

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-99198; File No. SR-NYSEARCA-2023-63)

December 18, 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 Grayscale Ethereum Futures Trust (ETH) ETF under NYSE Arca Rule 8.200-E, Commentary .02 (Trust Issued Receipts)

On September 19, 2023, NYSE Arca, Inc. (“NYSE Arca” 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 Grayscale Ethereum Futures Trust (ETH) ETF (“Trust”) under NYSE Arca Rule 8.200-E, Commentary .02 (Trust Issued Receipts). The proposed rule change was published for comment in the Federal Register on October 3, 2023.³

On November 15, 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. 98567 (Sept. 27, 2023), 88 FR 68171 (“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. 98944, 88 FR 81171 (Nov. 21, 2023). The Commission designated January 1, 2024, 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 NYSE Arca Rule 8.200-E, Commentary .02, which governs the listing and trading of Trust Issued Receipts on the Exchange.

According to the Exchange, the Chicago Mercantile Exchange, Inc. (“CME”) currently offers two Ethereum futures contracts, one contract representing 50 Ether (“ETH Contracts”) and another contract representing 0.10 Ether (“MET Contracts”).⁸ The investment objective of the Trust is to have the daily changes in the net asset value (“NAV”) of the Shares reflect the daily changes in the price of a specified benchmark (“Benchmark”), which is the average of the closing settlement prices for the first to expire and second to expire ETH Contracts listed on the CME.⁹ Under normal market conditions, the Trust will invest in the first to expire and second to expire ETH Contracts and MET Contracts (collectively, “Ether Futures Contracts”) and in cash and cash equivalents.¹⁰ The administrator of the Trust will calculate the NAV once each trading day, as of the earlier of the close of the New York Stock Exchange or 4:00 p.m. Eastern Standard Time.¹¹ To determine the value of Ether Futures Contracts, the Trust’s administrator will use the Ether Futures Contract settlement price on the exchange on which the contract is traded, except that the fair value of Ether Futures Contracts may be used when Ether Futures Contracts close at their price fluctuation limit for the day.¹² When the Trust sells or redeems its Shares, it will do so

⁷ See Notice, supra note 3.

⁸ See id. at 68171

⁹ See id. at 68171-72.

¹⁰ See id. at 68172.

¹¹ See id. at 68175.

¹² See id.

in transactions with authorized participants in blocks of 10,000 Shares.¹³

II. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEARCA-2023-63 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

¹³ See id. at 68176. The filing does not specify whether such transactions would be required to be in-kind or in cash. The filing states that an authorized purchaser who places a purchase order will transfer to the Trust's custodian the required amount of cash, cash equivalents, and/or ether futures by the end of the next business day following the purchase order date or by the end of such later business day, not to exceed three business days after the purchase order date, as agreed to between the authorized purchaser and the custodian when the purchase order is placed. See id. The filing also states that the redemption distribution from the Trust will consist of an amount of cash, cash equivalents, and/or exchange listed ether futures that is in the same proportion to the total assets of the Trust on the date that the order to redeem is properly received as the number of Shares to be redeemed under the redemption order is in proportion to the total number of Shares outstanding on the date the order is received. See id.

¹⁴ 15 U.S.C. 78s(b)(2)(B).

¹⁵ Id.

¹⁶ 15 U.S.C. 78f(b)(5).

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:

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 NYSE Arca Rule 8.200-E, Commentary .02 (Trust Issued Receipts)?¹⁷

2. The Exchange raises substantially similar arguments to support the listing and trading of the Shares as those made in Commission orders approving the listing and trading of CME bitcoin futures-based exchange-traded products (“CME Bitcoin Futures ETPs”). Do commenters agree that arguments to support the listing of CME Bitcoin Futures 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 futures’ susceptibility to fraud and manipulation?

¹⁷ NYSE Arca Rule 8.200-E(b) defines a “Trust Issued Receipt” as a security (1) that is issued by a trust which holds specific securities deposited with the trust; (2) that, when aggregated in some specified minimum number, may be surrendered to the trust by the beneficial owner to receive the securities; and (3) that pay beneficial owners dividends and other distributions on the deposited securities, if any are declared and paid to the trustee by an issuer of the deposited securities. NYSE Arca Rule 8.200-E, Commentary .02(c) provides that the Exchange may list and trade Trust Issued Receipts investing in “Financial Instruments.” NYSE Arca Rule 8.200-E, Commentary .02(b)(4) further defines “Financial Instruments” as any combination of investments, including cash; securities; options on securities and indices; futures contracts; options on futures contracts; forward contracts; equity caps, collars and floors; and swap agreements.

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?

4. Based on data and analysis provided by the Exchange,¹⁸ do commenters agree with the Exchange that the CME represents a regulated market of significant size related to the holdings of the Trust?¹⁹ 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?²⁰

5. The Exchange states that several exchange-traded funds ("ETFs") registered under the Investment Company Act of 1940 that hold ether futures contracts have filed registration statements with the Commission and that these ETFs would offer identical exposure to the Trust.²¹ The Exchange asserts that "if the Commission allows these ETFs to begin trading, then it should also approve the Trust for trading."²² Do commenters agree? Why or why not?

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

¹⁸ See Notice, 88 FR at 68174-75.

¹⁹ See *id.*

²⁰ See *id.* at 68175.

²¹ See *id.* at 68173.

²² See *id.*

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.²³

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-2023-63 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-2023-63. 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>).

²³ 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).

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-2023-63 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.²⁴

Sherry R. Haywood,

Assistant Secretary.

²⁴ 17 CFR 200.30-3(a)(57).