to the underlying bitcoin assets (here, CME bitcoin futures contracts); in Section III.B assertions that allowing investors to obtain exposure to bitcoin futures contracts through a bitcoin futures-based ETP would be beneficial; in Section III.C other assertions rasied by commenters; and in Section III.D whether the proposed ETP is consistent with other standards for commodity-futures ETPs. Based on its analysis, the

[23] *See id.* at 44074.

[24] *See* Amendment No. 2, *supra* note 9, at 3.

[25] In approving this proposed rule change, as modified by Amendment No. 2, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[26] 15 U.S.C. 78f(b)(5).

[27] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[28] *See* Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To List and Trade Shares of the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (Aug. 1, 2018) (SR–BatsBZX–2016–30) (''Winklevoss Order''); USBT Order, 85 FR 12595; Order Disapproving 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, Securities Exchange Act Release No. 93700 (Dec. 1, 2021), 86 FR 69322 (Dec. 7, 2021) (SR–CboeBZX–2021–024) (''WisdomTree Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the Kryptoin Bitcoin ETF Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93860 (Dec. 22, 2021), 86 FR 74166 (Dec. 29, 2021) (SR–CboeBZX–2021–029) (''Kryptoin Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the Valkyrie Bitcoin Fund Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares), Securities Exchange Act Release No. 93859 (Dec. 22, 2021), 86 FR 74156 (Dec. 29, 2021) (SR–NYSEArca–2021–31) (''Valkyrie Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the First Trust SkyBridge Bitcoin ETF Trust Under NYSE Arca Rule 8.201–E, Securities Exchange Act Release No. 94006 (Jan. 20, 2022), 87 FR 3869 (Jan. 25, 2022) (SR–NYSEArca–2021–37) (''Skybridge Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the Wise Origin Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 94080 (Jan. 27, 2022), 87 FR 5527 (Feb. 1, 2022) (SR–CboeBZX–2021–029) (''Wise Origin Order''); NYDIG Order, 87 FR 14932; Order Disapproving a Proposed Rule Change To List and Trade Shares of the Global X Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 94396 (Mar. 10, 2022), 87 FR 14912 (Mar. 16, 2022) (SR–CboeBZX–2021–052) (''Global X Order''); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Shares of the ARK 21Shares Bitcoin ETF Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 94571 (Mar. 31, 2022), 87 FR 20014 (Apr. 6, 2022) (SR–CboeBZX–2021–051). *See also* Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the SolidX Bitcoin Trust Under NYSE Arca Equities Rule 8.201, Securities Exchange Act Release No. 80319 (Mar. 28, 2017), 82 FR 16247 (Apr. 3, 2017) (SR–NYSEArca–2016–101) (''SolidX Order''). The Commission also notes that orders were issued by delegated authority on the following matters: Order Disapproving a Proposed Rule Change To List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF, Securities Exchange Act Release No. 83904 (Aug. 22, 2018), 83 FR 43934 (Aug. 28, 2018) (SR–NYSEArca–2017–139) (''ProShares Order''); Order Disapproving a Proposed Rule Change To List and Trade the Shares of the GraniteShares Bitcoin ETF and the GraniteShares Short Bitcoin ETF, Securities Exchange Act Release No. 83913 (Aug. 22, 2018), 83 FR 43923 (Aug. 28, 2018) (SR–CboeBZX–2018–001) (''GraniteShares Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the VanEck Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93559 (Nov. 12, 2021), 86 FR 64539 (Nov. 18, 2021) (SR–CboeBZX–2021–019) (''VanEck Order'').

[29] *See* USBT Order, 85 FR at 12596. In the context of derivative securities products such as commodity-trust ETPs, the Commission has long recognized the importance of comprehensive surveillance-sharing agreements to detect and deter fraudulent and manipulative activity. *See, e.g.,* streetTRACKS Gold Shares, Securities Exchange Act Release No. 50603 (Oct. 28, 2004), 69 FR 64614, 64618–19 (Nov. 5, 2004) (SR–NYSE–2004–22); iShares Silver Trust, Securities Exchange Act Release No. 53521 (Mar. 20, 2006), 71 FR 14967, 14968, 14973–74 (Jan 26, 2005) (SR–Amex–2004–38); JPM XF Physical Copper Trust, Securities Exchange Act Release No. 68440 (Dec. 14, 2012), 77 FR 75468, 75469–70, 75272, 75485–86 (Dec. 20, 2012) (SR–NYSEArca–2012–28). *See also* Winklevoss Order, 83 FR at 37592 n.202 and accompanying text (discussing previous Commission approvals of commodity-trust ETPs). And the Commission's approval orders for commodity-futures ETPs consistently note the ability of an ETP listing exchange to share surveillance information either through surveillance-sharing agreements or through membership by the listing exchange and the relevant futures exchange in the Intermarket Surveillance Group. *See, e.g.,* Securities Exchange Act Release No. 53105 (Jan. 11 2006), 71 FR 3129, 3136 (Jan. 19, 2006) (SR–Amex–2005–059); Securities Exchange Act Release No. 53582 (Mar. 31, 2006), 71 FR 17510, 17518 (Apr. 6, 2006) (SR–Amex–2005–127); Securities Exchange Act Release No. 54013 (June 16, 2006), 71 FR 36372, 36378–79 (June 26, 2006) (SR–NYSE–2006–17). *See also* GraniteShares Order, 83 FR at 43925–27 nn.35–39 and accompanying text (discussing previous Commission approvals of commodity-futures ETPs). Listing exchanges have also attempted to demonstrate that other means besides surveillance-sharing agreements will be sufficient to prevent fraudulent and manipulative acts and practices, including that the bitcoin market as a whole or the relevant underlying bitcoin market is ''uniquely'' and ''inherently'' resistant to fraud and manipulation. *See* USBT Order, 85 FR at 12597. The Exchange, however, does not make any such arguments with respect to this proposal.

[30] *See* ProShares Order, 83 FR at 43936; GraniteShares Order, 83 FR at 43925.

Commission concludes that the proposed rule change, as modified by Amendment No. 2, is consistent with the statutory requirements of Exchange Act Sections 6(b)(5) and 11A(a)(1)(C)(iii).

As discussed in more detail below, the approval is based on a finding that the CME is a ''significant market'' *related to CME bitcoin futures contracts,* which would be the exclusive non-cash holdings of the proposed ETP. The Commission emphasizes that its approval of this proposal is based on the specific facts and circumstances of the proposal.[31]

A. Comprehensive Surveillance-Sharing Agreement With a Regulated Market of Significant Size Related to CME Bitcoin Futures Contracts

As stated above, an exchange that lists a bitcoin-based ETP can meet its obligations under Exchange Act Section 6(b)(5) by demonstrating that the exchange has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to the underlying bitcoin assets.[32] When disapproving the earliest proposals for bitcoin-based ETPs, the Commission recognized that ''regulated bitcoin-related markets are in the early stages of their development,'' but that ''[o]ver time, regulated bitcoin-related markets may continue to grow and develop'' in a way that would make it possible for a bitcoin-based ETP to satisfy the requirements of the Exchange Act.[33] The Commission previously stated that, for example, ''existing or newly created bitcoin futures markets'' that are regulated may achieve significant size, and an ETP listing exchange may be able to demonstrate in a proposed rule change that it will be able to address the risk of fraud and manipulation by entering into a surveillance-sharing agreement with a regulated market of significant size.[34] Since the early stages of bitcoin futures trading on a regulated market, however, the Commission has not had the opportunity to consider whether a proposal for a bitcoin futures-based ETP is consistent with the Exchange Act.[35]

With respect to the proposed ETP, the underlying bitcoin assets are CME bitcoin futures contracts. The relevant analysis, therefore, is whether Arca has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to CME bitcoin futures contracts. As discussed below, taking into consideration the direct relationship between the regulated market with which Arca has a surveillance-sharing agreement and the assets held by the proposed ETP, as well as developments with respect to the CME bitcoin futures market—including the launch of exchange-traded funds registered under the Investment Company Act of 1940 (''1940 Act'') that hold CME bitcoin futures (''Bitcoin Futures ETFs'')—the Commission concludes that the Exchange has the requisite surveillance-sharing agreement.

Comprehensive Surveillance-Sharing Agreements With the CME, a Regulated Market

The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading the underlying assets for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules.[36] Comprehensive surveillance-sharing agreements ''provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.''[37] The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.[38]

As the Commission has stated, it considers two markets to have a comprehensive surveillance-sharing agreement with one another if they are both members of the Intermarket Surveillance Group (''ISG''), even if they do not have a separate bilateral surveillance-sharing agreement.[39] Accordingly, based on the common membership of Arca and the CME in the ISG,[40] Arca has the equivalent of a comprehensive surveillance-sharing agreement with the CME. Moreover, as the Commission has previously recognized, the Commodity Futures Trading Commission (''CFTC'') regulates the CME futures market, including the CME bitcoin futures market, and thus that market is ''regulated.''[41]

Whether the CME Is a Market of Significant Size Related to CME Bitcoin Futures Contracts

In the Winklevoss Order, the Commission stated that the term ''significant market'' or ''market of significant size'' includes a market (or group of markets) as to which (1) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, so that a surveillance-sharing agreement would assist in detecting and deterring misconduct, and (2) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[42] The Commission explained that this definition is illustrative and not exclusive, and that there could be other types of ''significant markets'' and ''markets of significant size.''[43]

(1) Prong 1

The first prong of the analysis addresses whether the surveillance-sharing agreement on which the ETP-listing exchange proposes to rely would assist in detecting and deterring fraudulent or manipulative misconduct related to the assets held by the ETP.

In the present proposal, the proposed ETP's only non-cash holdings will be CME bitcoin futures contracts. Moreover, the proposed ''significant'' regulated market (*i.e.,* the CME) with which the listing exchange has a surveillance-sharing agreement is the

[31] The Commission is not suggesting that either the development of the CME bitcoin futures market or the approval of this proposal would require the Commission to approve a proposed rule change seeking to list and trade shares of an ETP holding spot bitcoin as an asset or ETPs related to other digital assets. *See, e.g.,* GraniteShares Order, 83 FR at 43931. Other proposed ETPs will continue to be assessed on their particular facts and circumstances and on whether those proposals are consistent with the requirements of the Exchange Act.

[32] *See supra* note 29 and accompanying text.

[33] *See* Winklevoss Order, 83 FR at 37580.

[34] *See id.;* USBT Order, 85 FR at 12598.

[35] *See* ProShares Order, 83 FR at 43941; GraniteShares Order, 83 FR at 43931.

[36] *See* Amendment to Rule Filing Requirements for Self-Regulatory Organizations Regarding New Derivative Securities Products, Securities Exchange Act Release No. 40761 (Dec. 8, 1998), 63 FR 70952, 70959 (Dec. 22, 1998).

[37] *Id. See also* Winklevoss Order, 83 FR at 37594; ProShares Order, 83 FR at 43936; GraniteShares Order, 83 FR at 43924; USBT Order, 85 FR at 12596.

[38] *See* Winklevoss Order, 83 FR at 37592–93 (discussing Letter from Brandon Becker, Director, Division of Market Regulation, Commission, to Gerard D. O'Connell, Chairman, Intermarket Surveillance Group (June 3, 1994), available at *https://www.sec.gov/divisions/marketreg/mr-noaction/isg060394.htm*).

[39] *See id.* at 37580 n.19.

[40] *See* Notice, 86 FR at 44070–71.

[41] *See, e.g.,* WisdomTree Order, 86 FR at 69330; Wise Origin Order, 87 FR at 5534.

[42] *See* Winklevoss Order, 83 FR at 37594.

[43] *See id.*

same market on which these assets trade. The Commission agrees with Arca that the CME, as a CFTC-regulated futures exchange, has ''the requisite oversight, controls, and regulatory scrutiny necessary to maintain, promote, and effectuate fair and transparent trading of its listed products, including the BTC Contracts and MBT Contracts.'' [44] As Arca states, as a Designated Contracts Market (''DCM''), the CME ''comprehensively surveils futures market conditions and price movements on a real-time and ongoing basis in order to detect and prevent price distortions, including price distortions caused by manipulative efforts.'' [45] Thus the CME's surveillance can reasonably be relied upon to capture the effects on the CME bitcoin futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME bitcoin futures contracts, whether that attempt is made by directly trading on the CME bitcoin futures market or indirectly by trading outside of the CME bitcoin futures market. As such, when the CME shares its surveillance information with Arca, the information would assist in detecting and deterring fraudulent or manipulative misconduct related to the non-cash assets held by the proposed ETP.[46] Accordingly, for the present proposal, it is unnecessary for Arca to establish a reasonable likelihood that the would-be manipulator would have to trade on the CME itself to manipulate the proposed ETP.[47]

Arca makes several arguments in support of its assertion that a person manipulating the proposed ETP would be reasonably likely to trade on the CME bitcoin futures market.[48] First, Arca argues that the CME bitcoin futures market is the ''primary [b]itcoin price discovery'' market.[49] Second, Arca asserts that the CME bitcoin futures market ''compares favorably with other markets that were deemed to be markets of significant size'' in various prior Commission approval orders for the listing of commodity and commodity futures-based ETPs.[50] Arca asserts that, like gold, wheat, and other futures, bitcoin futures have grown in size to such a degree that they cannot be effectively or precisely manipulated by trading in other bitcoin interests.[51] Third, Arca argues that, ''due to the unique structure of the Fund,'' it is unlikely that price manipulation or fraud on spot bitcoin trading platforms will have a measurable impact on the NAV of the Fund.[52] Arca reasons that, ''[b]ecause the Fund calculates daily NAV based on Bitcoin Futures Contracts' settlement prices and does not calculate NAV based directly on the underlying spot [b]itcoin market . . . the only practicable way for a bad actor to manipulate the NAV of the Fund is through manipulating the first and second to expire Bitcoin Futures Contracts; there is simply no material connection between those two futures contracts and the underlying [b]itcoin spot market.'' [53] Arca further states that ''the market for BTC Contracts and MBT Contracts stands alone within the overall global [b]itcoin ecosphere,'' and is now of such size and scale that ''[b]itcoin futures prices are not specifically materially influenced by other [b]itcoin markets.'' [54] Fourth, Arca asserts that because of this ''lack of connection'' between the CME bitcoin futures contracts and spot bitcoin trading platforms, establishing a ''lead-lag'' relationship between the two is ''unnecessary and irrelevant.'' [55] Fifth, Arca states that recent—and continuing—growth in the CME bitcoin futures market (discussed further below) establishes that CME is a market of significant size and ''the primary, if not the lone determinant, of its valuation.'' [56] Sixth, Arca asserts that a would-be manipulator of bitcoin prices would be reasonably likely to do so through the CME bitcoin futures market, rather than any spot market, in order to take advantage of the ''inherent leverage'' in bitcoin futures; and that a would-be manipulator would be much more likely to attempt to manipulate a ''limited number of futures markets'' rather than attempt simultaneous executions on ''potentially dozens'' of different platforms.[57] Finally, Arca states that, based on an analysis of past Commission orders, the Sponsor believes that the relevant standard for a surveillance-sharing argreement should be whether it is ''adequate to monitor'' for abuses in the trading of the Fund's Shares, and Arca emphasizes that the Commission's two-pronged definition for a ''significant'' market in the Winklevoss Order was illustrative and not exclusive.[58]

The Commission disagrees with much of Arca's reasoning. The evidence in the record does not support a finding that the CME leads bitcoin price discovery.[59] Rather, the Commission has found that the ''mixed results'' of price discovery analyses, including the two studies cited by Arca in its filing,[60] fail to demonstrate that the CME bitcoin futures market constitutes a market of significant size vis-à-vis the bitcoin spot market.[61] As the Commission has also

[44] Notice, 86 FR at 44063.

[45] *Id.* at 44072 & n.85.

[46] This reasoning, however, does not extend to spot bitcoin ETPs. Spot bitcoin markets are not currently ''regulated.'' *See, e.g.,* USBT Order, 85 FR at 12604; NYDIG Order, 87 FR at 14936 nn.65–67. If an exchange seeking to list a spot bitcoin ETP relies on the CME as the regulated market with which it has a comprehensive surveillance-sharing agreement, because the assets held by a spot bitcoin ETP would not be traded on the CME, that proposal would be significantly different from the current proposal. Because of this important difference, with respect to a spot bitcoin ETP, there would be reason to question whether a surveillance-sharing agreement with the CME would, in fact, assist in detecting and deterring fraudulent and manipulative misconduct affecting the price of the spot bitcoin held by that ETP. If, however, an exchange proposing to list and trade a spot bitcoin ETP identifies the CME as the regulated market with which it has a comprehensive surveillance-sharing agreement, the exchange could overcome the Commission's concern by demonstrating that there is a reasonable likelihood that a person attempting to manipulate the spot bitcoin ETP would have to trade *on the CME* in order to manipulate the ETP, because such demonstration would help establish that the exchange's surveillance-sharing agreement with the CME would have the intended effect of aiding in the detection and deterrence of fraudulent and manipulative misconduct related to the spot bitcoin held by the ETP.

[47] In addition, when considering past proposals for spot bitcoin ETPs, the Commission has discussed whether there is a lead-lag relationship between the regulated market (*e.g.,* the CME) and the market on which the assets held by the ETP would have traded (*i.e.,* spot bitcoin platforms), as part of an analysis of whether a would-be manipulator of the spot bitcoin ETP would need to trade on the regulated market to effect such manipulation. *See, e.g.,* USBT Order, 85 FR at 12612. For the present proposal, because of the direct relationship between the regulated market (*i.e.,* the CME) and the only non-cash assets held by the proposed ETP (*i.e.,* CME bitcoin futures contracts), establishing a ''lead-lag'' relationship between the CME and non-CME markets is also unnecessary.

[48] *See* Notice, 86 FR at 44071–73.

[49] *See id.* at 44071.

[50] *See id.*

[51] *See id.* at 44072.

[52] *See id.* at 44071.

[53] *Id.*

[54] *Id.*

[55] *See id.* at 44072.

[56] *See id.*

[57] *See id.* at 44072–73.

[58] *See id.* at 44072.

[59] *See also* USBT Order, 85 FR at 12612; WisdomTree Order, 86 FR at 69331; Wise Origin Order, 87 FR at 5535.

[60] *See* Notice, 86 FR at 44071 n.76. The Exchange includes weblinks to papers by: B. Kapar & J. Olmo, *An analysis of price discovery between Bitcoin futures and spot markets,* 174 Econ. Letters 62 (2019) (''Kapar & Olmo''); and A. Chang, W. Herrmann & W. Cai, *Efficient Price Discovery in the Bitcoin Markets,* Wilshire Phoenix, Oct. 14, 2020 (''Wilshire Phoenix'').

[61] *See, e.g.,* USBT Order, 85 FR at 12613 n. 244 (discussing that studies such as Kapar & Olmo that use daily price data, as opposed to intraday prices, may not be able to distinguish which market incorporates new information faster); WisdomTree Order, 86 FR at 69331 n.143 (concluding that the papers cited by a commenter, including the

Continued

previously stated, citations to academic studies about the interrelationship of spot and futures markets for *other* asset classes (such as gold) are not persuasive, and do not help the Exchange to meet its burden with respect to a bitcoin-based ETP.[62] In addition, the Commission is not persuaded that the market for CME bitcoin futures contracts ''stands alone;'' has a ''lack of connection'' with, and is ''not specifically materially influenced'' by, other bitcoin markets; nor that it is ''the primary, if not the lone determinant, of its valuation.'' Nor is the Commission persuaded that the Fund's calculation of NAV based on the daily settlement price insulates the NAV from activity in other bitcoin markets, given that there is nothing that prevents the trade prices that contribute to the daily settlement price[63] from themselves being influenced by activity in other bitcoin markets. Moreover, while it may be plausible that a would-be manipulator may attempt their scheme through a leveraged position on a ''limited number of futures markets,'' it is not clear from the record why, as Arca asserts, such a would-be manipulator would choose to use a *regulated* futures market with limited leverage, such as the CME, to perpetrate its fraud or manipulation, rather than unregulated futures platforms that permit higher leverage.[64]

However, none of these deficiencies in Arca's arguments concerning whether there is a reasonable likelihood that a would-be manipulator of the proposed ETP would have to trade on the CME conflicts with the Commission's determination that, because the only non-cash assets held by the proposed ETP (*i.e.,* CME bitcoin futures contracts) are traded on the CME itself, Arca's surveillance-sharing agreement with the CME can reasonably be relied upon to assist in detecting and deterring fraudulent or manipulative misconduct related to those assets. Thus the first prong of the standard for ''market of significant size'' has been established.

(2) Prong 2

As discussed above, in determining whether the CME bitcoin futures market constitutes a ''market of significant size'' related to CME bitcoin futures contracts, the Commission has also considered as a second prong of the analysis whether trading in the proposed ETP would be unlikely to be the predominant influence on prices in the CME bitcoin futures market.[65] Based on the facts and circumstances here, the Commission finds that this second prong has been satisfied.

Arca asserts that trading in the Shares would not be the predominant force on prices in the CME bitcoin futures market (or spot market) because of the significant volume in and size of the CME bitcoin futures market, and the significant liquidity available in the spot market.[66] Arca states that, since the USBT Order was issued, there has been significant growth in CME bitcoin futures across each of trading volumes ($433 million on February 26, 2020, compared to $4.321 billion on April 7, 2021) and open interest ($238 million on February 26, 2020, compared to $2.582 billion on April 7, 2021).[67]

Arca also states that the growth of the CME bitcoin futures market has coincided with similar growth in the bitcoin spot market, and that the market for bitcoin futures is rapidly approaching the size of markets for other commodity interests.[68] Arca states that, as the bitcoin futures market continues to develop and more closely resemble other commodity futures markets, it can be reasonably expected that ''the relationship between the [b]itcoin futures market and [b]itcoin spot market will behave similarly to other future/spot market relationships, where the spot market may have no relationship to the futures market.''[69]

Arca also argues that the significant liquidity in the bitcoin spot market and the impact of market orders on the overall price of bitcoin have made attempts to move the price of bitcoin increasingly expensive over the past year.[70] According to Arca, in January 2020, for example, the cost to buy or sell $5 million worth of bitcoin averaged roughly 30 basis points (compared to 10 basis points in February 2021) with a market impact of 50 basis points (compared to 30 basis points in February 2021). For a $10 million market order, the cost to buy or sell was roughly 50 basis points (compared to 20 basis points in February 2021) with a market impact of 80 basis points (compared to 50 basis points in February 2021). Arca contends that as the liquidity in the bitcoin spot market increases, it follows that the impact of $5 million and $10 million orders will continue to decrease.[71] Arca concludes that, to the extent that the bitcoin spot market can be used to move the CME bitcoin futures market (which it does not believe is the case), this would make it even more likely that a person attempting to manipulate the price of the Shares would have to do so by manipulating the CME bitcoin futures market.[72]

The Commission has considered and rejected nearly identical arguments in past disapproval orders of spot bitcoin ETPs.[73] Moreover, the Commission finds arguments centered around the relationship between the bitcoin spot market and the CME bitcoin futures market to be inapposite where, as here, the proposed ''significant'' market (*i.e.,* the CME bitcoin futures market) is the same as the market on which the proposed ETP's only non-cash assets (*i.e.,* CME bitcoin futures contracts) trade.

Nonetheless, for the reasons discussed below, the Commission concludes that it is unlikely that trading in the proposed ETP would be the predominant influence on prices in the CME bitcoin futures market. In past orders approving commodity-futures ETPs, the Commission relied on the proposing exchanges' representations regarding the trading volume of the underlying futures markets, and the Commission was in each of those cases dealing with a large futures market that had been trading for a number of years before an exchange proposed an ETP based on those futures.[74]

With respect to the present proposal, the Commission observes that the CME bitcoin futures market has ''progressed and matured significantly.''[75] CME began offering trading in BTC Contracts in 2017 and in MBT Contracts in 2021.[76] As Arca states, nearly every measurable metric related to BTC Contracts has trended consistently up since launch and/or accelerated upward in the past year.[77] As Arca notes, trading in BTC Contracts has increased from $737 million in December 2017, to $1.4

Wilshire Phoenix working paper, evidence the unsettled nature of the academic literature).

[62] *See* USBT Order, 85 FR at 12613; Wise Origin Order, 87 FR at 5540.

[63] *See supra* note 16 and accompanying text.

[64] *See* NYDIG Order, 87 FR at 14939 n.105.

[65] *See* Winklevoss Order, 83 FR at 37594; USBT Order, 85 FR at 12596–97.

[66] *See* Notice, 86 FR at 44073.

[67] *See id.*

[68] *See id.*

[69] *Id.*

[70] *See id.*

[71] *See id.*

[72] *See id.*

[73] *See* VanEck Order, 86 FR at 64548–49; WisdomTree Order, 86 FR at 69332–33; Kryptoin Order, 86 FR at 74177; Skybridge Order, 87 FR at 3878–79; Wise Origin Order, 87 FR at 5536–37; NYDIG Order, 87 FR at 14939–40; Global X Order, 87 FR at 14920–21.

[74] *See, e.g.,* GraniteShares Order, 83 FR at 43925–27 & nn.36–37. And where the Commission has considered a proposed ETP based on futures that had only recently begun trading, the Commission specifically addressed whether the futures on which the ETP was based—which were futures on an index of well-established commodity futures—were illiquid or susceptible to manipulation. *See id.* at 43927 & nn.38–39.

[75] *See* Notice, 86 FR at 44064.

[76] *See id.* at 44067.

[77] *See id.*

billion in December 2018, $3.9 billion in December 2019, and $28 billion in December 2020.[78] In December 2021, trading in BTC Contracts was $44.6 billion.[79] Arca also notes that the BTC Contracts and MBT Contracts are highly liquid,[80] and that BTC Contracts traded more than $1.2 billion per day in December 2020 and represented $1.6 billion in open interest, compared to $115 million in December 2019.[81] Arca states that there is a ''clear trend in year-over-year growth'' in the CME bitcoin futures market, which is ''still growing in size.'' [82]

Significantly, evidence from the recent introduction of 1940 Act-registered Bitcoin Futures ETFs also supports the Commission's conclusion that it is unlikely that trading in the proposed ETP would be the predominant influence on prices in the CME bitcoin futures market. Since October 2021, three such ETFs have launched holding exclusively CME bitcoin futures contracts: ProShares Bitcoin Strategy ETF (''BITO''), Valkyrie Bitcoin Strategy ETF (''BTF''), and VanEck Bitcoin Strategy ETF (''XBTF''). BITO, which launched first on October 19, 2021, obtained $1.21 billion in assets under management (''AUM'') within three days of launch.[83] As of March 31, 2022, BITO had AUM of approximately $1.31 billion, constituting approximately 49.6 percent of open interest in the front two month BTC Contracts.[84] BTF and XBTF, which launched second and third, had AUM as of March 31, 2022, of approximately $47.8 million and $29.1 million, respectively.[85]

Since the launch of Bitcoin Futures ETFs, the Commission has neither observed any disruption to the CME bitcoin futures market, nor any evidence that the Bitcoin Futures ETFs have exerted a dominant influence on CME bitcoin futures prices. For example, based on CME data,[86] the Commission has not observed any disruption to, or dominant influence from the Bitcoin Futures ETFs on, settlement prices, spreads, or roll costs of CME bitcoin futures contracts. The Commission thus concludes that the CME bitcoin futures market has sufficiently developed to support ETPs seeking exposure to bitcoin by holding CME bitcoin futures contracts.[87]

Taken together, the maturation of the CME bitcoin futures market since its inception in 2017—including, but not limited to, the overall size, volume, liquidity, and number of years of trading in the CME bitcoin futures market—and evidence from the 1940 Act-registered Bitcoin Futures ETFs persuade the Commission that trading in the proposed ETP is not likely to be the predominant influence on prices in the CME bitcoin futures market. Thus the second prong of the standard for ''market of significant size'' has been established.

Therefore, the Commission concludes that the CME is a ''significant market'' related to CME bitcoin futures contracts, and thus that the Exchange has entered into the requisite surveillance-sharing agreement.

B. Exposure to Bitcoin Futures Contracts Through a Bitcoin Futures-Based ETP

Arca contends that, if approved, the proposed ETP would protect investors and the public interest. Arca asserts that, with the growth of U.S. investor exposure to bitcoin through over-the-counter (''OTC'') bitcoin funds, so too has grown the potential risk to U.S. investors.[88] Specifically, Arca argues that premium and discount volatility, high fees, insufficient disclosures, and technical hurdles are exposing U.S. investors to risks that could potentially be eliminated through access to a bitcoin futures-based ETP.[89] The Exchange believes that the Fund represents an opportunity for U.S. investors to gain price exposure to bitcoin futures contracts in a regulated and transparent exchange-traded vehicle that limits risks by: (i) Reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks associated with investing in operating companies that are imperfect proxies for bitcoin exposure; and (iv) avoiding regulatory concerns regarding custody and valuation posed by ETFs and ETPs that invest directly in bitcoin rather than in bitcoin futures contracts.[90]

According to Arca, OTC bitcoin funds are generally designed to provide exposure to bitcoin in a manner similar to the Shares. However, unlike the Shares, Arca states that OTC bitcoin funds are unable to freely offer creation and redemption in a way that incentivizes market participants to keep their shares trading in line with their NAV and, as such, frequently trade at a price that is out-of-line with the value of their assets held.[91] Arca represents that, historically, OTC bitcoin funds have traded at a significant premium to NAV.[92] Although the Exchange concedes that trading at a premium or a discount is not unique to OTC bitcoin funds and not itself problematic, Arca believes that it raises certain investor protections issues. First, according to Arca, investors may be buying shares of a fund for a price that is not reflective of the per share value of the fund's underlying assets.[93] Second, according to Arca, because only accredited investors, generally, are able to purchase shares from the issuing fund and can buy such shares directly from the fund at NAV (in exchange for either cash or

[78] *See id.*

[79] In March 2022, trading in BTC Contracts was $38.9 billion. Source: Bloomberg. At the time the Commission last considered bitcoin-futures based ETPs (August 2018), publicly available data showed that the median daily notional trading volume, from inception of the CME bitcoin futures market through August 10, 2018, had been 14,185 bitcoins; and that the median daily notional value of open interest in CME during the same period had been 10,145 bitcoins. *See, e.g.,* GraniteShares Order, 83 FR at 43930 & n.88. In addition, the CFTC Chairman at that time characterized the volume of the bitcoin futures markets as ''quite small.'' *See id.* at 43930 & n.90.

[80] *See* Notice, 86 FR at 44063.

[81] *See id.* at 44067.

[82] *See id.* at 44072. The Commission notes that Arca provided only data showing *absolute* growth in the size of the CME bitcoin futures market, but provides no data *relative* to the concomitant growth in either the bitcoin spot markets or other bitcoin derivative markets (including unregulated futures markets). However, given the direct relationship between the CME and the proposed ETP's bitcoin-related holdings (CME bitcoin futures contracts), such comparisons are unnecessary.

[83] Source: Bloomberg.

[84] Source: Bloomberg.

[85] Source: Bloomberg.

[86] Source: CME Globex MDP 3.0 (Market Data Platform).

[87] By contrast, at the time the Commission last considered bitcoin-futures based ETPs (August 2018), the President and COO of Cboe Global Markets had acknowledged in a letter to Commission staff that ''the current bitcoin futures trading volumes on Cboe Futures Exchange and CME may not currently be sufficient to support ETPs seeking 100% long or short exposure to bitcoin.'' *See, e.g.,* GraniteShares Order, 83 FR at 43930 & n.91.

[88] *See* Notice, 86 FR at 44066.

[89] *See id.* Arca states that while it understands the Commission's previous focus in prior disapproval orders on potential manipulation of a bitcoin ETP holding actual bitcoin, Arca believes that ''such concerns have been sufficiently mitigated by the use of futures contracts in the proposed ETP.'' *Id.*

[90] *See id.*

[91] *See id.* Arca also states that, unlike the Shares, because OTC bitcoin funds are not listed on an exchange, they are not subject to the same transparency and regulatory oversight by a listing exchange. Arca further asserts that the existence of a surveillance-sharing agreement between Arca and the CME results in increased investor protections for the Shares compared to OTC bitcoin funds. *See id.* at 44066 n.47.

[92] *See id.* at 44066. Arca further represents that the inability to trade in line with NAV may at some point result in OTC bitcoin funds trading at a discount to their NAV. According to Arca, while that has not historically been the case, prolonged, significant trading at a discount would give rise to nearly identical potential issues related to trading at a premium. *See id.* at 44066 n.48.

[93] *See id.* at 44066.

bitcoin) without having to pay the premium or sell into the discount, these investors that are able to hedge their bitcoin exposure as needed to satisfy holding requirements and collect on the premium or discount opportunity. Arca argues, therefore, that the premium in OTC bitcoin funds essentially creates a transfer of value from retail investors to more sophisticated investors.[94]

Arca also asserts that a number of operating companies engaged in unrelated businesses have announced investments as large as $1.5 billion in bitcoin.[95] Arca argues that, without access to bitcoin ETPs, retail investors seeking investment exposure to bitcoin may purchase shares in these companies in order to gain the exposure to bitcoin that they seek.[96] Arca contends that such operating companies, however, are imperfect bitcoin proxies and provide investors with partial bitcoin exposure paired with additional risks associated with whichever operating company they decide to purchase. Arca concludes that investors seeking bitcoin exposure through publicly traded companies are gaining only partial exposure to bitcoin and are not fully benefitting from the risk disclosures and associated investor protections that come from the securities registration process.[97]

Arca also states that investors in many other countries, including Canada, are able to use more traditional exchange-listed and traded products to gain exposure to bitcoin.[98]

Arca further asserts that exposure to bitcoin through a bitcoin futures-based ETP like the Fund also presents advantages for retail investors compared to buying spot bitcoin directly.[99] Arca asserts that the most notable advantage is that the BTC Contracts and MBT Contracts in which the Fund will invest do not require special, potentially complex and untested, custody procedures. Arca states that the Fund will have no ownership interests of any kind in actual bitcoin[100] and, unlike physical bitcoin ETPs, the Fund will not be required to use a bitcoin custodian because it will not be holding bitcoin.[101] Arca asserts that an ETP whose holdings consist exclusively of BTC Contracts and MBT Contracts would have all the benefits enjoyed by investors currently holding approved and listed futures-based ETPs without the risks associated with ETPs that hold actual bitcoin.[102] Arca asserts that, by contrast, an individual retail investor holding bitcoin through a cryptocurrency exchange lacks these protections; and that a retail investor holding spot bitcoin directly in a self-hosted wallet may suffer from inexperience in private key management (*e.g.,* insufficient password protection, lost key, etc.), which could cause them to lose some or all of their bitcoin holdings. Arca states that, in addition, retail investors will be able to hold the Shares in traditional brokerage accounts which provide SIPC protection if the brokerage firm fails.[103]

In essence, Arca asserts that the risky nature of direct investment in spot bitcoin or a spot bitcoin ETP and the unregulated markets on which bitcoin and OTC bitcoin funds trade compels approval of the proposed ETP. The Commission disagrees.[104] Pursuant to Section 19(b)(2) of the Exchange Act, the Commission must approve a proposed rule change filed by a national securities exchange if it finds that the proposed rule change is consistent with the applicable requirements of the Exchange Act, and it must disapprove the filing if it does not make such a finding.[105] Thus, even if a proposed rule change purports to protect investors from a particular type of investment risk—such as the susceptibility of an asset to loss or theft—the proposed rule change may still fail to meet the requirements under the Exchange Act.[106]

Regardless of Arca's assertions and for the reasons discussed herein—including that Arca has demonstrated that it has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to CME bitcoin futures contracts that will help prevent fraudulent and manipulative acts and practices,[107] and that core aspects of the proposed ETP will be consistent with other commodity-futures ETPs that the Commission has approved, including with respect to the availability of pricing information, transparency of portfolio holdings, and types of surveillance procedures[108]—the Commission finds that the proposal is also consistent with the requirement under Section 6(b)(5) that the Exchange's rules be designed to protect investors and the public interest.[109]

C. Other Comments Related to Bitcoin ETPs

Counsel for the Sponsor submitted a letter that argues that the Commission should be equally receptive to 1940 Act-registered Bitcoin Futures ETFs and the proposed ETP.[110] The Sponsor Letter also argues that there are ''compelling equitable bases'' to put the review and approval process for the proposed ETP ''on parity'' with Bitcoin Futures ETFs.[111] The Commission has considered and, for the reasons discussed above, is approving the proposed rule change, as modified by Amendment No. 2, on its own merits and under the standards applicable to it; namely, the standards provided by Section 6(b)(5) and Section 11A(a)(1)(C)(iii) of the Exchange Act.[112]

One comment letter also mentions risks of bitcoin adoption and the bitcoin network's effect on the environment.[113] Ultimately, however, additional discussion of these topics is unnecessary, as they do not bear on the basis for the Commission's decision to approve the proposal.

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[94] *See id.*

[95] *See id.* at 44067.

[96] *See id.*

[97] *See id.*

[98] *See id.* at 44065. Arca represents that the Purpose Bitcoin ETF, a retail bitcoin-based ETP launched in Canada, reportedly reached $421.8 million in AUM in two days, and $993 million in AUM as of April 2021, demonstrating the demand for a North American market-listed bitcoin ETP. Arca contends that the Purpose Bitcoin ETF also offers a class of units that is U.S. dollar bitcoin denominated, which could appeal to U.S. investors. Arca also argues that without an approved bitcoin ETP in the U.S. as a viable alternative, U.S. investors will seek to purchase these shares in order to get access to bitcoin exposure, leaving them without the protections of U.S. securities laws. Arca believes that, given the separate regulatory regime and the potential difficulties associated with any international litigation, such an arrangement would create more risk exposure for U.S. investors than they would otherwise have with a U.S. exchange-listed ETP. *See id.* Arca also states that regulators in other countries have either approved or otherwise allowed the listing and trading of bitcoin-based ETPs. *See id.* at 44065 n.42. Arca further asserts that, with the addition of more bitcoin ETPs in non-U.S. jurisdictions expected to grow, such risks will only continue to grow. *See id.* at 44065.

[99] *See id.* at 44067.

[100] *See id.* at 44063.

[101] *See id.* at 44067.

[102] *See id.* at 44063.

[103] *See id.* at 44067.

[104] The Commission has disagreed with similar arguments made in the context of spot bitcoin ETPs. *See, e.g.,* WisdomTree Order, 86 FR at 69333–34; Wise Origin Order, 87 FR at 5537–38.

[105] *See* Exchange Act Section 19(b)(2)(C), 15 U.S.C. 78s(b)(2)(C).

[106] *See* SolidX Order, 82 FR at 16259; WisdomTree Order, 86 FR at 69334; Wise Origin Order, 87 FR at 5538.

[107] *See supra* Section III.A.

[108] *See infra* Section III.D.

[109] The Commission acknowledges that, compared to trading in unregulated spot bitcoin markets, trading a CME bitcoin futures-based ETP on a national securities exchange may provide some additional protection to investors. *See* GraniteShares Order, 83 FR at 43931; USBT Order, 85 FR at 12615.

[110] *See* letter from W. Thomas Conner, Shareholder, VedderPrice, dated September 1, 2021 (''Sponsor Letter''), at 6–9.

[111] *See* Sponsor Letter at 4–6.

[112] 15 U.S.C. 78f(b)(5); 15 U.S.C. 78k–1(a)(1)(C)(iii).

[113] *See* letter from Donna Jean Ryder, dated November 8, 2021.

D. Other Standards for Commodity-Futures ETPs

Arca's proposal sets forth aspects of the proposed ETP, including the availability of pricing information, transparency of portfolio holdings, and types of surveillance procedures, that are consistent with the other commodity-futures ETPs that the Commission has approved.[114]

According to Arca,[115] quotation and last-sale information regarding the Shares will be disseminated through the facilities of the Consolidated Tape Association. Quotation information for cash equivalents and the Bitcoin Futures Contracts may be obtained from brokers and dealers who make markets in such instruments. The intra-day, closing, and settlement prices of the Bitcoin Futures Contracts will be readily available from the applicable futures exchange websites, automatic quotation systems, published or other public sources, or major market data vendors. Complete real-time data for the Bitcoin Futures Contracts will be available by subscription through online information services. ICE Futures U.S. and the CME also provide delayed futures and options on futures information on current and past trading sessions and market news free of charge on their respective websites. The specific contract specifications for Bitcoin Futures Contracts will also be available on such websites, as well as other financial information sources. Intra-day price and closing price level information for the Benchmark will be available from major market data vendors. The Benchmark value will be disseminated once every 15 seconds.

The Fund's website will display the applicable end of day closing NAV. The daily holdings of the Fund will be available on the Fund's website. The Fund's website will also include a form of the Fund's prospectus that may be downloaded. The website will include the Shares' ticker and CUSIP information, along with additional quantitative information updated on a daily basis.[116] The website disclosure of portfolio holdings will be made daily and will include, as applicable, (i) the name, quantity, price, and market value of the Fund's holdings; (ii) the counterparty to and value of forward contracts and any other financial instruments tracking the Benchmark; and (iii) the total cash and cash equivalents held in the Fund's portfolio, if applicable. The Fund's website will be publicy available at the time of the public offering of the Shares and accessible at no charge.

The Fund's NAV will be calculated once each trading day, as of the earlier of the close of the New York Stock Exchange or 4:00 p.m. Eastern Time (''ET''). In order to provide updated information relating to the Fund for use by investors and market professionals, ICE Data Indices, LLC will calculate an updated indicative fund value (''IFV''), which will be calculated by using the prior day's closing NAV per Share of the Fund as a base and updated throughout the Core Trading Session of 9:30 a.m. ET to 4:00 p.m. ET to reflect changes in the value of the Fund's holdings during the trading day. During the Exchange's Core Trading Session, the IFV will be disseminated on a per Share basis every 15 seconds and will be widely disseminated by one or more major market data vendors. The NAV for the Shares will be disseminated daily to all market participants at the same time.[117]

The proposal also is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading in the Shares when a reasonable degree of transparency cannot be assured. If the Exchange becomes aware that the NAV with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants. Further, the Exchange may halt trading during the day in which an interruption to the dissemination of the IFV or the value of the Benchmark occurs. If the interruption to the dissemination of the IFV, or to the value of the Benchmark, persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12–E have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.[118] The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees.[119] Moreover, trading of the Shares will be subject to NYSE Arca Rule 8.200–E, Commentary .02(e), which sets forth certain restrictions on Equity Trading Permit Holders (''ETP Holders'') acting as registered Market Makers in Trust Issued Receipts to facilitate surveillance.[120]

The Commission notes that the Exchange or the Financial Industry Regulatory Authority (''FINRA''), on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and the Fund's holdings with other markets and entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and the Fund's holdings from such markets and entities. In addition, the Exchange may obtain information regarding trading in the Shares and the Fund's holdings from markets and entities that are members of the ISG or with which the Exchange has in place a comprehensive surveillance-sharing agreement (''CSSA'').[121] The Exchange is also able to obtain information regarding trading in the Shares and the physical commodities underlying the futures contracts through ETP Holders, in connection with such ETP Holders' proprietary or customer trades which they effect through ETP Holders on any relevant market. The Exchange can obtain market surveillance information, including customer identity information, with respect to transactions (including transactions in futures contracts) occurring on U.S. futures exchanges, which are members of the ISG.[122]

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities.[123] In support of this

[114] *See, e.g.,* ProShares UltraPro 3X Natural Gas ETF and ProShares UltraPro 3X Short Natural Gas ETF, Securities Exchange Act Release No. 86532 (July 31, 2019), 84 FR 38312 (Aug. 6, 2019) (SR–NYSEArca–2019–02).

[115] *See* Notice, 86 FR at 44075.

[116] The Fund's website will include: (1) The prior business day's reported NAV and closing price, and a calculation of the premium and discount of the closing price or mid-point of the bid/ask spread at the time of the NAV calculation (''Bid/Ask Price'') against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price or Bid/Ask Price against the NAV, within appropriate ranges, for at least each of the four previous calendar quarters. *See id.*

[117] *See id.* at 44074–75.

[118] *See id.* at 44075.

[119] *See id.* at 44076.

[120] *See id.* at 44075.

[121] For a list of the current members of ISG, *see www.isgportal.org.* According to the Exchange, not all components of the Fund may trade on markets that are members of the ISG or with which the Exchange has in place a CSSA. *See* Notice, 86 FR at 44076 n.95.

[122] *See id.* at 44076. For additional discussion of the CME bitcoin futures market and how surveillance-sharing between the Exchange and the CME via common membership in the ISG would assist in detecting and deterring manipulative conduct related to the Shares, *see* Section III.A above.

[123] *See* Notice, 86 FR at 44075.

proposal, the Exchange represented that:[124]

(1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Rule 8.200–E.

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(3) Trading in the Shares will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws, and these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to the Exchange.

(4) Prior to the commencement of trading, the Exchange will inform its ETP Holders in an information bulletin (''Information Bulletin'') of the special characteristics and risks associated with trading in the Shares. Specifically, the Information Bulletin will discuss the following: (a) The risks involved in trading the Shares during the Early and Late Trading Sessions when an updated IFV will not be calculated or publicly disseminated; (b) the procedures for purchases and redemptions of Shares in Creation Baskets and Redemption Baskets (and that Shares are not individually redeemable); (c) NYSE Arca Rule 9.2–E(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (d) how information regarding the IFV is disseminated; (e) how information regarding portfolio holdings is disseminated; (f) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (g) trading information.

(5) For initial and continued listing, the Fund will be in compliance with Rule 10A–3 under the Exchange Act,[125] and the Trust will rely on the exception contained in Rule 10A–3(c)(7).

(6) Under no circumstances will the Fund hold and/or invest in any assets other than BTC Contracts and MBT Contracts, cash and cash equivalents. The Fund will not invest in or hold spot bitcoin. Cash equivalents only include short-term Treasury bills, money market funds, demand deposit accounts and commercial paper.

(7) The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage, and therefore the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*e.g.,* 2Xs, 3Xs, –2Xs, and –3Xs) of the Fund's Benchmark.

(8) The Fund will only hold Bitcoin Futures Contracts that are listed on an exchange that is a member of the ISG or is a market with which the Exchange has a CSSA.

(9) A minimum of 50,000 Shares of the Fund will be outstanding at the commencement of trading on the Exchange.

(10) The Exchange represents that all statements and representations made in the filing regarding (a) the description of the Benchmark, portfolio, or reference asset; (b) limitations on Benchmark or portfolio holdings or reference assets; or (c) applicablilty of Exchange listing rules specified in the filing will constitute continued listing requirements for the Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will monitor for compliance with the continued listing requirements.[126] If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5–E(m).

IV. Conclusion

This approval order is based on all of the Exchange's representations and description of the Fund, including those set forth above and in Amendment No. 2. The Commission notes that the Shares must comply with the requirements of NYSE Arca Rule 8.200–E and Commentary .02 thereto to be listed and traded on the Exchange on an initial and continuing basis.

For the reasons set forth above, the Commission finds, pursuant to Section 19(b)(2) of the Exchange Act,[127] that the proposed rule change, as modified by Amendment No. 2, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with Section 6(b)(5) and Section 11A(a)(1)(C)(iii) of the Exchange Act.[128]

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[129] that proposed rule change SR–NYSEArca–2021–53, as modified by Amendment No. 2, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[130]

J. Matthew DeLesDernier,

Assistant Secretary.

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[124] *See id.* at 44075–76 and Amendment No. 2.

[125] 17 CFR 240.10A–3.

[126] The Commission notes that certain other proposals for the listing and trading of exchange-traded products include a representation that the exchange will ''surveil'' for compliance with the continued listing requirements. *See, e.g.,* Securities Exchange Act Release No. 77499 (Apr. 1, 2016), 81 FR 20428 (Apr. 7, 2016) (Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to List and Trade Shares of the SPDR DoubleLine Short Duration Total Return Tactical ETF of the SSgA Active Trust). In the context of this representation, it is the Commission's view that ''monitor'' and ''surveil'' both mean ongoing oversight of the Fund's compliance with the continued listing requirements. Therefore, the Commission does not view ''monitor'' as a more or less stringent obligation than ''surveil'' with respect to the continued listing requirements.

[127] 15 U.S.C. 78f(b)(2).

[128] 15 U.S.C. 78f(b)(5); 15 U.S.C. 78k–1(a)(1)(C)(iii).

[129] 15 U.S.C. 78f(b)(2).

[130] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–94617; File No. SR–CboeEDGX–2022–022]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

April 6, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 1, 2022, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') proposes to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.