

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98302; File No. SR-NYSEARCA-2023-37)

September 6, 2023

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to List and Trade Shares of the COtwo Advisors Physical European Carbon Allowance Trust under NYSE Arca Rule 8.201-E

On May 23, 2023, NYSE Arca, Inc. filed with the Securities and Exchange Commission (“Commission” or “NYSE Arca”), 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 of the COtwo Advisors Physical European Carbon Allowance Trust. The proposed rule change was published for comment in the Federal Register on June 12, 2023.³

On July 25, 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 The Commission has received no comments on the proposal. 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. 97653 (June 6, 2023), 88 FR 38110 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 97972, 88 FR 49508 (July 31, 2023). The Commission designated September 10, 2023, as the date by which it should approve, 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 Exchange’s Proposal

As described in more detail in the Notice,⁷ the Exchange proposes to list and trade shares (“Shares”) of the COtwo Advisors Physical European Carbon Allowance Trust (“Trust”)⁸ under NYSE Arca Rule 8.201-E, which governs the listing and trading of Commodity-Based Trust Shares. The sponsor of the Trust is COtwo Advisors LLC, a Delaware limited liability company (“Sponsor”). State Street Bank and Trust Company serves as the Trust’s administrator (“Administrator”) and as the Trust’s transfer agent and as custodian of the Trust’s cash, if any (“Cash Custodian”).⁹

Operation of the Trust

The investment objective of the Trust will be for the Shares to reflect the performance of the price of EU Carbon Emission Allowances for stationary installations (“EUAs”), less the Trust’s expenses.¹⁰ The Trust intends to achieve its objective by investing all of its assets in EUAs on a non-discretionary basis (i.e., without regard to whether the value of EUAs is rising or falling over any particular period).¹¹ Shares of the Trust will represent units of fractional undivided beneficial interest in and ownership of the Trust. The Trust’s only ordinary recurring expense will be the Sponsor’s annual fee.¹² The Trust will not hold any assets other than EUAs

⁷ See Notice, supra note 3.

⁸ According to the Exchange, the Trust, which was formed as a Delaware statutory trust on January 12, 2023, will not be registered as an investment company under the Investment Company Act of 1940, as amended, and is not a commodity pool for purposes of the Commodity Exchange Act, as amended. On May 12, 2023, the Trust filed with the Commission a registration statement on Form S-1 (File No. 333-271910) (“Registration Statement”) under the Securities Act of 1933. The Exchange represents that the Registration Statement is not yet effective, and the Shares will not trade on the Exchange until such time that the Registration Statement becomes effective.

⁹ The Cash Custodian is responsible for holding the Trust’s cash as well as receiving and dispensing cash on behalf of the Trust in connection with the payment of Trust expenses.

¹⁰ See Notice, supra note 3, 88 FR at 38110.

¹¹ Id.

¹² Id.

or possibly cash. The Trust may hold a very limited amount of cash to pay Trust expenses. The Trust may also cause the Sponsor to receive EUAs from the Trust in such a quantity as may be necessary to pay the Sponsor's annual fee.¹³

The Trust will not invest in futures, options, or swap contracts on any futures exchange or in the over-the-counter market. The Trust will not hold or trade in commodity futures contracts, "commodity interests," or any other instruments regulated by the Commodity Exchange Act. As stated above, the Trust's Cash Custodian may hold cash proceeds from EUA sales to pay Trust expenses. All EUAs will be held in the Union Registry (defined below). The Exchange states that the Trust is not a proxy for investing in physical carbon credits. Rather, according to the Exchange, the Shares are intended to provide a cost-effective means of obtaining investment exposure to the price of EUAs through the securities markets that is similar to an investment in futures contracts or other derivatives.¹⁴

Description of EUAs¹⁵

According to the Exchange, the European Union Emissions Trading System ("EU ETS") is a "cap and trade" system that caps the total volume of greenhouse gas ("GHG") emissions from installations and aircraft operators responsible for around 40% of EU GHG emissions.¹⁶ The EU ETS is the largest cap and trade system in the world and covers more than 11,000 power stations and industrial plants in 31 countries, and flights between airports of participating

¹³ Id.

¹⁴ Id.

¹⁵ Additional information about EUAs and the operation of the EUA markets can be found in the Notice and in the Registration Statement. See Notice, supra note 3; Registration Statement, supra note 8.

¹⁶ There are two types of European Union ("EU") emissions allowances: (i) general allowances for stationary installations, or EUAs; and (ii) allowances for the aviation sector, or "EUAs." The Trust will hold EUAs only. See Notice, supra note 3, 88 FR at 38110.

countries.¹⁷ The EU ETS is administered by the EU Commission, which issues a predefined amount of EUAs through auctions or free allocation. An EUA represents the right to emit one metric ton of carbon dioxide equivalent into the atmosphere by operators of stationary installations (“Covered Entities”).¹⁸ By the end of April each year, all Covered Entities are required to surrender EUAs equal to the total volume of actual emissions from their installation for the last calendar year. EU ETS operators can buy or sell EUAs to achieve EU ETS compliance.¹⁹

In 2012, EU ETS operations were centralized into a single EU registry operated by the EU Commission (“Union Registry”), which covers all countries participating in the EU ETS.²⁰ The Union Registry is an online database that holds accounts for all entities covered by the EU ETS as well as for participants (such as the Trust) not covered under the EU ETS. An account must be opened in the Union Registry in order to transact in EUAs, and the Union Registry is at all times responsible for holding the EUAs. All EUAs are held in the Union Registry.

Trading and Pricing of EUAs

According to the Exchange, there are two primary avenues for trading EUAs: a primary market and a secondary market. The primary market involves participation in a regularly scheduled auction.²¹ The secondary market involves transactions between buyers and sellers on

¹⁷ See id.

¹⁸ Id. at 38111.

¹⁹ Id.

²⁰ Id.

²¹ Id.

regulated markets via trading in spot, options, and futures contracts.²² There are also over-the-counter transactions, but they comprise a negligible percentage of transactions.²³

The Exchange represents that the EUA markets are generally liquid. EUA auctions are held on a near-daily basis throughout the year, other than between mid-December to mid-January, when auctions are paused.²⁴ Prices achieved in these auctions are published on various publicly-accessible websites, including the European Commission’s primary website.

The secondary market trading takes place predominantly on the European Energy Exchange AG (“EEX”) and ICE Endex.²⁵ As of January 2023, the secondary market had average daily trading volume of €2 billion, with the majority of the liquidity in the futures market.²⁶ Prices for secondary market transactions are published on various publicly-accessible websites, including those of EEX and ICE Endex.²⁷ Both EEX and ICE Endex are affiliates of Exchange groups that are members of the Intermarket Surveillance Group.

Most liquidity in the secondary market is achieved by trading futures contracts. These contracts have expiration going out as far as 2030. The most liquid contract is the single day futures contract on EUAs (“Daily EUA Future”), which settles each day at the close of trading.²⁸ Generally, Daily EUA Futures trade from approximately 2:00 a.m. Eastern Time (“E.T.”) to approximately 12:00 p.m. E.T. The settlement price is fixed each business day and is published

²² Id.

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ Id.

at approximately 12:15 E.T. Final cash settlement occurs the first business day following the expiry day.

In 2021, the secondary spot market for EUAs (including the Daily EUA Future) averaged around 2.4 million EUAs daily, and the primary auctions accounted for almost 2.5 million EUAs being auctioned several times per week.²⁹ The current value (spot price) for an EUA is greatly influenced by a number of factors, including regulatory changes, world events, and the general level of economic activity.³⁰

Net Asset Value (“NAV”)

The Trust’s NAV is calculated by taking the current market value of its total assets, less any liabilities of the Trust, and dividing that total by the total number of outstanding Shares. The Administrator will calculate the NAV of the Trust once each Exchange trading day. The NAV for a normal trading day will be released after the end of the Core Trading Session, which is typically 4:00 p.m. New York time. The NAV for the Trust’s Shares will be disseminated daily to all market participants at the same time. The Administrator will use the settlement price for the Daily EUA Futures established by ICE Endex to calculate the NAV.

II. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEARCA-2023-37 and Grounds for Disapproval under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act³¹ 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

²⁹ Id.

³⁰ Id.

³¹ 15 U.S.C. 78s(b)(2)(B).

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,³² 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."³³

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,³⁴ 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:

- According to the Exchange, the investment objective of the Trust will be for the Shares to reflect the performance of the price of EUAs, and that the Trust intends to achieve its objective by investing all of its assets in EUAs on a non-discretionary basis and will not hold or trade in commodity futures contracts.³⁵ The Exchange further represents, however, that the Trust is not a proxy for investing in physical carbon credits, and that the Administrator will use the settlement price for the Daily EUA Futures established by ICE

³² Id.

³³ 15 U.S.C. 78f(b)(5).

³⁴ See Notice, supra note 3.

³⁵ See id. at 38110.

Endex to calculate the NAV.³⁶ What are commenters' views on the Trust's holdings in spot EUAs, on the one hand, and its method of calculating NAV based on the settlement price of Daily EUA Futures, on the other? What are commenters' views on the correlation in pricing between the EUA and Daily EUA Futures markets?

- The Exchange asserts that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Rule 8.201-E. 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?

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.³⁷

³⁶ See id.; id. at 38112.

³⁷ Section 19(b)(2) of the Act, as amended by the Securities Act 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 Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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
- Send an email to rule-comments@sec.gov. Please include file number SR-NYSEARCA-2023-37 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-NYSEARCA-2023-37. 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-NYSEARCA-2023-37 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.³⁸

Sherry R. Haywood,

Assistant Secretary.

³⁸ 17 CFR 200.30-3(a)(57).