

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-99428; File No. SR-NYSEARCA-2023-70)

January 25, 2024

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 Trust under NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares)

On October 10, 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 Trust (“Trust”) under NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares). The proposed rule change was published for comment in the Federal Register on October 27, 2023.³

On December 5, 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. 98780 (Oct. 23, 2023), 88 FR 73892 (“Notice”). Comments on the proposed rule change are available at: <https://www.sec.gov/comments/sr-nysearca-2023-70/srnysearca202370.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 99082, 88 FR 85962 (Dec. 11, 2023). The Commission designated January 25, 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 8.201-E, which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.

According to the Exchange, the investment objective of the Trust is for the value of the Shares to reflect the value of the Ethereum (“ETH”)⁸ held by the Trust, determined by reference to the “Index Price,” less the Trust’s expenses and other liabilities.⁹ The “Index Price” is the U.S. dollar value of an ETH derived from the “Digital Asset Exchanges”¹⁰ that are reflected in the “Index,” calculated at 4:00 p.m., New York time, on each business day.¹¹ The Trust’s assets will consist solely of ETH; Incidental Rights;¹² IR Virtual Currency;¹³ proceeds from the sale of ETH, Incidental Rights, and IR Virtual Currency pending use of such cash for payment of Additional Trust Expenses¹⁴ or distribution to shareholders, and any rights of the Trust pursuant to any

⁷ See Notice, supra note 3.

⁸ In its filing, the Exchange defines “ETH” as “Ethereum”. See id. at 73893. It, however, also provides that “[t]he Ethereum Network allows people to exchange tokens of value, called Ether, which are recorded on a public transaction ledger known as a blockchain.” See id. at 73894.

⁹ See id. at 73894. Grayscale Investments, LLC (“Sponsor”) is the sponsor of the Trust and is a wholly-owned subsidiary of Digital Currency Group, Inc. See id. at 73893.

¹⁰ A “Digital Asset Exchange” is an electronic marketplace where participants may trade, buy and sell ETH based on bid-ask trading. See id. at 73894 n.16.

¹¹ See id. at 73894 n.14. The index provider for the Trust is CoinDesk Indices, Inc. See id. at 73893. While the Exchange does not name the “Index” that the Trust would use to value the ETH held by the Trust, the Exchange provides that the value of the Index, as well as additional information regarding the Index, will be available at <https://www.coindesk.com/indices>. See id. at 73910.

¹² “Incidental Rights” are rights to acquire, or otherwise establish dominion and control over, any virtual currency or other asset or right, which rights are incident to the Trust’s ownership of ETH and arise without any action of the Trust, or of the Sponsor or trustee on behalf of the Trust. See id. at 73893 n.11.

¹³ “IR Virtual Currency” is any virtual currency tokens, or other asset or right, acquired by the Trust through the exercise (subject to the applicable provisions of the trust agreement) of any Incidental Right. See id. at 73893 n.12.

¹⁴ “Additional Trust Expenses” are any expenses incurred by the Trust in addition to the Sponsor’s fee that are not Sponsor-paid expenses. See id. at 73893 n.13.

agreements, other than the trust agreement, to which the Trust is a party.¹⁵ Each Share represents a proportional interest, based on the total number of Shares outstanding, in each of the Trust's assets as determined by reference to the Index Price, less the Trust's expenses and other liabilities (which include accrued but unpaid fees and expenses).¹⁶ On each business day at 4:00 p.m., New York time, or as soon thereafter as practicable, the Sponsor will evaluate the ETH held by the Trust and calculate and publish the “Digital Asset Holdings”¹⁷ of the Trust.¹⁸ When the Trust sells or redeems its Shares, it will do so either in “in-kind” or “in-cash” transactions with authorized participants in blocks of 100 Shares.¹⁹

II. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEARCA-2023-70 and Grounds for Disapproval under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act²⁰ 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

¹⁵ See id. at 73893-94.

¹⁶ See id. at 73894.

¹⁷ The Exchange does not define this term in the proposed rule change. Additional information about the calculation of the Digital Asset Holdings can be found in the Notice. See id. at 73898.

¹⁸ See id.

¹⁹ See id. at 73907.

²⁰ 15 U.S.C. 78s(b)(2)(B).

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,²¹ 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.”²²

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 8.201-E (Commodity-Based Trust Shares)?²³

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

²¹ Id.

²² 15 U.S.C. 78f(b)(5).

²³ NYSE Arca Rule 8.201-E(c)(1) defines the term “Commodity-Based Trust Shares” as a security (a) that is issued by a trust that holds (1) a specified commodity deposited with the trust, or (2) a specified commodity and, in addition to such specified commodity, cash; (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/or cash; 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 and/or cash.

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 ETH 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 ETH’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 ETH markets and the ETH markets’ susceptibility to manipulation?

4. Based on data and analysis provided by the Exchange,²⁴ do commenters agree with the Exchange that the Chicago Mercantile Exchange (“CME”), on which CME ETH futures trade, represents a regulated market of significant size related to spot ETH?²⁵ What are commenters’ views on whether there is a reasonable likelihood that a person attempting to manipulate the Shares would also have to trade on the CME to manipulate the Shares?²⁶ Do commenters agree with the Exchange that it is unlikely that trading in the Shares would be the predominant influence on prices in the CME ETH futures market?²⁷

5. Some sponsors of proposed ETH exchange-traded products (“ETPs”) have made statements regarding the correlation between ETH spot markets and the CME ETH futures

²⁴ See Notice, 88 FR at 73906-07.

²⁵ See *id.* at 73906.

²⁶ See *id.*

²⁷ See *id.*

market.²⁸ What are commenters' views on the correlation between the ETH spot market and the CME ETH 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 ETP that holds spot ETH, and on whether correlation analysis provides any evidence to this effect? What are commenters' views generally on whether an ETP that holds only CME ETH futures and an ETP that only holds spot ETH 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.²⁹

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

²⁸ See, e.g., Notice of Filing of a Proposed Rule Change to List and Trade Shares of the VanEck Ethereum ETF under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 98457 (Sept. 20, 2023), 88 FR 66076 (Sept. 26, 2023), 66081 (stating that “The Sponsor’s research indicates daily correlation between the spot ETH and the CME ETH Futures is 0.998 from the period of 9/1/22 through 9/1/23.”).

²⁹ 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).

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-2023-70 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-2023-70. 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-2023-70 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.³⁰

Sherry R. Haywood,

Assistant Secretary.

³⁰ 17 CFR 200.30-3(a)(57).