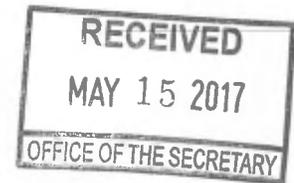


May 15, 2017



**VIA FACSIMILE**  
**AND FEDERAL EXPRESS**

Brent Fields  
Secretary  
Securities and Exchange Commission  
100 F. Street N.E.  
Washington, D.C. 20549-1090

**RE: SR-BatsBZX-2016-30, Exchange Release No. 80206;  
Statement of Bats BZX Exchange, Inc. in Opposition to Disapproval Order**

Dear Mr. Fields,

Enclosed please find the original and three copies of the Statement of Bats BZX Exchange, Inc. in Opposition to Disapproval Order regarding the above-captioned matter. This Statement was sent via facsimile to telephone number (202) 772-9324 and via Federal Express on May 15, 2017. Also enclosed, please find a Certificate of Service and facsimile confirmation sheet.

Any questions concerning this matter can be directed to me at (312) 786-7462.

Sincerely,

A handwritten signature in cursive script that reads "Joanne Moffic-Silver".

Joanne Moffic-Silver  
Executive Vice President, General Counsel &  
Corporate Secretary

**CERTIFICATE OF SERVICE**

I, Joanne Moffic-Silver, Executive Vice President, General Counsel & Secretary of Bats BZX Exchange, Inc., hereby certify that on May 15, 2017, I served copies of the attached Statement of Bats BZX Exchange, Inc. in Opposition to Disapproval Order, by way of facsimile and that the original was sent that day by Federal Express to:

Brent Fields  
Secretary  
Securities and Exchange Commission  
100 F. Street N.E.  
Washington, D.C. 20549-1090



Dated: May 15, 2017

Joanne Moffic-Silver  
Executive Vice President, General Counsel &  
Corporate Secretary

**Before the  
SECURITIES AND EXCHANGE COMMISSION**

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In the Matter of the Petition of: )  
)  
)  
)  
Bats BZX Exchange, Inc. )  
)  
\_\_\_\_\_ )

File No. SR-BatsBZX-2016-30

**STATEMENT OF BATS BZX EXCHANGE, INC.  
IN OPPOSITION TO DISAPPROVAL ORDER**

## TABLE OF CONTENTS

<b>TABLE OF AUTHORITIES .....</b>	<b>i</b>
<b>STATEMENT OF BATS BZX EXCHANGE, INC. IN OPPOSITION TO DISAPPROVAL ORDER.....</b>	<b>1</b>
<b>I. Introduction .....</b>	<b>1</b>
<b>The Commission Should Reverse the Disapproval and Approve the Listing and Trading of the Shares of the Winklevoss Bitcoin Trust on the Exchange .....</b>	<b>2</b>
<b>Description of the Proposal .....</b>	<b>4</b>
<b>Applicable Legal Standards.....</b>	<b>5</b>
<b>II. The Proposal is Consistent with the Act.....</b>	<b>7</b>
<b>a. The Proposal Would Confer Significant Benefits to Investors in Furtherance of the Public Interest.....</b>	<b>7</b>
<b>b. The Arbitrage Mechanism Will Operate Efficiently, Preventing Price Dislocation and Creating a Liquid Market With Tight Spreads.....</b>	<b>10</b>
<b>c. The Nature of the Bitcoin Ecosystem and the Gemini Exchange Auction Price Makes Manipulation Difficult.....</b>	<b>12</b>
<b>i. Bitcoin Ecosystem.....</b>	<b>12</b>
<b>ii. Gemini Exchange Auction Price.....</b>	<b>19</b>
<b>d. The Proposal Provides Sufficient Tools for the Exchange to Monitor For and Protect Against Manipulation in the Trading of the Shares.....</b>	<b>21</b>
<b>III. The Order Erroneously Applied an Unprecedented and Overly Restrictive Standard that is Inconsistent with Prior Approval Orders.....</b>	<b>25</b>
<b>IV. Conclusion .....</b>	<b>30</b>

## TABLE OF AUTHORITIES

### STATUTES

7 U.S.C. 1a(9) .....	4, 16
15 U.S.C. 78s(b)(1) .....	6
15 U.S.C. 78s(b)(2)(C)(i).....	6
7 U.S.C. 9.....	16
7 U.S.C. 7b-3(f)(3).....	17

### CASES

<i>In re Coinflip, Inc.</i> , No. 15-29 (CFTC Sept. 17, 2015).....	4, 16-18
<i>In re BFXNA INC.</i> , No. 16-19 (CFTC June 2, 2016).....	18
<i>In re TeraExchange LLC</i> , No. 15-33 (CFTC Sept. 24, 2015).....	18-19

### RULES

17 CFR 201.431(a).....	5
17 CFR 240.19b-4 .....	6
17 CFR 180.2.....	16

### OTHER AUTHORITIES

Securities Exchange Act Release No. 78262 (July 8, 2016), 81 FR 45554 (July 14, 2016).....	1
Securities Exchange Act Release No. 79183 (October 28, 2016), 81 FR 76650 (November 3, 2016) .....	1
Securities Exchange Act Release No. 80206 (March 10, 2017), 82 FR 14076 (March 16, 2017) .....	2
Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011).....	2
Securities Exchange Act Release No. 80511 (April 24, 2017),	

82 FR 19770 (April 28, 2017) .....	2
Securities Exchange Act Release No. 65592 (October 19, 2011), 76 FR 66103 (October 25, 2011) .....	6
Securities Exchange Act Release No. 77112 (February 11, 2016), 81 FR 8294 (February 18, 2016) .....	6
Securities Exchange Act Release No. 50603 (October 28, 2004), 69 FR 64614 (November 5, 2004).....	7, 9, 22-24, 28
Securities Exchange Act Release No. 53521 (March 20, 2006), 71 FR 14967 (March 24, 2006).....	7, 9, 22-23
Securities Exchange Act Release No. 61219 (December 22, 2009), 74 FR 68886 (December 29, 2009).....	7, 22-23, 27-28
Securities Exchange Act Release No. 61220 (December 22, 2009), 74 FR 68895 (December 29, 2009).....	7, 22-23, 27-28
Securities Exchange Act Release No. 68440 (Dec. 14, 2012), 77 FR 75468 (Dec. 20, 2012).....	7, 22-25
Securities Exchange Act Release No. 68973 (Feb. 22, 2013), 78 FR 13726 (Feb. 28, 2013).....	14, 17, 18, 25
Securities Exchange Act Release No. 60970 (November 9, 2009), 74 FR 59319 (November 17, 2009).....	28
Securities Exchange Act Release No. 60971 (November 9, 2009), 74 FR 59283 (November 17, 2009).....	28
Securities Exchange Act Release No. 36505 (November 22, 1995), 60 FR 61277 (November 29, 1995).....	28
Securities Exchange Act Release No. 36165 (August 29, 1995), 60 FR 46653 (September 7, 1995).....	29
Securities Exchange Act Release No. 52843 (November 28, 2005), 70 FR 72486 (December 5, 2005).....	29
Securities Exchange Act Release No. 58365 (August 14, 2008), 73 FR 49522 (August 21, 2008).....	29

Exchange Rule 14.11(e)(4).....2, 4, 23

**Before the  
SECURITIES AND EXCHANGE COMMISSION**

In the Matter of the Petition of:	)	
	)	File No. SR-BatsBZX-2016-30
	)	
Bats BZX Exchange, Inc.	)	
	)	
	)	
	)	

**STATEMENT OF BATS BZX EXCHANGE, INC. IN OPPOSITION TO DISAPPROVAL  
ORDER**

**I. Introduction**

Bats BZX Exchange, Inc. (the “Exchange”) formally filed a proposal to list and trade shares of the Winklevoss Bitcoin Trust on the Exchange on June 30, 2016 (the “Original Proposal”).<sup>1</sup> The Original Proposal was subsequently replaced in its entirety by Amendment No. 1,<sup>2</sup> which was modified by Partial Amendment No. 2<sup>3</sup> (collectively, the “Proposal”). Under the Proposal, the Exchange seeks to list and trade shares (“Shares”) of the Winklevoss Bitcoin Trust

<sup>1</sup> See Securities Exchange Act Release No. 78262 (July 8, 2016), 81 FR 45554 (July 14, 2016) (SR-BatsBZX-2016-30).

<sup>2</sup> See Securities Exchange Act Release No. 79183 (October 28, 2016), 81 FR 76650 (November 3, 2016).

<sup>3</sup> Amendment No. 2 further modified the Exchange’s proposal by (a) changing the size of a creation and redemption basket from 10,000 shares to 100,000 shares, (b) changing the bitcoin value of a share from 0.1 bitcoin to 0.01 bitcoin, and (c) changing the Exchange’s representation about the number of shares outstanding at the commencement of trading from 100,000 shares to 500,000 shares. Because Amendment No.2 did not materially alter the substance of the proposed rule change, Amendment No.2 was not subject to notice and comment. Amendment No. 2 is available on the Commission’s website at <https://www.sec.gov/comments/sr-batsbzx-2016-30/batsbzx201630-1594698-132357.pdf>.

(the “Trust”) as Commodity-Based Trust Shares under BZX Rule 14.11(e)(4).<sup>4</sup> On March 10, 2017, the Division of Trading and Markets (“Division” or “Staff”) disapproved the Proposal pursuant to delegated authority (the “Order”).<sup>5</sup> On March 24, 2017, the Exchange filed a petition for review of the Order (the “Petition”).<sup>6</sup> The Commission granted the Exchange’s petition for review of the Order on April 24, 2017.<sup>7</sup> The Exchange submits this statement (the “Statement”) in opposition to the Order in order to supplement the record set forth in the Proposal and the Petition. The Proposal is consistent with the Securities Exchange Act of 1934 (the “Act”) and therefore should be approved by the Commission, as further explained below.

**The Commission Should Reverse the Disapproval and Approve the Listing and Trading of the Shares on the Exchange**

As further described below, the Commission has plenary power to affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, any action made by the Staff pursuant to delegated authority. For the reasons specified below, the Proposal is consistent with the Act, and the Commission therefore should reverse the Order and approve the listing and trading of the Shares on the Exchange.

Bitcoin has already achieved widespread adoption and legitimacy, having been accepted by thousands of retailers and payment processors as well as having been recognized as an official form of payment by several major national governments; and its utility and influence grow on a

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<sup>4</sup> The Commission approved the Exchange’s ability to list and trade Commodity-Based Trust Shares pursuant to BZX Rule 14.11(e)(4) in Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR-BATS-2011-018).

<sup>5</sup> See Securities Exchange Act Release No. 80206 (March 10, 2017), 82 FR 14076 (March 16, 2017).

<sup>6</sup> The Petition is available on the Commission’s website at <https://www.sec.gov/rules/sro/batsbzx/2017/petition-for-review-sr-batsbzx-2016-30.pdf>.

<sup>7</sup> See Securities Exchange Act Release No. 80511 (April 24, 2017), 82 FR 19770 (April 28, 2017).

daily basis. The CFTC has designated bitcoin as a commodity, putting it on the same footing as commodities such as gold and silver, which means that the CFTC has regulatory responsibilities to maintain the integrity of the bitcoin market. Yet, for investors who wish to express an investment viewpoint in bitcoin, direct investment brings with it significant inconvenience, complexity, expense and risk. As investor demand for exposure to bitcoin continues to increase, these problems with gaining that access to bitcoin grow larger and larger. The Shares would significantly reduce or completely remove each of these hurdles.

The Shares would facilitate capital formation in the bitcoin marketplace in a manner nearly identical to other commodity-trust exchange traded products (“ETPs”). The arbitrage mechanism would function identically to other ETPs, with market participants taking advantage of arbitrage opportunities in both the Shares and in bitcoin, thereby keeping the price of the Shares in line with the price of bitcoin. The presence of these arbitrageurs also minimizes the risk of manipulation in both the broader bitcoin market and on individual bitcoin exchanges. The bitcoin marketplace has become so interconnected that manipulation of any single exchange would likely require manipulation of the entire bitcoin marketplace, rendering such manipulation cost-prohibitive. Finally, the Trust will value its bitcoin using the price of a U.S. equities-style auction on Gemini Exchange that generally represents the largest daily bitcoin transaction worldwide.

Investor interest in bitcoin exposure continues to grow, despite the costs described above and the market inefficiencies that they create. The Shares would significantly reduce or eliminate these costs and inefficiencies while expanding opportunities for investors by providing an inexpensive vehicle to gain exposure to bitcoin in a secure and easily accessible product that is familiar, transparent, and meaningfully regulated. Accordingly, the Proposal is consistent with

the Act, and the significant benefits that the Shares would confer on investors outweigh any concerns raised in the Order. The Commission therefore should reverse the Order and approve the Proposal.

### **Description of the Proposal**

Under the Proposal, the Exchange seeks to list and trade the Shares as Commodity-Based Trust Shares under BZX Rule 14.11(e)(4). An overview of the Proposal is provided below, but additional details regarding the Proposal and the Trust can be found in Amendments No. 1 and 2 to the Proposal.

The Trust would hold only bitcoin, which is a digital commodity<sup>8</sup> that would be secured by and held in the custody of Gemini Trust Company, LLC (the “Custodian”), the Trust’s custodian.<sup>9</sup> As further described below, bitcoin is a digital asset (“Digital Asset”) based on the decentralized, open source protocol of the peer-to-peer bitcoin computer network that hosts the decentralized public transaction ledger, known as the “Blockchain,” on which all bitcoin is recorded.

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<sup>8</sup> Bitcoin is a commodity as defined in Section 1a(9) of the Commodity Act. 7 U.S.C. § 1a(9). *See In re Coinflip, Inc.*, No. 15-29 (CFTC Sept. 17, 2015), available at: <http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfcoinfliprorder09172015.pdf> (“Coinflip”); *see also* Order at note 85.

<sup>9</sup> The Custodian is an affiliate of the Sponsor, as defined below, and a New York State-chartered limited liability trust company that operates under the direct supervision and regulatory authority of the New York State Department of Financial Services (“NYSDFS”). The Trust’s public Bitcoin addresses are established by the Custodian using its proprietary hardware and software security technology (“Cold Storage System”), which holds the Trust’s bitcoin and permits the Trust to move its bitcoin. Access and control of those Bitcoin addresses, and the bitcoin associated with them, is restricted through the public-private key pair relating to each Bitcoin address.

The Trust would issue and redeem Shares from time to time only in one or more whole Baskets,<sup>10</sup> and such transactions would be conducted only “in-kind” in exchange for bitcoin. Designated Authorized Participants would be the only persons that could place orders to create or redeem Baskets. Authorized Participants and market makers would have the ability to participate directly on one or more bitcoin exchanges.<sup>11</sup>

The investment objective of the Trust would be for the Shares to track the price of bitcoin, as measured by the clearing price of a two-sided auction (the “Gemini Exchange Auction Price”) – which would occur at 4:00 p.m. Eastern Time on the Gemini exchange (“Gemini Exchange”), on every day the Exchange is open for trading (each a “Business Day”) – less the Trust’s liabilities (which would include accrued but unpaid fees and expenses). The Exchange and Sponsor believe that, for many investors, the Shares will represent a cost-effective and convenient means of gaining investment exposure to bitcoin similar to a direct investment in bitcoin.

#### **Applicable Legal Standards**

Pursuant to Rule 431(a) of the Rules of Practice,<sup>12</sup> the Commission has plenary power to affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, any action made pursuant to delegated authority. Although the Rules of Practice characterize this proceeding as a “review” of Staff’s action, the Commission is not acting as an appellate body,

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<sup>10</sup> Each Basket would consist of 100,000 Shares.

<sup>11</sup> As disclosed in the Trust’s registration statement on Form S-1 filed on February 8, 2017 (the “Registration Statement”), Convergex Execution Solutions LLC, KCG Americas LLC, and Virtu Financial BD LLC have each signed an Authorized Participant Agreement with the Trust and, upon the effectiveness of such agreement and the registration statement, may create and redeem Baskets.

<sup>12</sup> 17 CFR 201.431(a).

but rather will decide de novo whether the Proposal should be approved pursuant to the Act's requirements.<sup>13</sup> When an exchange files a proposed rule change, such as the Proposal,<sup>14</sup> the standard to be applied is whether the proposed rule change is consistent with the statutory provisions and the rules and regulations thereunder that apply to national securities exchanges.<sup>15</sup> As noted in the Order, the Commission must approve an exchange filing if it finds that the proposed rule change is consistent with these legal requirements. In determining whether an exchange filing is consistent with the statutory provisions and the rules and regulations thereunder that apply to national securities exchanges, the Commission has consistently focused on Section 6(b)(5) of the Act, which provides that the rules of an exchange must be:

designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter or the administration of the exchange.

In evaluating whether a proposal to list and trade shares of a commodity-trust ETP meets these requirements, the Commission has focused its attention on: (i) the benefits and protections

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<sup>13</sup> See *In the Matter of NASDAQ OMX BX, Inc.*, Securities Exchange Act Release No. 65592 (October 19, 2011), 76 FR 66103 (October 25, 2011) (weighing whether to grant discretionary review under Rule 431(b), stating that it was “determining whether to grant de novo review of the Division’s exercise of delegated authority”); and *Options Clearing Corporation; Order Setting Aside Action by Delegated Authority*, Securities Exchange Act Release No. 77112 (February 11, 2016), 81 FR 8294 (February 18, 2016) (under Rule 431(a) review, “[h]ere, the Commission is setting aside the Delegated Order and conducting a de novo review of, and giving careful consideration to, the entire record”).

<sup>14</sup> Such filings are made under Section 19(b)(1) of the Act, 15 U.S.C. 78s(b)(1), and Act Rule 19b-4, 17 CFR 240.19b-4.

<sup>15</sup> See Section 19(b)(2)(C) of the Act, 15 U.S.C. 78s(b)(2)(C)(i).

conferred to investors and the furtherance of the public interest; (ii) the operation of the arbitrage mechanism and the ability of market makers to engage in arbitrage in an efficient and effective manner; (iii) the underlying reference asset's susceptibility to manipulation; and (iv) the ability to monitor for, detect, and deter manipulation and violations of Exchange rules and applicable federal securities laws and rules. If the Commission applies the same factors that the Commission considered relevant its approval orders for gold, silver, platinum, palladium and copper ETPs, the Proposal similarly should be found to be consistent with the Act.<sup>16</sup>

## **II. The Proposal is Consistent With the Act**

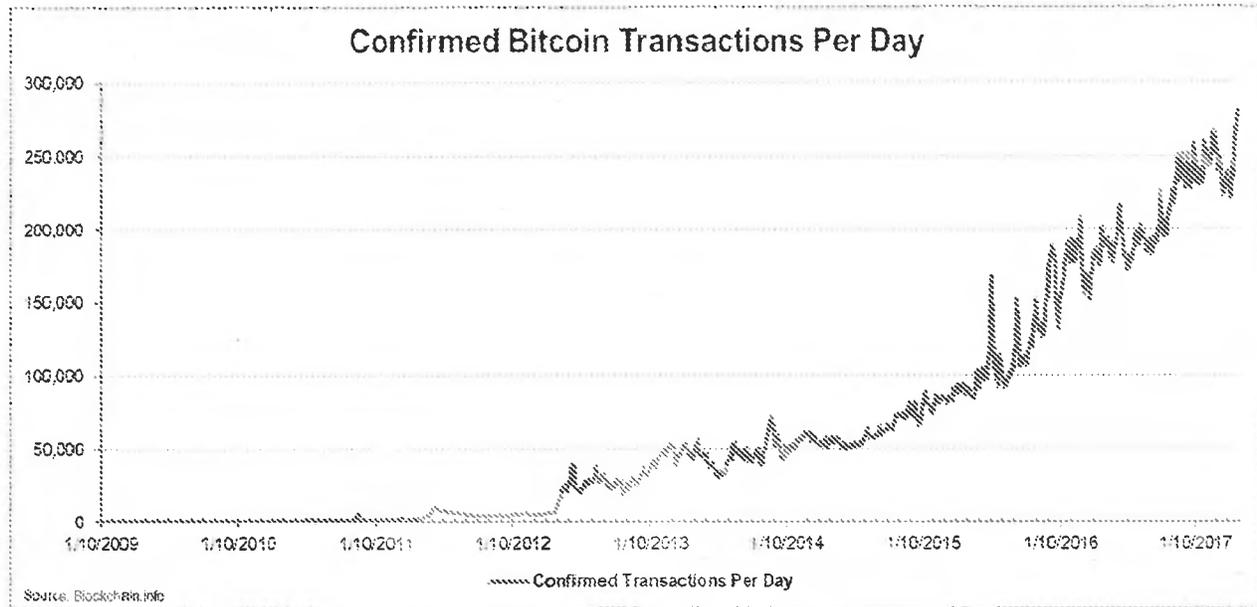
### **a. The Proposal Would Confer Significant Benefits to Investors in Furtherance of the Public Interest**

Because of its innovative features as a Digital Asset, bitcoin has gained wide acceptance as a secure means of exchange in the commercial marketplace and has generated significant interest among investors. In less than a decade since its creation in 2008, bitcoin has achieved significant market penetration, with payments giant PayPal and thousands of merchants and businesses accepting it as a form of commercial payment; as well as receiving official recognition from several governments, including Japan and Australia. Accordingly, investor interest in gaining exposure to bitcoin is increasing exponentially as well. As expected, the total

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<sup>16</sup> See, e.g., streetTRACKS Gold Shares, Securities Exchange Act Release No. 50603 (October 28, 2004), 69 FR 64614 (November 5, 2004) (SR-NYSE-2004-22) (the "Gold Order"); iShares Silver Trust, Securities Exchange Act Release No. 53521 (March 20, 2006), 71 FR 14967 (March 24, 2006) (SR-Amex-2005-72) (the "Silver Order"); ETFS Platinum Trust, Securities Exchange Act Release No. 61219 (December 22, 2009), 74 FR 68886 (December 29, 2009) (SR-NYSEArca-2009-95) (the "Platinum Order"); ETFS Palladium Trust, Securities Exchange Act Release No. 61220 (December 22, 2009) 74 FR 68895 (December 29, 2009) (SR-NYSEArca-2009-94) (the "Palladium Approval"); and JPM XF Physical Copper Trust, Securities Exchange Act Release No. 68440 (Dec. 14, 2012), 77 FR 75468 (Dec. 20, 2012) (SR-NYSEArca-2012-28) (the "Copper Order") (collectively, including the iShares Copper Order, defined below, the "Commodity Orders").

volume of bitcoin transactions in the market continues to grow exponentially as evidenced by the following chart.<sup>17</sup>



However, despite the growing investor interest in bitcoin, the primary means for investors to gain access to bitcoin exposure remains direct investment through bitcoin exchanges or over-the-counter (“OTC”) trading. For investors simply wishing to express an investment viewpoint in bitcoin, direct investment brings with it significant inconvenience, complexity, expense and risk. The Shares would therefore represent a significant innovation in the bitcoin market by providing an inexpensive vehicle for investors to gain exposure to bitcoin in a secure and easily accessible product that is familiar and transparent to investors and meaningfully regulated. The prior orders of the Commission approving commodity-trust ETPs have recognized the public

<sup>17</sup> Blockchain Charts, Total Number of Transactions, *available at* <https://blockchain.info/charts/n-transactions-total?daysAverageString=7>, (last day visited May 11, 2017).

interest in improving investor access, efficiency and transparency of investing in underlying commodity markets via such exchange-traded derivative products.<sup>18</sup>

In addition to improved convenience, efficiency and transparency, a bitcoin ETP will also enhance the *security* afforded to investors as compared to a direct investment in bitcoin. Despite the extensive security mechanisms provided by the Bitcoin Network's source code cryptography and the Blockchain validation process, a remaining risk to owning bitcoin directly is the need for the holder to retain and protect the "private key" required to spend or sell bitcoin after purchase. If a holder's private key is compromised or simply lost, their bitcoin can be rendered unavailable – *i.e.*, effectively lost to the investor. This risk will be resolved by the ETP because the bitcoin itself will be held by the Custodian of the Trust, with the investors in turn holding shares of the Trust (like any other security). As described in the Proposal,<sup>19</sup> the Custodian will use advanced technology to secure the Trust's bitcoin. The Custodian's proprietary and patent-pending Cold Storage System is designed specifically to secure and maintain the Trust's bitcoin. The Custodian will store all of the Trust's bitcoin on a segregated basis in the Trust's unique Bitcoin addresses, with balances that can be directly verified by investors on the Blockchain. The Custodian will use the Cold Storage System to manage and safeguard a system utilizing numerous Bitcoin addresses that are kept offline either (i) in computers that are not directly connected to or accessible from the internet or (ii) through the storage of the public and private keys relating to such Bitcoin addresses only in "cold storage." As such, the bitcoin held by the Custodian on behalf of the Trust is held in a manner more secure than is available to the vast majority of investors.

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<sup>18</sup> See, e.g., Gold Order at 64614; Silver Order at 14974.

<sup>19</sup> See supra note 2 at 76651.

**b. The Arbitrage Mechanism Will Operate Efficiently, Preventing Price Dislocation and Creating a Liquid Market With Tight Spreads**

Similar to other approved ETPs listed and traded on the Exchange, the Trust will rely on the creation and redemption process to reduce any premium or discount that may occur in the Share trading prices relative to the intraday net asset value (the “iNAV”). Baskets may be created or redeemed only by Authorized Participants who have entered into an Authorized Participant Agreement with the Trust and the Sponsor, subject to acceptance by the Transfer Agent. The Basket creation and redemption process creates an arbitrage mechanism through which Authorized Participants may keep Share trading prices in line with iNAV.

As the Shares trade intraday on the Exchange, their market prices will fluctuate due to supply and demand, which will be driven in large part by the price of bitcoin. The following examples generally describe the conditions surrounding Basket creation and redemption:

- If the market price of the Shares is greater than iNAV, an Authorized Participant can purchase sufficient bitcoin to create a Basket, and then sell the new Shares on the secondary market at a profit. This process increases the selling interest in the Shares and is expected to decrease the market price of the Shares such that their market price will move toward iNAV.
- If iNAV is greater than the market price of the Shares, an Authorized Participant can purchase Shares on the secondary market in an amount equal to a Basket and redeem them for bitcoin, and then sell the bitcoin at a profit. This process increases the buying interest in the Shares and is expected to increase the market price of the Shares such that their market price moves toward the iNAV.

This arbitrage mechanism (the “Arbitrage Mechanism”) helps to minimize the difference between the trading price of a Share and the iNAV. Over time, these buying and selling pressures

should balance, and a Share's market trading price is expected to remain at a level that is at or close to iNAV. The Arbitrage Mechanism provided by the creation and redemption process is designed to maintain the relationship between the market trading price of the Shares and iNAV. The fungibility of bitcoin further strengthens the Arbitrage Mechanism as it relates to the Shares by allowing arbitrageurs to engage in arbitrage opportunities on any bitcoin exchange, a process that will keep the price of the Shares in line with the price of their underlying reference asset – bitcoin. These worldwide arbitrage opportunities enabled through the fungibility of bitcoin expand and enhance the Arbitrage Mechanism for the Shares beyond the scope of a typical commodity-trust ETP and ETPs generally.

Based on conversations among the Exchange, market makers and Authorized Participants, the Exchange expects that arbitrageurs will be able to take advantage of price variations between the Shares' market price and iNAV and that the Arbitrage Mechanism will be facilitated by the transparency and simplicity of the Trust's holdings, the availability of the Intraday Indicative Value, the liquidity of the bitcoin market, each Authorized Participant's ability to access the bitcoin market, and each Authorized Participant's ability to create workable hedges. Further to this point, market makers and Authorized Participants have made clear in these conversations that they have access to numerous bitcoin markets, including the Gemini Exchange, and will be able to take advantage of arbitrage opportunities across multiple markets as it relates to the Shares' market price and the market price of bitcoin.

Based on the foregoing, the Exchange expects that the Arbitrage Mechanism for the Shares will operate efficiently and in a manner consistent with other commodity-trust ETPs that have previously been deemed to be consistent with the Act and, as such, that the Proposal to list and trade the Shares on the Exchange is also consistent with the Act.

c. **The Nature of the Bitcoin Ecosystem and the Gemini Exchange Auction Price Makes Manipulation Difficult**

i. **Bitcoin Ecosystem**

The geographically diverse and continuous nature of bitcoin trading makes it difficult and prohibitively costly to manipulate the price of bitcoin. In particular, the Exchange agrees with a submission from a commenter to a similar rule change proposal, that the bitcoin market generally is less susceptible to manipulation than the equity, fixed income, and commodity futures markets.<sup>20</sup> There are a number of reasons this is the case, including that there is not inside information about revenue, earnings, corporate activities, or sources of supply; it is generally not possible to disseminate false or misleading information about bitcoin in order to manipulate; manipulation of the price on any single venue would require manipulation of the global bitcoin price in order to be effective; a substantial over-the-counter market provides liquidity and shock-absorbing capacity; bitcoin's 24/7/365 nature provides constant arbitrage opportunities across all trading venues; and it is unlikely that any one actor could obtain a dominant market share.<sup>21</sup>

The Order acknowledges that "there is no inside information related to the earnings or revenue of bitcoin."<sup>22</sup> However, the Order expresses concerns that there are other ways in which manipulation can occur:

[T]here may be material non-public information related to the actions of regulators with respect to bitcoin; regarding order flow, such as plans of market participants to significantly increase or decrease their holdings in

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<sup>20</sup> See Craig M. Lewis, "SolidX Bitcoin Trust: A Bitcoin Exchange Traded Product" (Feb. 2017) (analysis commissioned by SolidX Management LLC and submitted to comment file SR-NYSEArca-2016-101) ("Lewis Paper"). A supplemental submission related to the Lewis Paper was submitted on March 3, 2017. Craig M. Lewis, "Supplemental Submission to SolidX Bitcoin Trust: A Bitcoin Exchange Traded Product" (Mar. 3, 2017) ("Lewis Paper II").

<sup>21</sup> *Id.*

<sup>22</sup> See Order at 14079.

bitcoin; regarding new sources of demand, such as new ETPs that would hold bitcoin; or regarding the decision of a bitcoin based ETP with respect to how it would respond to a 'fork' in the blockchain, which would create two different, non-interchangeable types of bitcoin.

The Exchange respectfully submits that, with the exception of information about how a sponsor of a bitcoin-based ETP would respond to a "fork" in the blockchain, these potential avenues for manipulation of the bitcoin market also exist in the context of any other commodity-trust ETP. In fact, with respect to other physical commodity-trust ETPs, there may be inside information relating to the supply of the physical commodity – such as the discovery of new sources of supply or significant disruptions at mining facilities that supply the commodity – but those ETPs have been approved for listing on national exchanges to the benefit of investors. Further, while there is no specific analog in a physical commodity ETP to a digital commodity "fork" that might impact the Trust, comparable risks have not prevented approval of those ETPs. For example, if the sponsor of a gold-based ETP determined to change the purity requirement for the ETP's gold, there could be a significant impact on both the ETP and the spot market price for gold. The existence of such a risk did not prevent gold-based ETPs from being approved. The Exchange is not aware of any other case in which the Commission has required a finding that there is *no* possibility of manipulation of a market in order for a proposed rule change to be consistent with the Act. Indeed, the Commission has approved a multitude of securities for exchange listing and trading and deemed those products consistent with the Act without determining that manipulation in the underlying asset was impossible.

The Commission has grappled with similar issues in connection with other proposed rule changes that were approved and deemed consistent with the Act. In approving a proposed rule

change regarding iShares Copper Trust,<sup>23</sup> the Commission found that “incremental demand from new investors will broaden the investor base in copper, which could reduce the possibility of collusion among market participants to manipulate the copper market.”<sup>24</sup> In addition, the Commission took comfort from the fact that “(1) trading in the Shares would be subject to the oversight of both NYSE Arca and the Commission, and (2) manipulation of physical copper would be subject to the oversight jurisdiction and enforcement authority of the [Commodity Futures Trading Commission (“CFTC”)].”<sup>25</sup> This is nearly identical to the Trust’s oversight structure, where trading in the Shares would be overseen by the Exchange and the Commission and where the underlying commodity would be subject to oversight by the CFTC.

Although the Order noted that a regulatory framework for providing oversight and deterring market manipulation currently does not exist for the bitcoin spot market,<sup>26</sup> the Exchange believes that a regulatory and structural framework to prevent and deter manipulative conduct in the spot market does exist, as further explained below, and that, coupled with Exchange and Commission oversight of the Shares, there will be robust enforcement capabilities against manipulative conduct.

In asserting that the underlying bitcoin markets were subject to manipulation, the Staff noted in the Order:

Moreover, the manipulation of asset prices, as a general matter, can occur simply through trading activity that creates a false impression of supply or demand, whether in the context of a closing auction or in the course of continuous trading, and does not require formal linkages among markets (such as consolidated quotations or routing requirements) or the complex

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<sup>23</sup> See Securities Exchange Act Release No. 68973 (Feb. 22, 2013), 78 FR 13726 (Feb. 28, 2013) (SR-NYSEArca-2012-66) (“iShares Copper Order”)

<sup>24</sup> *Id.* at 13738.

<sup>25</sup> *Id.*

<sup>26</sup> See Order at 14085.

quoting behavior associated with high- frequency trading. Finally, while it may or may not be possible to acquire a dominant position in the bitcoin market as a whole, it might be quite possible to acquire a position large enough to temporarily move the price on a single, less-liquid bitcoin trading market, even if OTC markets exist that are capable of absorbing liquidity shocks. (Order at 14085)

The Exchange respectfully contends that the manipulation of asset prices through continuous trading activity is an unlikely event. As one commenter noted, “[g]iven the degree of fragmentation across bitcoin exchanges, the relatively slow transaction speeds (compared to equity markets) and the capital necessary to maintain a significant presence on each one, the likelihood of spoofing is low.”<sup>27</sup> Moreover, the linkage between the bitcoin markets and the presence of arbitrageurs in those markets means that the manipulation of the price of bitcoin price on any single venue would require manipulation of the global bitcoin price in order to be effective.

The Trust’s Registration Statement explains how, as the bitcoin exchange market has evolved and matured, a number of new entrants, including two New York limited purpose trust companies, have emerged. These new entrants have markedly changed the once concentrated and non-regulated landscape of the bitcoin exchange market. In addition, the advent of market participants who are chiefly arbitrageurs has resulted in bitcoin exchange prices generally converging after dislodgement.<sup>28</sup> Arbitrageurs must have funds distributed across multiple bitcoin exchanges in order to take advantage of temporary price dislocations, thereby making it

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<sup>27</sup> See Lewis Paper I, at 9.

<sup>28</sup> A commenter to a similar proposed rule change presented data from four U.S. dollar-denominated bitcoin exchanges suggesting that price discrepancies across the exchanges generally are arbitrated away within a matter of seconds. See Letter from Daniel H. Gallancy, CFA, SolidX Partners Inc. (Mar. 15, 2017) (“Gallancy Letter”) at 5. Accordingly, arbitrageurs help to keep bitcoin prices aligned across bitcoin markets and greatly reduce the likelihood of manipulation.

unlikely that there will be strong concentration of funds on any particular Bitcoin Exchange.<sup>29</sup> As a result, the potential for manipulation on a particular bitcoin exchange would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.<sup>30</sup>

The Order argues that the record does not support the finding that Gemini Exchange is a regulated market comparable to a national securities exchange or to futures exchanges on which derivatives based on the underlying reference assets for already approved commodity-trust ETPs are traded. The Order further asserts that the CFTC does not set the standards for, approve the rules of, examine, or otherwise regulate bitcoin spot markets.<sup>31</sup> In fact, the CFTC does have significant anti-fraud and anti-manipulation authority over the trading of commodities, which includes the spot trading of commodities.<sup>32</sup> The CFTC has designated bitcoin as a commodity,<sup>33</sup>

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<sup>29</sup> Additionally, in response to the People's Bank of China's increased oversight in January 2017, the three largest China-based bitcoin exchanges, OKCoin, Huobi, and BTC China, started charging trading commission fees to suppress speculative trading and prevent price swings which resulted in a significant drop in volume on these exchanges that will likely continue going forward. Indeed, a commenter in a similar proposed rule change provided data demonstrating that this action has caused volumes on the China-based bitcoin exchanges to decline to levels in-line with the trading volumes on U.S. dollar-denominated bitcoin exchanges. *See* Gallancy Letter at 6-7.

<sup>30</sup> An institutional investor that participates in the daily auction on the Gemini Exchange concurred with the notion that arbitrageurs are actively eliminating any cross-market pricing differences while noting that the Gemini Exchange Auction Price is typically "within 1% of a global volume-weighted average price." Letter from Circle Internet Financial, Inc. (Feb. 3, 2017).

<sup>31</sup> *See* Order at 28.

<sup>32</sup> *See* 17 CFR 180.2 and 7 U.S.C. 9 which makes it unlawful for any person directly or indirectly to manipulate or attempt to manipulate the price of any swap or commodity in interstate commerce.

<sup>33</sup> Bitcoin is a commodity as defined in Section 1a(9) of the Commodity Exchange Act. 7 U.S.C. § 1a(9). *See* Coinflip.

which means that the CFTC is broadly responsible for the integrity of the bitcoin spot market to the extent that manipulation of the underlying bitcoin market could have an impact on the regulated derivatives market. The CFTC has also approved TeraExchange as a Swap Execution Facility (“SEF”) and permitted TeraExchange to trade bitcoin-based swap contracts. Notably, CFTC Core Principle 3 requires that a SEF permit trading only in swaps that are not readily susceptible to manipulation.<sup>34</sup> Thus, because the CFTC approved TeraExchange as a SEF and permitted it to trade bitcoin-based swap contracts, the CFTC had the opportunity to conclude that the pricing mechanism for settling these swaps was readily susceptible to manipulation, which implicitly includes the opportunity to conclude whether the underlying spot market on which the reference asset (bitcoin) is based is readily susceptible to manipulation, and declined to do so.

Additionally, the transparency that the Trust will provide with respect to its bitcoin holdings, as well as the continuous dissemination of the intraday indicative value and NAV of the Trust, will further promote market transparency and thereby reduce the ability of market participants to manipulate the price of bitcoin or the price of the Shares.<sup>35</sup> Moreover, as recognized by the Commission in assessing the risk of manipulation and availability of market transparency in connection with similar ETP applications, the listing and trading of the Shares on the Exchange should make the overall bitcoin market more transparent, which is an important factor weighing in favor of Commission approval.<sup>36</sup>

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<sup>34</sup> See Commodity Exchange Act (“CEA”) section 5h(f)(3); 7 U.S.C. 7b-3(f)(3).

<sup>35</sup> Gallancy Letter at 3; see also iShares Copper Order at 53. Indeed, an institutional investor concurred with this analysis that the approval of the Trust will “lead to improvements in price discovery, liquidity and price stability. . .” in the Bitcoin Network. See Letter from XBT OPPS Team (Nov. 21, 2016).

<sup>36</sup> iShares Copper Order at 13739. “In this case, the Commission believes the transparency that the Trust will provide with respect to its holdings, as well as the dissemination of quotations for and last-sale prices of transactions in the Shares and the intraday indicative

Although the CFTC does not regulate the bitcoin spot market – in the same way that it does not regulate the spot market for gold, silver or other exempt commodities – it nevertheless is responsible for enforcing, and has in fact enforced, the anti-fraud provisions of the CEA regarding bitcoin. For example, in September 2015, the CFTC found that Coinflip had conducted commodity option transactions on bitcoin without complying with the requirements of Section 5h(a)(1) of the CEA.<sup>37</sup> The CFTC also determined that Coinflip had operated an unregistered swap execution facility relating to bitcoin transactions in violation of Section 5h(a)(1) of the CEA. Subsequent to Coinflip, the CFTC found in the Bitfinex enforcement action<sup>38</sup> that Bitfinex had violated Section 4(a) of the CEA by engaging in off-exchange retail commodity transactions involving bitcoin. Further, the CFTC determined that Bitfinex had violated Section 4d(a) of the CEA by acting as a “futures commission merchant” with respect to retail commodity transactions involving bitcoin without registering with the CFTC. These CFTC enforcement actions demonstrate that the CFTC has the ability to use, and has used, its enforcement authority to address any potential fraud or other unlawful activity in the bitcoin market.<sup>39</sup>

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value and NAV of the Trust, all are expected to help reduce the ability of market participants to manipulate the physical copper market or the price of Shares. Also, the Commission believes that the listing and trading of the Shares on the Exchange (and any other national securities exchange that trades the Shares pursuant to unlisted trading privileges) may serve to make the overall copper market more transparent if OTC trading of unreported warehouse receipts shifts to trading Shares on exchanges.”

<sup>37</sup> See Coinflip Order at 3 (“Bitcoin and other virtual currencies are encompassed in the definition and properly defined as commodities.”).

<sup>38</sup> *In re BFXNA INC.*, No. 16-19 (CFTC June 2, 2016), available at <http://www.cftc.gov/ide/groups/public/@lrenforcementactions/documents/legalpleadings/enbfxnaorder060216.pdf>.

<sup>39</sup> See also, *In re TeraExchange LLC*, where the CFTC found that Tera Exchange, a CFTC-registered swap execution facility, engaged in certain bitcoin swap transactions that

For all of these reasons, bitcoin is not particularly susceptible to manipulation, especially as compared to other approved ETP reference assets, and the Proposal therefore is consistent with the Act.

**ii. Gemini Exchange Auction Price**

Not only is the Gemini Exchange Auction Price not susceptible to manipulation, but it is also a price forming event that more accurately reflects the value of bitcoin at 4:00 PM ET than any other individual or cross market snapshot of market conditions could provide. As further described below, the Gemini Exchange Auction Price is consistently a reliable indicator of the price of bitcoin and is the single largest transaction in the worldwide bitcoin market on most days. The fungibility of bitcoin and the presence of arbitrageurs make manipulation of price on any single venue prohibitively expensive. That is especially true as it relates to the Gemini Exchange Auction Price, which is arrived at through an entirely transparent two-sided auction (the “Gemini Exchange Auction”) that operates in a substantively identical manner to auctions occurring in the U.S. equities markets. In addition, as explained above, the Gemini Trust Company and Gemini Exchange are subject to regulation by the NYSDFS, which will help protect against fraud and manipulation on the exchange. Accordingly, using the Gemini Exchange Auction Price as the basis for calculating NAV ensures that the Proposal is consistent with the Act.

The Gemini Exchange Auction Price is the most accurate measure of the price of bitcoin at 4:00p.m. ET because it is the price at which the world’s largest bitcoin transaction occurs on

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constituted wash trading and prearranged trading in violation of Section 4c(a) of the CEA and related regulations. No. 15-33 (CFTC Sept. 24, 2015), *available at* <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfteraexchangeorder92415.pdf>.

most days. The volume transacted in the Gemini Exchange Auction is generally more than 50% larger than the second largest trade in the world, drawing an average daily volume of 1200 bitcoin as compared to approximately 800 bitcoin, respectively. Moreover, the Gemini Exchange Auction occurs at a regularly scheduled time each day in order to maximize participation and price formation, whereas other liquidity events are often unpredictable and irregular. Since launching on September 21, 2016 and through May 12, 2017, the Gemini Exchange Auction Price on business days has deviated from the Gemini Exchange midpoint price (the midrange of the highest bid and lowest offer prices) by 0.22% on average and 0.71% at most, and it has deviated from the median price of all U.S.-based bitcoin exchanges by 0.52% on average and 0.70% on average from the median price of all U.S. dollar-denominated bitcoin exchanges. These facts, taken together, demonstrate that the Gemini Exchange Auction Price is representative and indicative of the larger Bitcoin marketplace, and that it can handily support the liquidity and volume necessary to maintain an efficient arbitrage mechanism.

In addition to the liquidity attracted by the auction, Gemini Exchange is regularly near the top in market quality metrics for overall trading. According to publicly available market data for U.S.-based bitcoin exchanges covering the six months prior to May 12, 2017, the Gemini Exchange: was the fifth biggest by volume (second biggest within the U.S.); had the third tightest bid/ask spread as a percentage of price (second within the U.S.); had the tightest spread ten (10) bitcoin deep and the fifth tightest spread one hundred (100) bitcoin deep (second within the U.S.); and had the third lowest volatility (i.e., smallest standard deviation of daily prices; second within the U.S.).

As discussed above, the Gemini Exchange is uniquely positioned because of its regulatory status and licensing to be a venue on which traditional financial institutions will be

comfortable transacting in bitcoin. These institutions provide a vital bridge to the equities markets and other capital markets, and improve price discovery, liquidity, and transparency. The Trust has entered into agreements with a number of Authorized Participants as well as market makers, each of which is an experienced participant in the ETP marketplace and is actively engaged in trading ETPs. A number of these potential Authorized Participants currently trade bitcoin and are already registered participants that trade on the Gemini Exchange. Authorized Participants will not be required to use the Gemini Exchange to trade their bitcoin, and the Gemini Exchange is not the only venue on which Authorized Participants can purchase bitcoin for delivery to the Trust. However, the Gemini Exchange will provide a convenient and stable venue in which to purchase bitcoin, as well as an efficient way to trade bitcoin, given the regulatory oversight to which it is subject and its superior liquidity characteristics. As described above, market participants, including market makers and Authorized Participants, are able to transact on numerous bitcoin exchanges as well as in the Shares in order to engage in arbitrage that will further make the Gemini Exchange Auction Price a stronger price forming event that is reflective of the broader market price for bitcoin.

Finally, the Sponsor has a robust methodology in place to determine the value of the Trust's bitcoin, as detailed in the Registration Statement. This methodology includes the ability to use the Gemini Exchange Auction Price, the 4:00 p.m. Eastern Time spot price on the Gemini Exchange or the itBit bitcoin exchange and, under certain circumstances, a valuation using fair market value pricing as determined in good faith by the Sponsor and calculated by the Trust's administrator. These procedures greatly reduce the ability of a malicious actor to influence the NAV of the Trust through participating in the daily auction on the Gemini Exchange.

**d. The Proposal Provides Sufficient Tools for the Exchange to Monitor For and Protect Against Manipulation in the Trading of the Shares**

The Proposal meets the criteria that the Commission has utilized in approving other commodity-trust ETPs as it relates to the ability to monitor for, detect, and deter manipulation and violations of Exchange rules and applicable federal securities laws and rules. In approving prior commodity-trust ETPs, the Commission has analyzed whether the proposals would provide for adequate surveillance by the exchange to monitor for and protect against manipulation in the trading of the ETP shares.<sup>40</sup> While the Commission has noted that “[i]nformation sharing agreements with markets trading securities underlying a derivative are an important part of a self-regulatory organization’s ability to monitor for trading abuses in derivative products,”<sup>41</sup> it has acknowledged that it is “*not possible*” to enter into such information sharing agreements with the OTC markets for the commodities underlying the ETPs.<sup>42</sup> The approved orders also reflect the fact that the proposed ETP exchange in many cases did not have information sharing agreements with the corresponding exchanges (especially those outside of the United States) that were active in trading the underlying commodities or their derivatives.<sup>43</sup> In each case, the Commission nevertheless concluded that the exchange could adequately surveil the ETP shares

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<sup>40</sup> See Gold Order at 64619; Silver Order at 14974; Platinum Order at 68887-88; Palladium Order at 68895; Copper Order at 75485-86.

<sup>41</sup> Gold Order at 64619.

<sup>42</sup> Gold Order at 64619; Silver Order at 14974.

<sup>43</sup> See Gold Order at 64614, 64618 (noting that the “most significant gold futures exchanges are the COMEX division of the NYMEX and the Tokyo Commodity Exchange” but describing a surveillance agreement only with COMEX, not Tokyo); Silver Order at 14968, 14973 (stating that “the most significant silver futures exchanges are the COMEX and the Tokyo Commodity Exchange” but describing a surveillance agreement only with COMEX, not Tokyo); Copper Order at 75469, 75485 (explaining that most copper derivatives trading occurs on the COMEX, the London Metal Exchange and the Shanghai Futures Exchange, but describing surveillance agreements only with COMEX and London, not Shanghai).

in a manner consistent with the Act, “notwithstanding the lack of a surveillance sharing agreement with the market trading the product on which Shares are based.”<sup>44</sup> These conclusions were based on other aspects of the respective exchange’s rules and the underlying commodity markets that the Commission found satisfactory – aspects that are similarly reflected in the Proposal.

A particular area of surveillance focus for the Commission in these approval orders was the implementation of exchange rules requiring market makers in the commodity-trust ETP shares to disclose their dealings in the underlying commodities.<sup>45</sup> Analogous requirements are included in the Proposal here, with BZX Rule 14.11(e)(4) mandating that any market maker in the Shares disclose all of its commodity trading accounts, disclose all trading in bitcoin or bitcoin derivatives, and make available all related books and records.<sup>46</sup>

In the prior approval orders, the Commission has likewise reviewed the adequacy of the relevant exchange’s rules and procedures for surveillance of trading activity in the ETP shares themselves.<sup>47</sup> Such surveillance rules and procedures are similarly in place at the Exchange regarding the proposed bitcoin ETP – including obtaining information regarding trading in Shares from members or affiliates of the Intermarket Surveillance Group, trading information available on the Blockchain, and information available to the Gemini Exchange (with which the Exchange will have a comprehensive sharing agreement).<sup>48</sup>

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<sup>44</sup> Gold Order at 64619.

<sup>45</sup> Gold Order at 64619; Silver Order at 14974; Platinum Order at 68887; Palladium Order at 68896; Copper Order at 75485.

<sup>46</sup> See Amendment No. 1 at 65-66.

<sup>47</sup> See, e.g., Copper Order at 75486.

<sup>48</sup> See Amendment No. 1 at 65-66.

The Commission has also emphasized that the liquidity of the underlying commodity spot market can be significant in allaying concerns about the improper trading practices.<sup>49</sup> As discussed above, the geographically diverse and continuous nature of bitcoin trading makes it difficult and prohibitively costly to manipulate the price of bitcoin.<sup>50</sup> In particular, the bitcoin market is no more susceptible to manipulation than are the equity, fixed income, and commodity futures markets. There are a number of reasons why this is the case, including that there is less potential for material non-public information relating to sensitive areas such as revenue, earnings, corporate activities, or sources of supply. Accordingly, it is generally not possible to disseminate false or misleading information about bitcoin in order to manipulate the price of bitcoin. In addition, the substantial OTC market for bitcoin provides liquidity and shock-absorbing capacity that makes it even more unlikely that any one actor could obtain the dominant market share necessary for manipulation. Finally, the non-stop nature of bitcoin's trading activity (*i.e.*, 24/7/365) means that there is no single market-close event for investors to attempt to manipulate.<sup>51</sup>

Additionally, the transparency that the Trust will provide with respect to its bitcoin holdings, as well as the continuous dissemination of the intraday indicative value and NAV of

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<sup>49</sup> See Gold Order at 64619.

<sup>50</sup> As one commenter noted, “[g]iven the degree of fragmentation across bitcoin exchanges, the relatively slow transaction speeds (compared to equity markets) and the capital necessary to maintain a significant presence on each one, the likelihood of spoofing is low.” See Craig M. Lewis, “SolidX Bitcoin Trust: A Bitcoin Exchange Traded Product” at 9 (Feb. 2017) (analysis commissioned by SolidX Management LLC and submitted to comment file SR-NYSEArca-2016-101) (“Lewis Paper I”).

<sup>51</sup> See Lewis Paper I. A supplemental submission related to Lewis Paper I was submitted on March 3, 2017. Craig M. Lewis, “Supplemental Submission to SolidX Bitcoin Trust: A Bitcoin Exchange Traded Product” (Mar. 3, 2017).

the Trust, will further promote market transparency and thereby reduce the ability of market participants to manipulate the price of bitcoin or the price of the Shares.<sup>52</sup> Moreover, as recognized by the Commission in assessing the risk of manipulation and availability of market transparency in connection with similar ETP applications, the listing and trading of the Shares on the Exchange can be expected to make the overall Bitcoin market more transparent, which is an important factor weighing in favor of Commission approval.<sup>53</sup> In addition, the Commission took comfort from the fact that “(1) trading in the Shares would be subject to the oversight of both NYSE Arca and the Commission, and (2) manipulation of physical copper would be subject to the oversight jurisdiction and enforcement authority of the [CFTC].” This is nearly identical to the Trust’s oversight structure, where trading in the Shares would be overseen by the Exchange and the Commission, and where the underlying commodity would be subject to oversight by the CFTC.<sup>54</sup>

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<sup>52</sup> Gallancy Letter at 3; *see also* iShares Copper Order at 53. Indeed, an institutional investor concurred with this analysis that the approval of the Trust will “lead to improvements in price discovery, liquidity and price stability. . .” in the Bitcoin Network. *See* Letter from XBT OPPS Team (Nov. 21, 2016).

<sup>53</sup> Copper Order at 13739 (“In this case, the Commission believes the transparency that the Trust will provide with respect to its holdings, as well as the dissemination of quotations for and last-sale prices of transactions in the Shares and the intraday indicative value and NAV of the Trust, all are expected to help reduce the ability of market participants to manipulate the physical copper market or the price of Shares. Also, the Commission believes that the listing and trading of the Shares on the Exchange (and any other national securities exchange that trades the Shares pursuant to unlisted trading privileges) may serve to make the overall copper market more transparent if OTC trading of unreported warehouse receipts shifts to trading Shares on exchanges.”).

<sup>54</sup> Although the Order suggested that a regulatory framework for providing oversight and deterring market manipulation currently does not exist for the bitcoin spot market (*see* Order at 14085), the Exchange believes that a rapidly-developing regulatory framework to deter manipulative conduct in the spot market does exist and that this framework, coupled with Exchange oversight of the Shares, will protect against and detect any manipulative conduct.

**III. The Order Erroneously Applied an Unprecedented and Overly Restrictive Standard that is Inconsistent with Prior Approval Orders.**

The Exchange respectfully submits that in concluding that the Proposal was *not* consistent with the Act, the Staff applied a new standard that is inconsistent with prior approval orders and is not required by the Act. In the Order, the Staff posited a new standard for determining whether commodity-trust ETPs satisfy the requirements of Section 6(b)(5) that the listing exchange's rules must be designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest. Under the Staff's unprecedented standard, the Proposal must meet two specific requirements: "First, the exchange must have surveillance-sharing agreements with significant markets for trading the underlying commodity or derivatives on that commodity. And second, those markets must be regulated."<sup>55</sup> While surveillance and regulation of the underlying market have been noted in many commodity-trust ETP approval orders, the Staff's Order incorrectly assumes that precedent concerning the manner in which many ETPs have satisfied Section 6(b)(5)'s concern to prevent fraud and manipulation means that those are the only ways that statutory standard can be satisfied. The Order also overstates the extent to which those identified features have in fact been present in prior orders. Furthermore, the Staff's Order failed to appreciate (i) the extent to which the Proposal provides both traditional means of identifying and deterring fraud and manipulation and (ii) the ways in which the novel systems intrinsic to this new market provide unique additional protections that are unavailable in traditional commodity markets. The Order's denial of the proposed rule change cannot be squared with the Commission's approval of those earlier applications. The Order later states that:

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<sup>55</sup> See Order at 14077.

for the commodity-trust ETPs approved to date for listing and trading, there have been in every case well-established, significant, regulated markets for trading futures on the underlying commodity—gold, silver, platinum, palladium, and copper—and the ETP listing exchange has entered into surveillance-sharing agreements with, or held Intermarket Surveillance Group membership in common with, those markets. (Order at 14083)

This requirement is inconsistent with any previous approval orders for commodity-trust ETPs. Instead, none of the Commodity Orders offers even a cursory analysis about whether the regulated markets for trading futures on the underlying commodity are “well-established” or “significant.” In fact, the only discussion in the Platinum Order and Palladium Order about futures on the underlying commodity relates to: (i) the listing exchange’s ability to obtain information from market makers relating to their trading in the applicable commodity or related derivatives; (ii) the listing exchange’s rule preventing market makers from using material nonpublic information regarding trading in the applicable commodity or related derivatives; and (iii) whether “the Exchange may obtain trading information via the Intermarket Surveillance Group (“ISG”) from other exchanges who are members of the ISG,” which, as further described below, excludes the Tokyo Commodity Exchange (“TOCOM”).

None of the Platinum Order, the Palladium Order, nor their respective proposals discusses whether the NYMEX and TOCOM are well-established or significant,<sup>56</sup> nor do they explore the relevance of NYMEX being the “largest exchange in the world for trading precious metals futures and options” as it relates to palladium and platinum derivatives. Indeed, each

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<sup>56</sup> Those approval orders mention that NYMEX and TOCOM are the “most significant” markets, but the orders do not suggest that this fact is relevant or necessary for approval. *See* Securities Exchange Act Release No. 60970 (November 9, 2009), 74 FR 59319 (November 17, 2009) (SR-NYSEArca-2009-95) at 59321; and Securities Exchange Act Release No. 60971 (November 9, 2009) 74 FR 59283 (November 17, 2009) (SR-NYSEArca-2009-94) at 59285.

respective proposal related to the Platinum Order and Palladium Order notes that “TOCOM is not an ISG member and the Exchange does not have in place a comprehensive surveillance sharing agreement with such market,”<sup>57</sup> which means that the listing exchange actually was not able to obtain trading information from TOCOM at the time of the approval. This fact demonstrates that those orders did not turn on whether there was an information sharing agreement with the underlying exchange.

Finally, the standard applied by the Staff is inconsistent with prior approval orders and is not required under Section 6(b)(5) of the Act, in that other approval orders have made clear that the same factors used to determine whether currency derivative products are consistent with the Act should also be applied when making that determination for commodity-trust ETPs. For example, in the Gold Order, which was the first approval order for a commodity-trust ETP, the Commission drew comparisons between the OTC gold market and the currency market in articulating their basis for approval. The Commission highlighted that both the currency market (for which the Commission observed that it had already approved derivative products)<sup>58</sup> and spot gold market are largely unregulated,<sup>59</sup> but that certain factors mitigated any concerns raised by

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<sup>57</sup> See Securities Exchange Act Release No. 60970 (November 9, 2009), 74 FR 59319 (November 17, 2009) (SR-NYSEArca-2009-95) at 59327; and Securities Exchange Act Release No. 60971 (November 9, 2009) 74 FR 59283 (November 17, 2009) (SR-NYSEArca-2009-94) at 59291. Both proposals also note that “the Exchange does not have access to information regarding platinum/palladium-related OTC transactions in spot, forwards, options or other derivatives.”

<sup>58</sup> See, e.g., Securities Exchange Act Release Nos. 19133 (October 14, 1982), (approving the listing of standardized options on foreign currencies); 36505 (November 22, 1995), 60 FR 61277 (November 29, 1995) (approving the listing of dollar-denominated delivery foreign currency options on the Japanese Yen); and 36165 (August 29, 1995), 60 FR 46653 (September 7, 1995) (approving listing standards for, among other things, currency and currency index warrants)

<sup>59</sup> The vast majority of both the spot and derivative foreign currency markets are conducted over the counter. The Commission has approved a number of currency-trust ETPs,

the unregulated nature of the underlying market. In other words, from the outset of commodity-trust ETPs, in determining whether a proposed commodity-trust ETP is consistent with the Act, the Commission has included in its basis for approval an analysis of previously approved derivative products for which the underlying reference assets: (i) are traded over the counter; (ii) are largely unregulated; and (iii) the listing exchange could not enter into a surveillance sharing agreement.

The Staff therefore erroneously imposed an unprecedented standard that is inconsistent with prior approval orders and is not required under either Section 6(b)(5) or the Commission's prior approval orders for commodity-trust ETPs. For the reasons outlined in the Proposal and in this Statement, the Exchange's surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws.<sup>60</sup> As highlighted above, the nature of the broader bitcoin marketplace and the Gemini Exchange Auction Price make manipulation of the price of bitcoin and the price used for the calculation of NAV particularly difficult to manipulate. In addition, the Exchange notes that it may obtain customer identity information about bitcoin transactions, trades and market data from bitcoin exchanges with

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largely based on analysis that considers the same factors which the Commission considers in approving commodity-trust ETPs. *See e.g.* Securities Exchange Act Release No. 52843 (November 28, 2005), 70 FR 72486 (December 5, 2005); Securities Exchange Act Release No. 58365 (August 14, 2008), 73 FR 49522 (August 21, 2008) (the "Currency Trust Order"). While the Commission has not approved the listing and trading of a commodity-trust ETP without derivatives based on the underlying commodity, in the Currency Trust Order, the Commission approved the listing and trading of the CurrencyShares Hong Kong Dollar Trust and the CurrencyShares Singapore Dollar Trust based largely on the same factors described above despite the fact that the approval order affirmatively stated that "futures or options are not traded on the Singapore Dollar or Hong Kong Dollar."

<sup>60</sup> See supra note 2 at 76668.

which the Exchange has entered into a comprehensive surveillance sharing agreement, including Gemini Exchange, and will be able to obtain certain additional information that is publicly available through the Blockchain. As such and in conjunction with the arguments laid out above, the Exchange believes that the Proposal is consistent with the Act and that the Staff applied a standard that is erroneous and incongruent with other relevant approval orders that were deemed to be consistent with the Act.

#### IV. Conclusion

Bitcoin has already achieved widespread adoption and legitimacy, having been accepted by thousands of retailers and payment processors as well as having been recognized as an official form of payment by several major national governments; and its utility and influence grow on a daily basis. The CFTC has designated bitcoin as a commodity, putting it on the same footing as commodities such as gold and silver, which means that the CFTC has regulatory responsibilities to maintain the integrity of the bitcoin spot market. Yet, for investors who wish to express an investment viewpoint in bitcoin, direct investment brings with it significant inconvenience, complexity, expense and risk. As investor demand for exposure to bitcoin continues to increase, these problems with gaining that access to bitcoin grow larger and larger. The Shares would significantly reduce or completely remove each of these hurdles.

The Shares would facilitate capital formation in the bitcoin marketplace in a manner nearly identical to other commodity-trust ETPs. The arbitrage mechanism would function identically to other ETPs, with market participants taking advantage of arbitrage opportunities in both the Shares and in bitcoin, thereby keeping the price of the Shares in line with the price of bitcoin. The presence of these arbitrageurs also minimizes the risk of manipulation in both the broader bitcoin market and on individual bitcoin exchanges. The bitcoin marketplace has

become so interconnected that manipulation of any single exchange would likely require manipulation of the entire bitcoin marketplace, rendering such manipulation cost-prohibitive. Finally, the Trust will value its bitcoin using the price of a U.S. equities-style auction on Gemini Exchange that generally represents the largest daily bitcoin transaction worldwide.

Investor interest in bitcoin exposure continues to grow, despite the costs described above and the market inefficiencies that they create. The Shares would significantly reduce or eliminate these costs and inefficiencies while expanding opportunities for investors by providing an inexpensive vehicle to gain exposure to bitcoin in a secure and easily accessible product that is familiar, transparent, and meaningfully regulated. Accordingly, the Proposal is consistent with the Act, and the significant benefits that the Shares would confer on investors outweigh any concerns raised in the Order. The Commission therefore should reverse the Order and approve the Proposal.

DATED: May 15, 2017

Respectfully Submitted,



Joanne Moffic-Silver  
Executive Vice President, General Counsel & Corporate Secretary

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