*Select Service Contract 61 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–7, CP2023–7.

**Sarah Sullivan,**

*Attorney, Ethics & Legal Compliance.*

[FR Doc. 2022–22313 Filed 10–13–22; 8:45 am]

**BILLING CODE 7710–12–P**

## POSTAL SERVICE

### Product Change—Priority Mail Express, Priority Mail, First-Class Package Service, and Parcel Select Service Negotiated Service Agreement

**AGENCY:** Postal Service™.

**ACTION:** Notice.

**SUMMARY:** The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

**DATES:** *Date of required notice:* October 14, 2022.

**FOR FURTHER INFORMATION CONTACT:** Sean Robinson, 202–268–8405.

**SUPPLEMENTARY INFORMATION:** The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 3, 2022, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail, First-Class Package Service, and Parcel Select Service Contract 58 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–4, CP2023–4.

**Sarah Sullivan,**

*Attorney, Ethics & Legal Compliance.*

[FR Doc. 2022–22307 Filed 10–13–22; 8:45 am]

**BILLING CODE 7710–12–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–96011; File No. SR–CboeBZX–2022–006]**

### Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Order Disapproving a Proposed Rule Change To List and Trade Shares of the WisdomTree Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

October 11, 2022.

### I. Introduction

On January 25, 2022, 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 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the WisdomTree Bitcoin Trust (''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 February 14, 2022.[3]

On March 18, 2022, pursuant to Section 19(b)(2) of the Exchange 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] On May 13, 2022, the Commission instituted proceedings under Section 19(b)(2)(B) of the Exchange Act [6] to determine whether to approve or disapprove the proposed rule change,[7] and on August 4, 2022, the Commission designated a longer period for Commission action on the proposed rule change.[8]

This order disapproves the proposed rule change. The Commission concludes that BZX has not met its burden under the Exchange Act and the Commission's Rules of Practice to demonstrate that its proposal is consistent with the requirements of Exchange Act Section 6(b)(5), which requires, in relevant part, 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.'' [9]

When considering whether BZX's proposal to list and trade the Shares is designed to prevent fraudulent and manipulative acts and practices, the Commission applies the same analytical framework used in its orders considering previous proposals to list bitcoin [10]-based commodity trusts and bitcoin-based trust issued receipts to assess whether a listing exchange of an exchange-traded product (''ETP'') can meet its obligations under Exchange Act Section 6(b)(5).[11] As the Commission

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 94184 (Feb. 8, 2022), 87 FR 8318 (''Notice''). Comments received on the proposed rule change are available at: *https://www.sec.gov/comments/sr-cboebzx-2022-006/srcboebzx2022006.htm.* BZX previously filed, and the Commission disapproved, a substantially similar proposal to list and trade the Shares of the Trust. *See* Notice of Filing of a Proposed Rule Change to List and Trade Shares of the WisdomTree Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 91521 (Apr. 9, 2021), 86 FR 19917 (Apr. 15, 2021); Order Disapproving a Proposed Rule Change To List and Trade Shares of the WisdomTree Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93700 (Dec. 1, 2021), 86 FR 69322 (Dec. 7, 2021) (SR–CboeBZX–2021–024) (''WisdomTree Order'').

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 94476, 87 FR 16800 (Mar. 24, 2022).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 94907, 87 FR 30546 (May 19, 2022).

[8] *See* Securities Exchange Act Release No. 95422, 87 FR 48738 (Aug. 10, 2022).

[9] 15 U.S.C. 78f(b)(5).

[10] Bitcoins are digital assets that are issued and transferred via a decentralized, open-source protocol used by a peer-to-peer computer network through which transactions are recorded on a public transaction ledger known as the ''bitcoin blockchain.'' The bitcoin protocol governs the creation of new bitcoins and the cryptographic system that secures and verifies bitcoin transactions. *See, e.g.,* Notice, 87 FR at 8320.

[11] *See* Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To List and Trade Shares of the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (Aug. 1, 2018) (SR-BatsBZX–2016–30) (''Winklevoss Order''); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, 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, Securities Exchange Act Release No. 88284 (Feb. 26, 2020), 85 FR 12595 (Mar. 3, 2020) (SR–NYSEArca–2019–39) (''USBT Order''); WisdomTree Order; Order Disapproving a Proposed Rule Change To List and Trade Shares of the Valkyrie Bitcoin Fund Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares), Securities Exchange Act Release No. 93859 (Dec. 22, 2021), 86 FR 74156 (Dec. 29, 2021) (SR–NYSEArca–2021–31) (''Valkyrie Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the Kryptoin Bitcoin ETF Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93860 (Dec. 22, 2021), 86 FR 74166 (Dec. 29, 2021) (SR–CboeBZX–2021–029) (''Kryptoin Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the First Trust SkyBridge Bitcoin ETF Trust Under NYSE Arca Rule 8.201–E, Securities Exchange Act Release No. 94006 (Jan. 20, 2022), 87 FR 3869 (Jan. 25, 2022) (SR–NYSEArca–2021–37) (''SkyBridge Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the Wise Origin Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 94080 (Jan. 27, 2022), 87 FR 5527 (Feb. 1, 2022) (SR–CboeBZX–2021–039) (''Wise Origin Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the NYDIG Bitcoin ETF Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares), Securities Exchange Act Release No. 94395 (Mar. 10, 2022), 87 FR 14932 (Mar. 16, 2022) (SR–NYSEArca–2021–57) (''NYDIG Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the Global X Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 94396 (Mar. 10, 2022), 87 FR 14912 (Mar. 16, 2022) (SR–CboeBZX–2021–052) (''Global X Order''); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Shares of the ARK 21Shares Bitcoin ETF Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 94571 (Mar. 31, 2022), 87 FR 20014 (Apr. 6, 2022) (SR–CboeBZX–2021–051) (''ARK 21Shares Order'');

has explained, an exchange that lists bitcoin-based ETPs [12] can meet its obligations under Exchange Act Section 6(b)(5) by demonstrating that the exchange has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to the underlying or reference bitcoin assets.[13]

In this context, the terms ''significant market'' and ''market of significant size'' include a market (or group of markets) as to which (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, so that a surveillance-sharing agreement would assist in detecting and deterring misconduct, and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[14] A surveillance-sharing agreement must be entered into with a ''significant market'' to assist in detecting and deterring manipulation of the ETP, because a person attempting to manipulate the ETP is reasonably likely to also engage in trading activity on that ''significant market.'' [15]

Although surveillance-sharing agreements are not the exclusive means by which a listing exchange of a commodity-trust ETP can meet its obligations under Exchange Act Section 6(b)(5), such agreements have previously provided the basis for the exchanges that list commodity-trust ETPs to meet those obligations, and the Commission has historically recognized their importance. And where, as here, a listing exchange fails to establish that other means to prevent fraudulent and manipulative acts and practices will be sufficient, the listing exchange must enter into a surveillance-sharing agreement with a regulated market of significant size because such agreements detect and deter fraudulent and manipulative activity.[16]

The Commission has long recognized that surveillance-sharing agreements ''provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur'' and thus ''enable the Commission to continue to effectively protect investors and promote the public interest.'' [17] As the Commission has emphasized, it is essential for an exchange listing a derivative securities product to have the ability that surveillance-sharing agreements provide to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules.[18] The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.[19]

The Commission has explained that the ability of a national securities exchange to enter into surveillance-sharing agreements ''furthers the protection of investors and the public interest because it will enable the [e]xchange to conduct prompt investigations into possible trading violations and other regulatory improprieties.'' [20] The Commission has also long taken the position that surveillance-sharing agreements are important in the context of exchange listing of derivative security products, such as equity options, because a surveillance-sharing agreement ''permits the sharing of information'' that is ''necessary to detect'' manipulation and ''provide[s] an important deterrent to manipulation because [it] facilitate[s] the availability of information needed to fully investigate a potential

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Order Disapproving a Proposed Rule Change To List and Trade Shares of the One River Carbon Neutral Bitcoin Trust Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares), Securities Exchange Act Release No. 94999 (May 27, 2022), 87 FR 33548 (June 2, 2022) (SR–NYSEArca–2021–67) (''One River Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the Bitwise Bitcoin ETP Trust Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares), Securities Exchange Act Release No. 95179 (June 29, 2022), 87 FR 40282 (July 6, 2022) (SR–NYSEArca–2021–89) (''Bitwise Order''); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Shares of Grayscale Bitcoin Trust under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares), Securities Exchange Act Release No. 95180 (June 29, 2022), 87 FR 40299 (July 6, 2022) (SR–NYSEArca–2021–90) (''Grayscale Order''). In addition, orders were issued by delegated authority on the following matters: Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the SolidX Bitcoin Trust Under NYSE Arca Equities Rule 8.201, Securities Exchange Act Release No. 80319 (Mar. 28, 2017), 82 FR 16247 (Apr. 3, 2017) (SR–NYSEArca–2016–101) (''SolidX Order''); Order Disapproving a Proposed Rule Change To List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF, Securities Exchange Act Release No. 83904 (Aug. 22, 2018), 83 FR 43934 (Aug. 28, 2018) (SR–NYSEArca–2017–139) (''ProShares Order''); Order Disapproving a Proposed Rule Change To List and Trade the Shares of the GraniteShares Bitcoin ETF and the GraniteShares Short Bitcoin ETF, Securities Exchange Act Release No. 83913 (Aug. 22, 2018), 83 FR 43923 (Aug. 28, 2018) (SR–CboeBZX–2018–001) (''GraniteShares Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the VanEck Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93559 (Nov. 12, 2021), 86 FR 64539 (Nov. 18, 2021) (SR–CboeBZX–2021–019) (''VanEck Order''); Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 2, To List and Trade Shares of the Teucrium Bitcoin Futures Fund Under NYSE Arca Rule 8.200–E, Commentary .02 (Trust Issued Receipts), Securities Exchange Act Release No. 94620 (Apr. 6, 2022), 87 FR 21676 (Apr. 12, 2022) (SR–NYSEArca–2021–53) (''Teucrium Order''); Order Granting Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, To List and Trade Shares of the Valkyrie XBTO Bitcoin Futures Fund Under Nasdaq Rule 5711(g), Securities Exchange Act Release No. 94853 (May 5, 2022), 87 FR 28848 (May 11, 2022) (SR–NASDAQ–2021–066) (''Valkyrie XBTO Order'').

[12] As used in this order, the term ''ETFs'' refers to open-end exchange-traded funds that register the offer and sale of their shares under the Securities Act of 1933 (''Securities Act'') and are regulated as investment companies under the Investment Company Act of 1940 (''1940 Act''). The term ''ETPs'' refers to exchange-traded products that register the offer and sale of their shares under the Securities Act but are not regulated under the 1940 Act, such as commodity trusts and trust issued receipts.

[13] *See* USBT Order, 85 FR at 12596. *See also* Winklevoss Order, 83 FR at 37592 n.202 and accompanying text (discussing previous Commission approvals of commodity-trust ETPs); GraniteShares Order, 83 FR at 43925–27 nn.35–39 and accompanying text (discussing previous Commission approvals of commodity-futures ETPs).

[14] *See* Winklevoss Order, 83 FR at 37594. *See also* USBT Order, 85 FR at 12596–97; WisdomTree Order, 86 FR at 69322.

[15] *See* USBT Order, 85 FR at 12597.

[16] *See* Amendment to Rule Filing Requirements for Self-Regulatory Organizations Regarding New Derivative Securities Products, Securities Exchange Act Release No. 40761 (Dec. 8, 1998), 63 FR 70952, 70954, 70959 (Dec. 22, 1998) (File No. S7–13–98) (''NDSP Adopting Release''). *See also* Winklevoss Order, 83 FR at 37593–94; ProShares Order, 83 FR at 43936; GraniteShares Order, 83 FR at 43924; USBT Order, 85 FR at 12596.

[17] NDSP Adopting Release, 63 FR at 70954, 70959. *See also id.* at 70959 (''It is essential that the SRO [self-regulatory organization] have the ability to obtain the information necessary to detect and deter market manipulation, illegal trading and other abuses involving the new derivative securities product. Specifically, there should be a comprehensive ISA [information-sharing agreement] that covers trading in the new derivative securities product and its underlying securities in place between the SRO listing or trading a derivative product and the markets trading the securities underlying the new derivative securities product.'').

[18] *See* NDSP Adopting Release, 63 FR at 70959.

[19] *See* Winklevoss Order, 83 FR at 37592–93 (discussing Letter from Brandon Becker, Director, Division of Market Regulation, Commission, to Gerard D. O'Connell, Chairman, Intermarket Surveillance Group (June 3, 1994), *available at https://www.sec.gov/divisions/marketreg/mr-noaction/isg060394.htm*).

[20] Securities Exchange Act Release No. 27877 (Apr. 4, 1990), 55 FR 13344 (Apr. 10, 1990) *(N*otice of Filing and Order Granting Accelerated Approval to Proposed Rule Change Regarding Cooperative Agreements With Domestic and Foreign Self-Regulatory Organizations) (SR–NYSE–90–14).

manipulation if it were to occur.'' [21] With respect to ETPs, when approving the listing and trading of one of the first commodity-linked ETPs—a commodity-linked exchange-traded note—on a national securities exchange, the Commission continued to emphasize the importance of surveillance-sharing agreements, stating that the listing exchange had entered into surveillance-sharing agreements with each of the futures markets on which pricing of the ETP would be based and stating that ''[t]hese agreements should help to ensure the availability of information necessary to detect and deter potential manipulations and other trading abuses, thereby making [the commodity-linked notes] less readily susceptible to manipulation.'' [22]

Consistent with these statements, for the commodity-trust ETPs approved to date for listing and trading, there has been in *every* case at least one significant, regulated market for trading futures on the underlying commodity and the ETP listing exchange has entered into surveillance-sharing agreements with, or held Intermarket Surveillance Group (''ISG'') membership in common with, that market.[23] Moreover, the surveillance-sharing agreements have been consistently present whenever the Commission has approved the listing and trading of derivative securities, even where the underlying securities were also listed on national securities exchanges—such as options based on an index of stocks traded on a national securities exchange—and were thus subject to the Commission's direct regulatory authority.[24]

Listing exchanges have also attempted to demonstrate that other means besides surveillance-sharing agreements will be sufficient to prevent fraudulent and manipulative acts and practices, including that the bitcoin market as a whole or the relevant underlying bitcoin market is ''uniquely'' and ''inherently'' resistant to fraud and manipulation.[25] In response, the Commission has stated that, if a listing exchange could establish that the underlying market inherently possesses a unique resistance to manipulation beyond the protections that are utilized by traditional commodity or securities markets, the listing market would not necessarily need to enter into a surveillance-sharing agreement with a regulated significant market.[26] Such resistance to fraud and manipulation, however, must be novel and beyond those protections that exist in traditional commodity markets or securities markets for which surveillance-sharing agreements in the context of listing derivative securities products have been consistently present.[27]

Here, BZX contends that approval of the proposal is consistent with Section 6(b)(5) of the Exchange Act, and, in particular, Section 6(b)(5)'s requirement 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.[28] As discussed in more detail below, BZX asserts that the proposal is consistent with Section 6(b)(5) of the Exchange Act because the Exchange has a comprehensive surveillance-sharing agreement with a regulated market of significant size,[29] and there exist other means to prevent fraudulent and manipulative acts and practices that are sufficient to justify dispensing with the detection and deterrence of fraud and manipulation provided by a comprehensive surveillance-sharing agreement with a regulated market of significant size related to spot bitcoin.[30]

In the analysis that follows, the Commission examines whether the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act by addressing: in Section III.B.1 assertions that other means besides surveillance-sharing agreements will be sufficient to prevent fraudulent and manipulative acts and practices; in Section III.B.2 assertions that BZX has entered into a comprehensive surveillance-sharing agreement with a regulated market of significant size related to spot bitcoin; in Section III.B.3 assertions that the

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[21] Securities Exchange Act Release No. 33555 (Jan. 31, 1994), 59 FR 5619, 5621 (Feb. 7, 1994) (SR–Amex–93–28) (order approving listing of options on American Depositary Receipts (''ADR'')) (''ADR Option Order''). The Commission further stated that it ''generally believes that having a comprehensive surveillance sharing agreement in place, between the exchange where the ADR option trades and the exchange where the foreign security underlying the ADR primarily trades, will ensure the integrity of the marketplace. The Commission further believes that the ability to obtain relevant surveillance information, including, among other things, the identity of the ultimate purchasers and sellers of securities, is an essential and necessary component of a comprehensive surveillance sharing agreement.'' *Id.*

[22] Securities Exchange Act Release No. 35518 (Mar. 21, 1995), 60 FR 15804, 15807 (Mar. 27, 1995) (SR–Amex–94–30). *See also* Winklevoss Order, 83 FR at 37593 n.206.

[23] *See* Winklevoss Order, 83 FR at 37594. See also SolidX Order, 82 FR at 16254–55 n.125 for a discussion of the representations the Commission has received from listing exchanges in connection with proposals to list commodity-trust ETPs about the existence of a significant, regulated market for trading futures on the underlying commodity and the listing exchanges' ability to obtain trading information with respect to such market. Furthermore, the Commission notes that each of those cases dealt with a futures market that had been trading for a long period of time before an exchange proposed a commodity-trust ETP based on the asset underlying those futures. For example, silver futures and gold futures began trading in 1933 and 1974, respectively, *see https://www.cmegroup.com/media-room/historical-first-trade-dates.html,* and the first ETPs based on spot silver and gold were approved for listing and trading in 2006 and 2004. *See* Securities Exchange Act Release No. 53521 (Mar. 20, 2006), 71 FR 14967 (Mar. 24, 2006) (SR–Amex–2005–072) (order approving iShares Silver Trust); Securities Exchange Act Release No. 50603 (Oct. 28, 2004), 69 FR 64614 (Nov. 5, 2004) (SR–NYSE–2004–22) (order approving streetTRACKS Gold Shares). Platinum futures and palladium futures began trading in 1956 and 1968, respectively, *see https://www.cmegroup.com/media-room/historical-first-trade-dates.html,* and the first ETPs based on spot platinum and palladium were approved for listing and trading in 2009. *See* Securities Exchange Act Release No. 61220 (Dec. 22, 2009), 74 FR 68895 (Dec. 29, 2009) (SR–NYSEArca–2009–94) (order approving ETFS Palladium Trust); Securities Exchange Act Release No. 61219 (Dec. 22, 2009), 74 FR 68886 (Dec. 29, 2009) (SR–NYSEArca–2009–95) (order approving ETFS Platinum Trust). Copper futures began trading in 1988, *see https://www.cmegroup.com/media-room/historical-first-trade-dates.html#metals,* and the first ETPs based on spot copper were approved for listing and trading in 2012. *See* Securities Exchange Act Release No. 68440 (Dec. 14, 2012), 77 FR 75468 (Dec. 20, 2012) (SR–NYSEArca–2012–28) (order approving JPM XF Physical Copper Trust).

[24] *See* USBT Order, 85 FR at 12597; ADR Option Order, 59 FR at 5621. The Commission has also recognized that surveillance-sharing agreements provide a necessary deterrent to fraud and manipulation in the context of index options even when (i) all of the underlying index component stocks were either registered with the Commission or exempt from registration under the Exchange Act; (ii) all of the underlying index component stocks were traded in the U.S. either directly or as ADRs on a national securities exchange; and (iii) effective international ADR arbitrage alleviated concerns over the relatively smaller ADR trading volume, helped to ensure that ADR prices reflected the pricing on the home market, and helped to ensure more reliable price determinations for settlement purposes, due to the unique composition of the index and reliance on ADR prices. *See* Securities Exchange Act Release No. 26653 (Mar. 21, 1989), 54 FR 12705, 12708 (Mar. 28, 1989) (SR-Amex-87–25) (stating that ''surveillance-sharing agreements between the exchange on which the index option trades and the markets that trade the underlying securities are necessary'' and that ''[t]he exchange of surveillance data by the exchange trading a stock index option and the markets for the securities comprising the index is important to the detection and deterrence of intermarket manipulation''). And the Commission has explained that surveillance-sharing agreements ''ensure the availability of information necessary to detect and deter potential manipulations and other trading abuses'' even when approving options based on an index of stocks traded on a national securities exchange. *See* Securities Exchange Act Release No. 30830 (June 18, 1992), 57 FR 28221, 28224 (June 24, 1992) (SR–Amex–91–22).

[25] *See* USBT Order, 85 FR at 12597.

[26] *See* Winklevoss Order, 83 FR at 37580, 37582–91 (addressing assertions that ''bitcoin and [spot] bitcoin markets,'' generally, as well as one bitcoin trading platform, specifically, have unique resistance to fraud and manipulation). *See also* USBT Order, 85 FR at 12597.

[27] *See* USBT Order, 85 FR at 12597, 12599.

[28] *See* Notice, 87 FR at 8327–29, 8331–34.

[29] *See id.* at 8327–28, 8332–33.

[30] *See id.* at 8328–29, 8333.

Commission must approve the proposal because the Commission has approved the listing and trading of ETFs and ETPs that hold CME bitcoin futures; and in Section III.C assertions that the proposal is consistent with the protection of investors and the public interest.

Based on its analysis, the Commission concludes that BZX has not established that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with the detection and deterrence of fraud and manipulation provided by a comprehensive surveillance-sharing agreement with a regulated market of significant size related to spot bitcoin. The Commission further concludes that BZX has not established that it has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to spot bitcoin, the underlying bitcoin assets that would be held by the Trust. As discussed further below, BZX repeats various assertions made in prior bitcoin-based ETP proposals that the Commission has previously addressed and rejected, including in the prior WisdomTree Order—and more importantly, BZX does not respond to the Commission's reasons for rejecting those assertions. As a result, the Commission is unable to find that the proposed rule change is consistent with the statutory requirements of Exchange Act Section 6(b)(5).

The Commission emphasizes that its disapproval of this proposed rule change does not rest on an evaluation of the relative investment quality of a product holding spot bitcoin versus a product holding CME bitcoin futures, or an assessment of whether bitcoin, or blockchain technology more generally, has utility or value as an innovation or an investment. Rather, the Commission is disapproving this proposed rule change because, as discussed below, BZX has not met its burden to demonstrate that its proposal is consistent with the requirements of Exchange Act Section 6(b)(5).

## II. Description of the Proposed Rule Change

As described in more detail in the Notice,[31] 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 would be to gain exposure to the price of bitcoin, less expenses and liabilities of the Trust's operation.[32] The Trust would hold bitcoin and would calculate the Trust's net asset value (''NAV'') daily based on the value of bitcoin as reflected by the CF Bitcoin US Settlement Price (''Reference Rate''). The Reference Rate was created, and is administered, by CF Benchmarks Ltd. (''Benchmark Administrator''), an independent entity.[33] The Reference Rate is a once-a-day benchmark rate of the U.S. dollar price of bitcoin (USD/BTC), calculated as of 4:00 p.m. E.T., and is based on materially the same methodology (except calculation time) [34] as the Benchmark Administrator's CME CF Bitcoin Reference Rate (''BRR''), which is the rate on which CME bitcoin futures contracts are cash-settled in U.S. dollars.[35] The Reference Rate aggregates the trade flow of several bitcoin platforms (current platform composition of the Reference Rate is Bitstamp, Coinbase, Gemini, itBit, and Kraken, collectively, ''Constituent Bitcoin Platforms''). In calculating the Reference Rate, the methodology creates a joint list of the trade prices and sizes from the Constituent Bitcoin Platforms between 3:00 p.m. E.T. and 4:00 p.m. E.T. and then divides this list into 12 equally-sized time intervals of five minutes and calculates the volume-weighted median trade price for each of those time intervals. The Reference Rate is the arithmetic mean of these 12 volume-weighted median trade prices.[36]

Each Share would represent a fractional undivided beneficial interest in and ownership of the Trust. The Trust's assets would consist of bitcoin held by the Custodian on behalf of the Trust. 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.[37]

The Administrator would determine the NAV and NAV per Share of the Trust on each day that the Exchange is open for regular trading after 4:00 p.m. E.T. (often by 5:30 p.m. E.T. and almost always by 8:00 p.m. E.T.). The NAV of the Trust would be the aggregate value of the Trust's assets, less total liabilities of the Trust, each determined on the basis of generally accepted accounting principles. In determining the Trust's NAV, the Administrator would value the bitcoin held by the Trust based on the price set by the Reference Rate as of 4:00 p.m. E.T.[38]

The Trust would provide information regarding the Trust's bitcoin holdings, as well as an Intraday Indicative Value (''IIV'') per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.). The IIV would be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the value of the Trust's bitcoin holdings during the trading day.[39]

When the Trust sells or redeems its Shares, it would do so in ''in-kind'' transactions in blocks of 50,000 Shares at the Trust's NAV. Authorized participants would deliver, or facilitate the delivery of, bitcoin to the Trust's account with the Custodian in exchange for Shares when they purchase Shares, and the Trust, through the Custodian, would deliver bitcoin to such authorized participants when they redeem Shares with the Trust.[40]

Further, BZX represents that, although the Trust would not be an investment company registered under the 1940 Act, in seeking to protect investors and the public, the Sponsor has taken 1940 Act considerations into account in the structure of the Trust's operation.[41]

## III. Discussion

### *A. The Applicable Standard for Review*

The Commission must consider whether BZX's proposal is consistent with the Exchange Act. Section 6(b)(5) of the Exchange Act requires, in relevant part, that the rules of a national securities exchange be designed ''to

[31] *See supra* note 3. According to the Exchange, the Trust has filed an amended registration statement on Form S–1 under the Securities Act dated December 8, 2021 (File No. 333–254134) (''Registration Statement'').

[32] *See* Notice, 87 FR at 8329. WisdomTree Digital Commodity Services, LLC (''Sponsor'') is the sponsor of the Trust, and Delaware Trust Company is the trustee. U.S. Bank, N.A. would serve as the custodian of the Trust (''Custodian''). U.S. Bancorp Fund Services, LLC dba U.S. Bank Global Fund Services would be the administrator and transfer agent (''Administrator'') of the Trust. Foreside Fund Services LLC would be the marketing agent in connection with the creation and redemption of Shares. *See id.* at 8318–19, 8329.

[33] *See id.* at 8329. The Commission notes that the Benchmark Administrator's website states that the Reference Rate was *discontinued* as of April 2022. *See https://www.cfbenchmarks.com/blog/cessation-of-the-cf-bitcoin-us-settlement-price-and-cf-ether-dollar-us-settlement-price.* The Exchange has not amended its filing to indicate how the Trust would value bitcoin following discontinuation of the Reference Rate.

[34] The Reference Rate is calculated as of 4:00 p.m. E.T., whereas the BRR is calculated as of 4:00 p.m. London Time. *See id.* at 8329 n.77.

[35] *See id.* at 8329.

[36] *See id.* at 8329–30.

[37] *See id.* at 8329.

[38] *See id.* at 8330.

[39] *See id.* at 8334.

[40] *See id.* at 8329.

[41] *See id.* at 8323–24. For a more detailed description of those considerations, *see infra* note 221 and accompanying text.

prevent fraudulent and manipulative acts and practices'' and ''to protect investors and the public interest.'' [42] Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization ['SRO'] that proposed the rule change.'' [43]

The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[44] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.[45] Moreover, ''unquestioning reliance'' on an SRO's representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.[46]

*B. Whether BZX Has Met Its Burden To Demonstrate That the Proposal Is Designed To Prevent Fraudulent and Manipulative Acts and Practices*

(1) Assertions That Other Means Besides Surveillance-Sharing Agreements Will Be Sufficient to Prevent Fraudulent and Manipulative Acts and Practices

(i) Assertions Regarding the Bitcoin Market

As stated above, the Commission has recognized that a listing exchange could demonstrate that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with the detection and deterrence of fraud and manipulation provided by a comprehensive surveillance-sharing agreement with a regulated market of significant size related to the underlying bitcoin assets, including by demonstrating that the bitcoin market as a whole or the relevant underlying bitcoin market is uniquely and inherently resistant to fraud and manipulation.[47] Such resistance to fraud and manipulation, however, must be novel and beyond those protections that exist in traditional commodities or securities markets.[48]

(a) BZX's Assertions

BZX asserts that bitcoin is resistant to price manipulation. According to BZX, the geographically diverse and continuous nature of bitcoin trading render it difficult and prohibitively costly to manipulate the price of bitcoin.[49] BZX asserts that fragmentation across bitcoin platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of bitcoin prices through continuous trading activity challenging.[50] In addition, BZX states that, to the extent that there are bitcoin platforms engaged in or allowing wash trading or other activity intended to manipulate the price of bitcoin on other markets, such pricing does not normally impact prices on other platforms because participants will generally ignore markets with quotes that they deem non-executable.[51] BZX further argues 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 single venue would require manipulation of the global bitcoin price in order to be effective.[52] According to BZX, arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular bitcoin trading venue.[53] As a result, BZX concludes that the potential for manipulation on a bitcoin trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.[54]

BZX also argues that the significant liquidity in the spot bitcoin market and the impact of market orders on the overall price of bitcoin mean that attempting to move the price of bitcoin is costly and has grown more expensive over the past year.[55] According to BZX, in January 2020, for example, the cost to buy or sell $5 million worth of bitcoin averaged roughly 30 basis points (compared to 10 basis points in February 2021) with a market impact of 50 basis points (compared to 30 basis points in February 2021). For a $10 million market order, the cost to buy or sell was roughly 50 basis points (compared to 20 basis points in February 2021) with a market impact of 80 basis points (compared to 50 basis points in February 2021). BZX contends that, as the liquidity in the spot bitcoin market increases, it follows that the impact of $5 million and $10 million orders will continue to decrease.[56]

(b) Analysis

As with the previous proposals, the Commission here concludes that the record does not support a finding that the bitcoin market is inherently and uniquely resistant to fraud and manipulation. BZX does not sufficiently contest the presence of possible sources of fraud and manipulation in the spot bitcoin market that the Commission has identified in previous orders, including: (1) ''wash'' trading; [57] (2) persons with a

[42] 15 U.S.C. 78f(b)(5). Pursuant to Section 19(b)(2) of the Exchange Act, 15 U.S.C. 78s(b)(2), the Commission must disapprove a proposed rule change filed by a national securities exchange if it does not find that the proposed rule change is consistent with the applicable requirements of the Exchange Act. Exchange Act Section 6(b)(5) states that an exchange shall not be registered as a national securities exchange unless the Commission determines that ''[t]he rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the exchange.'' 15 U.S.C. 78f(b)(5).

[43] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[44] *See id.*

[45] *See id.*

[46] *Susquehanna Int'l Group, LLP* v. *Securities and Exchange Commission,* 866 F.3d 442, 447 (DC Cir. 2017) (''Susquehanna'').

[47] *See* USBT Order, 85 FR at 12597 n.23. The Commission is not applying a ''cannot be manipulated'' standard. Instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met. *See id.*

[48] *See id.* at 12597.

[49] *See* Notice, 87 FR at 8327 n.65.

[50] *See id.*

[51] *See id.*

[52] *See id.*

[53] *See id.*

[54] *See id.*

[55] *See id.* at 8328–29.

[56] *See id.*

[57] *See also CFTC* v. *Gemini Trust Co., LLC,* No. 22–cv–4563 (S.D.N.Y. filed June 2, 2022) (alleging, among other things, failure by Gemini personnel to disclose to the Commodity Futures Trading

dominant position in bitcoin manipulating bitcoin pricing; (3) hacking of the bitcoin network and trading platforms; (4) malicious control of the bitcoin network; (5) trading based on material, non-public information (for example, plans of market participants to significantly increase or decrease their holdings in bitcoin, new sources of demand for bitcoin, or the decision of a bitcoin-based investment vehicle on how to respond to a ''fork'' in the bitcoin blockchain, which would create two different, non-interchangeable types of bitcoin) or based on the dissemination of false and misleading information; (6) manipulative activity involving purported ''stablecoins,'' including Tether (USDT); and (7) fraud and manipulation at bitcoin trading platforms.[58]

BZX asserts that, because of how bitcoin trades occur, including through continuous means and through fragmented platforms, arbitrage across the bitcoin platforms essentially helps to keep global bitcoin prices aligned with one another, thus hindering manipulation. The Exchange, however, does not provide any data or analysis to support its assertions, either in terms of how closely bitcoin prices are aligned across different bitcoin trading venues or how quickly price disparities may be arbitraged away.[59] Here, the Exchange provides no evidence to support its assertion of efficient price arbitrage across bitcoin platforms, let alone any evidence that price arbitrage in the bitcoin market is novel or unique so as to warrant the Commission dispensing with the detection and deterrence of fraud and manipulation provided by a comprehensive surveillance-sharing agreement with a regulated market of significant size related to spot bitcoin. As stated above, ''unquestioning reliance'' on an SRO's representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.[60]

In any event, the Commission has explained that efficient price arbitrage is not sufficient to support the finding that a market is uniquely or inherently resistant to manipulation such that the Commission can dispense with surveillance-sharing agreements.[61] The Commission has stated, for example, that even for equity options based on securities listed on national securities exchanges, the Commission relies on surveillance-sharing agreements to detect and deter fraud and manipulation.[62] Equities that underlie such options trade on U.S. equity markets that are deep, liquid, and highly interconnected.[63] Moreover, BZX does not take into account that a market participant with a dominant ownership position would not find it prohibitively expensive to overcome the liquidity supplied by arbitrageurs and could use dominant market share to engage in manipulation.[64]

In addition, the Exchange makes the unsupported claim that, to the extent that there are bitcoin platforms engaged in or allowing wash trading or other activity intended to manipulate the price of bitcoin on other markets, market participants will generally ignore those platforms. However, the record does not demonstrate that wash trading and other possible sources of fraud and manipulation in the broader bitcoin spot market will be ignored by market participants.[65] Without the necessary data or other evidence, the Commission has no basis on which to conclude that bitcoin platforms are insulated from prices of others that engage in or permit fraud or manipulation.[66]

Further, the continuous nature of bitcoin trading does not support the finding that the bitcoin market is uniquely or inherently resistant to manipulation, and neither do linkages among markets, as BZX asserts.[67] Even in the presence of continuous trading or linkages among markets, formal (such as those with consolidated quotations or routing requirements) or otherwise (such as in the context of the fragmented, global bitcoin markets), manipulation of asset prices, as a general matter, can occur simply through trading activity that creates a false impression of supply or demand.[68]

Moreover, the data furnished by BZX regarding the cost to move the price of bitcoin, and the market impact of such attempts, are incomplete.[69] BZX does not provide meaningful analysis pertaining to how these figures compare to other markets or why one must conclude, based on the numbers provided, that the bitcoin market is costly to manipulate. In addition, BZX's analysis of the market impact of a mere two sample transactions is not sufficient evidence to conclude that the bitcoin market is resistant to manipulation.[70] The Commission thus concludes that the record does not demonstrate that the nature of bitcoin trading renders the bitcoin market inherently and uniquely resistant to fraud and manipulation. Even assuming that the Commission agreed with BZX's premise that it is costly to manipulate the bitcoin market and it is becoming increasingly so, any such evidence speaks only to establish that there is potentially some resistance to manipulation, not that it establishes *unique* resistance to manipulation that would justify dispensing with the detection and deterrence of fraud and manipulation provided by a comprehensive surveillance-sharing agreement with a regulated market of significant size related to spot bitcoin.[71]

Commission (''CFTC'') that Gemini customers could and did engage in collusive or wash trading).

[58] *See* USBT Order, 85 FR at 12600–01 & nn.66–67 (discussing J. Griffin & A. Shams, *Is Bitcoin Really Untethered?* (Oct. 28, 2019), *available at https://ssrn.com/abstract=3195066* and published in 75 J. Finance 1913 (2020)); Winklevoss Order, 83 FR at 37585–86; WisdomTree Order, 86 FR at 69326; Global X Order, 87 FR at 14916; ARK 21Shares Order, 87 FR at 20019; One River Order, 87 FR at 33554; Bitwise Order, 87 FR at 40283–84; Grayscale Order, 87 FR at 40305.

[59] For example, the Registration Statement states that ''[i]f increases in throughput on the Bitcoin network lag behind growth in usage of bitcoin, average fees and settlement times may increase considerably . . . which could adversely impact the value of the Shares.'' *See* Registration Statement at 20. BZX does not provide data or analysis to address, among other things, whether such risks of increased fees and bitcoin transaction settlement times may affect the arbitrage effectiveness that BZX asserts. *See also infra* note 73 and accompanying text (referencing statements made in the Registration Statement that contradict assertions made by BZX).

[60] *See supra* note 46.

[61] *See* Winklevoss Order, 83 FR at 37586; SolidX Order, 82 FR at 16256–57; USBT Order, 85 FR at 12601; WisdomTree Order, 86 FR at 69325; Valkyrie Order, 86 FR at 74159–60; Kryptoin Order, 86 FR at 74170; Wise Origin Order, 87 FR at 5531; ARK 21Shares Order, 87 FR at 20019; Grayscale Order, 87 FR at 40306.

[62] *See, e.g.,* USBT Order, 85 FR at 12601; WisdomTree Order, 86 FR at 69329; Valkyrie Order, 86 FR at 74160; Kryptoin Order, 86 FR at 74170; Wise Origin Order, 87 FR at 5531; ARK 21Shares Order, 87 FR at 20019; Grayscale Order, 87 FR at 40306–07.

[63] *See* Market Data Infrastructure Adopting Release, Securities Exchange Act Release No. 90610 (Dec. 9, 2020); 86 FR 18596, 18606–07 (Apr. 9, 2021); Market Data Infrastructure Proposing Release, Securities Exchange Act Release No. 88216 (Feb. 14, 2020), 85 FR 16726, 16728 (Mar. 24, 2020); Concept Release on Equity Market Structure, Securities Exchange Act Release No. 61358 (Jan. 14, 2010), 75 FR 3594 (Jan. 21, 2010). *See also* ARK 21Shares Order, 87 FR at 20019 n.70.

[64] *See, e.g.,* Winklevoss Order, 83 FR at 37584; USBT Order, 85 FR at 12600–01; WisdomTree Order, 86 FR at 69325.

[65] *See infra* note 89 and accompanying text.

[66] *See* USBT Order, 85 FR at 12601; WisdomTree Order, 86 FR at 69325.

[67] *See* Winklevoss Order, 83 FR at 37585 n.92 and accompanying text.

[68] *See id.* at 37585. *See also, e.g.,* WisdomTree Order, 86 FR at 69325–26.

[69] *See* WisdomTree Order, 86 FR at 69326.

[70] Aside from stating that the ''statistics are based on samples of bitcoin liquidity in USD (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase Pro, Gemini, Bitstamp, Kraken, LMAX Exchange, BinanceUS, and OKCoin during February 2021,'' the Exchange provides no other information pertaining to the methodology used to enable the Commission to evaluate these findings or their significance. *See* Notice, 87 FR at 8328–29 nn.74–75.

[71] *See* USBT Order, 85 FR at 12601; WisdomTree Order, 86 FR at 69326; Kryptoin Order, 86 FR at

Continued

Finally, BZX does not address risk factors specific to the bitcoin blockchain and bitcoin platforms, described in the Trust's Registration Statement, that undermine the argument that the bitcoin market is inherently resistant to fraud and manipulation.[72] For example, the Registration Statement acknowledges that ''bitcoin [platforms] on which bitcoin trades are relatively new and, in some cases, unregulated, and, therefore, may be more exposed to fraud and security breaches than established, regulated exchanges for other financial assets or instruments''; that ''as an intangible asset without centralized issuers or governing bodies, bitcoin has been, and may in the future be, subject to security breaches, cyberattacks or other malicious activities''; that ''[t]he trading for bitcoin occurs on multiple trading venues that have various levels and types of regulation, but are not regulated in the same manner as traditional stock and bond exchanges'' and if these spot markets ''do not operate smoothly or face technical, security or regulatory issues, that could impact the ability of Authorized Participants to make markets in the Shares'' which could lead to ''trading in the Shares [to] occur at a material premium or discount to the NAV''; that the bitcoin blockchain could be vulnerable to a ''51% attack,'' in which a bad actor that controls a majority of the processing power dedicated to mining on the bitcoin network may be able to alter the bitcoin blockchain on which the bitcoin network and bitcoin transactions rely; that ''some bitcoin [platforms] have been closed due to fraud and manipulative activity'' and that larger bitcoin platforms are more likely to be ''appealing targets for hackers''; and that ''[b]itcoin [platforms] may be more exposed to the risk of market manipulation than exchanges for more traditional assets.'' [73] The Exchange also acknowledges in the proposed rule change that ''largely unregulated currency and spot commodity markets do not provide the same protections as the markets that are subject to the Commission's oversight.'' [74]

(ii) Assertions Regarding the Reference Rate and the Create/Redeem Process

(a) BZX's Assertions

The Exchange also asserts that the Reference Rate, which it uses to value the Trust's bitcoin, is itself resistant to manipulation based on the Reference Rate's methodology.[75] The Exchange states that the Reference Rate is calculated based on the ''Relevant Transactions'' [76] of all of its Constituent Bitcoin Platforms. All Relevant Transactions are added to a joint list, recording the time of execution, trade price, and size for each transaction, and the list is partitioned by timestamp into 12 equally-sized time intervals of five-minute length.[77] For each partition separately, the volume-weighted median trade price is calculated from the trade prices and sizes of all Relevant Transactions.[78] The Reference Rate is then determined by the arithmetic mean of the volume-weighted medians of all partitions.[79] According to BZX, ''[b]y employing the foregoing steps, the Reference Rate thereby seeks to ensure that transactions in bitcoin conducted at outlying prices do not have an undue effect on the value of a specific partition, large trades or clusters of trades transacted over a short period of time will not have an undue influence on the index level, and the effect of large trades at prices that deviate from the prevailing price are mitigated from having an undue influence on the benchmark level.'' [80] BZX concludes its analysis of the Reference Rate by noting that ''an oversight function is implemented by the Benchmark Administrator in seeking to ensure that the Reference Rate is administered through codified policies for Reference Rate integrity.'' [81]

In addition, the Exchange states that to qualify as part of the bitcoin pricing input for the Trust, a Constituent Bitcoin Platform must: (a) have policies to ensure fair and transparent market conditions at all times and have processes in place to identify and impede illegal, unfair or manipulative trading practices; and (b) comply with applicable law and regulation, including, but not limited to, capital markets regulations, money transmission regulations, client money custody regulations, know-your-client (''KYC'') regulations and anti-money laundering (''AML'') regulations.[82]

Simultaneously with its assertions regarding the Reference Rate, BZX also states that, because the Trust will engage in in-kind creations and redemptions only, the ''manipulability of the Reference Rate [is] significantly less important.'' [83] The Exchange elaborates that, ''because the Trust will not accept cash to buy bitcoin in order to create new shares or . . . be forced to sell bitcoin to pay cash for redeemed shares, the price that the Sponsor uses to value the Trust's bitcoin is not particularly important.'' [84] According to BZX, when authorized participants create Shares with the Trust, they would need to deliver a certain number of bitcoin per Share (regardless of the valuation used), and when they redeem with the Trust, they would similarly expect to receive a certain number of bitcoin per Share.[85] As such, BZX argues that, even if the price used to value the Trust's bitcoin is manipulated, the ratio of bitcoin per Share does not change, and the Trust will either accept (for creations) or distribute (for redemptions) the same number of bitcoin regardless of the value.[86] This, according to BZX, not only mitigates the risk associated with potential manipulation, but also discourages and disincentivizes manipulation of the Reference Rate because there is little financial incentive to do so.[87]

(b) Analysis

Based on the assertions made and the information provided with respect to the Reference Rate and the create/redeem process, the record is inadequate to conclude that BZX has articulated other means to prevent fraud and manipulation that are sufficient to justify dispensing with the detection and deterrence of fraud and manipulation provided by a comprehensive surveillance-sharing agreement with a regulated market of significant size related to spot bitcoin.

The record does not demonstrate that the proposed methodology for calculating the Reference Rate would make the proposed ETP resistant to

74171; Global X Order, 87 FR at 14916; Wise Origin Order, 87 FR at 5531; Grayscale Order, 87 FR at 40306.

[72] *See* WisdomTree Order, 86 FR at 69326.

[73] Registration Statement at 11, 18–19, 25, 37–38. *See also* Winklevoss Order, 83 FR at 37585.

[74] Notice, 87 FR at 8320.

[75] *See* Notice, 87 FR at 8333.

[76] According to the Exchange, a ''Relevant Transaction'' is any cryptocurrency versus U.S. dollar spot trade that occurs during the observation window between 3:00 p.m. and 4:00 p.m. E.T. on a Constituent Bitcon Platform in the BTC/USD pair that is reported and disseminated by a Constituent Bitcoin Platform and observed by the Benchmark Adminstrator. *See id.* at 8329 n.78.

[77] *See id.* at 8329.

[78] *See id.* According to the Exchange, a volume-weighted median differs from a standard median in that a weighting factor, in this case trade size, is factored into the calculation. *See id.*

[79] *See id.* at 8330.

[80] *Id.*

[81] *Id.*

[82] *See id.*

[83] *See id.* at 8333.

[84] *See id.*

[85] *See id.*

[86] *See id.*

[87] *See id.*

fraud or manipulation such that the ability to detect and deter fraud and manipulation that is provided by a comprehensive surveillance-sharing agreement with a regulated market of significant size related to spot bitcoin is unnecessary. Specifically, BZX has not assessed the possible influence that spot platforms not included among the Constituent Bitcoin Platforms would have on bitcoin prices used to calculate the Reference Rate.[88] As discussed above, BZX does not sufficiently contest the presence of possible sources of fraud and manipulation in the spot bitcoin market generally.[89] Instead, BZX focuses its analysis on the eligibility and attributes of the Constituent Bitcoin Platforms, as well as the Reference Rate's methodology that calibrates the pricing input generated by the Constituent Bitcoin Platforms (such as partitioning the Relevant Transactions into equally-sized time intervals and using volume-weighted median trade prices). What the Exchange does not address, however, is that, to the extent that trading on spot bitcoin platforms not directly used to calculate the Reference Rate affects prices on the Constituent Bitcoin Platforms, the activities on those other platforms—where various kinds of fraud and manipulation from a variety of sources may be present and persist—may affect whether the Reference Rate is resistant to manipulation. Importantly, the record does not demonstrate that these possible sources of fraud and manipulation in the broader spot bitcoin market do not affect the Constituent Bitcoin Platforms that represent a portion of the spot bitcoin market. To the extent that fraudulent and manipulative trading on the broader bitcoin market could influence prices or trading activity on the Constituent Bitcoin Platforms, the Constituent Bitcoin Platforms (and thus the Reference Rate) would not be inherently resistant to manipulation.[90]

In addition, while BZX asserts that aspects of the Reference Rate methodology mitigate the impact of fraud and manipulation on the Shares, the Commission can find no basis to conclude that the Reference Rate methodology constitutes a novel means beyond the protections utilized by traditional commodity or securities markets to prevent fraud and manipulation that is sufficient to justify dispensing with the detection and deterrence of fraud and manipulation provided by a comprehensive surveillance-sharing agreement with a regulated market of significant size related to spot bitcoin. BZX has not shown that its proposed use of 12 equally-sized time intervals of five minute length over the observation window between 3:00 p.m. and 4:00 p.m. E.T. to calculate the Reference Rate would effectively be able to eliminate fraudulent or manipulative activity that is not transient. As the Commission has previously stated, fraud and manipulation in the spot bitcoin market could persist for a ''significant duration.'' [91] The Exchange does not explain how the use of such partitions would protect against the effects of the wash and fictitious trading that may persist in the spot bitcoin market for a significant duration.[92] While the Reference Rate methodology records the time of execution, trade price, and size for each Relevant Transaction, partitions the list of Relevant Transactions by timestamp into equally-sized time intervals, and calculates the weighted median trade price from the trade prices and sizes of such Relevant Transactions, this methodology could at most attenuate, but not eliminate, the effect of manipulative activity on the Constituent Bitcoin Platforms—just as it could at most attenuate, but would not eliminate, the effect of bona fide liquidity demand on those platforms.[93]

Moreover, the Exchange's assertions that the Reference Rate's methodology helps make the Reference Rate resistant to manipulation conflict with the Registration Statement. Specifically, the Registration Statement represents, among other things, that ''[b]itcoin [platforms] on which bitcoin trades . . . may be more exposed to fraud and security breaches than established, regulated exchanges for other financial assets or instruments, which could have a negative impact on the performance of the Trust.'' [94] Constituent Bitcoin Platforms are a subset of the bitcoin platforms currently in existence. Although the Sponsor raises concerns regarding fraud and security of bitcoin platforms in the Registration Statement, the Exchange does not explain how or why such concerns are consistent with its assertion that the Reference Rate is resistant to fraud and manipulation.

The Commission thus concludes that the Exchange has not demonstrated that its Reference Rate methodology makes the proposed ETP resistant to manipulation. While the proposed procedures for calculating the Reference Rate using only prices from the Constituent Bitcoin Platforms are intended to provide some degree of protection against attempts to manipulate the Reference Rate, these procedures are not sufficient for the Commission to dispense with the detection and deterrence of fraud and manipulation provided by a comprehensive surveillance-sharing agreement with a regulated market of significant size related to spot bitcoin.[95]

In addition, while BZX represents that a Constituent Bitcoin Platform must have policies to ensure fair and transparent market conditions at all times and have processes in place to identify and impede illegal, unfair, or manipulative trading practices, and comply with applicable law and regulation, including, but not limited to, capital markets regulations, money transmission regulations, client money custody regulations, KYC regulations and AML regulations, any oversight relating to such policies, processes, and regulations, including KYC and AML regulations, is not a substitute for a surveillance-sharing agreement between the Exchange and a *regulated* market of significant size related to the underlying bitcoin assets. KYC and AML regulation, for example, do not substitute for the sharing of information about market trading activity or clearing activity that a surveillance-sharing agreement would afford. As the Commission has explained, there are substantial differences between such regulations and the Commission's regulation of national securities exchanges.[96] For example, the Commission's market oversight of national securities exchanges includes substantial requirements, including the requirement to have rules that are ''designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with

[88] As discussed above, while the Exchange asserts that bitcoin prices on platforms with wash trades or other activity intended to manipulate the price of bitcoin would generally be ignored, the Commission has no basis on which to conclude that bitcoin platforms are insulated from prices of others that engage in or permit fraud or manipulation. *See supra* note 66 and accompanying text.

[89] *See supra* notes 65–66 and accompanying text.

[90] *See* USBT Order, 85 FR at 12601; WisdomTree Order, 86 FR at 69327; Kryptoin Order, 86 FR at 74172; Valkyrie Order, 86 FR at 74161; SkyBridge Order, 87 FR at 3873; Grayscale Order, 87 FR at 40309.

[91] *See* USBT Order, 85 FR at 12601 n.66; *see also id.* at 12607.

[92] *See* WisdomTree Order, 86 FR at 69327.

[93] *See* SolidX Order, 82 FR at 16257.

[94] Registration Statement at 19.

[95] *See* WisdomTree Order, 86 FR at 69327–28.

[96] KYC and AML regulation have been referenced in other bitcoin-based ETP proposals as a purportedly alternative means by which such ETPs would be uniquely resistant to manipulation. *See* USBT Order, 85 FR at 12603 n.101 and accompanying text. *See also, e.g.,* WisdomTree Order, 86 FR at 69328 n.95; Kryptoin Order, 86 FR at 74173 n.98; ARK 21Shares Order, 87 FR at 20022 n.107; Grayscale Order, 87 FR at 40308 n.111.

persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.'' [97] Moreover, national securities exchanges must file proposed rules with the Commission regarding certain material aspects of their operations,[98] and the Commission has the authority to disapprove any such rule that is not consistent with the requirements of the Exchange Act.[99] Thus, national securities exchanges are subject to Commission oversight of, among other things, their governance, membership qualifications, trading rules, disciplinary procedures, recordkeeping, and fees.[100] The Constituent Bitcoin Platforms have none of these requirements—none are registered as a national securities exchange and none are comparable to a national securities exchange or futures exchange.[101]

In addition, the Exchange states that the Benchmark Administrator would implement an oversight function to ensure that the Reference Rate is administered through codified policies for Reference Rate integrity.[102] However, the record does not suggest that the purported oversight represents a unique measure to resist or prevent fraud or manipulation beyond protections that exist in traditional securities or commodities markets.[103] Rather, the oversight performed by the Benchmark Administrator appears to be for the purpose of ensuring the accuracy and integrity of the Reference Rate. Such Reference Rate accuracy and integrity oversight serves a fundamentally different purpose as compared to the regulation of national securities exchanges and the requirements of the Exchange Act. While the Commission recognizes that this may be an important function in ensuring the integrity of the Reference Rate, such requirements do not imbue the Benchmark Administrator with regulatory authority similar to that which the Exchange Act confers upon self-regulatory organizations such as national securities exchanges.[104] Furthermore, other commodity-based ETPs approved by the Commission for listing and trading utilize reference rates or indices administered by similar benchmark administrators,[105] and the Commission has not, in those instances, dispensed with the need for a surveillance-sharing agreement with a significant regulated market.

Further, BZX does not explain the significance of the Reference Rate's purported resistance to manipulation to the overall analysis of whether the proposal to list and trade the Shares is designed to prevent fraud and manipulation.[106] To the extent that BZX's argument is that the price of the Trust's Shares would be resistant to manipulation if the Reference Rate is resistant to manipulation, BZX has not established in the record a basis for this conclusion because BZX has not established a link between the price of the Shares and the Reference Rate, either in the primary or secondary market. The Trust uses the Reference Rate to calculate the value of the bitcoin it holds according to the methodology discussed above.[107] However, the Trust will create or redeem baskets in the primary market only upon the receipt or distribution of bitcoins from/to authorized participants, and only for the amount of bitcoin represented by the Shares in such baskets, *without* reference to the value of such bitcoin as determined by the Reference Rate or otherwise.[108] In the secondary market, the Shares would trade at market-based prices, and market partcipants may or may not take into account the value of bitcoin as measured by the Reference Rate in determining such prices. The Exchange provides no information on the relationship between the Reference Rate and secondary market prices generally, or how the use of the Reference Rate would mitigate fraud and manipulation of the Shares in the secondary market.[109]

Moreover, the Exchange's arguments are contradictory. While arguing that the Reference Rate is resistant to manipulation, the Exchange simultaneously downplays the importance of the Reference Rate in light of the Trust's in-kind creation and redemption mechanism.[110] The Exchange points out that the Trust will create and redeem Shares in-kind, not in cash, which renders the NAV calculation, and thereby the ability to manipulate NAV, ''significantly less

[97] 15 U.S.C. 78f(b)(5).

[98] 17 CFR 240.19b-4(a)(6)(i).

[99] Section 6 of the Exchange Act, 15 U.S.C. 78f, requires national securities exchanges to register with the Commission and requires an exchange's registration to be approved by the Commission, and Section 19(b) of the Exchange Act, 15 U.S.C. 78s(b), requires national securities exchanges to file proposed rule changes with the Commission and provides the Commission with the authority to disapprove proposed rule changes that are not consistent with the Exchange Act. Designated contract markets (''DCMs'') (commonly called ''futures markets'') registered with and regulated by the CFTC must comply with, among other things, a similarly comprehensive range of regulatory principles and must file rule changes with the CFTC. *See, e.g.,* Designated Contract Markets (DCMs), CFTC, *available at http://www.cftc.gov/IndustryOversight/TradingOrganizations/DCMs/index.htm.*

[100] *See* Winklevoss Order, 83 FR at 37597.

[101] *See* USBT Order, 85 FR at 12603–05 and n.101; VanEck Order, 86 FR at 64545 and n.89; WisdomTree Order, 86 FR at 69328 and n.95; Kryptoin Order, 86 FR at 74173 and n.98; ARK 21Shares Order, 87 FR at 20021–22 and n.107; Grayscale Order, 87 FR at 40308 and n.110.

[102] *See supra* note 81 and accompanying text.

[103] *See, e.g.,* WisdomTree Order, 86 FR at 69328; Valkyrie Order, 86 FR at 74162.

[104] *See* WisdomTree Order, 86 FR at 69329; One River Order, 87 FR at 33556; Grayscale Order, 87 FR at 40310. The Benchmark Administrator does not itself exercise governmental regulatory authority. Rather, the Benchmark Administrator is a registered, privately-held company in England. *See https://blog.cfbenchmarks.com/legal/* (stating that the Benchmark Administrator is authorized and regulated by the UK Financial Conduct Authority (''FCA'') as a registered Benchmark Administrator (FRN 847100) under the EU benchmark regulation, and further noting that the Benchmark Administrator is a member of the Crypto Research group of companies which is in turn a member of the Payward, Inc. group of companies, and Payward, Inc. is the owner and operator of the Kraken Exchange, a venue that facilitates the trading of cryptocurrencies). The Benchmark Administrator's relationship with the Constituent Bitcoin Platforms is based on such platforms' participation in the determination of reference rates, such as the Reference Rate. While the Benchmark Administrator is regulated by the FCA as a benchmark administrator, the FCA's regulations do not extend to the Constituent Bitcoin Platforms by virtue of their trade prices serving as input data underlying the Reference Rate. *See* USBT Order, 85 FR at 12604. *See also* WisdomTree Order, 86 FR at 69328–29.

[105] *See, e.g.,* Securities Exchange Act Release Nos. 80840 (June 1, 2017) 82 FR 26534 (June 7, 2017) (SR–NYSEArca–2017–33) (approving the listing and trading of shares of certain trusts seeking to track the Solactive GLD EUR Gold Index, Solactive GLD GBP Gold Index, and the Solactive GLD JPY Gold Index).

[106] The Commission has previously considered and rejected similar arguments about the valuation of bitcoin according to a benchmark or reference price. *See, e.g.,* SolidX Order, 82 FR at 16258; Winklevoss Order, 83 FR at 37587–90; USBT Order, 85 FR at 12599–601; WisdomTree Order, 86 FR at 69327–29;Valkyrie Order, 86 FR at 74162; ARK 21Shares Order, 87 FR at 20022; Grayscale Order, 87 FR at 40310.

[107] *See supra* notes 32–36 and accompanying text.

[108] *See* Notice, 87 FR at 8330. According to the Exchange, to create, ''the total deposit of bitcoin required is an amount of bitcoin that is in the same proportion to the total assets of the Trust, net of accrued expenses and other liabilities, on the date the order to purchase is properly received, as the number of Shares to be created under the purchase order is in proportion to the total number of Shares outstanding on the date the order is received.'' The required deposit is determined ''for a given day by dividing the number of bitcoin held by the Trust as of the opening of business on that business day, adjusted for the amount of bitcoin constituting estimated accrued but unpaid fees and expenses of the Trust as of the opening of business on that business day, by the quotient of the number of Shares outstanding at the opening of business divided by the aggregation of shares (*i.e.,* 50,000) associated with a creation unit.''

[109] *See* WisdomTree Order, 86 FR at 69329 and n.108; Valkyrie Order, 86 FR at 74162; ARK 21Shares Order, 87 FR at 20022; Grayscale Order, 87 FR at 40310.

[110] *See supra* notes 83–84 and accompanying text.

important.'' [111] In BZX's own words, the Trust will not accept cash to buy bitcoin in order to create shares or sell bitcoin to pay cash for redeemed shares, so the price that the Sponsor uses to value the Trust's bitcoin ''is not particularly important.'' [112] If the Reference Rate that the Trust uses to value the Trust's bitcoin ''is not particularly important,'' it follows that the Reference Rate's resistance to manipulation is not material to the Shares' susceptibility to fraud and manipulation. As the Exchange does not address or provide any analysis with respect to these issues, the Commission cannot conclude that the Reference Rate aids in the determination that the proposal to list and trade the Shares is designed to prevent fraudulent and manipulative acts and practices.[113]

Finally, the Commission finds that BZX has not demonstrated that in-kind creations and redemptions provide the Shares with a unique resistance to manipulation. The Commission has previously addressed similar assertions.[114] As the Commission stated before, in-kind creations and redemptions are a common feature of ETPs, and the Commission has not previously relied on the in-kind creation and redemption mechanism as a basis for excusing exchanges that list ETPs from entering into surveillance-sharing agreements with significant, regulated markets related to the portfolio's assets.[115] Accordingly, the Commission is not persuaded here that the Trust's in-kind creations and redemptions afford it a unique resistance to manipulation.[116]

(2) Assertions That BZX Has Entered Into a Comprehensive Surveillance-Sharing Agreement With a Regulated Market of Significant Size Related to the Underlying Bitcoin Assets

As BZX has not demonstrated that other means besides surveillance-sharing agreements will be sufficient to prevent fraudulent and manipulative acts and practices, the Commission next examines whether the record supports the conclusion that BZX has entered into a comprehensive surveillance-sharing agreement with a regulated market of significant size related to the underlying bitcoin assets. In this context, the term ''market of significant size'' includes a market (or group of markets) as to which (i) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, so that a surveillance-sharing agreement would assist in detecting and deterring misconduct, and (ii) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[117]

As the Commission has explained, it considers two markets that are members of the ISG to have a comprehensive surveillance-sharing agreement with one another, even if they do not have a separate bilateral surveillance-sharing agreement.[118] Accordingly, based on the common membership of BZX and the CME in the ISG,[119] BZX has the equivalent of a comprehensive surveillance-sharing agreement with the CME. However, while the Commission recognizes that the CFTC regulates the CME futures market,[120] including the CME bitcoin futures market, and thus such market is ''regulated,'' in the context of the proposed ETP, the record does not, as explained further below, establish that the CME bitcoin futures market is a ''market of significant size'' related to spot bitcoin, the underlying bitcoin assets that would be held by the Trust.

(i) Whether There is a Reasonable Likelihood That a Person Attempting To Manipulate the ETP Would Also Have To Trade on the CME Bitcoin Futures Market to Successfully Manipulate the ETP

The first prong in establishing whether the CME bitcoin futures market constitutes a ''market of significant size'' related to spot bitcoin is the determination that there is a reasonable likelihood that a person attempting to manipulate the ETP would have to trade on the CME bitcoin futures market to successfully manipulate the ETP. In previous Commission orders, the Commission explained that the lead-lag relationship between the bitcoin futures market and the spot market is ''central'' to understanding this first prong.[121]

(a) BZX's Assertions

The Exchange asserts in its proposal that the significant growth in CME bitcoin futures across each of trading volumes, open interest, large open interest holders, and total market participants over the last two years are reflective of that market's growing influence on the spot price.[122] The Exchange represents that, from October 25, 2021, through November 19, 2021, CFTC-regulated bitcoin futures represented approximately $2.9 billion in notional trading volume on CME on a daily basis, and notional volume was

[111] Notice, 87 FR at 8333 (''While the Sponsor believes that the Reference Rate which it uses to value the Trust's bitcoin is itself resistant to manipulation based on the methodology further described below, the fact that creations and redemptions are only available in-kind makes the manipulability of the Reference Rate significantly less important.'').

[112] *Id.* (concluding that ''because the Trust will not accept cash to buy bitcoin in order to create new shares or, barring a forced redemption of the Trust or under other extraordinary circumstances, be forced to sell bitcoin to pay cash for redeemed shares, the price that the Sponsor uses to value the Trust's bitcoin is not particularly important.'').

[113] *See* WisdomTree Order, 86 FR at 69329.

[114] *See* Winklevoss Order, 83 FR at 37589–90; USBT Order, 85 FR at 12607–08; WisdomTree Order, 86 FR at 69329.

[115] *See, e.g.,* iShares COMEX Gold Trust, Securities Exchange Act Release No. 51058 (Jan. 19, 2005), 70 FR 3749, 3751–55 (Jan. 26, 2005) (SR–Amex–2004–38); iShares Silver Trust, Securities Exchange Act Release No. 53521 (Mar. 20, 2006), 71 FR 14969, 14974 (Mar. 24, 2006) (SR–Amex–2005–072).

[116] Putting aside the Exchange's various assertions about the nature of bitcoin and the bitcoin market, the Reference Rate, and the Shares, the Exchange also does not address concerns the Commission has previously identified, including the susceptibility of bitcoin markets to potential trading on material, non-public information (such as plans of market participants to significantly increase or decrease their holdings in bitcoin; new sources of demand for bitcoin; the decision of a bitcoin-based investment vehicle on how to respond to a ''fork'' in the bitcoin blockchain, which would create two different, non-interchangeable types of bitcoin), or to the dissemination of false or misleading information. *See* Winklevoss Order, 83 FR at 37585. *See also* USBT Order, 85 FR at 12600–01.

[117] *See* Winklevoss Order, 83 FR at 37594.

[118] *See id.* at 37580 n.19.

[119] *See* Notice, 87 FR at 8328, 8333.

[120] While the Commission recognizes that the CFTC regulates the CME, the CFTC is not responsible for direct, comprehensive regulation of the underlying spot bitcoin market. *See* Winklevoss Order, 83 FR at 37587, 37599. *See also* WisdomTree Order, 86 FR at 69330 n.118; Kryptoin Order, 86 FR at 74174 n.119; SkyBridge Order, 87 FR at 3874 n.80; Wise Origin Order, 87 FR at 5534 n.93; ARK 21Shares Order, 87 FR at 20023 n.121; Bitwise Order, 87 FR at 40286 n.54; Grayscale Order, 87 FR at 40311 n.138.

[121] *See, e.g.,* USBT Order, 85 FR at 12612 (''[E]stablishing a lead-lag relationship between the bitcoin futures market and the spot market is central to understanding whether it is reasonably likely that a would-be manipulator of the ETP would need to trade on the bitcoin futures market to successfully manipulate prices on those spot platforms that feed into the proposed ETP's pricing mechanism. In particular, if the spot market leads the futures market, this would indicate that it would not be necessary to trade on the futures market to manipulate the proposed ETP, even if arbitrage worked efficiently, because the futures price would move to meet the spot price.''). When considering past proposals for spot bitcoin ETPs, the Commission has discussed whether there is a lead-lag relationship between the regulated market (*e.g.,* the CME) and the market on which the assets held by the ETP would have traded (*i.e.,* spot bitcoin platforms), as part of an analysis of whether a would-be manipulator of the spot bitcoin ETP would need to trade on the regulated market to effect such manipulation. *See, e.g.,* USBT Order, 85 FR at 12612. *See also* VanEck Order, 86 FR at 64547; WisdomTree Order, 86 FR at 69330–31; Kryptoin Order, 86 FR at 74175–76; SkyBridge Order, 87 FR at 3875–76; Wise Origin Order, 87 FR at 5535–36, 5539–40; ARK 21Shares Order, 87 FR at 20023–24; Bitwise Order, 87 FR at 40287–89; Grayscale Order, 87 FR at 40311–13.

[122] *See* Notice, 87 FR at 8328, 8333.

never below $1.2 billion per day.[123] The Exchange also represents that ''[o]pen interest was over $4 billion for the entirety of the period and at one point reached $5.5 billion.'' [124] BZX further asserts that ''[n]early every measurable metric related to CME Bitcoin Futures has trended consistently up since launch and/or accelerated upward in the past year.'' [125] As an example, the Exchange states that ''there was approximately $12 billion in trading in Bitcoin Futures in August 2021 compared to $3.9 billion, $4.5[] billion, and $9[ ] billion in total trading in August 2017, August 2018, and August 2019, respectively.'' [126] The Exchange states that ''Bitcoin Futures traded over $500m and represented $1.5 billion in open interest compared to $115 million in December 2019.'' [127] BZX also asserts that the number of large open interest holders [128] ''has continued to increase even as the price of bitcoin has risen, as have the number of unique accounts trading Bitcoin Futures.'' [129]

Moreover, acording to the Exchange, the Sponsor believes that ''academic research corroborates this overall trend and supports the thesis that bitcoin futures, and more particularly CME [b]itcoin [f]utures[,] given the recent significant growth in that market, is a predominant influence in bitcoin price formation.'' [130]

BZX also contends that ''[w]here CME [b]itcoin [f]utures act as a predominant influence on the price in the spot market, such that a potential manipulator of the bitcoin spot market (beyond just the constituents of the Reference Rate) would have to participate in the CME [b]itcoin [f]utures market, it follows that a potential manipulator of the Shares would similarly have to transact in the CME [b]itcoin [f]utures market because the Reference Rate is based on spot prices.'' [131] Further, BZX asserts that ''the Trust only allows for in-kind creation and redemption, which . . . reduces the potential for manipulation of the Shares through manipulation of the Reference Rate or any of its individual constituents, again emphasizing that a potential manipulator of the Shares would have to manipulate the entirety of the bitcoin spot market, of which the CME [b]itcoin [f]utures market appears to be a predominant influence.'' [132] As such, the Exchange believes that the first prong of the significant market test is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the Shares.[133]

(b) Analysis

The record does not demonstrate that there is a reasonable likelihood that a person attempting to manipulate the proposed ETP would have to trade on the CME bitcoin futures market to successfully manipulate the proposed ETP. Specifically, BZX's assertions about the general upward trends in trading volume and open interest of, and in the number of large open interest holders and number of unique accounts trading in, CME bitcoin futures do not establish that the CME bitcoin futures market is of significant size.[134] While BZX provides data showing *absolute* growth in the size of the CME bitcoin futures market, it provides no data *relative* to the concomitant growth in either the spot bitcoin markets or other bitcoin futures markets (including unregulated futures markets). Moreover, even if the CME has grown in relative size, as the Commission has previously articulated, including in the WisdomTree Order, the interpretation of the term ''market of significant size'' or ''significant market'' depends on the interrelationship between the market with which the listing exchange has a surveillance-sharing agreement and the proposed ETP.[135] BZX's recitation of data reflecting the size of the CME bitcoin futures market, alone, either currently or in relation to previous years, is not sufficient to establish an interrelationship between the CME bitcoin futures market and the proposed ETP.[136]

In addition, the econometric evidence in the record for the proposal does not support the conclusion that an interrelationship exists between the CME bitcoin futures market and the spot bitcoin market such that it is reasonably likely that a person attempting to manipulate the proposed ETP would also have to trade on the CME bitcoin futures market.[137] The Exchange and the Sponsor, as they have done previously, rely on the findings of one section of the Hu, Hou & Oxley paper; [138] however, they do not address issues that the Commission has previously raised, including in the WisdomTree Order, with respect to this paper.[139] As the Commission explained in the WisdomTree Order, the findings of this paper's Granger causality analysis, which is widely used to formally test for lead-lag relationships, are concededly mixed.[140]

[123] *See id.* at 8321.

[124] *Id.*

[125] *Id.* at 8325.

[126] *Id.* The Exchange does not define the term ''Bitcoin Futures'' in its filing.

[127] *Id.*

[128] The Exchange states that a ''large open interest holder in Bitcoin Futures is an entity that holds at least 25 contracts, which is the equivalent of 125 bitcoin. At a price of approximately $46,996 per bitcoin on 8/31/21, more than 80 firms had outstanding positions of greater than $5.8 million in Bitcoin Futures.'' *Id.* at 8326 n.61.

[129] *Id.* at 8326.

[130] *Id.* at 8327 (citing to (a) representations made and comments submitted with respect to the proposed rule changes in connection with the ARK 21Shares Order and the Wise Origin Order, and (b) Hu, Y., Hou, Y. and Oxley, L. (2019), ''What role do futures markets play in Bitcoin pricing? Causality, cointegration and price discovery from a time-varying perspective'' (*available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7481826/*) (''Hu, Hou & Oxley'')). The Exchange references the following conclusion from the ''time-varying price discovery'' section of Hu, Hou & Oxley: ''There exist no episodes where the Bitcoin spot markets dominates the price discovery processes with regard to Bitcoin futures. This points to a conclusion that the price formation originates solely in the Bitcoin futures market. We can, therefore, conclude that the Bitcoin futures markets dominate the dynamic price discovery process based upon time-varying information share measures. Overall, price discovery seems to occur in the Bitcoin futures markets rather than the underlying spot market based upon a time-varying perspective.'' *Id.* at n.62

[131] *Id.* at 8328, 8333.

[132] *Id.* at 8328.

[133] *See id.*

[134] *See* WisdomTree Order, 86 FR at 69330.

[135] *See* USBT Order, 85 FR at 12611. *See also* WisdomTree Order, 86 FR at 69330; Kryptoin Order, 86 FR at 74175; SkyBridge Order, 87 FR at 3875; Wise Origin Order, 87 FR at 5534.

[136] *See* USBT Order, 85 FR at 12612. The Commission has previously considered and rejected similar arguments. *See, e.g.,* VanEck Order, 86 FR at 64547; WisdomTree Order, 86 FR at 69330; Kryptoin Order, 86 FR at 74175–76; SkyBridge Order, 87 FR at 3875–76; Wise Origin Order, 87 FR at 5534–35; Global X Order, 87 FR at 14919; Grayscale Order, 87 FR at 40312.

[137] *See also* USBT Order, 85 FR at 12611; WisdomTree Order, 86 FR at 69330–31; Wise Origin Order, 87 FR at 5535; NYDIG Order, 87 FR at 14938; Global X Order, 87 FR at 14920; ARK 21Shares, 87 FR at 20024; Bitwise Order, 87 FR at 40288–89; Grayscale Order, 87 FR at 40312–13.

[138] *See supra* note 130.

[139] *See, e.g.,* WisdomTree Order, 86 FR at 69331 (discussing that the paper's use of daily price data, as opposed to intraday prices may not be able to distinguish which market incorporates new information faster; and discussing that the paper found inconclusive evidence that futures prices lead spot bitcoin prices—in particular, that the months at the end of the paper's sample period showed, using Granger causality methodology, that the spot market was the leading market—and that the record did not include evidence to explain why this would not indicate a shift towards prices in the spot market leading the futures market that would be expected to persist into the future). *See also* USBT Order, 85 FR at 12613 n.244.

[140] The paper finds that the CME bitcoin futures market dominates the spot markets in terms of Granger causality, but that the causal relationship is bi-directional, and a Granger causality episode from March 2019 to June/July 2019 runs from bitcoin spot prices to CME bitcoin futures prices. The paper concludes: ''[T]he Granger causality episodes are not constant throughout the whole sample period. Via our causality detection methods, market participants can identify when markets are being led by futures prices and when they might not

Moreover, while the Exchange highlights data and analyses submitted to the Commission in connection with the Wise Origin Order and the ARK 21Shares Order to support the premise that the CME bitcoin futures market leads the spot bitcoin market,[141] the Commission disapproved the proposals related to these submissions, and the Commission raised issues with respect to these submissions—including with the data and analyses therein—that the Exchange does not address.[142]

The Exchange does not provide results of its own lead-lag analysis or provide any additional evidence of an interrelationship between the CME bitcoin futures market, which is the regulated market, and spot bitcoin platforms, which are the markets on which the assets held by the proposed ETP would trade. As discussed in previous disapprovals, including the WisdomTree Order, analyses regarding whether the CME bitcoin futures market leads the spot market remain inconclusive.[143] Thus, as in previous disapprovals, because the lead-lag analysis regarding whether the CME bitcoin futures market leads the spot market is ''central'' to understanding the first prong, the Commission determines that the evidence in the record is inadequate to conclude that an interrelationship exists between the CME bitcoin futures market and the spot bitcoin market such that it is reasonably likely that a person attempting to manipulate the proposed ETP would have to trade on the CME bitcoin futures market to successfully manipulate the proposed ETP.

The Exchange also makes additional assertions [144] that are conclusory and presuppose that the CME bitcoin futures market is a ''predominant influence'' on the spot bitcoin market. For example, the Exchange's assertion that ''a potential manipulator of the Shares would . . . have to transact in the CME [b]itcoin [f]utures market because the Reference Rate is based on spot prices'' [145] presupposes that ''CME [b]itcoin [f]utures act as a predominant influence on the price in the spot market'' [146] and assumes a link between the Reference Rate and the Shares that, as discussed above,[147] the Exchange has not established. Likewise, the Exchange states that the Trust's in-kind create/redeem process supports the conclusion that a would-be manipulator would have to trade on the CME bitcoin futures market to successfully manipulate the proposed ETP because the ''CME [b]itcoin [f]utures market appears to be a predominant influence'' on the spot bitcoin market.[148] However, as discussed already, the evidence in the record is inadequate to conclude that CME bitcoin futures prices lead spot bitcoin prices, let alone the premise that the CME bitcoin futures market has a ''predominant influence'' on the spot bitcoin market.

The Commission thus concludes that the information that BZX provides is not sufficient to support a determination that it is reasonably likely that a would-be manipulator of the proposed ETP would have to trade on the CME bitcoin futures market to successfully manipulate the proposed ETP. Therefore, the information in the record also does not establish that the CME bitcoin futures market is a ''market of significant size'' related to the assets to be held by the proposed ETP.

(ii) Whether It is Unlikely That Trading in the Proposed ETP Would Be the Predominant Influence on Prices in the CME Bitcoin Futures Market

The second prong in establishing whether the CME bitcoin futures market constitutes a ''market of significant size'' related to spot bitcoin is the determination that it is unlikely that trading in the proposed ETP would be the predominant influence on prices in the CME bitcoin futures market.[149]

(a) BZX's Assertions

BZX asserts that ''trading in the Shares would not be the predominant force on prices in the CME [b]itcoin [f]utures market (or spot market) for a number of reasons, including the significant volume in the CME [b]itcoin [f]utures market, the size of bitcoin's market cap, and the significant liquidity available in the spot market.'' [150] Moreover, BZX asserts that ''the Shares should trade close to NAV given that market participants would arbitrage any significant price deviations between the price of the Shares and prices in the spot market.'' [151]

In addition to the CME bitcoin futures market data points cited above, BZX represents that ''the spot market for bitcoin is also very liquid.'' [152] According to the Exchange, based on data from February 2021, the cost to buy or sell $5 million worth of bitcoin averages roughly 10 basis points with a market impact of 30 basis points.[153] According to the Exchange, based on the same data, the cost to buy or sell a $10 million market order of bitcoin ''is roughly 20 basis points with a market impact of 50 basis points.'' [154] According to the Exchange ''[s]tated another way, a market participant could enter a market buy or sell order for $10 million of bitcoin and only move the market 0.5%.'' [155] As such, BZX concludes that ''the combination of CME [b]itcoin [f]utures acting as a predominant influence on price discovery, the overall size of the bitcoin market, and the ability for market participants, including authorized participants creating and redeeming in-kind with the Trust, to buy or sell large amounts of bitcoin without significant market impact will help prevent the Shares from becoming the predominant force on pricing in either the bitcoin spot or CME [b]itcoin [f]utures markets.'' [156]

be.'' *See* Hu, Hou & Oxley, *supra* note 130. *See also* WisdomTree Order, 86 FR at 69331.

[141] *See supra* note *130 and accompanying text.*

[142] *See, e.g.,* Wise Origin Order, 87 FR at 5534–36, 5539–40; ARK 21Shares Order, 87 FR at 20023–24.

[143] As the academic literature and listing exchanges' analyses pertaining to the pricing relationship between the CME bitcoin futures market and spot bitcoin market have developed, the Commission has critically reviewed those materials. *See* Grayscale Order, 87 FR at 40311–13; Bitwise Order, 87 FR at 40286–89; ARK 21Shares Order, 87 FR at 20024; Global X Order, 87 FR at 14920; Wise Origin Order, 87 FR at 5535–36, 5539–40; Kryptoin Order, 86 FR at 74176; WisdomTree Order, 86 FR at 69330–32; VanEck Order, 86 FR at 64547–48; USBT Order, 85 FR at 12613.

[144] *See supra* notes 131–132.

[145] Notice, 87 FR at 8328, 8333.

[146] Notice, 87 FR at 8333.

[147] *See supra* notes 106–109 and accompanying text.

[148] Notice, 87 FR at 8328 (''the Trust only allows for in-kind creation and redemption, which . . . reduces the potential for manipulation of the Shares through manipulation of the Reference Rate or any of its individual constituents, again emphasizing that a potential manipulator of the Shares would have to manipulate the entirety of the bitcoin spot market, of which the CME [b]itcoin [f]utures market appears to be a predominant influence'').

[149] *See* Winklevoss Order, 83 FR at 37594; USBT Order, 85 FR at 12596–97.

[150] Notice, 87 FR at 8328, 8333.

[151] *Id.*

[152] *Id.*

[153] These statistics are sourced from CoinRoutes from February 2021 and are based on samples of bitcoin liquidity in USD (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase Pro, Gemini, Bitstamp, Kraken, LMAX Exchange, BinanceUS, and OKCoin during February 2021. *See* Notice, 87 FR at 8328–29 nn.74–75.

[154] Notice, 87 FR at 8328.

[155] *Id.*

[156] *Id.* In addition, the Exchange states that the largest bitcoin futures ETF represents 3,803 contracts of the total 9,625 contracts of open interest in December CME bitcoin futures as of December 2, 2021, (roughly 40% of open interest) and that this directly contradicts the previously articulated standards by the Commission in the disapproval orders issued for spot bitcoin ETPs related to whether the trading in the ETP would be the predominant influence on prices in that market. *See id.* at 8324. The Commission disagrees. The proposed rule change does not relate to the same underlying holdings as such ETFs, which provide exposure to bitcoin through CME bitcoin futures. The Commission considers the proposed rule change on its own merits and under the standards

Continued

(b) Analysis

The Commission does not agree with BZX's assertions, which are substantially the same assertions that BZX made, and the Commission discussed, in the WisdomTree Order. Now, as then, the record does not demonstrate that it is unlikely that trading in the proposed ETP would be the predominant influence on prices in the CME bitcoin futures market. As the Commission has already addressed and rejected one of the bases of BZX's assertion—that CME bitcoin futures lead price discovery [157]—the Commission will only address below the other two bases: the overall size of, and the impact of buys and sells on, the bitcoin market.

BZX's assertions about the potential effect of trading in the Shares on the CME bitcoin futures market and spot bitcoin market are general and conclusory, citing to the aforementioned trade volume of the CME bitcoin futures market and the size and liquidity of the spot bitcoin market, as well as the market impact of a single transaction in spot bitcoin, without any analysis or evidence to support these assertions. For example, there is no limit on the amount of mined bitcoin that the Trust may hold. Yet BZX does not provide any information on the expected growth in the size of the Trust and the resultant increase in the amount of bitcoin held by the Trust over time, or on the overall expected number, size, and frequency of creations and redemptions—or how any of the foregoing could (if at all) influence prices in the CME bitcoin futures market. Thus, the Commission cannot conclude, based on BZX's statements alone and absent any evidence or analysis in support of BZX's assertions, that it is unlikely that trading in the ETP would be the predominant influence on prices in the CME bitcoin futures market.[158]

The Commission also is not persuaded by BZX's assertions about the minimal effect a market order to buy or sell bitcoin would have on the bitcoin market.[159] While BZX concludes by way of an example of a $10 million market order that buying or selling large amounts of bitcoin would have insignificant market impact, the conclusion does not analyze the extent of any impact on the CME bitcoin futures market or the CME bitcoin futures market's prices. Accordingly, such statistics, without more, are not relevant to the Commission's consideration of whether trading in the ETP would be the predominant influence on prices in the CME bitcoin futures market.

To the extent that BZX is suggesting that a single $10 million order in bitcoin would have immaterial impact on the prices in the CME bitcoin futures market, the Exchange has not adequately explained why *a single market order in spot bitcoin* is an appropriate proxy for trading in the Shares. As stated above, the second prong in establishing whether the CME bitcoin futures market constitutes a ''market of significant size'' is the determination that it is unlikely that *trading in the proposed ETP* would be the predominant influence on prices in the CME bitcoin futures market. While authorized participants of the Trust might transact in the spot bitcoin market as part of their creation or redemption of Shares, the Shares themselves would be traded in the secondary market on BZX. Furthermore, the record does not discuss the expected number or trading volume of the Shares, or establish the potential effect of the Shares' trade prices on CME bitcoin futures prices. For example, BZX does not provide any data or analysis about the potential effect the quotations or trade prices of the Shares might have on market-maker quotations in CME bitcoin futures contracts and whether those effects would constitute a predominant influence on the prices of those futures contracts.[160]

Moreover, although BZX asserts that ''the Shares should trade close to NAV given that market participants would arbitrage any significant price deviations between the price of the Shares and prices in the spot market,'' [161] the Exchange does not provide any additional data or analysis to support such an assertion; [162] nor does the Exchange show that the arbitrage that may exist between the Shares and prices in the *spot* bitcoin markets demonstrates that the Shares would not be the predominant force on prices in the *CME bitcoin futures* market.

Thus, the Commission cannot conclude, based on the assertions in the filing and absent sufficient evidence or analysis in support of these assertions, that it is unlikely that trading in the proposed ETP would be the predominant influence on prices in the CME bitcoin futures market.

Therefore, because BZX has not provided sufficient information to establish both prongs of the ''market of significant size'' determination, the Commission cannot conclude that the CME bitcoin futures market is a ''market of significant size'' related to spot bitcoin such that BZX would be able to rely on a surveillance-sharing agreement with the CME to provide sufficient protection against fraudulent and manipulative acts and practices.

(3) Assertions That the Proposed Spot Bitcoin ETP Is Comparable to Bitcoin Futures-Based ETFs

(i) BZX's Assertions

BZX asserts that, after allowing the listing and trading of bitcoin futures ETFs that hold primarily CME bitcoin futures, disapproving spot bitcoin ETPs ''seems . . . arbitrary and capricious.'' [163] BZX asserts that, if the CME bitcoin futures market were not, in the opinion of the Commission, a regulated market of significant size, permitting bitcoin futures ETFs that trade on such market ''would seem to be inconsistent with the requirement under the [Exchange] Act of being designed to 'prevent fraudulent and manipulative acts and practices.' '' [164] BZX argues that this is particularly true for the Trust, which would use the Reference Rate as its price source to calculate its daily NAV, ''with inputs from *the same* bitcoin trading platforms. . . and materially the same methodology as is used to price CME [b]itcoin [f]utures.'' [165] According to BZX, the Constituent Bitcoin Platforms' pricing inputs and methodology (except for the calculation time) are the same ''with respect to the Trust and CME bitcoin futures.'' [166] BZX asserts that any

applicable to it. Namely, with respect to this proposed rule change, the Commission must apply the standards as provided by Section 6(b)(5) of the Exchange Act, which it has applied in connection with its orders considering previous proposals to list bitcoin-based commodity trusts and bitcoin-based trust issued receipts. *See supra* note 11 and accompanying text. *See also infra* Section III.B.3.

[157] *See supra* Section III.B.2.i.b.

[158] *See* VanEck Order, 86 FR at 64548–59; WisdomTree Order, 86 FR at 69332–33; Kryptoin Order, 86 FR at 74177; SkyBridge Order, 87 FR at 3879; Wise Origin Order, 87 FR at 5537; ARK 21Shares Order, 87 FR at 20025; Global X Order, 87 FR at 14921.

[159] *See* Notice, 87 FR at 8328 (''For a $10 million market order, the cost to buy or sell is roughly 20 basis points with a market impact of 50 basis points. Stated another way, a market participant could enter a market buy or sell order for $10 million of bitcoin and only move the market 0.5%.'').

[160] *See* VanEck Order, 86 FR at 64549; WisdomTree Order, 86 FR at 69333; Kryptoin Order, 86 FR at 74177; SkyBridge Order, 87 FR at 3879; Wise Origin Order, 87 FR at 5537; ARK 21Shares Order, 87 FR at 20025; Global X Order, 87 FR at 14921.

[161] Notice, 87 FR at 8328.

[162] *See also supra* notes 106–109 and accompanying text.

[163] Notice, 87 FR at 8325.

[164] *Id.* at 8323; 15 U.S.C. 78f(b)(5).

[165] Notice, 87 FR at 8323 (emphasis in the original).

[166] *Id.*

objective review of the proposals to list spot bitcoin ETPs compared to the already listed and traded bitcoin futures ETFs would lead to the conclusion that spot bitcoin ETPs should be available to U.S. investors [167] because ''any concerns related to preventing fraudulent and manipulative acts and practices related to [s]pot [b]itcoin ETPs would apply equally to the spot markets underlying the futures contracts held by a [CME] [b]itcoin [f]utures ETF.'' [168]

Further, as discussed in more detail below,[169] while the Trust is not an investment company registered under the 1940 Act,[170] according to BZX, ''the Sponsor has taken 1940 Act considerations into account in structuring the Trust's operations in seeking 'to protect investors and the public interest.' '' [171] According to BZX, ''the Sponsor has structured the Trust's operations to operate as if certain 1940 Act provisions apply, providing transparency and investor protections such that a distinction between [bitcoin futures] ETFs and [spot bitcoin] ETPs is unwarranted.'' [172]

(ii) Analysis

The Commission disagrees with these assertions and conclusions. The proposed rule change does not relate to the same underlying holdings as ETFs regulated under the 1940 Act that provide exposure to bitcoin through CME bitcoin futures, or CME bitcoin futures-based ETPs that have registered their offerings under the Securities Act but are not regulated under the 1940 Act. The Commission considers the proposed rule change on its own merits and under the standards applicable to it. Namely, with respect to this proposed rule change, the Commission must apply the standards as provided by Section 6(b)(5) of the Exchange Act, which it has applied in connection with its orders considering previous proposals to list bitcoin-based commodity trusts and bitcoin-based trust issued receipts.[173]

In focusing on whether ''concerns related to preventing fraudulent and manipulative acts and practices related to [s]pot [b]itcoin ETPs would apply equally to the spot markets underlying the futures contracts held by a [CME] [b]itcoin [f]utures ETF,'' [174] the Exchange mischaracterizes the framework that the Commission has articulated in the Winklevoss Order. As stated in the Winklevoss Order, the Commission is not applying a ''cannot be manipulated''approach—either on the CME bitcoin futures market or the spot bitcoin markets. Rather, as the Commission has repeatedly emphasized, and also summarized above, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, is placing the burden on BZX to demonstrate the validity of its contention that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with the detection and deterrence of fraud and manipulation provided by a comprehensive surveillance-sharing agreement with a regulated market of significant size related to spot bitcoin,[175] or to establish that it has entered into such a surveillance-sharing agreement.

Consistent with this approach, the Commission's consideration (and thus far, disapproval) of proposals to list and trade spot bitcoin ETPs does not focus on an assessment of the overall risk of fraud and manipulation in the spot bitcoin or futures markets, or on the extent to which such risks are similar.[176] Rather, the Commission's focus has been consistently on whether the listing exchange has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to the underlying bitcoin assets of the ETP under consideration, so that it would have the necessary ability to detect and deter manipulative activity. For reasons articulated in the orders approving proposals to list and trade CME bitcoin futures-based ETPs (*i.e.,* the Teucrium Order and the Valkyrie XBTO Order), the Commission found that in each such case the listing exchange has entered into such a surveillance-sharing agreement.[177] Applying the same framework to this proposed spot bitcoin ETP, however, as discussed and explained above, the Commission finds that BZX has not.

Moreover, for the CME bitcoin futures ETPs under consideration in the Teucrium Order and the Valkyrie XBTO Order, the proposed ''significant'' regulated market (*i.e.,* the CME) with which the listing exchange has a surveillance-sharing agreement is the *same* market on which the underlying bitcoin assets (*i.e.,* CME bitcoin futures contracts) trade. As explained in those Orders, the CME's surveillance can reasonably be relied upon to capture the effects on the CME bitcoin futures market caused by a person attempting to manipulate the CME bitcoin futures ETP by manipulating the price of CME bitcoin futures contracts, whether that attempt is made by directly trading on the CME bitcoin futures market or indirectly by trading outside of the CME bitcoin futures market.[178] Regarding the approved Teucrium Bitcoin Futures Fund in the Teucrium Order (''Fund''), for example, when the CME shares its surveillance information with the listing exchange, the information would assist in detecting and deterring fraudulent or manipulative misconduct related to the non-cash assets held by the Fund.[179] Accordingly, the Commission explains in the Teucrium Order and the Valkyrie XBTO Order that it is unnecessary for a listing exchange to establish a reasonable likelihood that a would-be manipulator would have to trade on the CME itself to manipulate a proposed ETP whose only non-cash holdings would be CME bitcoin futures contracts.[180]

However, as the Commission also states in those Orders, this reasoning does not extend to spot bitcoin ETPs. Spot bitcoin markets are not currently ''regulated.'' [181] If an exchange seeking

[167] *See* Notice, 87 FR at 8324.

[168] *Id.* at 8325.

[169] *See* Section III.C, *infra.*

[170] *See id.* at 8329 (according to the Registration Statement, ''the Trust is neither an investment company registered under the [1940 Act], as amended, nor a commodity pool for purposes of the Commodity Exchange Act . . . , and neither the Trust nor the Sponsor is subject to regulation as a commodity pool operator or a commodity trading adviser in connection with the Shares.'').

[171] *Id.* at 8323. *See also supra* note 41 and accompanying text (summarizing the 1940 Act considerations taken into account by the Sponsor in structuring the Trust's operations).

[172] *Id.*

[173] *See supra* note 11 and accompanying text.

[174] *See* Notice, 87 FR at 8325.

[175] *See supra* notes 42–45 and accompanying text.

[176] The Commission's past general discussion on the risk of fraud and manipulation in the spot bitcoin or futures markets is only in response to arguments raised by the proposing listing exchanges (or commenters) that mitigating factors against fraud and manipulation in the spot bitcoin or futures markets should compel the Commission to dispense with the detection and deterrence of fraud and manipulation provided by a comprehensive surveillance-sharing agreement with a regulated market of significant size related to the underlying bitcoin assets. *See, e.g.,* Winklevoss Order, 83 FR at 37580, 37582–91 (addressing assertions that ''bitcoin and [spot] bitcoin markets,'' generally, as well as one bitcoin trading platform, specifically, have unique resistance to fraud and manipulation). *See also* USBT Order, 85 FR at 12597, 12599–12608. But even in such instance, the central issue is about the necessity of such a surveillance-sharing agreement, not the overall risk of fraud and manipulation in the spot bitcoin or futures markets, or the extent to which such risks are similar.

[177] *See* Teucrium Order, 87 FR at 21678–81; Valkyrie XBTO Order, 87 FR at 28850–53.

[178] *See* Teucrium Order, 87 FR at 21679; Valkyrie XBTO Order, 87 FR at 28851.

[179] *See* Teucrium Order, 87 FR at 21679.

[180] *See id.*

[181] *See* Teucrium Order, 87 FR at 21679 n.46 (citing USBT Order, 85 FR at 12604; NYDIG Order, 87 FR at 14936 nn.65–67). *See also* Valkyrie XBTO Order, 87 FR at 28851 n.42.

to list a spot bitcoin ETP relies on the CME as the regulated market with which it has a comprehensive surveillance-sharing agreement, the assets held by the spot bitcoin ETP would not be traded on the CME. Because of this significant difference, with respect to a spot bitcoin ETP, there would be reason to question whether a surveillance-sharing agreement with the CME would, in fact, assist in detecting and deterring fraudulent and manipulative misconduct affecting the price of the spot bitcoin held by that ETP. If, however, an exchange proposing to list and trade a spot bitcoin ETP identifies the CME as the regulated market with which it has a comprehensive surveillance-sharing agreement, the exchange could overcome the Commission's concern by demonstrating that there is a reasonable likelihood that a person attempting to manipulate the spot bitcoin ETP would have to trade on the CME in order to manipulate the ETP, because such demonstration would help establish that the exchange's surveillance-sharing agreement with the CME would have the intended effect of aiding in the detection and deterrence of fraudulent and manipulative misconduct related to the spot bitcoin held by the ETP.[182]

Because, here, BZX is seeking to list a spot bitcoin ETP that relies on the CME as the purported ''significant'' regulated market with which it has a comprehensive surveillance-sharing agreement, the assets held by the proposed ETP would *not* be traded on the CME. Thus there is reason to question whether a surveillance-sharing agreement with the CME would, in fact, assist in detecting and deterring fraudulent and manipulative misconduct affecting the price of the spot bitcoin held by the proposed ETP.[183] An exchange can overcome this concern by demonstrating that there is a reasonable likelihood that a person attempting to manipulate the proposed ETP would have to trade *on the CME* in order to manipulate the ETP because such demonstration would help establish that an exchange's surveillance-sharing agreement with the CME would have the intended effect of aiding in the detection and deterrence of fraudulent and manipulative misconduct related to the spot bitcoin held by the proposed ETP.[184] As discussed and explained above,[185] the Commission finds that BZX has not made such demonstration.

To the extent that the Exchange is arguing that the CME's surveillance would, in fact, assist in detecting and deterring fraudulent and manipulative misconduct that impacts spot bitcoin ETPs in the same way as it would for misconduct that impacts the CME bitcoin futures ETFs/ETPs, the information in the record for this filing does not support such a claim. First, while BZX emphasizes that the ''pricing inputs and methodology (except for the calculation time)'' for the Reference Rate are ''the same'' as for the BRR,[186] this does not—absent supporting data—establish any link between prices of shares of any CME bitcoin futures ETFs/ETPs and the prices of Shares of the proposed spot bitcoin ETP. There is no evidence in the record that shares of CME bitcoin futures ETFs/ETPs are priced according to the BRR. The BRR is a once-a-day reference rate of the U.S. dollar price of one bitcoin as of 4:00 p.m., London Time.[187] The BRR aggregates the trade flow of its constituent spot bitcoin platforms—Coinbase, Gemini, LMAX Digital, itBit, Kraken, and Bitstamp [188]—during a specific one-hour calculation window.[189] While the BRR is used to value the final cash settlement of CME bitcoin futures contracts, it is not generally used for daily cash settlement of such contracts,[190] nor is it claimed to be used for any intra-day trading of such contracts. In addition, CME bitcoin futures ETFs do not hold their CME bitcoin futures contracts to final cash settlement; rather, the contracts are rolled [191] prior to their settlement dates. Moreover, the shares of CME bitcoin futures ETFs trade in secondary markets, and there is no evidence in the record for this filing that such intra-day, secondary market trading prices are determined by the BRR.

There is also no evidence in the record that the Shares' prices would be determined by the Reference Rate.[192] The Reference Rate aggregates the trade flow of the Constituent Bitcoin Platforms—the current Constituent Bitcoin Platforms are Bitstamp, Coinbase, Gemini, itBit and Kraken—during an observation window between 3:00 p.m. and 4:00 p.m. E.T. into the U.S. dollar price of one bitcoin at 4:00 p.m. E.T. While the Reference Rate would be used daily to value the bitcoins held by the Trust, the Reference Rate would not be used for the creation or redemption of Shares, nor is it claimed that the Reference Rate would be used for any intra-day secondary market trading of the Shares.[193] Rather, the Share price would be discovered through continuous intra-day, secondary market interactions of buy and sell interests.[194]

Thus, although the Exchange focuses on the similarities between the BRR and the Reference Rate,[195] there is no

[182] *See* Teucrium Order, 87 FR at 21679 n.46; Valkyrie XBTO Order, 87 FR at 28851 n.42.

[183] *See* Teucrium Order, 87 FR at 21679 n.46; Valkyrie XBTO Order, 87 FR at 28851 n.42. There is reason to question whether the CME's surveillance would capture manipulation of spot bitcoin that occurs off of the CME, if, for example, off-CME manipulation of spot bitcoin does not also similarly impact CME bitcoin futures contracts.

[184] *See* Teucrium Order, 87 FR at 21679 n.46; Valkyrie XBTO Order, 87 FR at 28851 n.42.

[185] *See* Section III.B.2.i, *supra.*

[186] *See* Notice, 87 FR at 8323. The Reference Rate is calculated as of 4:00 p.m. E.T., whereas the BRR is calculated as of 4:00 p.m. London Time. *See* Notice, 87 FR at 8329 n.77.

[187] *See https://docs-cfbenchmarks.s3.amazonaws.com/CME+CF+Reference+Rates+Methodology.pdf.*

[188] *See https://docs-cfbenchmarks.s3.amazonaws.com/CME+CF+Constituent+Exchanges.pdf.*

[189] *See https://www.cmegroup.com/trading/files/bitcoin-reference-rate-methodology.pdf.* This one-hour window is partitioned into 12, five-minute intervals, where the BRR is calculated as the equally-weighted average of the volume-weighted medians of all 12 partitions. *See id.*

[190] Under normal procedures, daily cash settlements are generally based on the volume-weighted average price of trading activity on CME Globex between 2:59 p.m. and 3:00 p.m., Central Time). *See https://www.cmegroup.com/confluence/display/EPICSANDBOX/Bitcoin* for a description of CME bitcoin futures daily settlement procedures.

[191] Rolling a futures contract refers to extending the expiration of a position by closing out the futures contract that is nearing expiration and opening a new position in a futures contract with a later expiration.

[192] As noted above, *see supra* note 33, the Commission understands that the Reference Rate was discontinued as of April 2022. Because the Exchange has not amended its filing or its assertions with respect to the Reference Rate, the Commission's analysis herein responds to the Exchange's arguments as presented in its filing by assuming that the Reference Rate continues to be published.

[193] *See supra* notes 106–109 and accompanying text.

[194] As discussed above, the use of the Reference Rate by the Trust to determine the value of its bitcoin does not support the finding that the Exchange has established other means to prevent fraud and manipulation that are sufficient to justify dispensing with the detection and deterrence of fraud and manipulation provided by a comprehensive surveillance-sharing agreement with a regulated market of significant size related to spot bitcoin. *See* Section III.B.1.ii, *supra.* Likewise, the Commission has previously rejected arguments by listing exchanges that the use of a reference rate similar to the BRR to value bitcoin held by proposed spot bitcoin ETPs provides other means to prevent fraud and manipulation that are sufficient to justify dispensing with the detection and deterrence of fraud and manipulation provided by a comprehensive surveillance-sharing agreement with a regulated market of significant size related to spot bitcoin. *See* Wise Origin Order, 87 FR at 5532–33; SkyBridge Order, 87 FR at 3877. Accordingly, the Reference Rate and the BRR, and the similarities between the BRR and the Reference Rate, are not informative in the Commission's determination of whether the Exchange has established other means to prevent fraud and manipulation.

[195] Despite the Exchange's claim that the Reference Rate uses ''inputs from *the same* bitcoin trading platforms'' as the BRR, the BRR includes trade flow from LMAX Digital, which platform does

evidence in the record that the shares of any CME bitcoin futures ETF/ETP, or the Shares of the proposed spot bitcoin ETP, would trade in the secondary market at a price related to (or informed by) the BRR or the Reference Rate.[196]

Second, even if the Exchange had demonstrated a link between the BRR and/or the Reference Rate and the prices of bitcoin futures ETFs/ETPs and/or the proposed spot bitcoin ETP, which it has not, it does not necessarily follow that the CME's surveillance would, in fact, assist in detecting and deterring fraudulent and manipulative misconduct that impacts spot bitcoin ETPs in the same way as it would for misconduct that impacts the CME bitcoin futures ETFs/ETPs—particularly when such misconduct occurs off of the CME itself.[197] For example, even assuming, for the sake of argument, that the BRR and/or the Reference Rate is a potential link between prices on certain spot bitcoin platforms and CME bitcoin futures prices, it does not—absent supporting data—necessarily follow that *any* manipulation that impacts spot bitcoin *also similarly* impacts CME bitcoin futures contracts. The Exchange has not provided analysis or data that assesses the reaction (if any) of CME bitcoin futures contracts to instances of fraud and manipulation in spot bitcoin markets.

In addition, the disapproval of the proposal would not constitute an ''arbitrary and capricious'' administrative action in violation of the Administrative Procedure Act.[198]

Importantly, the issuers are not similarly situated. The issuers of CME bitcoin futures-based ETFs/ETPs propose to hold only CME bitcoin futures contracts (which are traded on the CME itself) as their only non-cash holdings, and the Trust proposes to hold only spot bitcoin (which is not traded on the CME). As explained in detail above, and in the Teucrium Order, Valkyrie XBTO Order, and the Grayscale Order, because of this important difference, for a spot bitcoin ETP, there is reason to question whether a surveillance-sharing agreement with the CME would, in fact, assist in detecting and deterring fraudulent and manipulative misconduct affecting the price of the spot bitcoin held by that ETP.[199] And as discussed above, neither the Exchange nor any other evidence in the record for this filing, sufficiently demonstrates that the CME's surveillance can be reasonably relied upon to capture the effects of manipulation of the *spot* bitcoin assets underlying the proposed ETP when such manipulation is not attempted on the CME itself.

Moreover, the analytical framework for assessing compliance with the requirements of Exchange Act Section 6(b)(5) that the Commission applies here (*i.e.,* comprehensive surveillance-sharing agreement with a regulated market of significant size related to the underlying bitcoin assets) is the same one that the Commission has applied in each of its orders considering previous proposals to list bitcoin-based commodity trusts and trust issued receipts.[200] The Commission has applied this framework to each proposal by analyzing the evidence presented by the listing exchange and statements made by commenters.[201] Exchange Act Section 6(b)(5) can be satisfied by a proper showing; the Commission has in fact recently approved proposals by the Exchange and the Nasdaq Stock Market to list and trade shares of ETPs holding CME bitcoin futures as their only non-cash holdings.[202] And in the orders approving the CME bitcoin futures-based ETPs, the Commission explicitly discussed how an exchange seeking to list and trade a spot bitcoin ETP could overcome the lack of a one-to-one relationship between the regulated market with which it has a surveillance-sharing agreement and the market(s) on which the assets held by a spot bitcoin ETP could be traded: by demonstrating that there is a reasonable likelihood that a person attempting to manipulate the spot bitcoin ETP would have to trade on the regulated market (*i.e.,* on the CME) to manipulate the spot bitcoin ETP.[203]

When considering past proposals for spot bitcoin ETPs, the Commission has, in particular, reviewed the econometric and/or statistical evidence in the record to determine whether the listing exchange's proposal has met the applicable standard.[204] The Commission's assessment fundamentally presents quantitative, empirical questions, but, as discussed above, the Exchange has not provided evidence sufficient to support its arguments. Instead, the Exchange makes various assertions that are not supported by the limited data in the record regarding, among other things, CME bitcoin futures trading size, volume, and open interest, and spot bitcoin market capitalization, or the relationship between spot bitcoin prices and CME bitcoin futures prices (including the lead-lag relationship between the spot market and the CME bitcoin futures market), and the record contains insufficient empirical analysis or quantitative evidence of any such data to support the Exchange's conclusions.[205]

The Exchange also argues that ''a distinction between [bitcoin futures] ETFs and [spot bitcoin] ETPs is unwarranted'' because the Trust has agreed to voluntarily comply with some requirements of the 1940 Act.[206] While, as stated by the Exchange, an undertaking by the Trust to comply voluntarily with certain requirements of the 1940 Act may provide some level of transparency and promote certain types of investor protection, it does not alter the Commission's analysis under the Exchange Act relating to a spot bitcoin ETP.[207] As discussed above, the

not appear to be included as a Constituent Bitcoin Platform of the Reference Rate.

[196] In addition, the Commission's determination in the Teucrium Order and the Valkyrie XBTO Order to approve the listing and trading of the relevant CME bitcoin futures ETPs was not based on the ETPs' use—or lack of use—of the BRR (or any other similar pricing mechanism) for the calculation of NAV, or on the fact that the BRR is used for the final cash settlement of CME bitcoin futures contracts. Rather, as discussed above, the Commission approved the listing and trading of such CME bitcoin futures ETPs, not because of the BRR, but because the Commission found that the listing exchanges satisfy the requirement pertaining to a surveillance-sharing agreement with a regulated market of significant size related to the underlying bitcoin assets—which for such ETPs are CME bitcoin futures contracts, not spot bitcoin.

[197] *See also supra* note 183.

[198] The Commission is disapproving this proposed rule change because BZX has not met its burden to demonstrate that its proposal is consistent with the requirements of Exchange Act Section 6(b)(5). The Commission's disapproval of this proposed rule change does not rest on an evaluation of the relative investment quality of a product holding spot bitcoin versus a product holding CME bitcoin futures, or an assessment of whether bitcoin, or blockchain technology more generally, has utility or value as an innovation or an investment. See, *e.g.,* Winklevoss Order, 83 FR at 37580; USBT Order, 85 FR at 12597; One River Order, 87 FR at 33550; Grayscale Order, 87 FR at 40318 n.227.

[199] *See supra* note 183 and accompanying text.

[200] *See supra* notes 11–24 and accompanying text.

[201] *See supra* note 11.

[202] *See* Teucrium Order and Valkyrie XBTO Order, *supra* note 11.

[203] *See supra* note 182 and accompanying text.

[204] *See, e.g.,* USBT Order, 85 FR at 12612–13; VanEck Order, 86 FR at 64547–48; WisdomTree Order, 86 FR at 69330–32; Kryptoin Order, 86 FR at 74175–76; NYDIG Order, 87 FR at 14938–39; Wise Origin Order, 87 FR at 5534–36; Global X Order, 87 FR at 14919–20; ARK 21Shares Order, 87 FR at 20023–24; Bitwise Order, 87 FR at 40286–92; Grayscale Order, 87 FR at 40311–14.

[205] *See* Sections III.B.1 & III.B.2, *supra.*

[206] *See supra* note 172 and accompanying text.

[207] The 1940 Act provides for the regulation of investment companies. *See* 15 U.S.C. 80a. In general, the 1940 Act is designed to minimize conflicts of interest and is focused on disclosure to the investing public of information about the fund and its investment objectives, as well as on investment company structure and operations. *See https://www.sec.gov/investment/laws-and-rules.* The requirements of Section 6(b)(5) of the Exchange Act, on the other hand, apply to the rules of national securities exchanges and require, among other things, that such rules be designed to prevent

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proposed rule change does not relate to the same underlying holdings as either ETFs regulated under the 1940 Act that provide exposure to bitcoin through CME bitcoin futures, or CME bitcoin futures-based ETPs that have registered their offerings under the Securities Act but are not regulated under the 1940 Act.[208] And as discussed above, neither the Exchange nor any other evidence in the record for this filing, sufficiently demonstrates that the CME's surveillance can be reasonably relied upon to capture the effects of manipulation of the spot bitcoin assets underlying the proposed ETP when such manipulation is not attempted on the CME itself. The requirements of Section 6(b)(5) of the Exchange Act apply to the rules of national securities exchanges. Accordingly, the relevant obligation to have a comprehensive surveillance-sharing agreement with a regulated market of significant size related to spot bitcoin, or other means to prevent fraudulent and manipulative acts and practices that are sufficient to justify dispensing with such a surveillance-sharing agreement, resides with the listing exchange. Because there is insufficient evidence in the record demonstrating that BZX has satisfied this obligation, the Commission cannot approve the proposed ETP for listing and trading on BZX.

*C. Whether BZX Has Met Its Burden To Demonstrate That the Proposal Is Designed To Protect Investors and the Public Interest*

BZX contends that, if approved, the proposed ETP would protect investors and the public interest. However, the Commission must consider these potential benefits in the broader context of whether the proposal meets each of the applicable requirements of the Exchange Act.[209] Because BZX has not demonstrated that its proposed rule change is designed to prevent fraudulent and manipulative acts and practices, the Commission must disapprove the proposal.

(1) BZX's Assertions

The Exchange states that the proposal is designed to protect investors and the public interest. BZX asserts that access for U.S. retail investors to gain exposure to bitcoin via a transparent and U.S. regulated, exchange-traded vehicle remains limited.[210] According to the Exchange, current options include: (i) paying a potentially high premium (and high management fees) to buy over-the-counter (''OTC'') bitcoin funds, to the advantage of more sophisticated investors that are able to create shares at NAV directly with the issuing trust; (ii) facing the technical risk, complexity, and generally high fees associated with buying spot bitcoin; (iii) purchasing shares of operating companies that they believe will provide proxy exposure to bitcoin with limited disclosure about the associated risks; or (iv) through the purchase of bitcoin futures ETFs that represents a sub-optimal investment for long-term investors.[211] Meanwhile, the Exchange represents that investors in many other countries, including Canada [212] and Brazil, are able to use more traditional exchange-listed and traded products (including exchange-traded funds holding physical bitcoin) to gain exposure to bitcoin, disadvantaging U.S. investors and leaving them with more risky means of getting bitcoin exposure.[213] Additionally, investors in other countries and regions, specifically Canada and Europe, generally pay lower fees than U.S. retail investors that invest in OTC bitcoin funds due to the fee pressure that results from increased competition among available bitcoin investment options.[214] Without an approved and regulated spot bitcoin ETP in the U.S. as a viable alternative, BZX argues that U.S. investors could seek to purchase shares of non-U.S. bitcoin vehicles in order to get access to bitcoin exposure, and given the separate regulatory regime and the potential difficulties associated with any international litigation, such an arrangement would create more risk exposure for U.S. investors than they would otherwise have with an U.S. exchange listed ETP.[215]

BZX argues that over the past 1.5 years, U.S. investor exposure to bitcoin through OTC bitcoin funds has grown into the tens of billions of dollars and more than a billion dollars of exposure through bitcoin futures ETFs.[216] With that growth, BZX asserts, so too has grown the quantifiable investor protection issues to U.S. investors through roll costs for bitcoin futures ETFs and premium/discount volatility and management fees for OTC bitcoin funds.[217] The Exchange understands the Commission's previous focus on potential manipulation of a spot bitcoin ETP in prior disapproval orders, but now believes that such concerns have been sufficiently mitigated, and that the growing and quantifiable investor protection concerns should be a central consideration as the Commission reviews this proposal.[218] The Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to bitcoin in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in bitcoin futures ETFs and operating companies that are imperfect proxies for bitcoin exposure; and (iv) providing an alternative for investors to self-custodying spot bitcoin.[219]

In addition, BZX represents that the Sponsor has taken 1940 Act considerations into account in structuring the Trust's operations in seeking ''to protect investors and the public interest.'' [220] Although the Trust would not be an investment company registered under the 1940 Act, the Exchange represents that: (a) the Trust would qualify as an investment company under Accounting Standards Update 2013–08 and, as such, the Sponsor would ensure that the Trust's financial statements would be audited at least annually by an independent registered public accounting firm and,

fraudulent and manipulative acts and practices. 15 U.S.C. 78f(b)(5).

[208] Although counsel for the sponsor of the Teucrium Bitcoin Futures Fund submitted a letter to the Commission stating that the trust, which was not regulated under the 1940 Act, intended to comply with certain requirements of the 1940 Act, the Commission did not rely on this representation as a basis for its approval of the proposed rule change. *See* Teucrium Order, 87 FR at 21682. *See also* letter from W. Thomas Conner, Shareholder, VedderPrice, dated September 1, 2021, at 9.

[209] *See* Winklevoss Order, 83 FR at 37602. *See also* GraniteShares Order, 83 FR at 43931; ProShares Order, 83 FR at 43941; USBT Order, 85 FR at 12615; WisdomTree Order, 86 FR at 69333; Valkyrie Order, 86 FR at 74163; Kryptoin Order, 86 FR at 74178; SkyBridge Order, 87 FR at 3880; Wise Origin Order, 87 FR at 5537; ARK 21Shares Order, 87 FR at 20026; Global X Order, 87 FR at 14921; Bitwise Order, 87 FR at 40292; Grayscale Order, 87 FR at 40319.

[210] *See* Notice, 87 FR at 8322.

[211] *See id.*

[212] The Exchange notes that the Purpose Bitcoin ETF, a retail physical bitcoin ETP launched in Canada, reportedly reached $1.2 billion in assets under management as of October 15, 2021, demonstrating the demand for a North American market listed bitcoin ETP. *See id.* at 8322 n.46.

[213] The Exchange notes that securities regulators in a number of other countries have either approved or otherwise allowed the listing and trading of bitcoin ETPs. Specifically, these funds include the Purpose Bitcoin ETF, Bitcoin ETF, VanEck Vectors Bitcoin ETN, WisdomTree Bitcoin ETP, Bitcoin Tracker One, BTCetc bitcoin ETP, Amun Bitcoin ETP, Amun Bitcoin Suisse ETP, 21Shares Short Bitcoin ETP, CoinShares Physical Bitcoin ETP. *See id.* at 8322 n.47.

[214] *See id.* at 8322.

[215] *See id.*

[216] *See id.* at 8329.

[217] *See id.*

[218] *See id.*

[219] *See id.*

[220] *See id.* at 8323.

as part of such audit, the auditor would be expected to perform procedures similar to those used for ETFs registered under the 1940 Act; (b) the Sponsor would facilitate the Trust's compliance with the financial record keeping and reporting requirements under the Sarbanes-Oxley Act of 2002; (c) the Trust's Custodian would qualify as a ''custodian'' under the 1940 Act, and the Custodian would agree to exercise reasonable care, prudence, and diligence such as a person having responsibility for the safekeeping of property of the Trust would exercise; (d) the Trust would be subject to the transparency requirements of Rule 6c–11 under the 1940 Act; (e) the Sponsor would adopt procedures to ensure there are no transactions with affiliated persons that would be prohibited by Section 17 of the 1940 Act and the applicable rules and regulations thereunder; (f) the Trust would maintain a fidelity bond for the benefit of the Trust in the maximum amount required by Rule 17g–1 under the 1940 Act; and (g) the Sponsor or applicable service provider of the Trust would maintain the books and records of the Trust in satisfaction of the requirements of Section 31 of the 1940 Act.[221]

(2) Analysis

The Commission disagrees that the proposal should be approved because it is designed to protect investors and the public interest. Here, even if it were true that, compared to trading in unregulated spot bitcoin markets or OTC bitcoin funds, trading a spot bitcoin-based ETP on a national securities exchange could provide some additional protection to investors, or that the Shares would provide more efficient exposure to bitcoin than other products on the market such as bitcoin futures ETPs, or that approval of a spot bitcoin ETP could enhance competition, the Commission must consider this potential benefit in the broader context of whether the proposal meets each of the applicable requirements of the Exchange Act.[222] Moreover, the same consideration applies despite the Exchange's representation that the Sponsor would voluntarily apply certain provisions of the 1940 Act, as described above, to the Trust. Pursuant to Section 19(b)(2) of the Exchange Act, the Commission must approve a proposed rule change filed by a national securities exchange if it finds that the proposed rule change is consistent with the applicable requirements of the Exchange Act—including the requirement under Section 6(b)(5) that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices—and it must disapprove the filing if it does not make such a finding.[223] Thus, even if a proposed rule change purports to protect investors from a particular type of investment risk—such as experiencing a potentially high premium/discount by investing in an OTC bitcoin fund or roll costs by investing in bitcoin futures ETPs—or purports to provide benefits to investors and the public interest—such as enhancing competition—the proposed rule change may still fail to meet the requirements under the Exchange Act.[224]

For the reasons discussed above, BZX has not met its burden of demonstrating an adequate basis in the record for the Commission to find that the proposal is consistent with Exchange Act Section 6(b)(5),[225] and, accordingly, the Commission must disapprove the proposal.[226]

## IV. Conclusion

For the reasons set forth above, the Commission does not find, pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with Section 6(b)(5) of the Exchange Act.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Exchange Act, that proposed rule change SR–CboeBZX–2022–006 be, and it hereby is, disapproved.

By the Commission.

**J. Matthew DeLesDernier,**

*Deputy Secretary.*

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[221] *See id.* at 8323–24.

[222] *See supra* note 209.

[223] *See* Exchange Act Section 19(b)(2)(C), 15 U.S.C. 78s(b)(2)(C). *See also Affiliated Ute Citizens of Utah* v. *United States,* 406 U.S. 128, 151 (1972) (Congress enacted the Exchange Act largely ''for the purpose of avoiding frauds''); *Gabelli* v. *SEC,* 568 U.S. 442, 451 (2013) (The ''SEC's very purpose'' is to detect and mitigate fraud.).

[224] *See* SolidX Order, 82 FR at 16259; VanEck Order, 86 FR at 54550–51; WisdomTree Order, 86 FR at 69344; Kryptoin Order, 86 FR at 74179; Valkyrie Order, 86 FR at 74163; SkyBridge Order, 87 FR at 3881; Wise Origin Order, 87 FR at 5538; ARK 21Shares Order, 87 FR at 20026–27.

[225] 15 U.S.C. 78f(b)(5).

[226] In disapproving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

## SOCIAL SECURITY ADMINISTRATION

**[Docket No: SSA–2022–0053]**

### Agency Information Collection Activities: Proposed Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes one revision of an OMB-approved information collection.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

Office of Management and Budget (OMB), *Attn:* Desk Officer for SSA, *Comments: https://www.reginfo.gov/public/do/PRAMain.* Submit your comments online referencing Docket ID Number [SSA–2022–0053].

Social Security Administration (SSA), OLCA, *Attn:* Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, *Fax:* 410–966–2830, *Email address: OR.Reports.Clearance@ssa.gov.*

Or you may submit your comments online through *https://www.reginfo.gov/public/do/PRAMain,* referencing Docket ID Number [SSA–2022–0053].

The information collection below is pending at SSA. SSA will submit it to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than December 13, 2022. Individuals can obtain copies of the collection instrument by writing to the above email address.

### Certificate of Coverage Request—20 CFR 404.1913—0960–0554

The United States (U.S.) has agreements with 30 foreign countries to eliminate double Social Security coverage and taxation where, except for the provisions of the agreement, a worker would be subject to coverage and taxes in both countries. These agreements contain rules for determining the country under whose laws the worker's period of employment is covered, and to which country the