

March 24, 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**  
**Petition for Review**

Dear Mr. Fields,

Enclosed please find the original and three copies of the Petition for Review regarding the above-captioned matter. Bats BZX Exchange, Inc. (the "Exchange") submits this Petition for Review. Pursuant to Rule 154(c) of the Securities and Exchange Commission's Rules of Practice, the Exchange certifies that the enclosed Petition for Review contains 6,637 words, which does not exceed 7,000 words. This Petition for Review was sent via facsimile to telephone number (202) 772-9324 and via Federal Express on March 24, 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,



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 March 24, 2017, I served copies of the attached Petition for Review of SR-BatsBZX-2016-30, Exchange Release No. 80206, 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: March 24, 2017

A handwritten signature in black ink that reads "Joanne Moffic-Silver". The signature is written in a cursive, flowing style.

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

## TABLE OF CONTENTS

<b>TABLE OF AUTHORITIES</b> .....	ii
<b>PETITION FOR REVIEW</b> .....	1
<b>Description of the Rule Filing</b> .....	2
<b>Applicable Legal Requirements</b> .....	4
<b>Background on the Bitcoin Market</b> .....	4
<b>The Proposal is Consistent with the Exchange Act</b> .....	5
<b>Deficiencies in Staff’s Approval of the Rule Filing</b> .....	7
A. <u>The Standard Applied by the Staff is Inconsistent with Prior Approval Orders and Not Required Under Section 6(b)(5)</u> .....	8
B. <u>Manipulation Concerns Raised in the Order are Overstated and Largely Theoretical</u> .....	11
<b>The Filing Raises Important Policy Concerns that the Commission Should Address</b> .....	16
A. <u>Bitcoin and Digital Assets</u> .....	17
B. <u>Section 6(b)(5) and Commodity-Trust ETPs</u> .....	18
<b>CONCLUSION</b> .....	19

**TABLE OF AUTHORITIES**

**STATUTES**

7 U.S.C. § 1a(9) ..... 2  
15 U.S.C. 78f(b)(5)..... 6

**CASES**

*In re* Coinflip, Inc., No. 15-29 (CFTC Sept. 17, 2015)..... 2-3

**RULES**

17 CFR 201.430 ..... 1, 4  
17 CFR 201.431 ..... 4  
17 CFR 201.411(b)(2) .....4

**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) ..... 1  
  
Securities Exchange Act Release No. 65225 (August 30, 2011),  
76 FR 55148 (September 6, 2011)..... 2  
  
Securities Exchange Act Release No. 50603 (October 28, 2004),  
69 FR 64614 (November 5, 2004)..... 6, 7, 8  
  
Securities Exchange Act Release No. 53521 (March 20, 2006),  
71 FR 14967 (March 24, 2006)..... 6, 7, 8  
  
Securities Exchange Act Release No. 61219 (December 22, 2009),  
74 FR 68886 (December 29, 2009).....6, 7, 8, 9

Securities Exchange Act Release No. 61220 (December 22, 2009), 74 FR 68895 (December 29, 2009).....	6, 7, 8, 9
Securities Exchange Act Release No. 68440 (Dec. 14, 2012), 77 FR 75468 (Dec. 20, 2012).....	6, 7, 8
Securities Exchange Act Release No. 33732 (March 8, 1994), 59 FR 12023-01 (March 15, 1994).....	7
Securities Exchange Act Release No. 52843 (November 28, 2005), 70 FR 72486 (December 5, 2005).....	10
Securities Exchange Act Release No. 58365 (August 14, 2008), 73 FR 49522 (August 21, 2008).....	10
Securities Exchange Act Release No. 68973 (Feb. 22, 2013), 78 FR 13726 (Feb. 28, 2013).....	13, 14, 16
Exchange Rule 14.11(e)(4).....	2

**Before the  
SECURITIES AND EXCHANGE COMMISSION**

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

**PETITION FOR REVIEW**

Bats BZX Exchange, Inc. (the “Exchange”) hereby petitions for Commission review pursuant to Rule 430 of the Securities and Exchange Commission’s (the “Commission” or “SEC”) Rules of Practice, 17 CFR 201.430, of the March 10, 2017 disapproval by the Division of Trading and Markets (“Division” or “Staff”) pursuant to delegated authority of a proposed rule change, File No. SR-BatsBZX-2016-30<sup>1</sup> as modified by Amendments No. 1<sup>2</sup> and 2<sup>3</sup> (the “Proposal”), to list and trade shares of the Winklevoss Bitcoin Trust on the Exchange (the “Order”).<sup>4</sup> The Staff’s disapproval of the Proposal pursuant to delegated authority embodies a finding or conclusion of material fact or law that is clearly erroneous and embodies an exercise

---

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

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

<sup>3</sup> See Securities Exchange Act Release No. 80206 (March 10, 2017), 82 FR 14076 (March 16, 2017).

<sup>4</sup> *Id.*

of discretion or decision of law or policy that is important and that the Commission therefore should review. As described below, the Exchange believes: (i) the standard applied by the Staff is inconsistent with prior approval orders and not required under Section 6(b)(5) of the Securities Exchange Act of 1934 (the “Exchange Act”); (ii) that the manipulation concerns in the Order are overstated and largely theoretical; (iii) that the Proposal and Order constitute an exercise of discretion or decision of law or policy that is important and that the Commission should review and that include certain novel issues related to bitcoin and digital assets generally; and (iv) that the Proposal is consistent with the Exchange Act under a standard applied to other approved commodity-trust ETPs. As such, the Exchange believes that the Commission should set aside the Staff’s Order and approve the Proposal in order to ensure consistency with the Exchange Act and with prior ETP approvals as well as to provide investors access to bitcoin through a regulated and transparent investment vehicle.

### **Description of the Rule Filing**

As noted above, the Exchange formally filed the Proposal with the Commission on June 30, 2016. Under the Proposal, the Exchange seeks to list and trade shares (“Shares”) of the Winklevoss Bitcoin Trust (the “Trust”) as Commodity-Based Trust Shares under BZX Rule 14.11(e)(4).<sup>5</sup> 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>6</sup> that is not issued by any government, bank or central organization and that would be secured by and held in the

---

<sup>5</sup> The Commission approved 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>6</sup> Bitcoin is a commodity as defined in Section 1a(9) of the Commodity Exchange Act. 7 U.S.C. § 1a(9). See *In re* Coinflip, Inc., No. 15-29 (CFTC Sept. 17, 2015), *available at*:

custody of Gemini Trust Company LLC (the “Custodian”), the Trust’s custodian.<sup>7</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.

The Trust would issue and redeem Shares from time to time only in one or more whole Baskets,<sup>8</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 or their affiliated market makers would have the ability to participate directly on one or more bitcoin exchanges.<sup>9</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 Sponsor

---

<http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfcoinfliporder09172015.pdf> (“Coinflip”); *see also* Order at note 85.

<sup>7</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.

<sup>8</sup> Each Basket would consist of 100,000 Shares.

<sup>9</sup> As disclosed in the Trust’s registration statement on Form S-1 filed on February 8, 2017 (the “Registration Statement”), Convergen 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.

believes 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 Requirements**

Rules 430 and 431 of the Rules of Practice<sup>10</sup> provide for Commission review of Staff action taken by delegated authority upon the request by a party to the staff's action. The Exchange is a national securities exchange registered with the Commission and, as the Proposal was submitted to the Commission by the Exchange, is a party to the Staff's action. The Exchange has complied with the procedural requirements contained in Rule 430.<sup>11</sup>

Rule 431 states the criteria the Commission should consider in deciding whether to accept review of a petition. Rule 431 provides that the Commission must consider the standards set forth in Rule 411(b)(2) of the Rules of Practice.<sup>12</sup> Pursuant to that rule, in deciding whether to accept the Petition for review, the Commission should consider whether the Petition makes a reasonable showing that (i) a prejudicial error was committed in the conduct of the proceeding; or (ii) the decision embodies: (A) a finding or conclusion of material fact that is clearly erroneous; (B) a conclusion of law that is erroneous; or (C) an exercise of discretion or decision of law or policy that is important and that the Commission should review.

### **Background on the Bitcoin Market**<sup>13</sup>

---

<sup>10</sup> 17 CFR 201.430 and 17 CFR 201.431.

<sup>11</sup> Bats had actual notice of the Order on March 10, 2017, and timely filed Notice of Intent to Petition for Review on March 17, 2017. *See* Letter from Joanne Moffic-Silver, Executive Vice President, General Counsel & Corporate Secretary, Bats BZX Exchange, Inc., to Brent Fields, Secretary, SEC, dated March 17, 2017.

<sup>12</sup> 17 CFR 201.411(b)(2)

<sup>13</sup> The following is a brief summary of the background on the Bitcoin Market. For a more detailed description please refer to the Proposal or Registration Statement.

As noted above, bitcoin is a Digital Asset that is issued by, and transmitted through, the decentralized, open source protocol of the peer-to-peer Bitcoin Network. Bitcoin is “stored” or reflected on the Blockchain, which is a digital file stored in a decentralized manner on the computers of each Bitcoin Network user. The Bitcoin Network software source code includes the protocols that govern the creation of bitcoin and the cryptographic system that secures and verifies bitcoin transactions. The Blockchain is a canonical record of every bitcoin, every bitcoin transaction (including the creation or “mining” of new bitcoin) and every bitcoin address associated with a quantity of bitcoin. The Bitcoin Network and Bitcoin Network software programs can interpret the Blockchain to determine the exact bitcoin balance, if any, of any public bitcoin address listed in the Blockchain as having taken part in a transaction on the Bitcoin Network. The Bitcoin Network utilizes the Blockchain to evidence the existence of bitcoin in any public bitcoin address. A bitcoin private key controls the transfer or “spending” of bitcoin from its associated public bitcoin address.

Bitcoin is created and allocated by the Bitcoin Network protocol through a “mining” process subject to a strict, well-known issuance schedule. The value of bitcoin is determined by the supply of and demand for bitcoin in the “Bitcoin Exchange Market”<sup>14</sup> (and in private end-user-to-end-user transactions), as well as by the number of merchants that accept them. Third-party service providers such as Bitcoin Exchanges and third-party bitcoin payment processing services may charge fees for processing transactions and for converting, or facilitating the conversion of, bitcoin to or from fiat currency.

### **The Proposal is Consistent with the Exchange Act**

---

<sup>14</sup> For purposes of this filing, the term Bitcoin Exchange Market means the global Bitcoin Exchange Market for the trading of bitcoin, which consists of transactions on various electronic Bitcoin Exchanges.

The Staff's Order disapproving the Proposal should be set aside because the Proposal is consistent with the Exchange Act. It is consistent in particular with Section 6(b)(5) of the Exchange Act, which, among other things, requires that "the rules of the exchange are designed to prevent fraudulent and manipulative acts and practices" and "to protect investors and the public interest."<sup>15</sup> Importantly, in evaluating whether a proposal to list and trade a commodity-trust ETP meets these requirements, the Commission has not applied a specific test, but rather has considered a number of factors on a case by case basis.<sup>16</sup> Such factors are determined and

---

<sup>15</sup> 15 U.S.C. 78f(b)(5).

<sup>16</sup> *See* streetTRACKS Gold Shares, Securities Exchange Act Release No. 50603 (October 28, 2004), 69 FR 64614 (November 5, 2004) (SR-NYSE-2004-22) (approval order notes that "nevertheless, the Commission believes that the unique liquidity and depth of the gold market, together with the MOU with NYMEX (of which COMEX is a Division) and NYSE Rules 1300(b) and 1301, create the basis for the NYSE to monitor for fraudulent and manipulative practices in the trading of the Shares") (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) (approval order notes that "although an information sharing agreement with the OTC silver market is not possible, the Commission believes that Amex's information sharing agreement with NYMEX (of which COMEX is a division) and Exchange Rules 1203A and 1204A, create the basis for Amex to monitor for fraudulent and manipulative practices in the trading of the Silver Shares") (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) (approval order, which contains no discussion of the maturity of the platinum derivative markets, notes NYSE Arca's representation that "the Exchange's surveillance procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. Pursuant to NYSE Arca Equities Rule 8.201(h), the Exchange is able to obtain information regarding trading in the Shares and the underlying platinum, platinum futures contracts, options on platinum futures, or any other platinum derivative, through ETP Holders acting as registered Market Makers, in connection with such ETP Holders' proprietary or customer trades which they effect on any relevant market. In addition, the Exchange may obtain trading information via the Intermarket Surveillance Group ("ISG") from other exchanges who are members of the ISG") (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) (approval order, including the same language as the Platinum Order) (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) (approval order at 75485-75486

considered based on characteristics of the underlying asset in the ETP, including the underlying asset's susceptibility to manipulation and the Exchange's ability to monitor for, detect, and deter manipulation and violations of Exchange rules and applicable federal securities laws and rules.<sup>17</sup> When evaluated based on these factors, the Proposal is consistent with the Exchange Act and, in particular, Section 6(b)(5) of the Exchange Act, in that it is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest for the reasons enumerated below.<sup>18</sup>

### **Deficiencies in Staff's Disapproval of the Proposal**

The Commission should set aside the Order and grant this petition because several of the Staff's findings are clearly erroneous or unsupported by relevant facts or analysis, as further described below.

---

discusses the numerous representations that formed the basis for the Commission's belief "that the Exchange's surveillance procedures appear to be reasonably designed to permit the Exchange to monitor for, detect, and deter violations of Exchange rules and applicable federal securities laws and rules") (the "Copper Order") (collectively, the "Commodity Orders").

<sup>17</sup> As provided in the Commodity Orders, *supra* note 16, such factors include: (i) the ability of the listing exchange to enter into information sharing agreements with the markets trading securities underlying a derivative; (ii) the ability of the listing exchange to acquire information from market makers in the security related to trading in the commodity and related derivatives; (iii) listing exchange rules and procedures prohibiting use of material nonpublic information; (iv) the liquidity of the market in the underlying commodity; (v) the trading volume in derivatives based on the underlying commodity; (vi) the ability of the listing exchange to enter into information sharing agreements with the markets trading derivatives based on the underlying commodity; and (vii) listing exchange rules regarding trading halts.

<sup>18</sup> The Exchange notes that the Gold Order referred extensively to the Commission's previous approval of foreign currency options, for which there is no self-regulatory organization or Commission surveillance of the underlying markets, on the basis that the magnitude of the underlying currency market militated against manipulations through inter-market trading activity. *See* Securities Exchange Act Release No. 33732 (March 8, 1994), 59 FR 12023-01 (March 15, 1994).

A. The Standard Applied by the Staff is Inconsistent with Prior Approval Orders and Not Required Under Section 6(b)(5)

In the Order, the Staff posited for the first time that in order for a proposal for the listing and trading of commodity-trust ETPs to meet the requirements of Section 6(b)(5), particularly the requirements that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest, 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>19</sup> The Order later states that:

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 statement interprets Section 6(b)(5) in a prescriptive manner that is inconsistent with any previous approval orders for commodity-trust ETPs. To say that “there have been in every case well-established, significant, regulated markets for trading futures on the underlying commodity” is to create a standard that has not previously applied to commodity-trust ETPs. Additionally, 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.” Further to this point, the only discussion of futures in either the Platinum Order and the Palladium Order relates to: (i) the listing exchange’s ability to obtain information from market makers relating their trading in the applicable commodity or related derivatives; (ii) the listing exchange’s rule preventing market makers from using material nonpublic information regarding

---

<sup>19</sup> Order at 14077.

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.”

For the Palladium Order and the Platinum Order, rather than referencing the approval orders and the analysis therein, the Order refers to the respective notice of proposed rule change and highlights the following representations as supporting the applied standard: “the most significant palladium [platinum] futures exchanges are the NYMEX and the Tokyo Commodity Exchange” and “NYMEX is the largest exchange in the world for trading precious metals futures and options.” None of the Order, the Platinum Order, the Palladium Order, nor the applicable proposal discusses whether the NYMEX and Tokyo Commodity Exchange (“TOCOM”) are well-established or significant (only the “most significant”), nor do they explain 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. The Order also fails to note the representation from both the Palladium Order and the Platinum Order that “TOCOM is not an ISG member and the Exchange does not have in place a comprehensive surveillance sharing agreement with such market,” which means that regardless of whether it is a well-established or significant market, the listing exchange could not obtain trading information from TOCOM at the time of the approval.

Finally, the standard applied by the Staff is inconsistent with prior approval orders and not required under Section 6(b)(5) of the Exchange Act in that other approval orders have made clear that the factors applicable to currency-trust ETPs are also applicable to commodity-trust ETPs and that there is no singular test to determine whether a commodity-trust ETP is consistent with Section 6(b)(5) of the Exchange Act. To this point, in the Gold Order, which was the first

approval order issued for a commodity-trust ETP, the Commission relied on comparisons between the OTC gold market and the foreign currency market<sup>20</sup> (for which the Commission had already approved derivative products)<sup>21</sup> in order to approve the listing and trading of the gold-trust ETP. In the Gold Order, the Commission provided that the factors considered in determining whether a product for which the underlying was not a security trading on a regulated market met the requirements of Section 6(b)(5).<sup>22</sup>

The Staff therefore erred in applying a new standard for meeting the requirements of Section 6(b)(5) of the Exchange Act that is inconsistent with prior approval orders and not required under Section 6(b)(5) or the Commission's prior approval orders for commodity-trust ETPs. As such, the Commission should set aside the Order and grant this petition because the Staff's application of a new standard is a conclusion of law that is erroneous and unsupported by

---

<sup>20</sup> The Exchange notes that 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, 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>21</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) (approving the listing of dollar-denominated delivery foreign currency options on the Japanese Yen); and 36165 (August 29, 1995) (approving listing standards for, among other things, currency and currency index warrants)

<sup>22</sup> *See* Gold Order at 64619.

relevant analysis and other applicable approval orders that were deemed consistent with the Exchange Act.

B. Manipulation Concerns Raised in the Order are Overstated and Largely Theoretical

While the Exchange agrees with the Order that deterring manipulation of bitcoin in the underlying markets is important, the Exchange believes that 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, which asserted that the bitcoin market generally is less susceptible to manipulation than the equity, fixed income, and commodity futures markets for a number of reasons, including because 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; a substantial over-the-counter market provides liquidity and shock-absorbing capacity; bitcoin's 24/7/365 nature means that there is no single market-close event to manipulate; and it is unlikely that any one actor could obtain a dominant market share.<sup>23</sup>

The Order cites as the basis for disapproving the proposed rule change that the significant markets for bitcoin are unregulated and, as a result, “the Exchange has not entered into, and would currently be unable to enter into, the type of surveillance-sharing agreement that has been in place with respect to all previously approved commodity-trust ETPs – agreements that help

---

<sup>23</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”)

address concerns about the potential for fraudulent or manipulative acts and practices in this market.”<sup>24</sup> The Order also dismisses arguments made by the Exchange, as well as arguments made by other commenters to the rule change proposal and similar rule change proposals,<sup>25</sup> regarding the potential for manipulation of the bitcoin markets. Curiously, the Order cites at length a submission from a commenter to a similar rule change proposal, which asserted that the bitcoin market generally is less susceptible to manipulation than the equity, fixed income, and commodity futures markets for the reasons noted in the previous paragraph, but does not afford the comment the appropriate weight.

The Order ultimately concludes that the list of the possible means of manipulating the bitcoin market is “incomplete” and “does not form a basis to find that bitcoin cannot be manipulated.”<sup>26</sup> In this regard, the Commission specifically notes that

[W]hile there is no inside information related to the earnings or revenue of bitcoin, there 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 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.

While the Exchange does not disagree that these are potential avenues for manipulation, 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-based ETPs, there may be inside information

---

<sup>24</sup> Order at 2.

<sup>25</sup> Lewis Paper II.

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

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. Further, while there is no specific analog in a physical commodity ETP to a digital commodity “fork” that might impact the Trust, if the sponsor of a gold-based ETP, for example, 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 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 Exchange Act. Indeed, the Commission has approved a multitude of securities for exchange listing and trading and deemed those products consistent with the Exchange 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. In approving a proposed rule change regarding iShares Copper Trust,<sup>27</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>28</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

---

<sup>27</sup> Securities Exchange Act Release No. 68973 (Feb. 22, 2013), 78 FR 13726 (Feb. 28, 2013) (SR-NYSEArca-2012-66) (“iShares Copper Order”)

<sup>28</sup> *Id.* at 13738.

(“CFTC”).”<sup>29</sup> This is nearly identical to the Trust’s oversight structure, where trading in the Shares will 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>30</sup> the Exchange believes that a regulatory framework to deter manipulative conduct in the spot market does exist and that enforcement actions will increase over time.

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 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>31</sup>

---

<sup>29</sup> *Id.*

<sup>30</sup> Order at 14085.

<sup>31</sup> See Lewis Paper I, at 9.

As noted in the Trust’s Registration Statement, as the Bitcoin Exchange Market has evolved and matured, a number of new entrants, including two New York limited purpose trust companies, have emerged, markedly changing the once concentrated and non-regulated landscape of the Bitcoin Exchange Market. In addition, the advent of market participants who are chiefly arbitrageurs results in Bitcoin Exchange prices generally converging after dislodgement.<sup>32</sup> Arbitrageurs must have funds distributed across multiple Bitcoin Exchanges in order to take advantage of temporary price dislocations, thereby discouraging the strong concentration of funds on any particular Bitcoin Exchange.<sup>33</sup> As a result, the potential for manipulation on a particular Bitcoin Exchange would require overcoming the liquidity supply of such arbitrageurs who are actively eliminating any cross-market pricing differences.<sup>34</sup>

Moreover, the Sponsor has a robust methodology in place to determine the value of the Trust’s bitcoin, as detailed in the Registration Statement, which includes the ability to use the

---

<sup>32</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.

<sup>33</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>34</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).

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.

Additionally, the transparency the Trust will provide with respect to its bitcoin holdings, as well as the dissemination of the IIV and NAV of the Trust, will reduce the ability of market participants to manipulate the price of bitcoin or the price of the Shares.<sup>35</sup> Moreover, the listing and trading of the Shares on the Exchange may serve to make the overall bitcoin market more transparent.<sup>36</sup>

Based on the foregoing, the Exchange believes that the Commission should set aside the Order and grant this petition because the Staff's finding that the Proposal is not designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest is clearly erroneous.

### **The Filing Raises Important Policy Concerns that the Commission Should Address**

---

<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> "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 IIV 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." iShares Copper Order at 13739.

The Commission should set aside the Order and grant this petition because the Proposal and the Order raise several important policy concerns that the Commission should address.

A. Bitcoin and Digital Assets

The Proposal marks the first time that an exchange has proposed to list and trade shares of an ETP based on bitcoin or any other Digital Asset, and the Order therefore raises a number of important policy concerns that the Commission should address. While the CFTC established that bitcoin is a commodity,<sup>37</sup> there is no question that there are novel characteristics that distinguish bitcoin and other Digital Assets from traditional commodities, but it is not clear whether such characteristics warrant disparate treatment under the Exchange Act or exchange rules. The Order states that:

The Commission does not believe that the record supports finding that the unique properties of bitcoin and the underlying bitcoin market are so different from the properties of other commodities and commodity futures markets that they justify a significant departure from the standards applied to previous commodity-trust ETPs. (Order at 14085)

Additionally, the Order does not discuss the novel issues that may arise when bitcoin and Digital Assets are the underlying asset for an ETP or how such novel issues relate to traditional commodities. The novel characteristics of bitcoin and Digital Assets and how and whether such characteristics should fit within existing rules and standards are important policy concerns that the Commission should address.

The Proposal also raises important issues under Section 6(b)(5) of the Exchange Act and concerning the prevention of fraudulent and manipulative acts and practices and protecting investors and the public interest. If approved, the Proposal and Trust would provide a vehicle for investors to gain exposure to bitcoin while off-loading to the Trust the security and market

---

<sup>37</sup> See *supra* note 6.

access concerns associated with investing in bitcoin. With the Trust managing those concerns as described in the Proposal and the Registration Statement, investors that would otherwise be accessing the bitcoin market directly and managing their bitcoin independently are unquestionably less susceptible to fraudulent and manipulative acts and practices, and such an arrangement would result in greater protection to those investors and the public interest.

Based on the foregoing, the Exchange believes that the Proposal raises important policy concerns related to the novel characteristics of bitcoin and Digital Assets and how and whether such characteristics should fit within existing rules and standards and more generally to investor access to the bitcoin market and, as such, the Commission should address these issues.

**B. Section 6(b)(5) and Commodity-Trust ETPs**

Additionally, the Order sets forth a new standard for applying Section 6(b)(5) of the Act, which raises important policy concerns that the Commission should address not only for commodity-trust ETPs, but for all types of ETPs. The Order states that:

the Commission is disapproving this proposed rule change because it does not find the proposal to be consistent with Section 6(b)(5) of the Exchange Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest. The Commission believes that, in order to meet this standard, an exchange that lists and trades shares of commodity-trust exchange-traded products (“ETPs”) must, in addition to other applicable requirements, satisfy two requirements that are dispositive in this matter. 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. (Order at 14077)

As noted extensively above, the application of these two requirements is not consistent with any previous application of Section 6(b)(5) as it relates to an ETP, and the Commission has not generally applied a specific test, but rather has considered a number of factors in determining whether a proposal was consistent with Section 6(b)(5). Such factors have generally been

determined and applied based on the characteristics of the underlying asset and on how those characteristics relate to the generally articulated purpose of Section 6(b)(5): the susceptibility of the underlying asset to manipulation and the Exchange's ability to monitor for, detect, and deter manipulation and violations of Exchange rules and applicable federal securities laws and rules.<sup>38</sup> Accordingly, the requirements articulated in the Order mark a significant departure from the standard typically applied and raises an important policy concern for all ETPs that the Commission should address.

### **Conclusion**

For the foregoing reasons, the Exchange believes that the Staff's disapproval of the Proposal pursuant to delegated authority embodies a finding or conclusion of material fact or law that is clearly erroneous and embodies an exercise of discretion or decision of law or policy that is important and that the Commission therefore should review. The Exchange believes: (i) the standard applied by the Staff is inconsistent with prior approval orders and not required under Section 6(b)(5) of the Exchange Act; (ii) that the manipulation concerns in the Order are overstated and largely theoretical; (iii) that the Proposal and Order constitute an exercise of discretion or decision of law or policy that is important and that the Commission should review and that include certain novel issues related to bitcoin and digital assets generally; and (iv) that the Proposal is consistent with the Exchange Act under a standard consistent with the standard applied to other approved commodity-trust ETPs. As such, the Exchange respectfully requests that the Commission exercise its discretion to review this petition and to set aside the Staff's Order.

---

<sup>38</sup> See *supra* note 16 and 17 and accompanying text.

DATED: March 24, 2017

Respectfully Submitted,

A handwritten signature in black ink, reading "Joanne Moffic-Silver". The signature is written in a cursive, flowing style.

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