



March 7, 2022

Re: Rel. No. 34-94126  
File No. SR-NYSEArca-2021-89  
Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to List and Trade Shares of the Bitwise Bitcoin ETP Trust under NYSE Arca Rule 8.201-E (February 1, 2022) ("**SEC Order**")

Ms. Vanessa Countryman  
Secretary  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-0609

Dear Ms. Countryman:

We respectfully submit this letter on behalf of our mutual client, Bitwise Asset Management, Inc. ("**Bitwise**"), the parent of the sponsor of the Bitwise Bitcoin ETP Trust (the "**Trust**"), in response to the SEC Order. We strongly support the proposal by NYSE Arca Inc. pursuant to Rule 19b-4 under the Securities Exchange Act of 1934 (as amended, the "**Exchange Act**") to list shares of Bitcoin under NYSE Arca Rule 8.201-E (the "**Application**") as an exchange-traded product (the "**Bitwise Bitcoin ETP**").<sup>1</sup>

We urge the Securities and Exchange Commission ("**SEC**" or "**Commission**") to approve the Application. For the reasons set forth in the Application, including the extensive economic studies and other materials included in the exhibits to the Application, we believe the Application meets all applicable Exchange Act standards for granting the Application, including the standards set forth in the Winklevoss Order<sup>2</sup> and the subsequent Commission statements on the requirements for approval of a 19b-4 application regarding a Bitcoin ETP.

We also believe that the Application and the supporting exhibits, including the extensive economic studies conducted by Bitwise, provide strong support for each of Bitwise's statements that serve as the basis for the various requests for comment in the SEC Order. As the Commission considers whether to approve the Application and considers any responses to the various requests for comment, we urge the Commission to give significant weight to the academically rigorous studies conducted by

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<sup>1</sup> In this letter, we use the generic term "**ETP**" to cover exchange-traded investment vehicles that are required to register under the Investment Company Act of 1940 (as amended, the "**1940 Act**"), also commonly referred to as "exchange-traded funds" or "ETFs," as well as those, like the Trust, that are not subject to the registration requirements of the 1940 Act.

<sup>2</sup><https://www.sec.gov/rules/other/2018/34-83723.pdf>

Bitwise, particularly because, as discussed further in this letter, those studies were conducted with significant coordination with and input from the Commission's staff ("**Staff**").

As co-counsel to Bitwise, we want to add three additional points for the Commission's consideration.

First, we believe that the SEC, when analyzing the applicable legal standards for approving the Application, should consider – and should interpret those standards in recognition of – the wide-spread use and adoption of Bitcoin among retail investors, merchants, public and private companies, payment processors, and others in the U.S. business and investment community.

As just a few examples:

\* Bitcoin reportedly has an average daily trading volume that frequently exceeds \$1 billion among the three largest U.S. digital asset exchanges;<sup>3</sup>

\* A recent Pew Research Study published in November 2021 found that 16% of Americans had invested in or used Bitcoin and other digital assets.<sup>4</sup> Pew Research also found that 43% of American men between the ages of 18 and 29 have invested in, traded, or used Bitcoin and other cryptocurrency;<sup>5</sup>

\* It has been estimated that, as of December 2020, over 2,300 U.S. businesses accept Bitcoin as payment,<sup>6</sup> including major brands like Microsoft, AT&T, PayPal, and Wikipedia. In addition, third parties like Purse and Bakkt have enabled customers to use their Bitcoin at businesses like Amazon and Starbucks that do not offer their own Bitcoin payment options;

\* There are more than 31,200 Bitcoin ATMs available in the US;<sup>7</sup>

\* Visa (and other financial institutions) offers Bitcoin and other crypto-linked credit cards, and Visa reported crypto-linked credit usage of over \$2.5 billion in payments for Q1 of 2022 alone;<sup>8</sup> and

\* U.S. investors indirectly are exposed to Bitcoin through their investments in various U.S. publicly-traded companies. For example, MicroStrategy and Tesla hold more than 125,000 and more

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<sup>3</sup> <https://www.bitcointradevolume.com/>

<sup>4</sup> <https://www.pewresearch.org/fact-tank/2021/11/11/16-of-americans-say-they-have-ever-invested-in-traded-or-used-cryptocurrency/>

<sup>5</sup> <https://www.pewresearch.org/fact-tank/2021/11/11/16-of-americans-say-they-have-ever-invested-in-traded-or-used-cryptocurrency/>

<sup>6</sup> <https://www2.deloitte.com/us/en/pages/audit/articles/corporates-using-crypto.html>; <https://coinmap.org>

<sup>7</sup> <https://coinatmradar.com/charts/growth/united-states/>

<sup>8</sup> <https://www.cnbc.com/2022/01/28/visa-says-crypto-linked-card-usage-hit-2point5-billion-in-its-first-quarter.html>

than 42,900 Bitcoin, respectively, valued at over \$5 billion and almost \$2 billion, respectively, at recent Bitcoin valuations.<sup>9</sup>

Beyond the statistics, another powerful indication of the significant adoption of Bitcoin (and other digital assets) by U.S. retail and other investors were some of the commercials aired during the most recent Super Bowl. An estimated 112.3 million viewers<sup>10</sup> watched a QR code bounce across their television screens for 60 seconds.<sup>11</sup> By scanning the code with their phones, viewers were offered a promotion to sign up for Coinbase, the largest U.S. cryptocurrency exchange, and receive \$15 worth of free Bitcoin. Coinbase's commercial was followed by three other cryptocurrency-related commercials from Crypto.com, eToro, and FTX, which featured public figures like LeBron James and Larry David. Similar commercials were aired during the broadcasts of the Olympics. And, we note, the NBA's Los Angeles Lakers play at the Crypto.com Arena.

The question before the Commission, therefore, is not a binary choice as whether to give retail investors the ability to gain Bitcoin exposure through the Trust or to prevent retail investors from participating in Bitcoin. That ship sailed long ago.

We believe that the fundamental question before the Commission, as it considers whether to approve the Application, is (or should be) whether, in light of the wide-spread retail holdings, investment in, and use of Bitcoin, at least some segment of retail (and other) investors would benefit from having access to an investment product that provides exposure to Bitcoin and that:

- \* is professionally managed, SEC-regulated, highly-liquid, fully transparent, and listed on the NYSEArca;

- \* reasonably can be expected to closely track the value of Bitcoin, and not periodically trade at substantial premiums to and discounts from the value of Bitcoin (as is the case with other publicly available Bitcoin funds available today); and

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<sup>9</sup> <https://www.forbes.com/sites/jonathanponciano/2022/02/07/teslas-bitcoin-investment-hits-nearly-2-billion-heres-how-that-compares-to-billionaire-novogratzs-galaxy-dorseys-square-and-more/?sh=5ace00d87e55>

<sup>10</sup> <https://www.nfl.com/news/super-bowl-lvi-averages-audience-of-112-3-million-viewers-is-most-watched-show-i#:~:text=Around%20the%20NFL-.Super%20Bowl%20LVI%20averages%20audience%20of%20112.3%20million%20viewers%2C%20is.watched%20show%20in%20five%20years&text=Super%20Bowl%20LVI%20cracked%20the.game%20drama%20and%20thrilling%20finishes.>

<sup>11</sup> <https://www.thedrum.com/news/2022/02/22/will-coinbase-s-super-bowl-ad-really-change-the-landscape-tv-gr-codes#:~:text=Earlier%20this%20month%2C%20Coinbase%20broke,code%20bouncing%20around%20the%20screen.>

\* would relieve retail and other investors of the need to, among other things, take on the burden of custodialing their Bitcoin, determining the appropriate trading venue for their Bitcoin transactions, and bearing the trading costs for their Bitcoin transactions.

In short, we believe that the public interest is best served by giving retail (and other) investors access to a publicly-traded Bitcoin ETP like the Trust, that at least some segment of the investing public would be affirmatively disadvantaged by not having access to the Trust, and that no part of the investing public would be harmed by having access to the Trust. On this last point, we stress again that any retail or other investor that currently wants to invest directly in Bitcoin can do so, and a great many (and an ever-increasing number of) investors already do so. Giving these and other investors the option of gaining Bitcoin exposure through the professionally managed, well-regulated Trust increases investor options, and significantly reduces risk and perhaps trading costs for many Bitcoin investors, especially but not limited to novice Bitcoin investors.

As the Commission is aware, one of the two key factors identified by the Commission under Section 6(b)(5) of the Exchange Act in considering a 19b-4 application for a proposed rule change permitting the listing of a Bitcoin ETP is whether the proposed rule change would “protect investors and the public interest.” For the reasons discussed above, we believe the Commission’s approval of the Application overwhelmingly meets this standard.

The other key factor identified by the Commission is whether the proposed rule change would “prevent fraudulent and manipulative acts and practices.” We have three observations about this factor. The first observation is that Bitwise has demonstrated in its academically rigorous “lead lag” study that, under the circumstances described in the Application, the listing of the Trust shares on NYSEArca would be done in a manner that would prevent fraudulent and manipulative acts and practices.

The second observation is that, while the Commission has argued that the burden of meeting this and the other factors under Section 6(b)(5) is on the parties requesting the rule change, in this case Bitwise, through its “lead lag” and other studies, has more than reasonably met this burden. If commenters now raise objections to the Application suggesting that there is nonetheless a significant risk of fraudulent and manipulative acts and practices, we respectfully submit that those commenters should be required to provide significant and rigorous economic studies or other analyses supporting that position. Following the detailed and rigorous “lead lag” and other studies conducted by Bitwise, we are well past the time that commenters can simply raise hypothetical, anecdotal, or other unsubstantiated concerns of fraud or manipulation. We also note, as Bitwise has pointed out, that any such concerns would be undermined by the vast weight of other academic studies that have addressed the “lead lag” question and come to substantially the same conclusions as Bitwise.

The third observation is that we believe that the Commission should consider the “fraud or manipulation” question in light of the large and increasing number of U.S. investors who directly invest in and trade Bitcoin. While Bitwise and the NYSEArca intend to operate and surveil the Trust in a way designed to minimize the opportunity for fraud and manipulation, individual Bitcoin investors will not necessarily have similar protections, and – depending on how and where they choose to make their Bitcoin investments – may in fact be subject to increased risks of fraud and manipulation. The

Commission, by granting the Application, would provide investors who seek exposure to Bitcoin with an investment option – the Trust – that could materially reduce their risk of fraud and manipulation. This is yet another reason that granting the Application would powerfully support the public interest.

Second, we believe that the SEC must be able to work with the digital asset community to find a way to approve more digital asset products for investors. The SEC has for years made it clear that it views most digital assets (although not Bitcoin) as securities. The SEC's Division of Enforcement has brought a number of enforcement actions emphasizing that point. But the SEC's regulatory divisions have not been as active in bringing clarity to the space and there has been a dearth of SEC rules or rule proposals that seek to accommodate Bitcoin or other digital asset projects or to streamline and tailor the public reporting requirements applicable to digital asset issuers. Similarly, there have been very few SEC-approved digital-asset public offerings, SEC approved digital-asset alternative trading systems and other trading venues, SEC-approved digital-asset public investment vehicles, and SEC-approved digital-asset investment advisers and other regulated investment professionals.

While the regulatory issues involved with some digital asset projects undoubtedly present many complexities, the Application, in our view, presents a relatively straight-forward proposal with significant potential advantages and few if any potential disadvantages to the investing public. The Trust would invest in Bitcoin, one of the few digital assets that the SEC appears to acknowledge is not a security. Bitcoin is the best-known and most widely-traded of all digital assets, and is the digital asset with by far the largest market capitalization. As previously discussed, Bitcoin is widely held and already used by retail investors and others throughout the U.S. economy, and this will continue regardless of whether the Commission approves the Application. Investors in the Trust would get exposure to Bitcoin, and the value of their investments in the Trust reasonably can be expected to closely track the value of the underlying Bitcoin. As also previously discussed, there are obvious benefits, and no obvious harms, to permitting U.S. investors to gain Bitcoin exposure through the Trust, when they can and often do invest in Bitcoin directly.

This Application provides the SEC an excellent opportunity to approve a digital asset project where the issuer collaborated extensively and in good faith with the SEC and its Staff, and sought to address all issues and concerns raised by the SEC and the Staff, including through producing several detailed, academically rigorous, and statistically validated research studies and reports. Approving the Application also send a positive message to the digital asset community about the importance and advantages of engagement with the SEC in order to get product approvals accomplished.

This last point is especially relevant for this Application. As the Commission is aware, Bitwise and the Staff had been engaged in an extensive, collaborative, and highly constructive dialogue about the Application for almost a year-and-a-half. Among other things, Bitwise sought and received guidance from the Staff of the Division of Economic and Risk Analysis regarding the economic studies Bitwise conducted, including feedback regarding the selection of the data sets Bitwise used, the scope and construction of the studies conducted, the existing economic literature Bitwise consulted, and the presentation of the studies. The Staff also reviewed and provided helpful comments on drafts of the studies, and suggested that Bitwise conduct an additional study (which Bitwise did).

Bitwise and the Staff (especially the Staff of the Division of Trading and Markets) engaged in similar discussions about the legal and regulatory issues relevant to the Trust, and to some extent the structure of the Trust, the operations of and regulatory considerations relevant to the authorized participants and other services providers to the Trust, and the consistency of the Application with prior novel Rule 19b-4 ETP applications.

Bitwise met with the Staff in a double-digit number of meetings, submitted to the Staff numerous sets of talking points, legal analyses, draft economic study abstracts and drafts, drafts of the Application, and various other materials. Again, the Staff was an active and constructive participant in these discussions, and Bitwise is extremely grateful to the Staff for its efforts and constructive engagement with Bitwise.

Bitwise also had a number of meetings with many of the current Commissioners (and at least one former SEC Commissioner) and their staff, in which Bitwise sought to keep the Commissioners informed of Bitwise's progress with the Staff, sought and received valuable input from the Commissioners and their Staff, and shared the results of Bitwise's economic research with the Commissioners and their Staffs. Bitwise also met on one occasion with the Staff of Chair Gensler to discuss these and related issues.

If this level of engagement with the Staff and the Commission, coupled with the significant good faith and impressive efforts of Bitwise – which included conducting three significant and academically rigorous economic studies, and engaging two major law firms to advise Bitwise and work with Bitwise and the Staff to attempt in good faith to identify and resolve the legal and regulatory issues associated with the Application – is insufficient to help the Commission get to yes, then again, there is a legitimate question as to what digital asset participant should and would seek to engage with the SEC in the future, and there is a legitimate question as to whether counsel and other professional advisers to digital asset participants should and could responsibly advise their clients to undertake the significant time and cost to engage with the SEC, given the limited apparent benefits of that engagement.

To state what we believe is obvious, it is in the public interest, it is in the Commission's interest, and – assuming there is some reasonable prospect of success – it is in the interest of digital asset participants, for digital asset participants to speak with the Commission about novel digital asset projects, products and services. For this to happen, though, the SEC cannot “just say no”.

Third, as we previously have discussed, we believe that the Application fully satisfies the requirements of the Exchange Act and the SEC's interpretations of those requirements as applied to Bitcoin ETPs. We strongly believe that the SEC should grant the Application.

In Bitwise's conversations with the Staff, however, Bitwise never presented the Staff with a “take it or leave it” proposal. Bitwise consistently offered the Staff its good faith proposal for how to structure the Trust, but was always clear with the Staff that Bitwise was willing to change the structure or operation of the Trust as needed to resolve good faith legal and regulatory concerns. And, in fact, the structure described in the Application reflects changes Bitwise made based on helpful comments and questions raised by the Staff.

That continues to be Bitwise's position. On the chance – which we hope and expect is unlikely – that the Commission has remaining concerns about the Application or the Trust, we urge the Commission to authorize its Staff to continue to work collaboratively and in good faith with Bitwise to address those concerns. We also urge the Commission, to the maximum extent possible, to approve the Application and direct the Staff to work with Bitwise, again collaboratively and in good faith, to address any remaining concerns in connection with the Commission's approval of the Trust's Form S-1 registration statement.

For example, Bitwise is aware of the potential desire from some Commission members to assure that a Bitcoin ETP is subject to many of the key protections of the Investment Company Act of 1940 (the "**1940 Act**"). The Trust would, in fact, comply with many of the key 1940 Act provisions, including the affiliated and joint transaction restrictions in Section 17,<sup>12</sup> the leverage restrictions in Section 18, and the fund of funds and other investment limitations in Section 12. If relevant to the Commission, Bitwise is prepared to make relevant representations or similar statements in the Trust's Form S-1 registration statement.

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Please feel free to contact either Rob Rosenblum at Wilson Sonsini Goodrich & Rosati, P.C. or Kathleen Moriarty at Chapman & Cutler LLP if you have any questions or comments concerning the foregoing, or if you would like any further information.

Very truly yours,

/s/ Robert H. Rosenblum  
Robert H. Rosenblum

/s/ Kathleen H. Moriarty  
Kathleen H. Moriarty

WILSON SONSINI GOODRICH & ROSATI, P.C.

CHAPMAN AND CUTLER LLP

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<sup>12</sup> It is possible that the Trust's Bitcoin custodian might not qualify as a bank or similar financial institution, and therefore might not technically be a qualified custodian for purposes of Section 17(f) of the 1940 Act. Although we believe that Bitwise could find a Bitcoin custodian that met the requirements applicable to custodians under the 1940 Act, we strongly believe that the Commission should not require the Trust to use a 1940 Act qualified custodian to hold its Bitcoin. No doubt, there are strong investor protections reasons for requiring a registered fund's stocks, bonds and other conventional investments to be held by a major bank or other financial institution. This is less helpful in the context of Bitcoin. Most major banks do not provide Bitcoin custody services, and Commission interpretations generally prohibit broker-dealers from providing Bitcoin custody services. Bitwise has instead determined to use Coinbase as its Bitcoin custodian, in recognition of the fact that Coinbase is generally regarded as a or the premier Bitcoin custodian in the United States, and perhaps in the world. We believe that the Trust, and Trust investors, are best served by seeking the best and safest Bitcoin custody services, rather than seeking a Bitcoin custodian that happens to meet the technical requirements of the 1940 Act but that might not provide the best custody services available.