

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98639; File No. SR–CboeBZX–2023–044]

### Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 2, To List and Trade Shares of the Wise Origin Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

September 28, 2023.

On June 30, 2023, 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 (“Act”)<sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares (“Shares”) of the Wise Origin Bitcoin Trust (“Trust”) under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. On July 11, 2023, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the proposed rule change in its entirety. On July 13, 2023, the Exchange filed Amendment No. 2 to the proposed rule change, which amended and replaced the proposed rule change, as modified by Amendment No. 1, in its entirety. The proposed rule change, as modified by Amendment No. 2, was published for comment in the **Federal Register** on July 19, 2023.<sup>3</sup>

On August 31, 2023, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> 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, as modified by Amendment No. 2.<sup>5</sup> This order institutes proceedings under Section 19(b)(2)(B) of the Act<sup>6</sup> to determine whether to approve or disapprove the

proposed rule change, as modified by Amendment No. 2.

#### I. Summary of the Proposal, as Modified by Amendment No. 2

As described in more detail in the Notice,<sup>7</sup> 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 is to seek to track the performance of bitcoin, as measured by the performance of the Fidelity Bitcoin Index PR (the “Index”), less the Trust’s expenses and other liabilities.<sup>8</sup> The Trust’s assets will consist of bitcoin held by the Trust’s custodian on behalf of the Trust.<sup>9</sup> The Trust’s holdings of bitcoin will be valued using the same methodology as used to calculate the Index.<sup>10</sup> The administrator of the Trust will calculate the net asset value of the Trust once each Exchange trading day after 4:00 p.m. ET.<sup>11</sup> When the Trust sells or redeems its Shares, it will do so in “in-kind” transactions with authorized participants in blocks of Shares.<sup>12</sup>

#### II. Proceedings To Determine Whether To Approve or Disapprove SR–CboeBZX–2023–044 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>13</sup> to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>14</sup> the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule

change’s consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be “designed to prevent fraudulent and manipulative acts and practices” and “to protect investors and the public interest.”<sup>15</sup>

The Commission asks that commenters address the sufficiency of the Exchange’s statements in support of the proposal, which are set forth in the Notice, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following questions and asks commenters to submit data where appropriate to support their views:

1. What are commenters’ views on whether the proposed Trust and Shares would be susceptible to manipulation? What are commenters’ views generally on whether the Exchange’s proposal is designed to prevent fraudulent and manipulative acts and practices? What are commenters’ views generally with respect to the liquidity and transparency of the bitcoin markets and the bitcoin markets’ susceptibility to manipulation?

2. Based on data and analysis provided and the academic research cited by the Exchange,<sup>16</sup> do commenters agree with the Exchange that the Chicago Mercantile Exchange (“CME”), on which CME bitcoin futures trade, represents a regulated market of significant size related to spot bitcoin?<sup>17</sup> What are commenters’ views on whether there is a reasonable likelihood that a person attempting to manipulate the Shares would also have to trade on the CME to manipulate the Shares?<sup>18</sup> Do commenters agree with the Exchange that trading in the Shares would not be the predominant influence on prices in the CME bitcoin futures market?<sup>19</sup>

3. The Exchange states that bitcoin is resistant to price manipulation and that other means to prevent fraudulent and manipulative acts and practices “exist to justify dispensing with the requisite surveillance sharing agreement” with a regulated market of significant size related to spot bitcoin.<sup>20</sup> In support, the Exchange states, among other things, that the geographically diverse and continuous nature of bitcoin trading make it difficult and prohibitively costly to manipulate the price of bitcoin, and that the fragmentation across bitcoin

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> See Securities Exchange Act Release No. 97899 (July 13, 2023), 88 FR 46249 (“Notice”). Comments on the proposed rule change, as modified by Amendment No. 2, are available at: <https://www.sec.gov/comments/sr-cboebzx-2023-044/sr-cboebzx2023044.htm>.

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 98263, 88 FR 61642 (Sept. 7, 2023). The Commission designated October 17, 2023, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

<sup>6</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>7</sup> See Notice, *supra* note 3.

<sup>8</sup> See *id.* at 46278. FD Funds Management LLC (“Sponsor”) is the sponsor of the Trust.

<sup>9</sup> See *id.* 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. See *id.*

<sup>10</sup> See *id.* at 46279.

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>14</sup> *Id.*

<sup>15</sup> 15 U.S.C. 78f(b)(5).

<sup>16</sup> See Notice, 88 FR at 46255–77.

<sup>17</sup> See *id.* at 46281.

<sup>18</sup> See *id.* at 46282.

<sup>19</sup> See *id.*

<sup>20</sup> See *id.* at 46257 n.52.

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.<sup>21</sup> The Exchange also states that offering only in-kind creations and redemptions provides “unique protections against potential attempts to manipulate the price of the Shares” and that it makes the benchmark that the Sponsor uses to value the Trust’s bitcoin “not particularly important.”<sup>22</sup> Do commenters agree with the Exchange’s statements regarding the bitcoin market’s resistance to price manipulation?

4. The Exchange also states that it will execute a surveillance-sharing agreement with Coinbase, Inc. (“Coinbase”) that is intended to supplement the Exchange’s market surveillance program.<sup>23</sup> According to the Exchange, the agreement is “expected to have the hallmarks of a surveillance-sharing agreement between two members of the [Intermarket Surveillance Group], which would give the Exchange supplemental access to data regarding spot [b]itcoin trades on Coinbase where the Exchange determines it is necessary as part of its surveillance program for the Commodity-Based Trust Shares.”<sup>24</sup> Based on the description of the surveillance-sharing agreement as provided by the Exchange, what are commenters’ views of such an agreement if finalized and executed? Do commenters agree with the Exchange that such an agreement with Coinbase would be “helpful in detecting, investigating, and deterring fraud and market manipulation in the Commodity-Based Trust Shares”?<sup>25</sup>

5. Some sponsors of proposed spot bitcoin exchange-traded products have also provided data regarding the correlation between certain bitcoin spot markets and the CME bitcoin futures market.<sup>26</sup> What are commenters’ views

on the correlation between the bitcoin spot market and the CME bitcoin futures market? What are commenters’ views on the extent to which that correlation provides evidence that the CME bitcoin futures market is “significant” related to spot bitcoin?

### III. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, and the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.<sup>27</sup>

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by October 25, 2023. Any person who wishes to file a rebuttal to any other person’s submission must file that rebuttal by November 8, 2023.

Comments may be submitted by any of the following methods:

#### Electronic Comments

- Use the Commission’s internet comment form (<https://www.sec.gov/rules/sro.shtml>); or

Commodity-Based Trust Shares, Securities Exchange Act Release No. 98112 (Aug. 11, 2023), 88 FR 55743 (Aug. 16, 2023) (including data from sponsor 21Shares US LLC that purports to show correlations of returns across the two-year period from January 20, 2021, to February 1, 2023, of no less than 92% among certain spot bitcoin platforms and between the CME bitcoin futures market and such spot bitcoin platforms on an hourly basis, and no less than 78% on a minutely basis).

<sup>27</sup> Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR–ChoeBZX–2023–044 on the subject line.

#### Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–ChoeBZX–2023–044. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission’s Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–ChoeBZX–2023–044 and should be submitted on or before October 25, 2023. Rebuttal comments should be submitted by November 8, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>28</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>28</sup> 17 CFR 200.30–3(a)(57).

<sup>21</sup> See *id.*

<sup>22</sup> See *id.* at 46278.

<sup>23</sup> See *id.* at 46277.

<sup>24</sup> See *id.* The Exchange states that “[t]his means that the Exchange expects to receive market data for orders and trades from Coinbase, which it will utilize in surveillance of the trading of Commodity-Based Trust Shares.” *Id.*

<sup>25</sup> See *id.*

<sup>26</sup> See, e.g., Notice of Filing of Amendment No. 3 to, and Order Instituting Proceedings to Determine Whether to Approve or Disapprove, a Proposed Rule Change to List and Trade Shares of the ARK 21Shares Bitcoin ETF under BZX Rule 14.11(e)(4),