

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-100541; File Nos. SR-NYSEARCA-2024-44; SR-NYSEARCA-2024-53)

July 17, 2024

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Changes to List and Trade Shares of the Grayscale Ethereum Mini Trust and ProShares Ethereum ETF

**I. INTRODUCTION**

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) proposed rule changes to list and trade shares of the Grayscale Ethereum Mini Trust<sup>3</sup> and the ProShares Ethereum ETF<sup>4</sup> (each a “Trust” and, together, the “Trusts”) under NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares). Each filing was subject to notice and comment.<sup>5</sup>

Each of the foregoing proposed rule changes is referred to herein as a “Proposal” and together as the “Proposals.” As described in more detail in the Proposals’ respective filings,<sup>6</sup>

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 3, To List and Trade Shares of the Grayscale Ethereum Mini Trust, Securities Exchange Act Release No. 100233 (May 28, 2024), 89 FR 47618 (June 3, 2024) (SR-NYSEARCA-2024-44) (“Grayscale Filing”).

<sup>4</sup> See Notice of Filing of Proposed Rule Change To List and Trade Shares of the ProShares Ethereum ETF, Securities Exchange Act Release No. 100307 (June 10, 2024), 89 FR 50644 (June 14, 2024) (SR-NYSEARCA-2024-53) (“ProShares Filing”).

<sup>5</sup> The Commission did not receive any comments on either filing.

<sup>6</sup> See supra notes 3-4.

each Proposal seeks to list and trade shares of a Trust that would hold spot ether,<sup>7</sup> in whole or in part.<sup>8</sup> This order approves the Proposals.

## **II. DISCUSSION AND COMMISSION FINDINGS**

After careful review, the Commission finds that the Proposals are consistent with the Exchange Act and rules and regulations thereunder applicable to a national securities exchange.<sup>9</sup> In particular, the Commission finds that the Proposals are consistent with Section 6(b)(5) of the Exchange Act,<sup>10</sup> which requires, among other things, that the Exchange’s rules be designed to “prevent fraudulent and manipulative acts and practices” and, “in general, to protect investors and the public interest;” and with Section 11A(a)(1)(C)(iii) of the Exchange Act,<sup>11</sup> which sets forth Congress’ finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities.

### **A. Exchange Act Section 6(b)(5)**

The Commission has explained that one way an exchange that lists ether-based exchange-traded products (“ETPs”) can meet the obligation under Exchange Act Section 6(b)(5) that its rules be designed to prevent fraudulent and manipulative acts and practices is by demonstrating that the exchange has a comprehensive surveillance-sharing agreement with a regulated market

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<sup>7</sup> Ether is a digital asset that is native to, and minted and transferred via, a distributed, open-source protocol used by a peer-to-peer computer network through which transactions are recorded on a public transaction ledger known as “Ethereum.” The Ethereum protocol governs the creation of new ether and the cryptographic system that secures and verifies transactions on Ethereum.

<sup>8</sup> Each Trust proposes to hold spot ether. The ProShares Ethereum ETF also proposes to hold cash. See ProShares Filing at 50645.

<sup>9</sup> In approving the Proposals, the Commission has considered the Proposals’ impacts on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

<sup>11</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

of significant size related to the underlying or reference assets.<sup>12</sup> Such an agreement would assist in detecting and deterring fraud and manipulation related to that underlying asset.

The Commission has also consistently recognized, however, that this is not the *exclusive* means by which an ETP listing exchange can meet this statutory obligation.<sup>13</sup> A listing exchange could, alternatively, demonstrate that “other means to prevent fraudulent and manipulative acts and practices will be sufficient” to justify dispensing with a surveillance-sharing agreement with a regulated market of significant size.<sup>14</sup> In the Spot Ether ETP Approval Order, the Commission determined that having a comprehensive surveillance-sharing agreement with a U.S.-regulated market that, based on evidence from robust correlation analysis, is consistently highly correlated with the ETPs’ underlying assets (spot ether) constituted “other means” sufficient to satisfy the

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<sup>12</sup> See Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, To List and Trade Shares of Ether-Based Exchange-Traded Products, Securities Exchange Act Release No. 100224 (May 23, 2024), 89 FR 46937 (May 30, 2024) (SR-NYSEARCA-2023-70; SR-NYSEARCA-2024-31; SR-NASDAQ-2023-045; SR-CboeBZX-2023-069; SR-CboeBZX-2023-070; SR-CboeBZX-2023-087; SR-CboeBZX-2023-095; SR-CboeBZX-2024-018) (“Spot Ether ETP Approval Order”). See also Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, To List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units, Securities Exchange Act Release No. 99306 (Jan. 10, 2024), 89 FR 3008 (Jan. 17, 2024) (SR-NYSEARCA-2021-90; SR-NYSEARCA-2023-44; SR-NYSEARCA-2023-58; SR-NASDAQ-2023-016; SR-NASDAQ-2023-019; SR-CboeBZX-2023-028; SR-CboeBZX-2023-038; SR-CboeBZX-2023-040; SR-CboeBZX-2023-042; SR-CboeBZX-2023-044; SR-CboeBZX-2023-072) (“Spot Bitcoin ETP Approval 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). The Commission has provided an illustrative definition for “market of significant size” to 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. 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, 37594 (Aug. 1, 2018) (SR-BatsBZX-2016-30) (“Winklevoss Order”).

<sup>13</sup> See, e.g., Winklevoss Order at 37580; Spot Bitcoin ETP Approval Order at 3009; Spot Ether ETP Approval Order at 46938.

<sup>14</sup> See Spot Ether ETP Approval Order at 46938 (quoting Winklevoss Order at 37580).

Exchange Act Section 6(b)(5) standard.<sup>15</sup> Specifically, given the consistently high correlation between the ether futures market of the Chicago Mercantile Exchange (“CME”) and a sample of spot ether markets—confirmed by the Commission through robust<sup>16</sup> correlation analysis using data at hourly, five-minute, and one-minute intervals—the Commission was able to conclude that fraud or manipulation that impacts prices in spot ether markets would likely similarly impact CME ether futures prices. And because the CME’s surveillance can assist in detecting those impacts on CME ether futures prices, the Commission was able to conclude that the comprehensive surveillance-sharing agreement among the listing exchanges and the CME can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the proposals considered in the Spot Ether ETP Approval Order.

With respect to the present Proposals, the structure of the Trusts, the terms of their operation and the trading of their shares, and the representations in their respective filings are substantially similar to those of the proposals considered in the Spot Ether ETP Approval Order.<sup>17</sup> In addition, the Commission recently found in the Spot Ether ETP Approval Order that the spot ether market is consistently highly correlated with the CME ether futures market.<sup>18</sup> As such, based on the record before the Commission, the Commission is able to conclude that the Exchange’s comprehensive surveillance-sharing agreement with the CME can be reasonably

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<sup>15</sup> See *id.* at 46938-41.

<sup>16</sup> The Commission stated that the “robustness” of its correlation analysis rested on the pre-requisites of (1) the correlations being calculated with respect to ether futures that trade on the CME, a U.S. market regulated by the Commodity Futures Trading Commission, (2) the lengthy sample period of price returns for both the CME ether futures market and the spot ether market, (3) the frequent intra-day trading data in both the CME ether futures market and the spot ether market over that lengthy sample period, and (4) the consistency of the correlation results throughout the lengthy sample period. See *id.* at 46941 n.49.

<sup>17</sup> See also *infra* Section II.B.

<sup>18</sup> See Spot Ether ETP Approval Order at 46939-41, assessing the period from October 1, 2021, to March 29, 2024.

expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the Proposals.

**B. Exchange Act Section 11A(a)(1)(C)(iii)**

Each Proposal sets forth aspects of its proposed ETP, including the availability of pricing information, transparency of portfolio holdings, and types of surveillance procedures, that are consistent with other ETPs that the Commission has approved.<sup>19</sup> This includes commitments regarding: the availability via the Consolidated Tape Association of quotation and last-sale information for the shares of each Trust; the availability on the websites of each Trust of certain information related to the Trusts, including net asset values; the dissemination of intra-day indicative values by one or more major market data vendors, updated every 15 seconds throughout the Exchange's core trading hours; the Exchange's surveillance procedures and ability to obtain information regarding trading in the shares of the Trusts; the conditions under which the Exchange would implement trading halts and suspensions; and the requirements of registered market makers in the shares of each Trust.<sup>20</sup> In addition, in each Proposal, the Exchange deems the shares of the applicable Trust to be equity securities, thus rendering trading in such shares subject to the Exchange's existing rules governing the trading of equity securities.<sup>21</sup> Further, the listing rules of the Exchange require that all statements and representations made in its filing regarding, among others, the description of the applicable

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<sup>19</sup> See, e.g., Spot Bitcoin ETP Approval Order at 3011; Spot Ether ETP Approval Order at 46941-42; Securities Exchange Act Release No. 61220 (Dec. 22, 2009), 74 FR 68895 (Dec. 29, 2009) (SR-NYSEARCA-2009-94) (Order Granting Approval of Proposed Rule Change Relating To Listing and Trading Shares of the ETFs Palladium Trust); Securities Exchange Act Release No. 94518 (Mar. 25, 2022), 87 FR 18837 (Mar. 31, 2022) (SR-NYSEARCA-2021-65) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Shares of the Sprott ESG Gold ETF Under NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares)).

<sup>20</sup> See Grayscale Filing at 47635-37; ProShares Filing at 50646, 50649-51.

<sup>21</sup> See Grayscale Filing at 47636; ProShares Filing at 50650.

Trust's holdings, limitations on such holdings, and the applicability of the Exchange's listing rules specified in the filing, will constitute continued listing requirements.<sup>22</sup> Moreover, each Proposal states that: its sponsor has represented to the Exchange that it will advise the Exchange of any failure to comply with the continued listing requirements; pursuant to obligations under Section 19(g)(1) of the Exchange Act, the Exchange will monitor for compliance with the continued listing requirements; and if the applicable Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures.<sup>23</sup>

The Commission therefore finds that the Proposals, as with other ETPs that the Commission has approved,<sup>24</sup> are reasonably designed to promote fair disclosure of information that may be necessary to price the shares of the Trusts appropriately, to prevent trading when a reasonable degree of transparency cannot be assured, to safeguard material non-public information relating to the Trusts' portfolios, and to ensure fair and orderly markets for the shares of the Trusts.

### **III. CONCLUSION**

This approval order is based on all of the Exchange's representations and descriptions in the respective filings, which the Commission has carefully evaluated as discussed above.<sup>25</sup> For the reasons set forth above, the Commission finds, pursuant to Section 19(b)(2) of the Exchange Act,<sup>26</sup> that the Proposals are consistent with the requirements of the Exchange Act and the rules

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<sup>22</sup> See NYSE Arca Rule 8.201-E(e)(2)(vii).

<sup>23</sup> See Grayscale Filing at 47637; ProShares Filing at 50651.

<sup>24</sup> See *supra* note [19].

<sup>25</sup> See *supra* notes 3-4. In addition, the shares of the Trusts must comply with the requirements of NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares) to be listed and traded on NYSE Arca on an initial and continuing basis.

<sup>26</sup> 15 U.S.C. 78s(b)(2).

and regulations thereunder applicable to a national securities exchange, and in particular, with Section 6(b)(5) and Section 11A(a)(1)(C)(iii) of the Exchange Act.<sup>27</sup>

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,<sup>28</sup> that the Proposals (SR-NYSEARCA-2024-44; SR-NYSEARCA-2024-53) be, and hereby are, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>29</sup>

**J. Matthew DeLesDernier,**

*Deputy Secretary.*

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<sup>27</sup> 15 U.S.C. 78f(b)(5); 15 U.S.C. 78k-1(a)(1)(C)(iii).

<sup>28</sup> 15 U.S.C. 78s(b)(2).

<sup>29</sup> 17 CFR 200.30-3(a)(12).