

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-99196; File No. SR-CboeBZX-2023-070)

December 18, 2023

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to List and Trade Shares of the ARK 21Shares Ethereum ETF Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

On September 6, 2023, Cboe BZX Exchange, Inc. (“BZX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the ARK 21Shares Ethereum ETF (“Trust”) under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. The proposed rule change was published for comment in the Federal Register on September 27, 2023.³

On September 27, 2023, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ This order institutes proceedings under Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 98467 (Sept. 21, 2023), 88 FR 66515 (“Notice”). The Commission has received no comments on the proposal.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 98565, 88 FR 68187 (Oct. 3, 2023). The Commission designated December 26, 2023, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

⁶ 15 U.S.C. 78s(b)(2)(B).

I. Summary of the Proposal

As described in more detail in the Notice,⁷ the Exchange proposes to list and trade the Shares of the Trust under BZX Rule 14.11(e)(4), which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.

The investment objective of the Trust will be to seek to track the performance of ether, as measured by the performance of the CME CF Ether-Dollar Reference Rate—New York Variant (“Index”), adjusted for the Trust’s expenses and other liabilities.⁸ The Trust’s assets will consist of ether held by the Trust’s custodian on behalf of the Trust.⁹ The Trust will value its Shares daily based on the value of ether as reflected by the Index.¹⁰ The administrator of the Trust will determine the net asset value (“NAV”) of the Trust on each day that the Exchange is open for regular trading, as promptly as practicable after 4:00 p.m. ET.¹¹ In determining the Trust’s NAV, the administrator values the ether held by the Trust based on the price set by the Index as of 4:00 p.m. ET.¹² When the Trust sells or redeems its Shares, it will do so in “in-kind” transactions with authorized participants in blocks of 5,000 Shares.¹³

⁷ See Notice, supra note 3.

⁸ See id. at 66518. 21Shares US LLC (“Sponsor”) is the sponsor of the Trust. See id. at 66515.

⁹ See id. at 66515. The Trust generally does not intend to hold cash or cash equivalents; however, there may be situations where the Trust would unexpectedly hold cash on a temporary basis. See id. at 66515-16.

¹⁰ See id. at 66518.

¹¹ See id. at 66519.

¹² See id.

¹³ See id. at 66516.

II. Proceedings to Determine Whether to Approve or Disapprove SR-CboeBZX-2023-070 and Grounds for Disapproval under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹⁴ to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,¹⁵ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the 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."¹⁶

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following questions and asks commenters to submit data where appropriate to support their views:

¹⁴ 15 U.S.C. 78s(b)(2)(B).

¹⁵ Id.

¹⁶ 15 U.S.C. 78f(b)(5).

1. Given the nature of the underlying assets held by the Trust, has the Exchange properly filed its proposal to list and trade the Shares under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares?¹⁷

2. The Exchange raises substantially similar arguments to support the listing and trading of the Shares as those made in proposals to list and trade spot bitcoin exchange-traded products (“Bitcoin ETPs”). Do commenters agree that arguments to support the listing of Bitcoin ETPs apply equally to the Shares? Are there particular features related to ether and its ecosystem, including its proof of stake consensus mechanism and concentration of control or influence by a few individuals or entities, that raise unique concerns about ether’s susceptibility to fraud and manipulation?

3. What are commenters’ views on whether the proposed Trust and Shares would be susceptible to manipulation? What are commenters’ views generally on whether the Exchange’s proposal is designed to prevent fraudulent and manipulative acts and practices? What are commenters’ views generally with respect to the liquidity and transparency of the ether markets and the ether markets’ susceptibility to manipulation?

4. Based on data and analysis provided by the Exchange,¹⁸ do commenters agree with the Exchange that the Chicago Mercantile Exchange (“CME”), on which CME ether futures trade, represents a regulated market of significant size related to spot ether?¹⁹ What are commenters’ views on whether there is a reasonable likelihood that a person attempting to

¹⁷ BZX Rule 14.11(e)(4)(C)(i) defines the term “Commodity-Based Trust Shares” as a security (a) that is issued by a trust that holds a specified commodity deposited with the trust; (b) that is issued by such trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity; and (c) that, when aggregated in the same specified minimum number, may be redeemed at a holder’s request by such trust which will deliver to the redeeming holder the quantity of the underlying commodity.

¹⁸ See Notice, 88 FR at 66521.

¹⁹ See id. at 66518.

manipulate the Shares would also have to trade on the CME to manipulate the Shares?²⁰ Do commenters agree with the Exchange that trading in the Shares would not be the predominant influence on prices in the CME ether futures market?²¹

5. The Exchange states that ether is resistant to price manipulation and that other means to prevent fraudulent and manipulative acts and practices “exist to justify dispensing with the requisite surveillance sharing agreement” with a regulated market of significant size related to spot ether.²² In support, the Exchange states, among other things, that the geographically diverse and continuous nature of ether trading make it difficult and prohibitively costly to manipulate the price of ether, and that the fragmentation across ether platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ether prices through continuous trading activity challenging.²³ The Exchange also states that offering only in-kind creations and redemptions “reduces the potential for manipulation of the Shares through manipulation of the Index or any of its individual constituents, again emphasizing that a potential manipulator of the Shares would have to manipulate the entirety of the ether spot market, which is led by the [CME] ether [f]utures market.”²⁴ Do commenters agree with the Exchange’s statements regarding the ether market’s resistance to price manipulation?

6. The Exchange also states that it will execute a surveillance-sharing agreement with Coinbase, Inc. (“Coinbase”) that is intended to supplement the Exchange’s market

²⁰ See id. at 66522.

²¹ See id.

²² See id. at 66521 n.29.

²³ See id.

²⁴ See id. at 66522.

surveillance program.²⁵ According to the Exchange, the agreement is “expected to have the hallmarks of a surveillance-sharing agreement between two members of the [Intermarket Surveillance Group], which would give the Exchange supplemental access to data regarding spot [ether] trades on Coinbase where the Exchange determines it is necessary as part of its surveillance program for the Commodity-Based Trust Shares.”²⁶ Based on the description of the surveillance-sharing agreement as provided by the Exchange, what are commenters’ views of such an agreement if finalized and executed? Do commenters agree with the Exchange that such an agreement with Coinbase would be “helpful in detecting, investigating, and deterring fraud and market manipulation in the Commodity-Based Trust Shares”?²⁷

7. The Exchange states that the “Sponsor’s research indicates that daily correlation between the [s]pot [ether] and the CME [ether] [f]utures . . . was over 99.88%.”²⁸ The Exchange further states that this “high correlation” in pricing between CME ether futures and spot ether indicates that there is a reasonable likelihood that a person attempting to manipulate the Trust would also have to trade on the CME ether futures market.²⁹ What are commenters’ views on the correlation between the ether spot market and the CME ether futures market? What are commenters’ views on the extent to which a surveillance-sharing agreement with the CME would assist in detecting and deterring fraud and manipulation that impacts an exchange-traded product (“ETP”) that holds spot ether, and on whether the Sponsor’s daily return correlation

²⁵ See id.

²⁶ See id. at 66522-23. The Exchange states that “[t]his means that the Exchange expects to receive market data for orders and trades from Coinbase, which it will utilize in surveillance of the trading of Commodity-Based Trust Shares.” Id. at 66523.

²⁷ See id. at 66522.

²⁸ See id. at 66521. The Exchange states that this is based on a pairwise correlation performed by the Sponsor of ether daily returns across top centralized spot cryptocurrency platforms and the CME from March 19, 2021, to September 5, 2023. See id.

²⁹ See id. at 66522.

analysis provides any evidence to this effect? What are commenters' views generally on whether an ETP that holds CME ether futures and an ETP that holds spot ether are similar products?

III. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, and the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.³⁰

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's internet comment form

(<https://www.sec.gov/rules/sro.shtml>); or

³⁰ Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBZX-2023-070 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-CboeBZX-2023-070. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright

protection. All submissions should refer to file number SR-CboeBZX-2023-070 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³¹

Sherry R. Haywood,

Assistant Secretary.

³¹ 17 CFR 200.30-3(a)(57).