

Dissenting Statement of Hester M. Peirce in Response to Release No. 34-88284; File No. SR-NYSEArca-2019-39



Commissioner Hester M. Peirce

Feb. 26, 2020

Today the Commission once again disapproved a proposed rule change that would give American investors access to bitcoin through a product listed and traded on a national securities exchange subject to the Commission's regulatory framework.^[1] This order is the latest in a long string of disapproval orders that the Commission has issued regarding bitcoin-related products.^[2] This line of disapprovals leads me to conclude that this Commission is unwilling to approve the listing of any product that would provide access to the market for bitcoin and that no filing will meet the ever-shifting standards that this Commission insists on applying to bitcoin-related products—and only to bitcoin-related products.

When I dissented from the Commission's order disapproving a proposed rule change that would have permitted Bats BZX Exchange, Inc. to list and trade shares of the Winklevoss Bitcoin Trust,^[3] I did so because I believed that the proposed rule change was consistent with the statutory standard for such rule filings. I also argued that the Commission's approach to that product—and others like it—interfered with the continued institutionalization of the market and thus delayed improvements in market structure and investor protections, and that it deprived investors (particularly retail investors) of the ability to access bitcoin in markets within our regulatory framework. Finally, I warned that the Commission's hesitancy to embrace new products and technologies impedes innovation in this country and threatens to drive entrepreneurs, and the opportunities they create, to other jurisdictions. The Commission's actions in this area over the past eighteen months confirm these concerns. Meanwhile, investor interest in gaining exposure to bitcoin continues to grow.

I. The Commission Applies a Unique, Heightened Standard under Exchange Act Section 6(b) to Rule Filings Related to Digital Assets

Section 6(b)(5) of the Exchange Act requires, in 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.” As I explained in the Winklevoss Dissent, this provision requires the Commission to look to the rules of the exchange seeking to list the product, not the attributes of the assets or markets underlying the product to be traded. The statute says nothing about the underlying markets.

The Winklevoss Dissent set out my statutory analysis in full, and I will not repeat it here.^[4] I am persuaded that NYSE Arca’s proposed rule filing to list and trade shares of the United States Bitcoin and Treasury Investment Trust (“the Trust”) satisfies the statutory standard for generally the same reasons that persuaded me the Bats BZX filing did so. Moreover, as in the Winklevoss Dissent, I would reach the same conclusion even if I agreed that the Commission could scrutinize the underlying market as part of this analysis.

This disapproval order is just the most recent in a series of such disapprovals in which the Commission applies Section 6(b)(5) in a manner contrary to the plain language of the statute.^[5] The Commission has looked not to the rules of the listing exchange but instead to the quality (or, more accurately, *the merits*) of the underlying bitcoin spot or futures market. As exchanges refine their filings to address the Commission’s concerns, the Commission responds by requiring increasingly granular analyses of the relevant markets and by requiring exchanges to establish that these markets possess characteristics that the Commission has required in no other market. One might suspect that the Commission has found in the penumbras of Section 6 of the Exchange Act a heightened market quality standard—indeed, a mandate for merit regulation—that applies only to products based on bitcoin. One also might conclude that this standard will forever beckon, as a mirage on the horizon that tempts the entrepreneur to continue committing her limited resources to a quest that is, in the end, doomed to fail.

As I noted in the Winklevoss Dissent, prior to its orders disapproving bitcoin-related products, the Commission had never articulated a standard that expressly required surveillance-sharing agreements with a regulated market *of significant size*.^[6] Notwithstanding the Commission’s assertion in this order that “in every case,” regardless of the underlying commodity, it has required “at least one significant, regulated market for trading futures on the underlying commodity,”^[7] that standard in fact appears to be unique to the bitcoin-related products the Commission has

considered.[8] In a prior order, the Commission admitted that its pre-bitcoin orders “did not explicitly undertake an analysis of whether the related futures markets were of ‘significant size,’” but protested that such analysis was implicit.[9] In support, the Commission cited to a large number of pre-bitcoin orders where the exchanges made representations regarding the trading volumes on the relevant regulated markets.[10] Tellingly, in none of these pre-bitcoin orders does the Commission appear to have performed any analysis of whether those volumes were significant when compared to the underlying commodity markets.[11] In some prior orders, the Commission does not even mention the size of any related market, much less conduct any analysis of the relevant markets.[12] In at least one case, the Commission approved a rule change to list shares of a product referencing a futures market that, at the time of approval, had no trading whatsoever.[13]

Prior to these bitcoin-related filings, the Commission also did not require an exchange to establish any relationship between pricing on the regulated market and the underlying futures or spot markets. Nor has the Commission previously demanded a lead-lag analysis, which considers the relationship between pricing in the markets with which the exchange has a surveillance-sharing arrangement or that will be used to price the listed product, and all other markets.[14] The Commission has not established that this test is consistent with, or reasonable in light of, its prior approval orders, and it is unclear whether this pricing relationship could ever be established to the Commission’s satisfaction for any product, including those previously approved.[15]

I also take issue with the Commission’s approach to determining whether the listing exchange has appropriate surveillance-sharing arrangements in place. Here, as in the prior bitcoin orders, the Commission faults the exchange for not having surveillance sharing agreements with the underlying spot markets and suggests such agreements would be insufficient in any event, as those markets are not “regulated” to a sufficient level.[16] Yet the Commission’s analysis in prior orders seldom focused on the regulatory status of markets that had surveillance-sharing arrangements with the listing exchange.

Indeed, in several cases, the Commission recognized—though again with little analysis—that effective surveillance-sharing arrangements can take different forms and need not be with a market at all, much less with a regulated one. For example, in the Palladium and Platinum Trust Orders, the primary surveillance-sharing arrangement was the exchange’s ability under its rules to obtain information from its own registered market makers in the approved product.[17] In an order approving the listing and trading of units of an oil-related fund that was designed to hold oil futures contracts, options on futures contracts, forward contracts, swaps, and over-the-counter contracts for commodities, the exchange represented that most of these markets “may . . . be effectively unregulated.”[18] The Commission approved the proposed rule change on the condition that the

exchange enter into a surveillance-sharing arrangement with any market on which oil derivatives are traded,[19] which suggests that the exchange did not need to enter into such agreements only with regulated markets (or that the regulatory status of related markets is not relevant for purposes of the surveillance-sharing arrangement). Yet the Commission consistently has imposed this condition in its bitcoin disapproval orders. [20]

Moreover, the Commission's requirement of a formal agreement with a regulated exchange is not necessary to achieve the Commission's stated objective for the requirement. The Commission explains that "a surveillance-sharing agreement with a regulated, significant market *facilitates* the ETP listing exchange's ability to obtain the necessary information to detect and deter such manipulative conduct." [21] It does not explain why this type of agreement is *necessary* if another arrangement can "facilitate" access to "necessary information." As detailed in a submission by the exchange, both the exchange and the Chicago Mercantile Exchange ("CME") are members of the Intermarket Surveillance Group ("ISG"). The Commission has previously noted that, when two or more exchanges belong to the ISG, their membership qualifies as a surveillance-sharing agreement with each other. [22] To be recognized as a constituent exchange for the Bitcoin Reference Rate, [23] a bitcoin spot exchange must both agree to cooperate with regulator inquiries and investigations and enter into a data sharing agreement with CME. [24] CME monitors the constituent exchanges for compliance and enforces these requirements, as illustrated by its previous removal of two platforms for non-compliance. [25] In other words, this arrangement enables the ETP listing exchange to obtain the information it needs from both CME and the underlying spot exchanges, [26] thereby "*facilitat[ing]* the [] listing exchange's ability to obtain the necessary information to detect and deter such manipulative conduct," as the Commission requires. The Commission's dismissal of this mix of public and private regulation simply because it is not identical to the Commission's regulation of national securities exchanges or SROs exalts form over function and disregards the important role that alternative forms of regulation always have played in the financial markets. [27]

These further refinements of the standard expressed in the Commission's demands appear designed for one purpose: to keep bitcoin out of our markets, notwithstanding the ongoing development and increasing sophistication we have seen in the bitcoin market over the past several years. Absent a rational justification for subjecting bitcoin to a standard different from that applied in prior orders, the Commission should have approved this filing.

More than 116 years ago, Justice Holmes observed that hard cases make bad law. [28] The same might be said for efforts to make easy cases hard. A significant number of ETPs and other products that the Commission has approved for listing probably would not meet the

standard the Commission is demanding of exchanges in connection with the listing of bitcoin-related products. That the Commission, in its efforts to keep bitcoin out of the markets we regulate, is impeding innovation in the market for bitcoin-related products is bad enough; that the Commission may be setting precedent that will make it more expensive to submit rule filings to bring other listed products to market, and more difficult for the Commission to approve them, only compounds the harm to investors.^[29]

II. The Commission's Approach Impedes Institutionalization and Innovation

The Commission's three-part mission—protecting investors; maintaining fair, orderly, and efficient markets; and facilitating capital formation—is best-served when we make clear to the market that we welcome innovation and that we will not interfere with the ability of our regulated entities to embrace innovation within our regulatory framework. We do not protect investors by adopting standards that compel them to access novel products anywhere but in our markets; we do not promote fair, orderly, or efficient markets when we prevent institutional players from bringing to already vibrant markets the benefits of their participation; and we do not facilitate capital formation when we greet innovation in a defensive crouch.

As I noted in the Winklevoss Dissent, bitcoin is ripe for a more welcoming approach by the Commission. Investor demand remains strong. The markets are well-connected by active arbitrageurs, who regulate prices and markets.^[30] Permitting institutional investors and regulated exchanges to enter this market would lead to more robust protections for retail investors (who, to be clear, are already active in the underlying spot market),^[31] to better custody solutions for bitcoin, and to more effective surveillance for market manipulation and other fraudulent activity.

The potential benefits of increased institutionalization are apparent in the filing describing the exchange's proposed rule change. As I have already described above, the CME, which is a Commodity Futures Trading Commission-regulated futures exchange that serves a largely institutional market, prices its U.S. dollar futures contracts using a bitcoin reference rate that is calculated using prices on several constituent bitcoin spot markets.^[32] A spot market seeking to become—or continue as—a constituent exchange must satisfy a rigorous set of requirements that is designed to ensure a fair, transparent market, reduce fraud and manipulative activity, and facilitate regulatory oversight. A more receptive stance by the Commission toward similar involvement by our regulated entities would likely compound this effect, further promoting the maturation of the underlying bitcoin market.

Erecting impediments, limiting people's liberty to choose for themselves, and resisting innovation achieve none of these benefits. They

demonstrate instead that the Commission is unprepared to confront and embrace the new opportunities that we can expect entrepreneurs to develop. Meanwhile, American investors will still seek access to products they want, but without the vaunted protections of our securities laws, while American entrepreneurs will seek their fortunes elsewhere, taking their talents and ingenuity with them.

Investors are well served when innovation flourishes. I recognize that innovation involves risks, but it is investors who should get to choose the winners and the losers of the market. Regulators should not impede investor choice; rather, they should ensure that investors have access to accurate disclosures about the range of available products, including their risks.

III. Conclusion

The Commission's approach to these bitcoin exchange-traded products is frustrating because it evinces a stubborn stodginess in the face of innovation. The irony is that, in taking this approach, the Commission wanders into the unbounded, dangerous territory of merit regulation for which the Commission is ill-equipped. Because the Commission's order applies an inappropriate standard under Section 6(b)(5) of the Exchange Act, I respectfully dissent.

Hester M. Peirce, Commissioner

Dated: February 26, 2020

[1] See 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 8.21-E ("Bitcoin Trust Disapproval Order"), Release No. 34-88284; File No. SR-NYSEArca-2019-39 (Feb. 26, 2020).

[2] See Order Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, to BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, to List and Trade Shares Issued by the Winklevoss Bitcoin Trust, Release No. 34-80206 (Mar. 10, 2017); 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, Release No. 34-80319 (Mar. 28, 2017); 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 ("Winklevoss Order"), Release No. 34-83723 (July 26, 2018); Order Disapproving a Proposed Rule Change to List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF, Release No. 34-83904 (Aug. 22, 2018); Order Disapproving a Proposed Rule Change Relating to Listing

and Trading of the Direxion Daily Bitcoin Shares, Release No. 34-83912 (Aug. 22, 2018); Order Disapproving a Proposed Rule Change to List and Trade the Shares of the GraniteShares Bitcoin ETF and the GraniteShares Short Bitcoin ETF (“GraniteShares Order”), Release No. 34-83913 (Aug. 22, 2018); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the Bitwise Bitcoin ETF Trust Under NYSE Arca Rule 8.201-E (“Bitwise Order”), Release No. 34-87267 (Oct. 9, 2019) (subsequently withdrawn while the delegated action was under review by the Commission on Jan. 13, 2020; see SR-NYSEArca-2019-01).

Other proposed rule changes were withdrawn before the Commission acted on them. See Notice of Withdrawal of a Proposed Rule Change, as Modified by Amendment No. 2, Relating to the Listing and Trading of Shares of the Bitcoin Investment Trust under NYSE Arca Equities Rule 8.201, Release No. 34-81747 (Sept. 28, 2017); Notice of Withdrawal of a Proposed Rule Change to List and Trade Shares of SolidX Bitcoin Shares Issued by the VanEck SolidX Bitcoin Trust, Release No. 34-86995 (Sept. 17, 2019).

[3] Dissent of Commissioner Hester M. Peirce to Release No. 34-83723, File No. SR-BatsBZX-2016-30 (July 26, 2018) (“Winklevoss Dissent”), available at <https://www.sec.gov/news/public-statement/peirce-dissent-34-83723>.

[4] The Commission issued approval orders for platinum and palladium ETPs in December 2009 that used an analytical framework much closer to my understanding of what Exchange Act Section 6(b)(5) requires. See Order Granting Approval of Proposed Rule Change Relating to Listing and Trading Shares of the ETFS Palladium Trust (“Palladium Trust Order”), Release No. 34-61220 (Dec. 22, 2009); Order Granting Approval of Proposed Rule Change Relating to Listing and Trading Shares of the ETFS Platinum Trust (“Platinum Trust Order”), Release No. 34-61219 (Dec. 22, 2009). These orders correctly focused on the rules of the listing exchange and the provision of pricing and other information to investors. The orders mention the underlying futures, options, or spot markets only briefly and in the context of describing either (1) disclosures the listing exchange represented it would make available to investors or (2) representations by the listing exchange regarding its ability to obtain information about activity in those markets primarily “through ETP Holders acting as registered Market Makers, in connection with such ETP Holders’ proprietary or customer trades which they effect on any relevant market.” Palladium Trust Order at 6; Platinum Trust Order at 6.

Notably, these orders state that the listing exchange “*may* obtain information via the Intermarket Surveillance Group from other exchanges who are members of ISG” (emphasis added) but do not require any specific arrangements to be in place with any specific exchange. Like the Trust at issue here, neither the platinum trust nor the palladium trust addressed in those orders held futures contracts; both traded only in the

underlying physical commodity. *See, e.g.*, Notice of Filing of Proposed Rule Change Relating to Listing and Trading of Shares of ETFS Palladium Trust, Release No. 34-60971 at 11 (Nov. 9, 2009). The orders do not address the regulatory status of the underlying spot markets, nor do they analyze the relative sizes of, or the pricing relationship between, the spot market and the related futures market; the focus of the inquiry is on the exchange’s ability to monitor trading in the listed product on the exchange itself. *See* Palladium Trust Order at 6; Platinum Trust Order at 6.

Consequently, it is unclear how the rule changes approved in the Palladium and Platinum Trust Orders satisfied the requirement for a surveillance-sharing agreement the Commission has applied so vigorously in the bitcoin disapproval orders. Had the Commission applied this standard, it would have approved every one of the bitcoin-related products that it has considered. The Commission’s attempt to distinguish the Palladium and Platinum Trust Orders in its 2018 Winklevoss order—by stating that “futures products on those metals had been trading for *several decades* before commodity-trust ETPs were launched”—lacks a basis in Section 6(b)(5) of the Exchange Act and is not grounds for the disparate treatment of bitcoin-related products. *See* Winklevoss Order, *supra* note 2, at 86 (emphasis in original).

[5] *See supra* note 2.

[6] *See* Winklevoss Dissent, *supra* note 3.

[7] Bitcoin Trust Disapproval Order at 5 (emphasis in original).

[8] As discussed below, in 2017, the Commission appears to have started emphasizing the significance of the related markets for other products, although the Commission does not seem to be applying that standard to non-bitcoin products in the rigorous manner that it uses for bitcoin-related products. *See infra* note 29 and accompanying text.

[9] *See* GraniteShares Order, *supra* note 2, at 9-12.

[10] *Id.* The Commission leaves unexplained how it derives either a broadly applicable legal requirement from the mere fact that exchanges made factual representations—representations that the Commission subjected to no further analysis—about the size of the market in a subset of filings.

[11] *See id.* at 10 n.36. The Commission does not explain how it derives the “significant size” condition as applied in the bitcoin orders from prior non-bitcoin orders when the exchanges did nothing more than describe volumes traded on regulated markets “in isolation from the broader context of the underlying market.” *Id.* at 23 (finding that the exchange had not shown that a bitcoin futures market was a market of significant size based on its volume because “[w]hether a market is a ‘market of significant size’ . . . does not depend solely on trading volume in isolation from the broader context of the underlying market”).

A review of the past orders cited in the GraniteShares Order shows that the staff's focus on the "significance" of the market with which an exchange has a surveillance-sharing agreement does not appear until the 2017 Winklevoss Order, after which later ETP approval (or, in the case of bitcoin ETPs, disapproval) orders routinely mention it. However, in the non-bitcoin orders both preceding and following the 2017 Winklevoss Order, the Commission has not demanded the exchanges establish, as it has in the bitcoin disapproval orders, "the interrelationship between the market with which the listing exchange has a surveillance-sharing agreement and the proposed ETP." Bitwise Order, *supra* note 2, at 99.

[12] See, e.g., Palladium and Platinum Trust Orders, *supra* note 4; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Units of the United States Natural Gas Fund, LP, Release No. 34-55632 (Apr. 13, 2007).

[13] See Letter from Marlon Paz (Feb. 20, 2020) ("Paz Letter") (submitted on behalf of client Wilshire Phoenix Funds LLC), File No. SR-NYSEArca-2019-39 (citing Order Granting Approval of Proposed Rule Change and Amendment No. 1 Thereto, and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2, Relating to Listing and Trading Shares of the iShares GSCI Commodity Indexed Trust under New Rules 1300B and 1301B, et seq., Release No. 34-54013 (June 16, 2006)); Letter from Mary Yeager on behalf of NYSE (May 12, 2006), File No. SR-NYSE-2006-17.

[14] See, e.g., *id.*; Order Approving Proposed Rule Change Relating to the Listing and Trading of Commodity Indexed Securities, Release No. 34-36885 (Feb. 26, 1996), 61 Fed. Reg. 8315, 8319 n.17 (Mar. 4, 1996) (noting that the listing exchange could obtain surveillance information regarding markets used to set pricing of the approved product and that the exchange would enter into surveillance-sharing agreements with other markets if the listing exchange decided to use them to set pricing, notably without conducting any analysis of the relative sizes of these other markets or their effect on pricing on the markets used to set prices of the approved product); Order Approving Proposed Rule Change Relating to the Listing and Trading of Commodity Linked Notes, Release No. 34-35518 (Mar. 21, 1995), 60 Fed. Reg. 15804, 15807 n.21 (Mar. 27, 1995) (same).

[15] It would be instructive for the Commission to conduct a study to determine whether any—and if so, how many—of the previously approved products could meet this rigorous analytical requirement it has imposed on bitcoin-related products.

[16] See, e.g., Winklevoss Order, *supra* note 2, at 60-80 (discussing whether BZX had entered into surveillance-sharing agreements with regulated markets of significant size relative to bitcoin); GraniteShares

Order, *supra* note 2, at 20-22; Bitwise Order, *supra* note 2, at 89-104.

[17] See Platinum and Palladium Trust Orders, *supra* note 4, at 6. The orders mention, almost in passing, that “the Exchange *may* obtain trading information via the [ISG] from other exchanges who are members of the ISG,” with, as I already have noted, no analysis as to the size, significance, or relevance of these other markets for platinum or palladium. *Id.* (emphasis added).

[18] Order Approving Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Relating to the Listing and Trading of Units of the United States Oil Fund, LP, Release No. 34-53582 (Mar. 31, 2006).

[19] See *id.* at 31-32.

[20] See, e.g., *supra* note 16 and accompanying text.

[21] Bitcoin Trust Disapproval Order at 68 (emphasis added).

[22] See Winklevoss Order, *supra* note 2, at 53.

[23] The CME CF Bitcoin Reference Rate is used to calculate the U.S. dollar settlement price for bitcoin futures contracts on the CME, and the administrator of the Trust would use this price to calculate the price of shares in the Trust. See Letter from Martha Redding on behalf of NYSE Arca (Oct. 4, 2019) (“NYSE Arca Filing”) (noting the filing of Amendment No. 1), File No. SR-NYSEArca-2019-39.

[24] *Id.* at 23.

[25] *Id.* at 23 n.53.

[26] The Sponsor represents that CME will be able to share any information it receives from the constituent exchanges with NYSE Arca because both CME and NYSE Arca are members of the ISG. See Letter from William Herrmann on behalf of Wilshire Phoenix Funds LLC (Dec. 18, 2019) (“Wilshire Letter”) at 16. The Sponsor also represents that NYSE Arca will be able to obtain information directly from the constituent exchanges because those exchanges are required, pursuant to their inclusion in the CME CF Bitcoin Reference Rate, “to cooperate with inquiries and investigations of regulators.” *Id.* at 17.

[27] As already noted, the Commission previously has approved listings where such alternative arrangements were in place. See, e.g., Platinum and Palladium Trust Orders, *supra* note 4, at 5-6 (placing significance on the use of “market makers”). The Commission’s insistence that any arrangement be with an exchange that is regulated just like a national securities exchange or a futures exchange is especially inappropriate for newly developing markets. To imply, as the Commission does elsewhere, that market participants may need to wait decades for novel products to be traded in the markets that it regulates encapsulates the regulatory conservatism that is willing to deprive investors of opportunities in order to preserve the regulator’s reputation. See Winklevoss Order, *supra* note

2, at 86 (implying that the Commission approved the palladium and platinum ETPs in part because the underlying futures markets were “*several decades*” old when the ETPs were approved). The Commission’s suggested pace would ensure that only our grandchildren will enjoy the opportunity to invest in these products. See GraniteShares Order, *supra* note 2, at 13 n.37 (noting delays between the first futures trades in a product and the approval of related ETPs, including that corn futures started trading in 1877, or 133 years prior to the approval of the first corn futures ETP in 2010).

[28] See *Northern Sec. Co. v. United States*, 193 U.S. 197, 399 (1904) (Holmes, J., dissenting).

[29] This shift in approach may already be occurring. Following the initial disapproval by the Commission of the proposed rule change to list and trade shares of the Winklevoss Bitcoin Trust Post, the Commission’s approval orders for rule changes to list and trade other products began referencing the significance of the underlying market. See, e.g., Notice of Filing of Amendment No. 1, and Order Granting Approval on an Accelerated Basis of a Proposed Rule Change, as Modified by Amendments No. 1 and No. 3, to List and Trade of Shares of the Breakwave Dry Bulk Shipping ETF Under NYSE Arca Rule 8.200–E, Commentary .02, Release No. 34-82390 (Dec. 22, 2017) (noting the exchange’s representation that “the [underlying futures] trade on *well established, regulated markets* that are members of the ISG,” enabling it “to share surveillance information with a *significant regulated market* for trading futures on dry bulk freight” (emphasis added)); Order Granting Approval of a Proposed Rule Change, as Modified by Amendment Nos. 2 and 3 Thereto, To List and Trade Shares of Direxion Daily Crude Oil Bull 3x Shares and Direxion Daily Crude Oil Bear 3x Shares Under NYSE Arca Equities Rule 8.200, Release No. 34–81686 (Sept. 22, 2017) (noting “[t]he oil [futures] contract market is of *significant size and liquidity*” and describing its regulated status (emphasis added)). See also *supra*, note 5. If the Commission continues to incorporate the standards applicable to bitcoin-related products into its analysis of rule changes for other products, retail investors may find themselves with far fewer investment options across asset classes.

[30] I disagree with the Commission’s dismissal of the role of arbitrageurs in regulating markets and in thereby making them more resistant to manipulation. See Bitcoin Trust Disapproval Order at 22 (stating that even if significant arbitrage and deep liquidity on the relevant markets made manipulation more difficult, “these factors would not be sufficient to establish a unique resistance to manipulation that would justify dispensing with the standard surveillance-sharing agreement with a significant, regulated market”). The Commission’s analysis of our markets —and its policy choices—should account for the role of non-governmental actors in protecting the integrity of these markets from fraud, manipulation, and other misconduct.

[31] In suggesting that institutionalization brings benefits, I do not mean to suggest that the only way retail investors should be permitted to gain exposure to bitcoin is through our regulated markets. Just as retail investors now have the choice to have exposure to gold through an ETP or by holding it directly, retail investors should have the opportunity to hold bitcoin directly or through an ETP. Whether there would be retail interest for exposure through an ETP is a matter for markets, not regulators, to sort out. Indeed, many people believe that one of the benefits of bitcoin is the ability to hold it outside of the traditional financial system.

[32] See *supra*, note 23 and accompanying text.