

February 20, 2020

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Re: File No. SR-NYSEArca-2019-39

Dear Mr. Redfearn:

We are writing on behalf of our client, Wilshire Phoenix Funds LLC, sponsor of a product that is the subject of a listing application pursuant to Rule 19b-4 submitted to the U.S. Securities and Exchange Commission (“Commission”) by NYSE Arca, Inc. (“NYSE Arca”), File No. SR-NYSEArca-2019-39, to amend NYSE Arca Rule 8.201-E (the “Rule Change”) for the listing and trading of shares of the United States Bitcoin and Treasury Investment Trust (the “Trust”). We are mindful of the Commission’s review of the application, and in furtherance of that, we would like to highlight additional precedent that we believe is relevant and would appreciate the opportunity to discuss with you and your staff. We respectfully request the opportunity to meet with you and your staff as promptly as possible. We are available on Friday, February 21, 2020, as well as the following Monday and Tuesday.

The Commission has established that the approval of the Rule Change may be contingent upon a showing that either (i) the segment of the market applicable to the Trust is inherently resistant to fraud and manipulation, or (ii) NYSE Arca has the requisite surveillance-sharing agreements with significant and regulated markets for trading the underlying commodity or derivatives on that commodity.¹

In prior orders, the Commission has stated that certain exchange-traded products (“ETPs”) were approved for listing on an exchange on the basis that the component underlying assets were traded on regulated, well-established futures markets. We find the following approval orders for ETPs to be instructive for the Rule Change with regard to the requirement for a “regulated market of significant size.” At the time of approval, the markets for underlying assets in each of the ETPs

¹ See, e.g., 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, 83 Fed. Reg. 37579, 37582, 37580 (Aug. 1, 2018).

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exhibited fewer characteristics of a “regulated market of significant size” than the CME bitcoin futures market.

1. AirShares™ EU Carbon Allowances Fund:² One of the concerns the Commission has addressed regarding the Chicago Mercantile Exchange (“CME”) bitcoin futures market is that because it is a nascent market, the Commission has no basis to predict how the market may grow or develop over time, or whether or when it may reach significant size.³ The carbon equivalent emissions allowances (“EUAs”) futures market at the time the Commission approved this ETP was only in existence for three years.⁴ The CME bitcoin futures market has now been in existence for a comparable duration.⁵ Additionally, the trading volume for the underlying EUA futures at the time of the approval was less significant than the bitcoin futures trading volume on the CME.⁶ The CME bitcoin futures market is similar in maturity to the EUA market at the time the ETP was approved, but the trading volume for bitcoin futures on the CME is now an order of magnitude greater than the EUA futures market underlying the ETP was at the time of approval.
2. iShares® S&P GSCI® Commodity-Indexed Trust:⁷ This ETP’s holdings is made up of only long positions in futures contracts on the GSCI® Excess Return Index (“CERFs”). The underlying futures market for CERFs had zero trading volume reported as of May 12, 2006, yet the ETP was approved by the Commission on June 16, 2006.⁸ In a letter presented to the Commission, the listing exchange acknowledged that it “believes that it is premature to predict the liquidity of CERFs at this time.”⁹ Additionally, the risk factors set forth in the ETP’s registration statement include the risk that “there can be no assurance as to the size or liquidity of any market for CERFs that may develop,” and that an illiquid CERFs market “may adversely affect the price of CERFs, the Trust’s ability to track the

² Approval Order available at: <https://www.sec.gov/rules/sro/nysearca/2008/34-57838.pdf>.

³ See, e.g., Order Disapproving a Proposed Rule Change To List and Trade the Shares of the GraniteShares Bitcoin ETF and the GraniteShares Short Bitcoin ETF, 83 Fed. Reg. 43923, 43931 (Aug. 28, 2018).

⁴ The EUA futures market for the underlying assets came into existence on April 22, 2005. The ETP was approved on May 20, 2008.

⁵ CME bitcoin futures began trading on December 18, 2017.

⁶ The ECX CFI Futures Contract had average daily trading volume of \$135,717,089, representing 3,551 contracts traded daily from January 1, 2008 through March 11, 2008. For comparison, for 2019, the CME bitcoin futures market had an average daily trading volume of roughly \$240 million (a 99% increase year over year), and on February 18, 2020, the CME bitcoin futures market traded approximately \$1.13 billion, representing roughly 23,000 contracts. Furthermore, the CME bitcoin futures market averaged \$156 million in open interest for 2019 (a 72% increase year over year).

⁷ Approval Order available at <https://www.sec.gov/rules/sro/nyse/2006/34-54013.pdf>.

⁸ See Letter from Mary Yeager, Assistant Secretary, NYSE, to Nancy M. Morris, Secretary, Securities and Exchange Commission (May 12, 2006), p. 2.

⁹ *Id.*

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Index and the Trust's ability to issue or redeem Shares."¹⁰ In the ETP's approval order, the Commission concluded that requirements of Section 6(b)(5) of the Securities Exchange Act of 1934 had been met because concerns about manipulation would be addressed by the arbitrage relationship between the new index futures and the existing component futures, as well as the ETP listing exchange's comprehensive surveillance sharing agreements with the market for the index futures and the markets for the component futures.¹¹ The CME bitcoin futures market has a more significant trading history than the ETP at time of approval, and even now, CERFs futures are thinly traded in an illiquid market predominantly made up of the activity of the ETP.¹² The CME bitcoin futures market is also the subject of comprehensive surveillance sharing agreements between the CME and NYSE Arca.¹³

3. Breakwave Dry Bulk Shipping ETF:¹⁴ This ETP's portfolio holdings consist entirely of dry bulk freight futures. Freight futures are financial instruments that trade off-exchange but then are cleared through an exchange. Market participants in the freight futures market communicate their buy or sell orders mainly through phone or instant messaging platforms via a network of execution brokers, who submit orders through an exchange.¹⁵ In the approval order for this ETP, the Commission found that the ETP listing exchange would be able to share surveillance information with a significant regulated market for trading futures on dry bulk freight.¹⁶ In comparison, the CME provides greater transparency and more structured processes for conducting trading activities for the bitcoin futures market.

¹⁰ Pre-Effective Amendment No. 5 to the Registration Statement on Form S-1, iShares® GSCI® Commodity-Indexed Trust, iShares® GSCI® Commodity-Indexed Investing Pool LLC, *Risk Factors Relating to CERFs and the GSCI-ER*, p. 12, available at <https://www.sec.gov/Archives/edgar/data/1332174/000119312506120454/ds1a.htm>.

¹¹ Order Granting Approval of Proposed Rule Change and Amendment No. 1 Thereto, and Notice of Filing and Order Granting Accelerated Approval To Amendment No. 2, Relating to Listing and Trading Shares of the iShares GSCI Commodity Indexed Trust Under New Rules 1300B and 1301B, *et seq.*, 71 Fed. Reg. 36372, 36379 (June 26, 2006).

¹² By observing the trading activity on the CERFs futures market, it can be determined that nearly all of the activity on the market is made up by the ETP.

¹³ Further, in disapproval orders related to prior bitcoin ETP applications, the Commission noted that one of the components of a "market of significant size" is that it is "unlikely" that trading in the ETP would be the predominant influence on prices in such market. At the time of the Commission's approval of this ETP, it was highly likely that trading in the ETP would be a predominant influence on the prices of CERFs listed on the CME because the CERFs were created to be used by the trust.

¹⁴ Approval Order available at <https://www.sec.gov/rules/sro/nysearca/2017/34-82390.pdf>.

¹⁵ Notice of Filing of Amendment No. 1, and Order Granting Approval on an Accelerated Basis of a Proposed Rule Change, as Modified by Amendments No. 1 and No. 3, to List and Trade of Shares of the Breakwave Dry Bulk Shipping ETF Under NYSE Arca Rule 8.200-E, Commentary .02, 82 Fed. Reg. 61625, 61628-61629 (December 28, 2017).

¹⁶ *Id.* at 61633.

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The CME is better able to obtain information in respect of the bitcoin futures market and its participants in order to surveil for manipulative or fraudulent activity than the largely unregulated network of brokers that make up the freight futures market. Additionally, the Commodity Futures Trading Commission has the ability to acquire trade data from the CME bitcoin futures market that further enhances the CME bitcoin futures market's integrity and allows for greater detection and prevention of fraud and manipulation.

We submit that the CME bitcoin futures market exhibits the characteristics of a “regulated market of significant size” to a greater degree than the markets applicable to the underlying assets of ETPs already approved for listing by the Commission that we have discussed above. The Commission has approved these ETPs on the basis that the markets for their underlying assets were “regulated” and “well established” where those markets had fewer measures to detect and prevent manipulation or fraud and where those markets were more nascent and less liquid than the CME bitcoin futures market.

In prior orders, the Commission has stated that it would need to analyze the facts and circumstances of any particular proposal and examine whether any “*unique features*” of a bitcoin futures market would warrant further analysis before approval.¹⁷ The federal securities laws have long been understood to favor disclosure as the proper method for investor protection. We believe that requiring the market relevant to the Trust to exhibit “unique features” in order for the Rule Change to be approved is a departure from the Commission's long-standing policy.¹⁸ We express our agreement with the views expressed in the Commission's “Statement of the Purposes of the Securities and Exchange Commission, Accomplishments up to August 13, 1934, and Future Program,” by Commissioners throughout the history of the Commission, and most recently by Commissioners Peirce and Roisman that “instead of utilizing a system of merit regulation based on state law models, the Securities Act of 1933... was drafted as a ‘Truth in Securities’ Act emphasizing public disclosure of material information as the primary mechanism for federal regulation of the securities markets.”¹⁹

¹⁷ See *supra* note 3 at 43931.

¹⁸ “[The Commission] does not evaluate the merits of securities offerings, or determine whether the securities offered are ‘good’ investments or appropriate for a particular type of investor.”
<https://www.sec.gov/page/federal-securities-laws?auHash=B8gdTzu6DrpJNvsGIS1-JY1LnXDZQqS-JgJAgaSXimg>.

¹⁹ Chairman David S. Ruder, *The Evolution of Disclosure Regulation by the Securities and Exchange Commission*, (Mar. 10, 1988), available at <https://www.sec.gov/news/speech/1988/031088ruder.pdf>; see *Statement of the Purposes of the Securities and Exchange Commission, Accomplishments up to August 13, 1934, and Future Program* (Aug. 13, 1934), available at http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1930/1934_08_13_Statement_of_Purp.pdf; see also Commissioners Hester M. Peirce and Elad L. Roisman, *Statement on the Re-Proposal to Regulate Funds' Use of Derivatives as Well as Certain Sales Practices*, (Nov. 26, 2019), available at <https://www.sec.gov/news/public-statement/roisman-peirce-statement-funds-derivatives-sales-practices>.

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In light of these considerations, we urge you and your staff to consider these ETPs in the context of the standards set forth for a “regulated market of significant size” and how the market relevant to the Trust exceeds those standards. We look forward to further engagement with you and your staff on this matter.

Sincerely yours,

A handwritten signature in blue ink, appearing to read 'M. Paz', with a long horizontal flourish extending to the right.

Marlon Q. Paz
Partner

cc: The Honorable Jay Clayton, Chairman
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner
The Honorable Allison Herren Lee, Commissioner
Benjamin Bernstein, Senior Special Counsel, Division of Trading and Markets
William Herrmann, Managing Partner, Wilshire Phoenix Funds LLC