

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-87071; File No. SR-NYSEArca-2019-39)

September 24, 2019

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares) and to List and Trade Shares of the United States Bitcoin and Treasury Investment Trust under NYSE Arca Rule 8.201-E

On June 12, 2019, 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 amend NYSE Arca Rule 8.201-E and to list and trade shares (“Shares”) of the United States Bitcoin and Treasury Investment Trust (“Trust”) under NYSE Arca Rule 8.201-E, as proposed to be amended. The proposed rule change was published for comment in the Federal Register on July 1, 2019.³

On August 12, 2019, 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. 86195 (June 25, 2019), 84 FR 31373 (July 1, 2019) (“Notice”). Comments on the proposed rule change can be found at: <https://www.sec.gov/comments/sr-nysearca-2019-39/srnysearca201939.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 86631 (Aug. 12, 2019), 84 FR 42028 (Aug. 16, 2019). The Commission designated September 29, 2019, as the date by which it should

I. Summary of the Proposal

As described in detail in the Notice,⁷ the Exchange proposes to amend NYSE Arca Rule 8.201-E, which governs the listing and trading of Commodity-Based Trust Shares on the Exchange,⁸ and to list and trade Shares of the Trust under NYSE Arca Rule 8.201-E, as proposed to be amended.

Proposed Amendments to NYSE Arca Rule 8.201-E

NYSE Arca Rule 8.201-E(c)(1) currently states that Commodity-Based Trust Shares are issued by a trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity, and may be redeemed in the same specified minimum number by a holder for the quantity of the underlying commodity. The Exchange proposes to amend Rule 8.201-E(c)(1) to provide that Commodity-Based Trust Shares may be issued and redeemed for the underlying commodity and/or cash. The Exchange further proposes to amend Rule 8.201-E(c)(2) to state that the term “commodity” is defined in Section 1(a)(9) of the Commodity Exchange Act.

Proposal to List and Trade Shares of the Trust

approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Notice, supra note 3.

⁸ 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 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.

The Shares would be issued by the Trust, a Delaware statutory trust.⁹ The Trust would operate pursuant to a trust agreement between Wilshire Phoenix Funds, LLC (“Sponsor”) and Delaware Trust Company. UMB Bank N.A. would act as custodian for the Trust’s cash and U.S. treasury assets (“Cash and Treasury Custodian”), and UMB Fund Services, Inc. would act as the transfer agent and administrator of the Trust. Coinbase Custody Trust Company, LLC would act as the Bitcoin custodian for the Trust (“Bitcoin Custodian”).

The investment objective of the Trust would be for the Shares to closely reflect the Bitcoin Treasury Index (“Index”), less the Trust’s liabilities and expenses. The Trust would have no assets other than (a) bitcoin and (b) short-term U.S. Treasury securities with a maturity of less than one year (“T-Bills”). The Trust would also hold U.S. dollars for short periods of time in connection with (i) the maturity of any T-Bills, (ii) the purchase and sale of bitcoin and/or T-Bills, and (iii) the payment of redemptions, if any, and fees and expenses of the Trust. Bitcoin would be held by the Bitcoin Custodian on behalf of the Trust, and T-Bills and U.S. dollars would be held by the Cash and Treasury Custodian on behalf of the Trust. The amount of bitcoin and T-Bills held by the Trust would be determined by the Index.¹⁰

The Index is calculated and published by Solactive AG (“Index Calculation Agent”).¹¹ The level of the Index is published on each business day at approximately 5:00 p.m. Eastern time

⁹ On May 21, 2019, the Trust filed Amendment 3 to Form S-1 under the Securities Act of 1933 (File No. 333-229187).

¹⁰ See Notice, supra note 3, 84 FR at 31374–76.

¹¹ According to the Exchange, the Index is a passive, rules-based index, and the Index Calculation Agent provides calculation services only. The Index Calculation Agent is not affiliated with the Sponsor and has represented that it and its employees are subject to market abuse laws and that the Index Calculation Agent has established and maintains processes and procedures to prevent the use and dissemination of material, non-public information regarding the Index. See id. at 31375 n.11.

and has two components: (1) a notional component representing bitcoin (“Bitcoin Component”); and (2) a notional component representing T-Bills (“Treasury Component”). On a monthly basis, the Index rebalances its weighting of the Bitcoin Component and the Treasury Component utilizing a mathematically derived passive rules-based methodology that is based on the daily volatility of the “Bitcoin Price.” The Bitcoin Price, which will be the price of bitcoin used to determine the weighting of the Bitcoin Component and the Treasury Component of the Index, as well as the value of bitcoin held by the Trust, is based on the Chicago Mercantile Exchange (“CME”) CF Bitcoin Reference Rate (“CME CF BRR”). On a monthly basis, following the calculation of the weighting of the components of the Index, the Trust would rebalance its holdings in bitcoin and T-Bills in order to closely replicate the Index.¹²

According to the proposal, the Trust may offer and sell Shares from time to time through (1) underwriters, placement agents, or distributors, or such other means as the Sponsor may determine or (2) through subscription agreements. In addition, upon at least five business days’ prior written notice, a shareholder may redeem all or a portion of its Shares on the last business day of each calendar month. All redemptions will be based on the net asset value (“NAV”) of Shares submitted for redemption, determined as of the last business day of the applicable calendar month. In general, redemptions will be deemed to occur on a “first-in first-out” basis among Shares held by a particular shareholder.¹³

¹² See id. at 31375–76.

¹³ See id. at 31377.

II. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEArca-2019-39 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 such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. 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, to promote just and equitable principles of trade," 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,¹⁷ 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).

¹⁷ See Notice, supra note 3.

1. What are commenters' views of the Exchange's assertion that the "proper 'market' that one should evaluate to determine whether the 'market' is inherently resistant to manipulation is the segment of the market formed by the Constituent Platforms"?¹⁸ What are commenters' views of the Exchange's conclusion that, while bitcoin is listed and traded on a number of markets and platforms, the CME CF BRR exclusively utilizes its Constituent Platforms to determine the value of the CME CF BRR, and therefore, use of the CME CF BRR would mitigate the effects of potential manipulation of the bitcoin market?¹⁹ Additionally, what are commenters' views of the Exchange's assertion that the capital necessary to maintain a significant presence on any Constituent Platform would make manipulation of the CME CF BRR unlikely?²⁰

2. What are commenters' views of the Exchange's assertion that the CME CF BRR is not susceptible to manipulation? What are commenters' views of the Exchange's assertion that the linkage between the bitcoin markets and the presence of arbitrageurs in those markets means that the manipulation of the price of bitcoin on any Constituent Platform would likely require overcoming the liquidity supply of such arbitrageurs who are potentially eliminating any cross-market pricing differences?²¹

3. What are commenters' views of the Exchange's arguments that substantially similar price discovery and degrees of price volatility among each of the Constituent Platforms

¹⁸ See id. at 31378.

¹⁹ See id. at 31383.

²⁰ See id. at 31379.

²¹ See id. ("The linkage between the [b]itcoin markets and the presence of arbitrageurs . . . in those markets means that the manipulation of the price of [b]itcoin on any Constituent Platform would likely require overcoming the liquidity supply of such arbitrageurs who are potentially eliminating any cross-market pricing differences.").

support the conclusion that robust arbitrage trading and liquidity provision occurs among the Constituent Platforms?²²

4. What are commenters' views on whether the Constituent Platforms are regulated markets of significant size related to bitcoin? What are commenters' views on the Exchange's assertion that, because the CME CF BRR is calculated based solely on the price data from the Constituent Platforms, manipulating the CME CF BRR must necessarily entail manipulating the price data at one or more Constituent Platforms and that anyone attempting to manipulate the Trust would need to place numerous large sized trades on any of the Constituent Platforms that are used to calculate the CME CF BRR?²³ What are commenters' views on the Exchange's argument that, if an attempt were made to manipulate the Trust, the administrator for the CME CF BRR and the CME would be able to detect the manipulative trading patterns?²⁴ What are commenters' views on the Exchange's assertion that the CME and the Exchange would be able, in the case of any suspicious trades, to share surveillance information with the Constituent Platforms and to discover all material trade information including the identities of the customers placing the trades?²⁵

5. What are commenters' views of the Exchange's assertion that the trading volume in CME bitcoin futures makes the CME a regulated market of significant size related to bitcoin?²⁶ Additionally, what are commenters' views of the Exchange's assertions that, in comparison, the bitcoin futures market is larger in size as a percentage of bitcoin spot trading

²² See id. at 31378–79.

²³ See id. at 31380 & n.50.

²⁴ See id. at 31380 & n.51.

²⁵ See id. at 31380.

²⁶ See id.

than the size of the gold futures markets as a percentage of OTC gold trading?²⁷ 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?

6. What are commenters' views on the trading relationship between the CME and the Constituent Platforms or the bitcoin spot market more broadly? For example, what is the relative size of these markets, and where does bitcoin price formation occur? Does the market, spot or futures, in which price formation occurs affect commenters' analysis of whether it is reasonably likely that someone attempting to manipulate the Shares would have to trade on the CME, or that trading in the Shares would be the predominant influence on prices on the CME?

7. What are commenters' views on the Exchange's representation that, "given the nature of the Trust and the composition of its assets, trading in the Trust would not be the predominant influence on prices (i) that make up the CME CF BRR, (ii) in the [b]itcoin futures market on the CME, or (iii) in the USD/BTC spot market on the Constituent Platforms?"²⁸ In addition, what are commenters' views on the Exchange's conclusion that, because the Trust will only purchase bitcoin if (1) required to as a result of the monthly rebalancing of its assets or (2) if it sells Shares to new investors, and will only sell bitcoin if required to as a result of the monthly rebalancing of its assets, "trading in the Shares will not cause the Trust to purchase or sell [b]itcoin and will therefore not influence the price of [b]itcoin?"²⁹

8. According to the Exchange, (a) the level of the Index is published on each business day at approximately 5:00 p.m. Eastern time (U.S.), (b) the CME CF BRR aggregates

²⁷ See id.

²⁸ See id. at 31381.

²⁹ See id.

the trade flow of the Constituent Platforms during a calculation window into the U.S. dollar price of one bitcoin as of 4:00 p.m. London time, (c) the Trust's NAV will be determined daily as of 4:00 p.m. Eastern time (U.S.), and (d) the Trust will determine the price of the Trust's bitcoin by reference to the Bitcoin Reference Rate, which is published between 4:00 p.m. and 4:30 p.m. London time. What are commenters' views on whether (and if so, how) the variation in timing with respect to the calculation and price determination of the underlying bitcoin price, Index level, and NAV would affect the susceptibility of the Shares to fraudulent and manipulative acts and practices? What are commenters' views on whether this variation in timing would affect the ability of arbitrage to keep the price of the Shares aligned with the value of the portfolio at all times during the trading day?

9. What are commenters' views on the requirement that shareholders may redeem all or a portion of its Shares only on the last business day of each calendar month?³⁰ What are commenters' views on whether this restriction on redemptions would affect the ability of arbitrage to keep the price of the Shares aligned with the value of the portfolio continuously during the trading day over each monthly period? What are commenters' views on whether this restriction on redemptions would affect the resistance of the Shares to manipulation?

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

³⁰ See supra note 13 and accompanying text.

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.³¹

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from 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 from publication in the Federal Register].

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEArca-2019-39 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-2019-39. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all

³¹ 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).

comments on the Commission's Internet website (<http://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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2019-39 and should be submitted by [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³²

Jill M. Peterson
Assistant Secretary

³² 17 CFR 200.30-3(a)(57).