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I. Introduction

In January 2023, the Securities and Exchange Commission (“SEC”) simultaneously approved the listing and trading of eleven exchange-traded products (“ETPs”) that would directly hold bitcoin (“Bitcoin ETPs”). For many observers of the digital asset and investment management industries, it seemed that Bitcoin ETPs might never come to fruition. Since the first Bitcoin ETP registration statement filing in 2013, the SEC had taken a resistant, if not openly hostile, stance towards Bitcoin ETPs. Observers assessed this hostility as resulting from overstated and misguided fears surrounding investor protection, concerns regarding the regulation of underlying asset markets, and a desire to drive such markets offshore. The approval of Bitcoin ETPs and, subsequently, ETPs that directly hold ether (“Ether ETPs”), provided investors with access to bitcoin and ether through ETPs offering robust disclosures, tradable liquidity, and the benefits of professional custodial services that would otherwise be unavailable to retail investors in digital assets.

Although political expediency and the courts ultimately forced the SEC to issue approval orders for Bitcoin and Ether ETPs, the difficult and uncompromising regulatory environment facing the sponsors of proposed digital asset-based ETPs remains largely as it has been for most of the last decade. The SEC wields the so-called “Winklevoss Standard,” a novel requirement for digital asset ETP listing rules to comply with Section 6(b)(5) of the Securities Exchange Act of 1934 (“Exchange Act”). Under the Winklevoss Standard, which expanded the parameters used to evaluate ETPs, the SEC evaluates the attributes of the underlying digital asset and the markets on which the digital asset trades, rather than simply evaluating the ETP itself and the market on which its shares trade. The Winklevoss Standard has been uniquely applied to digital assets, seemingly in a manner designed to frustrate digital asset ETP applicants.

The justification for the Winklevoss Standard relies on a misrepresentation of prior SEC approval orders and a misreading of certain Exchange Act requirements. Additionally, the Winklevoss Standard has been applied inconsistently and far too narrowly; in practice, this application runs counter to the SEC’s mission and fails to serve the SEC’s stated policy objective of protecting investors. Instead, the SEC applied the Winklevoss Standard to deny approval, on questionable grounds, of products that otherwise met standards articulated under previously



granted applications. These actions denied investors exposure to a desired asset class and prevented them from receiving the benefits of the rules and standards of conduct that apply to exchange traded products and the parties that facilitate their operation and distribution.¹ The Winklevoss Standard also impedes capital formation and frustrates the fair, orderly, and efficient operation of markets by discouraging institutional investment in an asset class with broad and increasing investor demand.² The development of registered products based on digital assets would encourage institutional investment needed to mature digital asset markets. Finally, the Winklevoss Standard stymies innovation and competition by failing to promote the responsible adoption of products. As such, the SEC's imposition of the Winklevoss Standard on digital asset-based ETPs should be considered unlawful. The SEC should instead develop an objective, rules-based program for approval of ETPs that includes the ability of ETPs to gain automatic approval based on generic listing standards of the national securities exchanges. Such generic listing standards should include conditions based on market capitalization, trading volumes, and diversity of trading platforms.

¹ Securities Exchange Act Release No. 99306 (Jan. 10, 2024), 89 FR 3008, 3012 (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) (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) ("Bitcoin ETP Approval Order") (The SEC explained that the protections provided by existing rules and standards of conduct, such as Regulation Best Interest and the fiduciary duty of investment advisers under the Investment Advisers Act of 1940, are important protections that may be considered in the context of the Section 6(b)(5) analysis).

² See Sec. & Exch. Comm'n Release Notice, Release No. 35518 (Mar. 21, 1995) (Order approving proposed rule change relating to the listing and trading of commodity linked notes.) (In an order approving the listing of an exchange-traded product, the SEC emphasized the importance of the product's ability to help investors achieve investment objectives, "In particular, the Commission believes that the availability of exchange-traded COINs will provide a new instrument for investors to achieve desired investment objectives (e.g., inflation hedge and portfolio diversification)").



II. The Regulatory Environment Facing Prospective Digital Asset ETPs

The first registration statement for a Bitcoin ETP was filed in 2013 by the Winklevoss Bitcoin Trust, which sought to list and trade its shares on the Bats BZX Exchange, Inc. (“BZX”). As its existing exchange rules did not provide for the listing of shares in a digital asset-based ETP, BZX filed a Form 19b-4 application with the SEC to notify the agency of, and seek approval for, the proposed rule changes that would permit listing of the Winklevoss Bitcoin Trust on BZX.³ The SEC is obliged to approve proposed rule changes that are consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, including the requirements of Section 6(b)(5).⁴ In 2017, the SEC denied BZX’s Form 19b-4 application to list shares of the Winklevoss Bitcoin Trust for failing to carry its burden to demonstrate that the proposed rule changes were consistent with Section 6(b)(5),⁵ which requires, among other things, that the rules of an exchange be “designed to prevent fraudulent and manipulative acts and practices.”⁶ In its order rejecting BZX’s Form 19b-4 application for the Winklevoss Bitcoin ETP, the SEC set forth the primary method for 19b-4 applicants to demonstrate compliance with Section 6(b)(5), which would become known as the Winklevoss Standard.

Under the Winklevoss Standard, an exchange could establish that its application complied with Section 6(b)(5) by pointing to the existence of a comprehensive surveillance-sharing agreement, or common Intermarket Surveillance Group (“ISG”) membership, with at least one regulated market of significant size related to the underlying digital assets.⁷ According to the initial Winklevoss Bitcoin Trust denial order, both “spot” markets (i.e., markets where a particular asset is bought and sold directly for immediate delivery) and futures markets in a particular digital asset would be considered markets related to the digital

³ 15 U.S.C. 78s(b)(1); 17 CFR 240.19b-4.

⁴ 15 U.S.C. 78s(c)(1).

⁵ Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (SR-BatsBZX-2016-30) (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) (“Winklevoss Order”).

⁶ 15 U.S.C. 78f(b)(5).

⁷ See Winklevoss Order at 37582.



asset for the purpose of compliance with the Winklevoss Standard.⁸ The SEC defined a “market of significant size” as a market for which (1) there is a reasonable likelihood that a person attempting to manipulate an ETP would have to trade on the market in order to successfully manipulate the ETP, and (2) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.⁹ In subsequent denial orders for Bitcoin ETPs, the SEC clarified that the lead-lag relationship between bitcoin prices on spot and futures markets is “central to understanding” whether the first prong of the significant market test was met.¹⁰ To be clear, the Winklevoss Standard is a novel, heightened standard for compliance with Section 6(b)(5) applied exclusively to digital asset-based ETPs. The Winklevoss Standard was cited by the SEC as the primary justification for its denial of all 19b-4 applications subsequently filed by exchanges on behalf of Bitcoin and Ether ETPs until the first Bitcoin ETPs were finally approved in January 2024. Beyond the fact that the Winklevoss Standard was not born out of statute or precedent, by keeping the standard purposely vague the SEC continued to “move the goal posts” as an ever growing number of applicants attempted to satisfy the requirements through voluminous data and research.

In October 2021, the SEC allowed several Investment Company Act of 1940 registered exchange traded funds (“ETFs”) to launch with a strategy of investing in rolling CME bitcoin futures contracts (“Bitcoin Futures ETFs”).¹¹ Following such launches, several issuers applied for rule changes and, in 2022, the SEC approved rule changes to list and trade shares of two

⁸ See Winklevoss Order at 37600 (“When the spot market is unregulated—the requirement of preventing fraudulent and manipulative acts may possibly be satisfied by showing that the ETP listing market has entered into a surveillance-sharing agreement with a regulated market of significant size in derivatives related to the underlying asset”).

⁹ See Winklevoss Order at 37594.

¹⁰ See Securities Exchange Act Release No. 88284 (February 26, 2020), 83 FR 37579 (August 1, 2018) (SR-NYSEArca-2019-39) (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) (“USBT Order”) (“[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.”).

¹¹ Under Rule 6c-11 under the Investment Company Act of 1940, ETFs that comply with the requirements of Rule 6c-11 are not required to obtain approval of a 19b-4 application.



ETPs holding CME bitcoin futures (“Bitcoin Futures ETFs”).¹² Arguably, the approval of the first Bitcoin Futures ETF set forth a clear path for other Bitcoin ETPs to obtain SEC approval. In the SEC’s order approving the Bitcoin Futures ETF, the SEC found that the CME bitcoin futures market, a related market to the Bitcoin ETPs, was in fact a regulated market of significant size.¹³ In its decision, the SEC explained that the first prong of the “significant market” test, that a would-be manipulator of the ETP would have to trade on the underlying market, was unnecessary for the approval of the Bitcoin Futures ETF.¹⁴ However, the rest of the SEC’s analysis was arguably applicable to 19b-4 applications for Bitcoin ETPs. As surveillance sharing agreements were already in place with the CME,¹⁵ some believed that Bitcoin ETP applicants needed only to show that the price formation occurred principally in the CME bitcoin futures market (i.e., that manipulation of the Bitcoin ETPs would not likely occur without trading on the CME bitcoin futures markets).

¹² See Securities Exchange Act Release No. 94620 (Apr. 6, 2022), 87 FR 21676 (Apr. 12, 2022) (SR-NYSEArca-2021-53) (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)) (“Teucrium Order”); Securities Exchange Act Release No. 94853 (May 5, 2022), 87 FR 28848 (May 11, 2022) (SR-NASDAQ-2021-066) (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)) (“Valkyrie XBTO Order”).

¹³ Teucrium Order, 21860-21861 (The SEC held “that the CME is a “significant market” related to CME bitcoin futures contracts, and thus that the Exchange has entered into the requisite surveillance-sharing agreement”).

¹⁴ *Id.* at 21679 (The SEC reasoned that, because the surveillance sharing agreement was with the “same market on which [the underlying bitcoin futures] trade”, the CME’s surveillance could be reasonably relied upon to “capture the effects on the CME bitcoin futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME bitcoin futures contracts”).

¹⁵ See Securities Exchange Act Release No. 95180 (June 29, 2022) 87 FR 40299, 40311 (July 6, 2022) (SR-NYSEArca-2021-90) (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) (the “Grayscale Order”) (The SEC “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” and the NYSE Arca and the CME have common membership in the ISG); Securities Exchange Act Release No. 83913 (August 22, 2019) 83 FR 43923-01, 43929 (August 28, 2019) (SR-CboeBZX-2018-001) (Order Disapproving a Proposed Rule Change To List and Trade the Shares of the GraniteShares Bitcoin ETF and the GraniteShares Short Bitcoin ETF”) (the “GraniteShares Order”) (The CBOE BZX exchange “represents it is able to share surveillance information with CME... through membership in the Intermarket Surveillance Group; and Securities Exchange Act Release No. 94853 (May 6, 2022) 87 FR 28848-02, 28850 (May 11, 2022) (SR-NASDAQ-2021-066) (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) (“based on the common membership of Nasdaq and the CME in the ISG Nasdaq has the equivalent of a comprehensive surveillance-sharing agreement with the CME.”)).



Nevertheless, the SEC continued to frustrate sponsors. Between the launch of the Bitcoin Futures ETFs in 2021 and the end of 2023, the SEC denied twelve 19b-4 applications from exchanges seeking to list Bitcoin ETPs.¹⁶ These denials were issued despite the yeoman efforts of those in the investment management industry to demonstrate that the CME bitcoin futures market met the SEC’s definition of a significant market under the Winklevoss Standard. Several potential Bitcoin ETP sponsors commissioned in depth studies to determine whether the price of bitcoin as reflected in the CME bitcoin futures market “led” the price of bitcoin in the spot market.¹⁷ The evidence produced by these studies largely supported the conclusion that a person attempting to manipulate a Bitcoin ETP would have to trade on the CME bitcoin futures

¹⁶ Securities Exchange Act Release No. 93559 (Nov. 12, 2021), 86 FR 64539 (Nov. 18, 2021) (SR-CboeBZX-2021-019) (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. 93700 (Dec. 1, 2021), 86 FR 69322 (Dec. 7, 2021) (SR-CboeBZX-2021-024) (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. 93859 (Dec. 22, 2021), 86 FR 74156 (Dec. 29, 2021) (SR-NYSEArca-2021-31) (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. 93860 (Dec. 22, 2021), 86 FR 74166 (Dec. 29, 2021) (SR-CboeBZX-2021-029) (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. 94006 (Jan. 20, 2022), 87 FR 3869 (Jan. 25, 2022) (SR-NYSEArca-2021-37) (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. 94080 (Jan. 27, 2022), 87 FR 5527 (Feb. 1, 2022) (SR-CboeBZX-2021-039) (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. 94395 (Mar. 10, 2022), 87 FR 14932 (Mar. 16, 2022) (SR-NYSEArca-2021-57) (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. 94396 (Mar. 10, 2022), 87 FR 14912 (Mar. 16, 2022) (SR-CboeBZX-2021-052) (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. 94571 (Mar. 31, 2022), 87 FR 20014 (Apr. 6, 2022) (SR-CboeBZX-2021-051) (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. 94999 (May 27, 2022), 87 FR 33548 (June 2, 2022) (SR-NYSEArca-2021-67) (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. 95179 (June 29, 2022), 87 FR 40282 (July 6, 2022) (SR-NYSEArca-2021-89) (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. 95180 (June 29, 2022), 87 FR 40299 (July 6, 2022) (SR-NYSEArca-2021-90) (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)).

¹⁷ See Bitwise Asset Management, *Price Discovery In the Modern Bitcoin Market: Examining Lead- Lag Relationships Between The Bitcoin Spot and Bitcoin Futures Market*, (June 21, 2022), <https://static.bitwiseinvestments.com/Bitwise-Bitcoin-ETP-White-Paper-1.pdf> (“Bitwise Study”); and Fidelity Investments, Inc., *Suitable Price Discovery Measurement of Bitcoin Spot and Futures Markets*, (Jan 20, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4012165 (“Fidelity Study”).



market.¹⁸ Accordingly, there was sufficient evidence to demonstrate that the CME bitcoin futures market constitutes a market of significant size related to the underlying bitcoin assets.¹⁹ The SEC was not convinced, and continued to issue denial orders for Bitcoin ETPs even in the face of convincing evidence that the Winklevoss Standard had been met. This inconsistent treatment of Bitcoin Futures ETFs and Bitcoin ETPs, while disheartening, created an avenue for serious legal challenges to the SEC's denial orders.

In 2023, Grayscale Investments, LLC successfully argued that the SEC acted arbitrarily and capriciously when it approved two Bitcoin Futures ETFs but did not approve Bitcoin ETPs, including the proposed Grayscale Bitcoin ETP.²⁰ In *Grayscale Investments, LLC v. Securities and Exchange Commission*, the U.S. Court of Appeals for the DC Circuit ("Court") vacated the SEC's denial order for the Grayscale Bitcoin Trust's 19b-4 application, finding that, "across relevant regulatory factors," the Grayscale Bitcoin Trust was substantially similar to the Bitcoin Futures ETFs approved by the SEC.²¹ In its decision, the Court identified the inconsistent application of the Winklevoss Standard's "significant market test" as the sole distinction in the SEC's treatment of the Bitcoin ETPs and Bitcoin Futures ETFs.²² The SEC required the Bitcoin ETPs to show that a would-be Bitcoin ETP manipulator would have to trade on the CME bitcoin futures market, as demonstrated by a lead-lag analysis furnished by the 19b-4 applicant, but determined that such analysis was unnecessary for the evaluation of the Bitcoin Futures ETFs.²³ In the absence of a reasonable explanation from the SEC, the Court found this disparate treatment of like products to be unlawful.²⁴ As a result, the SEC was forced to reexamine the

¹⁸ See Bitwise Study at 24 ("The results show that the CME bitcoin futures market leads the bitcoin spot market in a significant fashion.") and Fidelity Study at 1 ("Our results show that CME bitcoin futures have consistently led price formation over the last two years.").

¹⁹ See *supra*, notes 7, 11, 13, 15-16 and accompanying text.

²⁰ *Grayscale Investments, LLC v. SEC*, 82 F.4th 1239, 1245 (D.C. Cir. 2023).

²¹ *Id.* at 1246.

²² *Id.* at 1247.

²³ *Id.* at 1249.

²⁴ *Id.* at 1252.



19b-4 application relating to the listing of the Grayscale Bitcoin Trust in a manner consistent with the Court’s decision.²⁵

After revisiting the Grayscale Bitcoin Trust’s 19b-4 application, and reviewing several other 19b-4 applications filed on behalf of prospective Bitcoin ETPs, the SEC simultaneously approved the exchange listing of eleven Bitcoin ETPs on January 10, 2024.²⁶ Curiously, the final order granting approval of the relevant 19b-4 applications did not find that the exchanges had complied with the Winklevoss Standard by entering comprehensive surveillance-sharing agreements with regulated markets of significant size related to the underlying or reference bitcoin assets.²⁷ Instead, the SEC approved the 19b-4 applications on the grounds that “other means to prevent fraudulent and manipulative acts and practices” were sufficient to justify dispensing with the Winklevoss Standard.²⁸ The “other means” cited by the SEC were comprehensive surveillance sharing agreements between the exchanges and a regulated bitcoin futures market that is “consistently highly correlated to spot bitcoin, albeit not of ‘significant size’ related to spot bitcoin.”²⁹ The SEC relented in the face of overwhelming evidence that the pricing of bitcoin on spot and futures bitcoin markets is strongly correlated, but refused to concede that the Bitcoin ETPs met the Winklevoss Standard.³⁰ In short order, the SEC approved Ether ETPs on similar grounds, determining that surveillance-sharing agreements with ether futures markets could be reasonably expected to assist in surveilling for fraudulent and

²⁵ *Id.*

²⁶ Securities Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008-01 (January 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) (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) (“Bitcoin ETP Approval Order”).

²⁷ *Id.* at 3009-3011.

²⁸ *Id.* at 3009.

²⁹ *Id.* at 3010-3011.

³⁰ *Id.* (The results of the commission’s own correlation analysis supported the conclusion in the correlation analysis provided in the 19b-4 application filed on behalf of ARK 21Shares Bitcoin ETF that “prices generally move in close (although not perfect) alignment between the spot bitcoin market and the CME bitcoin futures market.” Based on this support, the SEC found that the CME was “a U.S. regulated market whose bitcoin futures market is consistently highly correlated to spot bitcoin, albeit not [a market] of ‘significant size’ related to spot bitcoin.”)



manipulative acts and practices despite finding that ether futures markets were not markets of significant size as related to ether.

This awkward resolution leaves the Winklevoss Standard intact, if not consistently applied. More than 10 years after the first registration statement was filed for a Bitcoin ETP, the SEC has yet to determine that the Winklevoss Standard has been met by any 19b-4 applicant seeking to list a “spot” digital asset-based ETP. For asset managers seeking to launch products based on digital assets other than bitcoin and ether, the Winklevoss Standard remains a formidable obstacle as ever. It is a false standard – a non-judiciable set of moving targets the SEC deems satisfied based not on the underlying data but its sentiment towards the product. With constantly shifting goalposts, it remains unclear what evidence could ever be sufficient to demonstrate a digital asset-based ETP’s compliance with the Winklevoss Standard. In addition, it is not yet known how the SEC will adjudicate whether a digital asset futures market is “consistently highly correlated” to the corresponding digital asset spot market such that surveillance agreements between an exchange and the futures market could be expected to provide the surveillance information necessary to prevent fraudulent and manipulative acts and practices in the trading of shares in a digital asset-based ETP. Left alive, the Winklevoss Standard will continue to impede the normalization, maturation, and institutionalization of the broader digital asset markets unless the SEC were to provide clear and objective measures of how to satisfy the standard. If applied to other product types without sufficiently clear and objective standards, it could forestall innovation throughout the registered products landscape.



III. Revisiting the Winklevoss Standard

The Winklevoss Standard requires that, as a part of its Section 6(b)(5) analysis of a 19b-4 application seeking to list a product which holds digital assets, the SEC conduct a rigorous evaluation of the underlying digital asset and the markets on which the digital asset trades. This diverges from the statutory standard, which mandates a review of the rules of the proposing exchanges as they apply to the shares of the product itself.³¹

In the years since the Winklevoss Standard was first set forth, arguments proffered by asset managers, institutional investors, digital asset industry participants, and even certain SEC commissioners³² urged the SEC to reconsider the wisdom of applying a heightened standard of review for digital asset-based ETP's under Section 6(b)(5) of the Exchange Act. The SEC has thus far resisted such arguments. Now is the time for a thorough reexamination of the continued applicability of the Winklevoss Standard. Although Bitcoin and Ether ETFs have been approved, bitcoin and ether are just two of the several prominent digital assets with both retail and institutional investor demand that are critical to the larger digital asset industry. Several significant digital assets, including SOL (the native asset of the Solana network), XRP (the native asset of Ripple) and APT (the native asset of the Aptos network), could be arbitrarily and capriciously sidelined if the SEC continues to advance the unclear, ahistorical and inconsistently applied Winklevoss Standard.

Historically, administrative actions, including agency orders such as SEC orders approving or disapproving proposed rule changes pursuant to Rule 19b-4, were afforded generous deference under the Administrative Procedure Act and the Chevron Doctrine.³³ Under the Administrative Procedure Act, agency actions, findings and conclusions could be deemed unlawful and set aside if, among other reasons, they were found to be arbitrary and capricious or to be in excess of statutory authority.³⁴ In *Chevron U.S.A., Inc. v. Natural Resources Defense*

³¹ See Hester M. Peirce, U.S. Sec. Exch. Comm'n, Dissent of Commissioner Hester M. Peirce to Release No. 34-83723 (July 26, 2018), . ("I do not believe that an analysis of [surveillance sharing] agreements or of the nature of the underlying market was ever appropriate under Section 6(b)(5).").

³² See Hester M. Peirce and Mark T. Uyeda, U.S. Sec. Exch. Comm'n, Statement Regarding the Commission's Disapproval of a Proposed Rule Change to List and Trade Shares of the VanEck Bitcoin Trust (March 10, 2023), <https://www.sec.gov/newsroom/speeches-statements/peirce-uyeda-statement-vaneck-bitcoin-trust-031023>. .

³³ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694.

³⁴ 5 U.S.C. § 706(2)(A), (C).



Council, Inc., the Supreme Court set forth a rule requiring courts to defer to an agency's reasonable interpretation of ambiguous statutory language.³⁵ In other words, a court must defer to the SEC's reasonable interpretations regarding the scope of the requirement under Section 6(b)(5) of the Exchange Act that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices. Earlier this year, the Supreme Court overturned the *Chevron* Doctrine in *Loper Bright Enterprises v. Raimondo*.³⁶ Courts are now empowered to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority."³⁷

In a post-Chevron environment, the Winklevoss Standard should be deemed an unlawful agency action under the Administrative Procedure Act. This paper maintains that:

- A. The Winklevoss Standard is based on a misinterpretation of the requirements of Section 6(b)(5) of the Exchange Act and should be deemed unlawful.
- B. Even if the Winklevoss Standard is a reasonable interpretation of the requirements of Section 6(b)(5) of the Exchange Act, support for the Winklevoss Standard relies on prior SEC orders issued on behalf of commodity-based ETPs, the significance of which are misrepresented.
- C. Even if the Winklevoss Standard is an accurate distillation of the analysis applied by the SEC in determining compliance with Section 6(b)(5), the SEC has applied the Winklevoss Standard inconsistently and far too narrowly, imposing different burdens of proof on 19b-4 applicants depending on an ETP's underlying reference asset and refusing to recognize that applicants have demonstrated compliance with Section 6(b)(5).

Simply put, the Winklevoss Standard is not the appropriate framework for determining whether an exchange, in a 19b-4 application seeking to list shares of an ETP with spot exposure to a digital asset, has demonstrated compliance with the requirements under Section 6(b)(5) of the Exchange Act.

³⁵ *Chevron* at 844.

³⁶ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (overruling *Chevron*).

³⁷ *Loper Bright* at 2247.



A. The Winklevoss Standard is based on a misinterpretation of the requirements of Section 6(b)(5) of the Exchange Act.

In its denial orders applying the Winklevoss Standard, the SEC improperly considered factors that were beyond the scope of the SEC's statutory authorization to review rule changes proposed by securities exchanges under the Exchange Act. The plain meaning of the Exchange Act, as well as its legislative history, clearly direct the SEC to evaluate the design of the rules of the exchange in considering whether a proposed rule change is consistent with the requirements of the Exchange Act. Further, under a plain reading of the requirements of Section 6(b)(5), the SEC should consider whether the rules of the exchange are designed to prevent fraudulent and manipulative acts and practices that could occur in trading should the particular product be listed on the exchange. Instead, without legislative basis, the framework set forth under the Winklevoss Standard requires the SEC to undertake a substantive evaluation of the underlying assets and markets in such underlying assets, as well as evaluate the ability of an exchange to detect and deter fraud and manipulation in the markets for products that don't trade on the exchange.³⁸ No part of Section 6(b)(5) compels the SEC to undertake such an evaluation nor does it even implicitly suggest that such evaluation is an appropriate factor in undertaking the analysis required by Section 6(b)(5). Accordingly, the SEC's interpretation of Section 6(b)(5) under the Winklevoss Standard is incongruous with the straightforward text of the statute. Denial orders citing the Winklevoss Standard are actions that exceed the SEC's statutory authority under the Exchange Act and should be deemed unlawful under the Administrative Procedure Act.

1. Evaluating the Rules of the Exchange

Under Section 19(b) of the Exchange Act, the SEC shall approve the rule change if it determines the rule to be consistent with the requirements set forth under the Exchange Act, including Section 6(b)(5).³⁹ Section 6(b)(5) requires the SEC to determine that “the rules of the exchange are designed to prevent fraudulent and manipulative acts and practices [and] to protect investors and the public interest.”⁴⁰ The scope of the SEC's review of proposed rule changes for consistency with Section 6(b)(5) is clear: the SEC is tasked with evaluating whether the rules of

³⁸ Winklevoss Order at 37592-37593.

³⁹ 15 U.S.C. § 78s(b)(2)(C)(i).

⁴⁰ 15 U.S.C. § 78f(b)(5) (emphasis added).



the exchange provide the exchange with the ability to prevent fraud and manipulation and promote the public interest. Considerations outside the rules of the exchange are beyond the scope of the SEC's review. This interpretation of the analysis under Section 6(b)(5) is further supported by the purpose of Exchange Act rules relating to the governance and supervision of self-regulatory organizations such as securities exchanges.

Under the Winklevoss Standard, in order for the SEC to conclude that an exchange's rules are designed to prevent fraudulent and manipulative activity, the agency must consider factors outside of the rules of the exchange. Specifically, exchanges must make representations, and the SEC must make findings, as to the attributes of the underlying digital asset⁴¹ and as to the size, characteristics, and quality of the markets on which the underlying digital assets trade.⁴² These considerations run counter to the purpose of Section 6(b)(5), which section was originally adopted as part of the Securities Act Amendments of 1975. In the Senate Report accompanying the Securities Act Amendments of 1975, the Committee on Banking, Housing and Urban Affairs laid out the impetus for the reform of the national securities market.⁴³ According to the Senate Report, the purpose of the amendment relating to the exchanges is to assure that exchanges follow effective and fair procedures, that their activities are not anticompetitive, and that the SEC's "responsibility to correct self-regulatory lapses is unmistakable."⁴⁴ These statements reflect Congress' understanding and intention that Section 6(b)(5) and the accompanying statutory scheme would provide the SEC with authority to oversee the governance and procedure of self-regulatory exchanges themselves, not the products trading on such exchanges.

The elements of self-regulatory exchanges over which the SEC has oversight include the general organization of the exchange and specific rules of the exchange governing membership, exchange fees, and discipline of exchange members. Only one rule under Section 6 of the

⁴¹ Grayscale Order, at 40305 (The SEC rejected arguments from NYSE Arca that bitcoin's "fungibility, transportability, and exchange tradability" help detect and deter fraud and manipulation.)

⁴² Grayscale Order, at 40306 (The SEC stating that it "is not persuaded by commenters' assertions that the bitcoin market's size, liquidity, market participation, or arbitrage, either individually or together, sufficiently address concerns regarding fraud and manipulation.")

⁴³ S. REP. 94-75, at 180-182.

⁴⁴ *Id.* at 201-202.



Exchange Act applies to the listing of a particular type of security.⁴⁵ Section 6(b)(9)(A) requires that the rules of an exchange prohibit the listing of any security issued in a limited partnership roll up transaction, unless certain procedures designed to protect the rights of limited partners are in place.⁴⁶ This restriction is concerned primarily with a self-regulatory exchange's rules and provides a safe harbor if certain procedural requirements are met.⁴⁷ The statutory scheme set forth by Congress in Section 6 of the Exchange Act is focused on the SEC's oversight of self-regulatory exchanges and their operations, not the products listed on such exchanges. Interpreting Section 6(b)(5) to require a rigorous, in depth review of the assets underlying a product listed on a self-regulatory exchange would be inconsistent with the statutory scheme designed and envisioned by Congress.

Furthermore, by focusing its review on the digital assets underlying a digital asset ETP instead of the rules of the exchange, the SEC dismisses the important role that securities exchanges serve in the securities markets. Congress, when introducing the amendment that adopted Section 6(b)(5), emphasized the importance of self-regulatory organizations in regulating the activities of broker-dealers using those markets enforcing the conduct of industry members under the Exchange Act.⁴⁸ Beyond regulating broker dealer conduct, exchanges set listing standards, monitor trading in the shares of issuers, regulate market makers, and collect transaction information that is useful in identifying fraudulent and manipulative market activity. Self-regulation is an important, and intentional, feature of the Exchange Act's regulatory framework. The SEC has acknowledged that the objective of Section 6(b)(5) is to minimize regulation by "providing an opportunity for the industry to regulate itself."⁴⁹ When evaluating a

⁴⁵ 15 U.S. Code 78f(b)(9)(A).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ S. REP. 94-75, at 201 ("Industry organizations, i.e., the exchanges and the NASD, are delegated governmental power in order to enforce, at their own initiative, compliance by members of the industry with both the legal requirements laid down in the Exchange Act and ethical standards going beyond those requirements.")

⁴⁹ In the Matter of New York Stock Exchange, Inc., Exchange Act Release No. 12737, 1976 SEC LEXIS 984, 37-39 (Aug. 25, 1976) (SR-NYSE-76-7; SR-NYSE-76-8) ("In the Matter of New York Stock Exchange") ("Section 6(b)(5) underlines that the purpose of the Act in providing for self-regulatory organizations has always been to minimize regulation of the securities markets by providing an opportunity for the industry to regulate itself and, in turn, to promote the efficient functioning of the securities markets by providing the maximum opportunity for private initiatives and innovative experimentation.").



rule change proposed by an exchange, the appropriate role of the SEC is to review whether such rule change disrupts the ability of the exchange to perform these functions. To expand the scope of the Section 6(b)(5) analysis beyond the rules of the exchange would run counter to the SEC's limited oversight role in the Exchange Act framework. By applying the Winklevoss Standard, the SEC oversteps its statutorily-defined role in the Exchange Act regulatory framework, and instead uses the Winklevoss Standard analysis as pretext for a merit-based evaluation of an investment product. While the federal securities laws empower the SEC to use its discretion to approve or deny applicants based on certain criteria, those laws were specifically designed to avoid creating a regulatory schema that favors or disfavors industry participants based on the sentiments of the SEC or its staff. The Winklevoss Standard creates an end-around the legislative purposes of the Exchange Act to allow the SEC to consider whatever factors it wants before issuing pre-textual denials on paper thin rationales.

2. Fraudulent and Manipulative Acts and Practices

Under Section 6(b)(5), the rules of national securities exchanges must be designed to prevent fraudulent and manipulative acts and practices.⁵⁰ Because Congress did not provide a definition of the term fraudulent and manipulative acts and practices and the SEC has not promulgated any rules or regulations further defining the term, it is not immediately clear what acts and practices the rules of the exchange must be designed to prevent. Again, the plain meaning of the terms used in Section 6(b)(5), as well as the legislative history and purpose of the statute, are informative.

In the Senate Report recommending the Securities Acts Amendments of 1975, Congress explained that because national securities exchanges “are also the principal regulators of the activities of broker-dealers... meaningful reform of this country’s securities trading mechanisms will, therefore, be impossible unless there is also a reform of the method and manner by which the self-regulatory organizations operate and in the way that the SEC oversees the performance of their regulatory responsibilities.”⁵¹ Congress further explained that exchanges are “delegated governmental power in order to enforce, at their own initiative, compliance by members of the industry with both the legal requirements laid down in the Exchange Act and ethical standards

⁵⁰ 15 U.S. Code 78f(b)(5).

⁵¹ S. REP. 94-75, at 181.



going beyond those requirements.”⁵² In the eyes of Congress, the key function of national securities exchanges in the protection of investors and prevention of fraud and market manipulation is the regulation of industry member conduct and enforcement of the Exchange Act. In overseeing national securities exchanges, the SEC is tasked with supervising the exchanges’ self-regulatory power “to assure that it is used effectively to fulfill the responsibilities assigned to the self-regulatory agencies.”⁵³ Section 6(b)(5) should be read in a manner consistent with these policy objectives.

Because the purpose served by exchanges in the securities market framework is the regulation of industry participants, Section 6(b)(5) should be interpreted to require that the rules of the exchange be designed to limit fraudulent and manipulative acts and practices of exchange members of the exchange in transactions taking place on the exchange. To require a broader evaluation of the ability of an exchange to detect and deter fraudulent acts and practices within the markets for assets underlying a product that trades on the exchange contradicts the legislative purpose of Section 6(b)(5). In fact, a hypothetical retroactive application of the Winklevoss Standard to other ETPs would seemingly result in most, if not all, ETPs being ineligible for listing in the U.S., even those that have been operating without significant issue for decades and despite reports that such ETPs’ underlying asset markets have been subject to wide-spread manipulation schemes.⁵⁴

3. An Appropriate Framework Under Section 6(b)(5)

Until recently, the SEC’s interpretation that Section 6(b)(5) requires the agency to review the quality and characteristics of the asset and markets underlying a proposed product would have arguably been subject to *Chevron* Doctrine deference. Following the Supreme Court’s decision in *Loper-Bright*, a court will apply its independent judgment in evaluating whether Section 6(b)(5) permits the SEC to consider factors outside of the rules of the exchange as they

⁵² *Id.* at 201.

⁵³ *Id.*

⁵⁴ See *Big Fine in Metals Case: Hedge-Fund Trader to Pay \$1 Million in Market-Manipulation Settlement*, WALL ST. J., Jul. 26, 2011, <https://www.wsj.com/articles/SB10001424053111904772304576468530892198942>; *Lawsuit Alleges Palladium, Platinum Prices Manipulated*, WALL ST. J., Nov. 26, 2014, <https://www.wsj.com/articles/lawsuit-alleges-palladium-platinum-prices-manipulated-1417033574>; *Big Banks Face Scrutiny Over Pricing of Metals*, WALL ST. J., Feb. 23, 2015, <https://www.wsj.com/articles/big-banks-face-scrutiny-over-pricing-of-metals-1424744801>.



apply to securities of an issuer. A decision to uphold the Winklevoss Standard would ignore both the plain meaning and legislative history of Section 6(b)(5). A textual reading of the statute would not permit the SEC the freedom, when determining whether to approve a proposed rule change, to undertake an analysis that, in practice, amounts to a merit-based review of the quality or characteristics of the underlying ETP asset to be listed on an exchange.

Under a framework consistent with the plain meaning of Section 6(b)(5), the SEC should evaluate a proposed rule change by considering the following factors, among others, to holistically determine whether exchange rules are designed to prevent fraud and market manipulation and protect investors and the public interest: (a) whether any features of the product to be listed on the exchange serve to enhance investor protection (e.g., the potential for increased pricing efficiency, depth and liquidity in the markets of the underlying asset stemming from the use of options; the improved access to esoteric asset classes, transparency and liquidity inherent in the ETF structure)⁵⁵; (b) whether the exchange has adopted a requirement that underlying assets meet certain initial and continuing listing standards; (c) whether exchange rules require ETP holders registered as market makers to comply with certain requirements designed to deter manipulation and other misconduct (e.g., limitations on certain trading activities and requirements to make available to the exchange certain records of transactions); (d) the ability of the exchange to halt trading in shares if market conditions are not supportive of a fair and orderly market; and (e) whether adequate mechanisms are in place to provide the exchange with the surveillance information necessary to adequately detect and deter market manipulation or trading abuses.

While such a framework would provide welcome certainty to the marketplace, the SEC can go further. Prior to the adoption of Rule 6c-11 under the Investment Company Act of 1940, ETFs seeking to list their shares routinely relied on the generic listing standards available under the rules of the national securities exchanges.⁵⁶ By meeting the conditions of these generic listing

⁵⁵ See *Self-Regul. Organizations; Am. Stock Exch., Inc.; Ord. Approving & Notice of Filing & Ord. Granting Accelerated Approval of Amend. No. 1 to A Proposed Rule Change Relating to the Listing of Options on Am. Depositary Receipts*, Release No. 634 (Jan. 31, 1994) (The SEC reasoned that permitting the trade of options on a new asset class (American Depositary Receipts) was consistent with Section 6(b)(5) because it would engender the same benefits to investors (pricing efficiency and increased depth and liquidity) as options on common stock).

⁵⁶ See 1934 Act Rel. No. 78397 (Jul. 22, 2016), available at <https://www.sec.gov/rules/sro/nysearca/2016z/34-78397.pdf>; 1934 Act Rel. No. 78396 (Jul. 22, 2016), available at <https://www.sec.gov/rules/sro/bats/2016/34-78396.pdf>.



standards, ETF issuers could avoid the time consuming and expensive process of obtaining an order under Rule 19b-4 and instead list their shares once their respective registration statements became effective. This paradigm gave ETF sponsors certainty that their products would not be met with arbitrary regulatory roadblocks and gave the SEC and the public certainty that those ETFs relying on the generic listing standards met certain minimum thresholds that would support the policy objections of Section 6(b)(5). While not every ETF proposal could meet the generic listing standards, those that did not could still submit applications under Rule 19b-4, which would be analyzed under the objective criteria established in precedential orders.

The SEC should collaborate with the exchanges to develop generic listing standards for ETPs, including digital asset ETPs. The success of the generic listing standards for pre-Rule 6c-11 ETFs offers ample evidence that such a regulatory framework would work for digital asset ETPs as well. While different listing standards would naturally need to be developed for different types of ETPs, the following proposed standards for digital asset ETPs would satisfy the requirements of Section 6(b)(5), which are based on the original generic listing standards approved by the SEC for ETFs:

1. The portfolio-weighted mark capitalization of the digital assets in the portfolio must be at least \$500,000,000 for at least one day in the prior six month period.
2. At least 70% of the portfolio weight must have:
 - a. Monthly trading volume in USD/USD-based stablecoins of at least \$10,000,000; or
 - b. Average notional value of monthly trades of at least \$25,000,000 in USD/USD-based stablecoins over the prior six months.
3. No more than 10% of the portfolio can be invested in non-exchange traded assets.
4. At least 90% of the portfolio must consist of assets with listings on digital asset trading platforms open to U.S. retail users.
5. The ETP may not take on leverage in excess of 50% of the value of its portfolio at any time.
6. For actively managed ETPs, the ETP must satisfy the standards on an initial and continuous basis.

The proposed generic listing standards are clear, objective, and are supported by and consistent with applicable law. The standards ensure that robust markets exist for the underlying



digital assets that would be sufficient to support the ETPs trading and liquidity needs and avoid a circumstance where an ETP would dominate a particular market. Further, these standards are flexible enough to cover a wide array of yet to be developed digital asset ETP products, including those following broad-based indices, actively managed strategies, strategies with limited illiquid positions and moderately leveraged strategies.

The adoption of generic listing standards would not constitute an abandonment of the SEC's important investor protection role. The SEC's Division of Corporation Finance would still function as an appropriate gatekeeper through its disclosure review function, ensuring investors receive full and fair disclosures through the registration statement regarding an ETP's sponsor and other service providers, custody, liquidity, valuation, and other important information about the ETP and its underlying assets. However, the merit review function that had been adopted by the Division of Trading and Markets under the Winklevoss Standard would be appropriately retired.

B. The Winklevoss Standard misinterprets and misrepresents the significance of the approval orders for other commodity-linked ETPs.

In the unlikely scenario that a court in a post-*Chevron* environment agreed that the appropriate interpretation of Section 6(b)(5) is that which the SEC has set forth in the Winklevoss Standard, the most restrictive aspect of the Winklevoss Standard should be overturned, as it is inconsistent with prior SEC orders. In the Winklevoss Order, the SEC points to several prior approval orders in support of the Winklevoss Standard. The SEC misrepresents the analysis set forth in the prior approval orders, particularly the portions of the orders cited in support of the "Significant Market Test". Under the Significant Market Test, only a comprehensive surveillance sharing agreement, or common ISG membership, with a market of significant size will be considered sufficient to demonstrate compliance with Section 6(b)(5) through a surveillance sharing agreement requirement. As discussed above, a market is considered to be of "significant size" if: (1) there is a reasonable likelihood that a person attempting to manipulate an ETP would have to trade on the market in order to successfully manipulate the ETP, and (2) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.⁵⁷ This standard has no precedent.

⁵⁷ See Winklevoss Order at 37594.



In support of the Significant Market Test, the SEC explained in the Winklevoss Order that “for the commodity-trust ETPs approved to date for listing and trading, including where the underlying commodity is silver, palladium, or platinum, 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 ISG membership in common with, that market.”⁵⁸ The SEC admitted that its orders preceding the adoption of the Winklevoss Standard “did not explicitly undertake an analysis of whether the related futures markets were of ‘significant size,’” but the agency claims that the analysis was implicit in its orders.⁵⁹ However, prior to the Winklevoss Order, the SEC had never considered the size or quality of the underlying market when a surveillance sharing agreement was in place with a related market. The SEC had only looked to the characteristics of the markets of the underlying assets to determine whether an exchange could obtain relevant surveillance information without a comprehensive surveillance sharing agreement in place.⁶⁰

The SEC flips this analysis on its head in the Winklevoss Order. For the first time, the SEC looked to the characteristics of the underlying market to determine whether an exchange had a comprehensive surveillance sharing agreement with a sufficiently suitable market. Even under the most charitable lens, the SEC’s position is a misrepresentation of its own prior decisions. More likely, it’s a pretextual justification to restrict the exchange listing of products it has deemed undesirable based on its own prevailing policy views. While attention has flown to the federal government’s debanking of unfavored industries, the Winklevoss Standard was, itself, an abuse of SEC review authority that appeared designed to cut off digital asset markets.

In the Winklevoss Order, the SEC points to several prior approval orders that underscore the importance of comprehensive surveillance sharing agreements.⁶¹ In support of the proposition that “for the commodity-trust ETPs approved to date for listing and trading, there has been in

⁵⁸ See Winklevoss Order at 37594.

⁵⁹ See GraniteShares Order at 9-12..

⁶⁰ See Exchange Act Release No. 33555 (Jan. 31, 1994), 59 FR 5619, 5621 (Feb. 7, 1994) (SR-Amex-93-28) (the “ADR Options Order”); and Exchange Act Release No. 35518 (Mar. 21, 1995), 60 FR 15804, 15807 (Mar. 27, 1995) (SR-Amex-94-30) (the “COINs Order”).

⁶¹ See Exchange Act Release No. 33555 (Jan. 31, 1994), 59 FR 5619, 5621 (Feb. 7, 1994) (SR-Amex-93-28) (the “ADR Options Order”); and Exchange Act Release No. 35518 (Mar. 21, 1995), 60 FR 15804, 15807 (Mar. 27, 1995) (SR-Amex-94-30) (the “COINs Order”).



every case at least one significant, regulated market for trading futures on the underlying commodity” with which the ETP listing exchange had entered into a surveillance sharing agreement. In support of that proposition, the SEC cites approval orders issued on behalf of exchanges seeking to list ETPs holding gold, silver, platinum, palladium and copper.⁶² None of the precedent orders cited by the SEC in the Winklevoss Order directly offer support for the Winklevoss Standard’s Significant Market Test, and, when read together, the orders stand for a Section 6(b)(5) analysis that contradicts the Winklevoss Standard.

One of the approval orders cited by the SEC is an order approving the listing of options on American Depositary Receipts (“ADRs”) (the “ADR Options Order”).⁶³ The ADR Options Order, while containing some facial similarities to the Winklevoss Standard, reflects a Section 6(b)(5) analysis that is materially different from the analysis required under the Winklevoss Standard. In the ADR Options Order, the SEC approved a proposed rule change from an exchange seeking to list options on ADRs.⁶⁴ This approval was issued despite the fact that the exchange’s proposal did not require the exchange to have a comprehensive surveillance sharing agreement in place with the related market for the underlying ADRs.⁶⁵ While the SEC did undertake an evaluation of the underlying market (the agency considered whether trading volume in the underlying asset market occurred primarily in the U.S.), the analysis was conducted only to the extent necessary to determine whether the proposal could dispense with the requirement to have in place a comprehensive surveillance sharing agreement with the market on which the underlying security was traded.⁶⁶ In the ADR Options Order, the SEC made it clear that the

⁶² See Winklevoss Order at 37592, n. 202.

⁶³ ADR Options Order at 5621.

⁶⁴ *Id.* ADRs are certificates that represent shares of a foreign company that are issued by a U.S. bank and trade on U.S. stock exchanges.

⁶⁵ *Id.* at 5620.

⁶⁶ *Id.* at 5620-5621. In addition, the evaluation of the underlying asset markets also differed drastically from the analysis required under the Winklevoss Standard in terms of the burden placed on the exchange. In the ADR Options Order the SEC looked only to trading volumes in the markets of the underlying assets to determine that surveillance information from the U.S. ADR market would sufficiently replace a surveillance sharing agreement with the markets on which the foreign securities underlying the ADRs trade.



analysis was only required because there was no comprehensive surveillance sharing agreement in place.⁶⁷

Furthermore, the analysis undertaken by the SEC in the ADR Options Order was appropriately limited in scope. The SEC did not develop an independent standard for determining whether the proposal could obtain adequate surveillance information without a comprehensive surveillance sharing agreement. In the ADR Options Order, the exchange seeking to list options on ADRs proposed listing standards that required 50% or more of the world-wide trading volume in the underlying foreign security to occur in the U.S. ADR market.⁶⁸ In its review, the SEC did not develop an independent test to be applied to all exchanges regardless of context. It merely reviewed the rule proposed by the particular exchange to determine whether it reasonably provided for the prevention of fraud and market manipulation. By contrast, the Winklevoss Standard is a test based on the SEC's interpretation of terms to which the agency attaches arbitrary importance.⁶⁹ The Winklevoss Standard was developed independently of the specific rules of any exchange to which it is applied. This type of evaluation is not in keeping with the SEC's limited oversight role over self-regulatory organizations. Rather than reviewing an exchange's rules for self-regulatory lapses, the SEC is engaging in the prescriptive regulation of exchanges seeking to list a certain type of investment product, which has served as pretext for merit-based review of would-be listings and their underlying asset markets. The ADR Options Order stands for the proposition that, when a comprehensive surveillance sharing agreement is not in place, the SEC should review the rules of the exchange to determine whether such rules provide an alternative mechanism for the exchange to obtain market surveillance information. As such, the ADR Options Order provides no support for the Winklevoss Standard.

The other approval orders cited in the Winklevoss Order share the same problem: the SEC approved the listing of a product which is comparable to the Bitcoin ETPs based on the

⁶⁷ *Id.* at 5621 (“Under the current proposal, the Commission believes that it is appropriate to permit the listing of options on an ADR without the existence of a comprehensive surveillance sharing agreement with the foreign market where the underlying security traded, as long as the U.S. market for the underlying ADRs is at least as large as the market for the underlying foreign security.”)

⁶⁸ *Id.*

⁶⁹ *See* Winklevoss Order at 37594. The SEC defined, for the first time, the terms “significant market” and “market of significant size.” Prior to the Winklevoss Order, the SEC had neither used the terms in any meaningful way, nor discussed their importance.



existence of a surveillance sharing agreement with a market related to the product's underlying assets without considering or discussing any of the factors set forth in the Significant Market Test.⁷⁰ In a series of orders approving derivative products from the 1990s (the “Derivatives Orders”), the SEC found that several factors significantly minimized the potential for manipulation.⁷¹ In each of the Derivatives Orders, the SEC acknowledged that a surveillance sharing agreement was one of the factors supporting its approval of the proposed rule; however, the SEC never undertook even a cursory analysis of the size or characteristics of the underlying assets' markets.⁷² In fact, the significance of the surveillance sharing agreements themselves did not seem to be emphasized. In each of the Derivatives Orders, the surveillance sharing agreement in question was never listed higher than the third factor in support of the SEC's finding that the exchanges could conduct adequate surveillance.⁷³ These orders also demonstrate the SEC's historic willingness to consider a variety of frameworks proposed by exchanges. In one of the approval orders, the SEC found that the general requirement that there be a surveillance sharing agreement in place with a related market was satisfied by an exchange listing rule that permitted up to 20% of the product's weight to be comprised of underlying assets that were not subject to a surveillance sharing agreement or that had 50% of their trading volume on U.S. markets.⁷⁴ These orders are inconsistent with strict obligations relating to surveillance sharing agreements which are imposed on exchanges by the Winklevoss Standard.

The chief support cited by the SEC for the Significant Market Test was a series of approval orders issued for proposed rule exchanges providing for the listing of commodity-trust

⁷⁰ See Exchange Act Release No. 35518 (Mar. 21, 1995), 60 FR 15804 (Mar. 27, 1995) (SR-Amex-94-30); Exchange Act Release No. 36885 (Feb. 26, 1996), 61 FR 8315 (Mar. 4, 1996) (SR-Amex-95-50); and Exchange Act Release No. 36166 (Aug. 29, 1995), 60 FR 46660 (Sept. 7, 1995) (SR-PSE-94-28).

⁷¹ See Exchange Act Release No. 35518, at 15806-15807; Exchange Act Release No. 36885, at 8319; and Exchange Act Release No. 36166, at 4664-4665.

⁷² *Id.*

⁷³ Exchange Act Release No. 35518, at 15806-15807 (“Fourth, as discussed below, the Amex has entered into certain surveillance sharing agreements with each of the futures exchanges upon which the underlying designated futures contracts trade.”); Exchange Act Release No. 36885, at 8319 (“Third, as discussed below, the Amex has entered into certain surveillance sharing agreements with each of the futures exchanges upon which the underlying designated futures contracts trade.”); and Exchange Act Release No. 36166, at 4665 (“Third, the Exchange has developed adequate surveillance procedures...”).

⁷⁴ Exchange Act Release No. 36166, at 4665.



ETPs which are similar in organization and operation to the Bitcoin ETPs.⁷⁵ These orders suffer from a similar problem as the Derivatives Orders. The SEC claims that commodity-trust ETP orders, which include no meaningful discussion or consideration of a related underlying asset market's size, provide support for the Winklevoss Standard because exchanges, in their 19b-4 applications, made representations as to the size and trading volume of the related underlying asset market. In the Winklevoss Order, the SEC specifically points to these representations in the citations for gold, silver, platinum, and palladium commodity-trust ETPs.⁷⁶ However, as pointed out by Commissioner Hester Peirce in her dissent to the Grayscale Order, “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.”⁷⁷ In some of its approval orders for commodity-trust ETPs, the SEC does not even mention the size of the underlying asset markets,⁷⁸ despite the fact that several of the orders did not contemplate comprehensive surveillance sharing agreements.⁷⁹ In the ETFS Silver and Palladium Orders, the SEC was satisfied that relevant surveillance information could be obtained by the exchange's regulated market makers in connection with their activity in the markets for the ETFS Silver and Palladium Trusts.⁸⁰ This analysis is in stark contrast with the depth and rigor of the Section 6(b)(5) analysis applied to Bitcoin ETPs, under which the SEC required exchanges to demonstrate, based on sophisticated statistical analysis, the existence of certain characteristics and pricing relationships within the related markets for the underlying asset. It is difficult to see how the commodity-trust ETP orders, in approving rule changes with no consideration of the

⁷⁵ See Winklevoss Order at 37592, n. 202.

⁷⁶ *Id.*

⁷⁷ See Hester M. Peirce, U.S. Sec. Exch. Comm'n, Dissent of Commissioner Hester M. Peirce to Release No. 34-88284 (Feb. 26, 2020), <https://www.sec.gov/newsroom/speeches-statements/peirce-dissenting-statement-34-88284>.

⁷⁸ See ETFS Silver Trust, Exchange Act Release No. 59781 (Apr. 17, 2009), 74 FR 18771, 18772, 18775-77 (Apr. 24, 2009) (SR-NYSEArca-2009-28) (the “ETFS Silver Order”); ETFS Palladium Trust, Exchange Act Release No. 61220 (Dec. 22, 2009), 74 FR 68895, 68896 (Dec. 29, 2009) (the “ETFS Palladium Order”).

⁷⁹ *Id.*

⁸⁰ *Id.* (“[T]he Exchange is able to obtain information regarding trading in the Shares and the underlying silver, silver futures contracts, options on silver futures, or any other silver derivative, 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.”)



characteristics of the underlying market, could possibly provide justification for the Winklevoss Standard.

Certainly, the existence of comprehensive surveillance sharing agreements can be a useful tool for exchanges to detect fraudulent or manipulative activities; however, the SEC's attempt in Winklevoss to create a screen for surveillance sharing agreements based on the size and characteristics of the markets for an ETP's underlying asset is not supported by the SEC's prior administrative decision. Such a standard misrepresents the analysis of surveillance sharing agreements historically undertaken by the SEC and oversteps the agency's limited oversight role.

C. Even if the Winklevoss Standard is the appropriate framework for the Section 6(b)(5) analysis under Rule 19b-4, the SEC has applied the standard far too narrowly.

As discussed at length above, the Winklevoss Standard itself is at odds with the SEC's authority under the Exchange Act. The SEC's application of the Winklevoss Standard is subject to its own set of issues. In practice, the SEC has never approved the listing of a digital asset ETP based on the existence of a surveillance sharing agreement with a regulated market of significant size as related to the ETPs underlying digital asset, in spite of overwhelming empirical evidence produced by asset managers supporting the conclusion that the market related to the underlying digital asset met the Significant Market Test.⁸¹ In the SEC order approving the listing of the first Bitcoin ETPs, the SEC held that, because bitcoin prices on the spot and futures bitcoin markets are closely correlated, fraud or manipulation impacting prices on the bitcoin market would also impact prices on the bitcoin futures markets.⁸² Thus, a comprehensive surveillance sharing agreement with the CME bitcoin futures market could reasonably be expected to assist in surveilling for fraudulent and manipulative activity in accordance with Section 6(b)(5).⁸³

There are two primary issues with the SEC's application of the Winklevoss Standard in the Bitcoin ETP Approval Order. First, the SEC has failed to recognize, as it has in pre-Bitcoin ETP approval orders,⁸⁴ that there are myriad ways for an exchange to demonstrate that a

⁸¹ *E.g.*, Bitwise Study at 24; Fidelity Study at 1.

⁸² Bitcoin ETP Approval Order, at 3010-3011.

⁸³ *Id.*

⁸⁴ ADR Options Order, at 5620-5621 (Finding that alternative mechanisms, including exchange listing requirements and ISG membership, were adequate to provide for the surveillance information necessary to detect and deter market



surveillance sharing agreement is appropriate on its own or in concert with other surveillance mechanisms. In the Bitcoin and Ether ETP approval orders, the SEC creates another test, adding further complexity to the Section 6(b)(5) analysis and further uncertainty for the digital asset and investment management industries. This narrow interpretation discourages investment and invites uncertainty into the markets, and all but ensures that the rules of the exchanges are designed in a manner that puts digital assets at a competitive disadvantage. Furthermore, without adequate justification for its different treatment of digital asset-based products, the SEC's decision is likely in violation of the Administrative Procedure Act as an arbitrary and capricious agency action.

Second, the SEC's Bitcoin ETP approval orders went to pains to avoid considering the extensive evidence demonstrating that price discovery in the bitcoin markets takes place on spot digital asset trading platforms or on the CME bitcoin futures market.⁸⁵ By issuing the approval orders based on "other means" rather than through finding that the Significant Market Test had been satisfied, the SEC failed to even consider legitimate evidence demonstrating that the Significant Market Test had been met. This reflects, among other things, the agency's inappropriately narrow application of the Winklevoss Standard's Significant Market Test and its use as an opportunistic merit-review blocking device rather than an actual legal standard. With every 19b-4 application filed on behalf of a Bitcoin ETP, the SEC has had the opportunity to provide clarity and to defer to the will of investors and the self-regulatory authority of the exchanges. Instead, the agency demanded increasingly granular evidence of pricing relationships, imposed an enormous burden on the digital asset industry and asset managers, and overstepped its limited oversight authority over national securities exchanges.

The SEC's determination in the Bitcoin and Ether ETP approval orders that the Winklevoss Standard has still not been met is arguably a violation of the arbitrary and capricious standard, especially following the decision of the D.C. Circuit Court in *Grayscale*. To find agency decisions arbitrary in informal adjudications, courts must first "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear

manipulation when an exchange did not have a comprehensive surveillance sharing agreement in place with the markets on which the relevant underlying securities trade).

⁸⁵ Bitcoin ETP Approval Order, at 3010 n.39 (Explaining that the correlation recognized in the approval order should not be interpreted as an indicator of the existence of the causal lead-lag relationship required under the Winklevoss Standard).



error of judgment.”⁸⁶ It has not ever been demonstrated or argued why the SEC’s consideration of such granular data regarding pricing relationships is a relevant, or even permissible, factor to be considered in determining whether an exchange’s rules are sufficiently designed to prevent fraudulent and manipulative market activity. It is also unclear whether a court would consider a clear error in judgment (or, worse, an arbitrary and capricious moving of goal posts) the SEC’s continued rejection of increasingly thorough and convincing evidence that the pricing relationships it incorrectly required did, in fact, exist.⁸⁷

Even if a Court were to uphold the Winklevoss Standard as an appropriate interpretation of the SEC’s authority under the Exchange Act and an accurate restatement of the standards applied by the SEC in prior orders approving and denying 19b-4 applications, the inconsistent and narrow application of the Winklevoss Standard would run counter to the policy objectives under the Exchange Act and Section 6(b)(5), and subject the Winklevoss Standard to challenge under the Administrative Procedure Act. The SEC’s refusal to acknowledge that Bitcoin and Ether ETPs demonstrated compliance with the Winklevoss Standard is arguably arbitrary and capricious in light of the SEC’s failure to consider the relevant factors in its orders denying 19b-4 applications from exchanges seeking to list Bitcoin ETPs. Accordingly, Bitcoin and other digital asset ETP denial orders which continue to enforce the Winklevoss Standard should be considered unlawful agency actions.

IV. Conclusion.

The Winklevoss Standard requires that the SEC conduct an unprecedented and thorough evaluation of the markets underlying a digital asset-based ETP that is the subject of a proposed

⁸⁶ *Judulang v. Holder*, 565 U.S. 42, 53, 132 S.Ct. 476, 181 L.Ed.2d 449 (2011).

⁸⁷ See Securities Exchange Act Release No. 93445 (October 28, 2021), 86 FR 60695 (November 3, 2021) (SR-NYSEArca-2021-89) (Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change to List and Trade Shares of the Bitwise Bitcoin ETP Trust under NYSE Arca Rule 8.201-E) (“Bitwise Application”); Securities Exchange Act Release No. 91994 (May 25, 2021), 86 FR 29321 (June 1, 2021) (SR-CboeBZX-2021-039) (Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of 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) (“Fidelity Application”); Securities Exchange Act Release No. 95179 (June 29, 2022), 87 FR 40282 (July 6, 2022) (SR-NYSEArca-2021-89) (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)) (“Bitwise Denial Order”); Securities Exchange Act Release No. 94080 (Jan. 27, 2022), 87 FR 5527 (Feb. 1, 2022) (SR-CboeBZX-2021-039) (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) (“Fidelity Denial Order”).



rule change reviewed by the SEC pursuant to Rule 19b-4. This evaluation, in particular the Significant Market Test, amounts to a merit based review of the investment quality of the underlying asset, as opposed to a review of an exchange's compliance with the rules of the Exchange Act.⁸⁸ Because the Winklevoss Standard finds no support in the text of Section 6(b)(5), prior SEC administrative decisions, or the policy objectives it aims to achieve, its continued use in the evaluation of Rule 19b-4 applications should be immediately discontinued. In the wake of *Loper-Bright* and *Grayscale*, the SEC should re-evaluate its statutory role in approving or denying such applications consistent with the actual requirements of Section 6(b)(5). Further, the SEC should work with the national securities exchanges and the digital asset industry to develop workable generic listing standards for non-controversial digital asset ETP products.

⁸⁸ See Self-Regulatory Organizations; NYSE Arca, Inc.; 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), 87 FR 40299-01, 40303 (The SEC explains 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.”).