

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82939; File No. SR-NYSEArca-2017-139)

March 23, 2018

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF under NYSE Arca Rule 8.200-E, Commentary .02

On December 4, 2017, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade the shares (“Shares”) of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF (each a “Fund” and, collectively, “Funds”) issued by the ProShares Trust II (“Trust”) under NYSE Arca Rule 8.200-E, Commentary .02. The proposed rule change was published for comment in the Federal Register on December 26, 2017.³

The Commission has received one comment letter on the proposed rule change.⁴ On January 30, 2018, pursuant to Section 19(b)(2) of the Act,⁵ 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.⁶ This

¹ 15 U.S.C.78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 82350 (Dec. 19, 2017), 82 FR 61100 (Dec. 26, 2017) (“Notice”).

⁴ See Letter from Abe Kohen, AK Financial Engineering Consultants, LLC (Dec. 27, 2017) (“Kohen Letter”). All comments on the proposed rule change are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nysearca-2017-139/nysearca2017139.htm>.

⁵ 15 U.S.C. 78s(b)(2).

⁶ See Securities Exchange Act Release No. 82602 (Jan. 30, 2018), 83 FR 4941 (Feb. 2, 2018). The Commission designated March 26, 2018, as the date by which it should

order institutes proceedings under Section 19(b)(2)(B) of the Act⁷ to determine whether to approve or disapprove the proposed rule change.

I. Summary of the Proposal⁸ and Comments Received

The Exchange proposes to list and trade the Shares under NYSE Arca Rule 8.200-E, Commentary .02, which governs the listing and trading of Trust Issued Receipts on the Exchange.⁹ Each Fund will be a series of the Trust, and the Trust and the Funds will be managed and controlled by ProShare Capital Management LLC (“Sponsor”). Brown Brothers Harriman & Co. will be the custodian and administrator for the Trust. SEI Investments Distribution Co. will serve as the distributor of the Shares (“Distributor”). The Trust will offer Shares of the Funds for sale through the Distributor in “Creation Units.”¹⁰

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

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ The Commission notes that additional information regarding the Trust, the Shares, and the Funds, including investment strategies, calculation of net asset value (“NAV”) and indicative fund value, creation and redemption procedures, and additional background information about bitcoins, the bitcoin network, and bitcoin futures contracts, among other things, can be found in the Notice (see supra note 3) and the registration statement filed with the Commission on Form S-1 (File No. 333-220680) under the Securities Act of 1933 (“Registration Statement”), as applicable.

⁹ See NYSE Arca Rule 8.200-E, Commentary .02. NYSE Arca Rule 8.200-E permits the listing and trading of “Trust Issued Receipts,” defined as a security (1) that is used by the trust which holds specific securities deposited with the trust; (2) that, when aggregated in some specified minimum number, may be surrendered to the trust by the beneficial owner to receive the securities; and (3) that pay beneficial owners dividends and other distributions on the deposited securities, if any are declared and paid to the trustee by an issuer of the deposited securities. Commentary .02 applies to Trust Issued Receipts that invest in any combination of investments, including cash; securities; options on securities and indices; futures contracts; options on futures contracts; forward contracts; equity caps, collars, and floors; and swap agreements.

¹⁰ See Notice, supra note 3, at 61101.

According to the Exchange, the ProShares Bitcoin ETF's investment objective will be to seek results (before fees and expenses) that, both for a single day and over time, correspond to the performance of lead month bitcoin futures contracts¹¹ listed and traded on either the Cboe Futures Exchange ("CFE") or the Chicago Mercantile Exchange ("CME") ("Benchmark Futures Contract"). This Fund generally intends to invest substantially all of its assets in the Benchmark Futures Contracts, but may invest in other U.S. exchange listed bitcoin futures contracts, if available (together with Benchmark Futures Contracts, collectively, "Bitcoin Futures Contracts").¹²

In addition, the Exchange states that the ProShares Short Bitcoin ETF's investment objective will be to seek results, for a single day, that correspond (before fees and expenses) to the inverse of the daily performance of the Benchmark Futures Contract. This Fund generally intends to invest substantially all of its assets through short positions in Benchmark Futures Contracts, but may invest through short positions in Bitcoin Futures Contracts, if available.¹³

Further, the Exchange states that, in the event position, price, or accountability limits are reached with respect to Bitcoin Futures Contracts, each Fund may invest in listed options on Bitcoin Futures Contracts (should such listed options become available) and OTC swap agreements referencing Bitcoin Futures Contracts (collectively, "Financial Instruments").¹⁴

¹¹ According to the Exchange, lead month futures contracts are the monthly contracts with the earliest expiration date. See Notice, supra note 3, at 61101, n.6. See also Notice and Registration Statement, supra notes 3 and 8.

¹² See Notice, supra note 3, at 61101.

¹³ See id.

¹⁴ See id. at 61102.

The Commission has received one comment letter, which expresses concerns about the proposed rule change.¹⁵ The commenter refers to the proposal as a “house of cards” and expresses concern that the Funds’ attempt to replicate the bitcoin futures markets, which are related to underlying cryptocurrencies that trade on unregulated exchanges, will lead to losses for retail investors, and that the inclusion of an inverse Fund will add to the risk.¹⁶

II. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEArca-2017-139 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹⁷ to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,¹⁸ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change’s consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be “designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,” and “to protect investors and the public interest.”¹⁹

¹⁵ See supra note 4 and accompanying text.

¹⁶ See Kohen Letter, supra note 4.

¹⁷ 15 U.S.C. 78s(b)(2)(B).

¹⁸ Id.

¹⁹ 15 U.S.C. 78f(b)(5).

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, or 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.²⁰

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. 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,²¹ 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:

1. What are commenters' views on whether the Exchange has sufficiently described how the Sponsor will select the applicable Benchmark Futures Contracts, given that the contracts

²⁰ Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

²¹ See supra note 3.

trading on these two bitcoin futures exchanges have different terms (including different reference prices) and trade at different prices?

2. In its proposal, the Exchange states that each Fund may, in the event that position, price, or accountability limits are reached with respect to Bitcoin Futures Contracts—or if the market for a specific Bitcoin Futures Contract experiences an emergency or disruption—also invest in Financial Instruments, which include listed options on Bitcoin Futures Contracts (should such listed options become available) and OTC swap agreements referencing Bitcoin Futures Contracts. What are commenters' views on the current availability of Financial Instruments for trading? What are commenters' views on the ability of the Funds to invest in Financial Instruments in the event that position, price, or accountability limits are reached with respect to Bitcoin Futures Contracts? What are commenters' views on the ability of the Funds to invest in Financial Instruments if the market for a specific Bitcoin Futures Contract experiences emergencies or disruptions?

3. What are commenters' views on whether the Funds would have the information necessary to adequately value, including fair value, the Bitcoin Futures Contracts and related Financial Instruments when determining an appropriate end-of-day NAV for the Funds, taking into account any volatility, fragmentation, or general lack of regulation of the underlying bitcoin markets?

4. What are commenters' views on the potential impact of manipulation in the underlying bitcoin markets on the Funds' NAV? What are commenters' views on the potential effect of such manipulation on the valuation of a Fund's Bitcoin Futures Contracts, which is determined using the last traded price on the primary listing futures exchange (as opposed to the settlement price, closing price, midpoint, or volume weighted average price)? What are

commenters' views on the potential effect of such manipulation on the pricing of a Fund's Financial Instruments?

5. What are commenters' views on how the Funds' valuation policies would address the potential for the bitcoin blockchain to diverge into different paths (i.e., a "fork")?

6. What are commenters' views on the price differentials and trading volumes across bitcoin trading platforms (including during periods of market stress) and on the extent to which these differing prices may affect the trading of the Bitcoin Futures Contracts and, accordingly, trading in the Shares of the Funds?

7. What are commenters' views on how the substantial margin requirements for Bitcoin Futures Contracts, and the nature of liquidity and volatility in the market for Bitcoin Futures Contracts, might affect the Trust's ability to meet redemption orders? What are commenters' views on whether and how the margin requirements for Bitcoin Futures Contracts, and the nature of liquidity and volatility in the market for Bitcoin Futures Contracts, might affect a Fund's use of available cash to achieve its investment strategy?

8. What are commenters' views on the possibility that the Funds—along with other exchange-traded products with similar investment objectives—could acquire a substantial portion of the market for Bitcoin Futures Contracts or the Financial Instruments? What are commenters' views on whether such a concentration of holdings could affect the Funds' portfolio management, the liquidity of the Funds' respective portfolios, or the pricing of the Bitcoin Futures Contracts or the Financial Instruments?

9. What are commenters' views on possible factors that might impair the ability of the arbitrage mechanism to keep the trading price of the Shares tied to the NAV of each Fund? With respect to the market for Bitcoin Futures Contracts, what are commenters' views on the

potential impact on the arbitrage mechanism of the price volatility and the potential for trading halts? What are commenters' views on whether or how these potential impairments of the arbitrage mechanism may affect the Funds' ability to ensure adequate participation by Authorized Participants? What are commenters' views on the potential effects on investors if the arbitrage mechanism is impaired?

10. What are commenters' views on the risks of price manipulation and fraud in the underlying bitcoin trading platforms and how these risks might affect the Bitcoin Futures Contracts market or the Financial Instruments? What are commenters' views on how these risks might affect trading in the Shares of the Funds?

11. What are commenters' views on how an investor may evaluate the price of the Shares in light of the risk of potential price manipulation and fraud in the underlying bitcoin trading platforms and in light of the potentially significant spread between the price of the Bitcoin Futures Contracts and the spot price of bitcoin?

12. What are commenters' views on whether the two bitcoin futures exchanges represent a significant market, i.e., a market of significant size?

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEArca-2017-139 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NYSEArca-2017-139. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All

submissions should refer to File Number SR-NYSEArca-2017-139 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

Brent J. Fields
Secretary

²² 17 CFR 200.30-3(a)(57).