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# CRYPTOCURRENCY AND FINANCIAL REGULATION: THE SEC'S REJECTION OF BITCOIN-BASED ETPS

## I. THE CREATION OF THE REGULATORY CATCH-22

Cryptocurrency began as a decentralized currency that could cross borders and exist free from the oversight of a central government.<sup>1</sup> In the ten years that have passed since bitcoin first launched, cryptocurrency has entered the sphere of popular news and general awareness.<sup>2</sup> With this has come increased interaction between cryptocurrency markets, companies, investors, and financial regulators in the United States.<sup>3</sup>

The U.S. Securities and Exchange Commission's ("SEC") rejection of nine proposed bitcoin-based exchange-traded funds ("ETFs")<sup>4</sup> and their second rejection of the Winklevoss bitcoin-based exchange-traded products ("ETPs")<sup>5</sup> showcased the tension between financial market regulators and cryptocurrency market innovators.<sup>6</sup> When the SEC rejected the Winklevoss ETP for the second time in July of 2018, the price of

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1. See Bernard Marr, *A Short History of Bitcoin and Crypto Currency Everyone Should Read*, FORBES (Dec. 6, 2017), <https://www.forbes.com/sites/bernardmarr/2017/12/06/a-short-history-of-bitcoin-and-crypto-currency-everyone-should-read/#1361c7c53f27> (explaining the origins of bitcoin).

2. See Peter Rudegeair & Akane Otani, *Bitcoin Mania: Even Grandma Wants in on the Action*, WALL ST. J. (Nov. 29, 2017), <https://www.wsj.com/articles/bitcoin-mania-even-grandma-wants-in-on-the-action-1511996653> (expressing the rise of popular awareness of bitcoin through the story of an older woman who invested profitably in bitcoin and earned a 45% profit on her investment, selling as the price of bitcoin neared \$10,000).

3. See U.S. CFTC OFFICE OF PUBLIC AFFAIRS, CFTC BACKGROUNDER ON OVERSIGHT OF AND APPROACH TO VIRTUAL CURRENCY FUTURES MARKETS 1 (2018), [https://www.cftc.gov/sites/default/files/idc/groups/public/%40customerprotection/documents/file/backgrounder\\_virtualcurrency01.pdf](https://www.cftc.gov/sites/default/files/idc/groups/public/%40customerprotection/documents/file/backgrounder_virtualcurrency01.pdf) [hereinafter CFTC BACKGROUNDER] (detailing the role of regulatory agencies in overseeing aspects of cryptocurrency markets).

4. See *infra* Part II.A.

5. See *infra* Part II.A.

6. Nikhil Subba, *SEC Rejects Nine Proposals for Bitcoin ETFs*, REUTERS (Aug. 22, 2018), <https://www.reuters.com/article/us-bitcoin-funds-etfs/sec-rejects-nine-proposals-for-bitcoin-etfs-idUSKCN1L802V> (pointing out that in August, 2018, the SEC rejected nine applications for bitcoin-based ETFs—five from Direxion, two from GraniteShares, and two from ProShares); see also U.S. SEC. & EXCH. COMM'N, No. 34-83912, ORDER DISAPPROVING A PROPOSED RULE CHANGE RELATING TO LISTING AND TRADING OF THE DIREXION DAILY BITCOIN BEAR 1X SHARES, DIREXION DAILY BITCOIN 1.25X BULL SHARES, DIREXION DAILY BITCOIN 1.5X BULL SHARES, DIREXION DAILY BITCOIN 2X BULL SHARES, AND DIREXION DAILY BITCOIN 2X BEAR SHARES UNDER NYSE ARCA RULE 8.200-E (2018) [hereinafter "DIREXION DISAPPROVAL ORDER"] (rejecting Direxion's ETF proposal).

bitcoin fell by 3%.<sup>7</sup> It is likely that the pre-rejection price was inflated by speculation that the SEC would approve a bitcoin-based ETP.<sup>8</sup> This fluctuation illustrates both the volatility in the bitcoin market and the impact of regulatory action on bitcoin investment regardless of bitcoin's independent origins.<sup>9</sup> The orders and releases that the SEC has generated in response to bitcoin ETP proposals reveal a number of challenges facing those who wish to shape and invest in the cryptocurrency market going forward.

The SEC's application of legal standards derived from the Exchange Act of 1934 in their disapprovals has created a catch-22 for proponents of cryptocurrency-based ETPs. ETPs need the SEC's regulatory approval of their investment vehicle, but the SEC's responses suggest that bitcoin-based ETPs may not be able to acquire approval without proof of better regulation of the underlying market.<sup>10</sup> The creation of a cryptocurrency self-regulatory organization ("CSRO") with which an ETP proposer could enter a surveillance-sharing agreement<sup>11</sup> could address the SEC's concerns, although it is likely that the passage of time is the only thing that will move the SEC towards approval.<sup>12</sup>

This Note proceeds in five parts. Part II explains the history and background of cryptocurrency regulation and ETPs in the United States.<sup>13</sup> Part III analyzes the SEC's response to bitcoin-based ETP proposals.<sup>14</sup> Part IV examines solutions for future proposals and the likelihood that a

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7. See Katie Rooney & Bob Pisani, *Winklevoss Twins Bitcoin ETF Rejected by SEC*, CNBC (July 27, 2018), <https://www.cnbc.com/2018/07/26/winklevoss-twins-bitcoin-etf-rejected-by-sec.html> (reporting the second rejection of the Winklevoss proposal for a bitcoin ETP and the announcement's impact on the market); see also U.S. SEC. & EXCH. COMM'N, No. 34-83723, SELF-REGULATORY ORGANIZATIONS; BATS BZX EXCHANGE, INC.; 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 76 (2018), <https://www.sec.gov/rules/other/2018/34-83723.pdf> [hereinafter "WINKLEVOSS DISAPPROVAL ORDER"] (setting forth the SEC's reasons for disapproving the Winklevoss proposal).

8. Rooney & Pisani, *supra* note 7.

9. See Rooney & Pisani, *supra* note 7 ("Bitcoin soared to a two-month high above \$8,300 this week, partially because of rumors that the SEC could approve a similar trading vehicle as early as August.").

10. See WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 76 (establishing the standard for ETPs that requires surveillance-sharing agreements with a regulated market of significant size).

11. See *infra* Part III.

12. See *infra* Part IV (establishing why more time needs to pass before the SEC will approve a bitcoin-based ETP).

13. See *infra* Part II.

14. See *infra* Part III.

CSRO can address the SEC's concerns about bitcoin-based ETPs.<sup>15</sup> Part V summarizes this Note's conclusions about the SEC's treatment of bitcoin-based ETPs.<sup>16</sup>

## II. THE STATUS OF CRYPTOCURRENCY REGULATION AND ETPS IN THE UNITED STATES

Virtual or crypto-currencies are regulated at both the state and federal level.<sup>17</sup> U.S. and foreign virtual currency spot exchanges fall under the purview of state banking regulators due to state money transfer laws.<sup>18</sup> On the federal level, the IRS applies the capital gains tax to virtual currencies as it does to other property.<sup>19</sup> The Treasury's Financial Crimes Enforcement Network ("FinCEN") oversees virtual currency transfers in its duties to combat money laundering.<sup>20</sup> The Commodity Futures Trading Commission ("CFTC") has labeled virtual currencies "commodities" that fall under the Commodity Exchange Act.<sup>21</sup> Finally, the SEC regulates cryptocurrency by applying existing securities laws<sup>22</sup> to initial coin

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15. *See infra* Part IV.

16. *See infra* Part V.

17. CFTC BACKGROUNDER, *supra* note 3, at 1.

18. CFTC BACKGROUNDER, *supra* note 3, at 1.

19. INTERNAL REVENUE SERV., NOTICE 2014-21 2 (2018), <https://www.irs.gov/pub/irs-drop/n-14-21.pdf>.

20. Kenneth A. Blanco, Fin. Crimes Enf't Network, Prepared Remarks of FinCEN Director Kenneth A. Blanco Delivered At the 2018 Chicago-Kent Block (Legal) Tech Conference 2-3 (August 9, 2018), <https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-kenneth-blanco-delivered-2018-chicago-kent-block>; CFTC BACKGROUNDER, *supra* note 3, at 1.

21. CFTC BACKGROUNDER, *supra* note 3, at 1.

22. JIM CLAYTON, SEC. EXCH. COMM'N, STATEMENT ON CRYPTOCURRENCIES AND INITIAL COIN OFFERINGS (2017), <https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11> (stating that ICOs are probably securities because "[p]rospective purchasers are being sold on the potential for tokens to increase in value – with the ability to lock in those increases by reselling the tokens on a secondary market – or to otherwise profit from the tokens based on the efforts of others," and that the SEC would carry out enforcement actions against fraudulent actors).

offerings (“ICOs”)<sup>23</sup> and other cryptocurrency-based products that qualify as securities or investment companies.<sup>24</sup>

A. *Recent Developments in the Cryptocurrency Markets: The Push to Offer Bitcoin-Based ETPs*

Recently, there has been a push to make bitcoin-based exchange-traded products available to U.S. investors.<sup>25</sup> ETPs are derivatively-priced securities that trade on a national securities exchange.<sup>26</sup> Their value is derived from an investment instrument such as a commodity, a currency, a share price, or an interest rate and they are generally benchmarked to stocks, commodities, or indices.<sup>27</sup>

The various types of ETPs include: Exchange-traded funds (“ETFs”), exchange-traded vehicles (“ETVs”), and exchange-traded notes (“ETNs”)<sup>28</sup> and certificates.<sup>29</sup> ETFs are a type of mutual fund which “allow investors to buy into a large basket of stocks.”<sup>30</sup> An ETF

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23. *See id.* (“Coinciding with the substantial growth in cryptocurrencies, companies and individuals increasingly have been using initial coin offerings to raise capital for their businesses and projects. Typically these offerings involve the opportunity for individual investors to exchange currency such as U.S. dollars or cryptocurrencies in return for a digital asset labeled as a coin or token.”); *see also* Joseph D. Moran, *The Impact of Regulatory Measures Imposed on Initial Coin Offerings in the United States Market Economy*, 26 Cath. J. of Law and Tech. 3 (2018) (providing background on ICOs).

24. DIV. ENF’T AND TRADING AND MKTS., SEC. EXCH. COMM’N, STATEMENT ON POTENTIALLY UNLAWFUL ONLINE PLATFORMS FOR TRADING DIGITAL ASSETS (2018), <https://www.sec.gov/news/public-statement/enforcement-tm-statement-potentially-unlawful-online-platforms-trading> (“The SEC’s Divisions of Enforcement and Trading and Markets stated that an online trading platform that offers trading of digital assets that meet the definition of a “security” under federal securities laws and operates as an “exchange” must register with the SEC as a national securities exchange or be exempt from registration.”).

25. *See Number of Proposed Bitcoin ETFs Grows*, ETF.COM, <https://www.etf.com/sections/features-and-news/number-proposed-bitcoin-etfs-grows> (last visited Feb. 8, 2019) (“[Twenty-three] filings for bitcoin ETFs have reached regulators in the past few years.”).

26. *Exchange Traded Products—ETP*, INVESTOPEdia, <https://www.investopedia.com/terms/e/exchange-traded-products-etp.asp> (last visited Sept. 4, 2018).

27. *Id.*

28. On September 9, 2018, the SEC suspended U.S. trading of shares of two Swedish ETPs which had become available in the U.S. in August, 2018. The SEC cited confusion over the classification of these ETPs, with some trading platforms calling them ETFs and some calling them ETNs, in their order suspending trading. Brent J. Fields, *Certain Bitcoin/Ether Tracking Certificates* (Sec. Exch. Comm’n Sept. 9, 2018) (order of suspension of trading), <https://www.sec.gov/litigation/suspensions/2018/34-84063-o.pdf>.

29. *Exchange Traded Products—ETP*, *supra* note 26.

30. THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* 728 (7th ed. 2016); *see generally* DAVID J. ABNER, *THE ETF HANDBOOK: HOW TO VALUE AND TRADE EXCHANGE-TRADED FUNDS* (2nd ed. 2016) (describing ETFs in greater technical detail in a manner that is geared towards practicing lawyers).

“basket” can hold securities, derivatives such as swaps, or commodity futures contracts in line with the fund’s investment strategy.<sup>31</sup> The shares of an ETF “can be bought or sold throughout the day on an exchange at a market-determined price.”<sup>32</sup> Investors in ETFs receive interest in the fund from its investments in stocks, bonds, or other assets.<sup>33</sup>

ETFs have six features which make them attractive to retail and institutional investors.<sup>34</sup> These features include: (1) liquidity and quick access to different asset classes because ETF shares can be traded throughout the day; (2) price transparency because the trading price of an ETF tends to approximate the market value of its underlying securities; (3) tax efficiency because few distribute capital gains and many use in-kind transactions to acquire and dispose of their underlying investments; (4) exposure to specific markets that otherwise could be difficult or impossible to attain; (5) strong demand from investors for index-linked investments; and (6) use by financial advisors in third-party asset allocation models to manage their clients’ assets.<sup>35</sup> One of the major benefits of the investment vehicle is that it would allow indirect investment in cryptocurrencies like bitcoin on a regulated securities market.<sup>36</sup>

Bitcoin ETPs could be in two basic forms: (1) ETFs that hold bitcoin derivatives; and (2) ETPs that physically hold bitcoin.<sup>37</sup> Both forms of ETPs have applied for approval<sup>38</sup> from the SEC and to date have not been approved.<sup>39</sup> Bitcoin ETFs are structured as “series” of a

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31. THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* 728 (7th ed. 2016).

32. Kenneth C. Fang & Jane Heinrichs, *Understanding the Regulation of Exchange-Traded Funds Under the Securities Exchange Act of 1934*, INVESTMENT CO. INST. 2 (Aug. 2017), [https://www.ici.org/pdf/ppr\\_17\\_etf\\_listing\\_standards.pdf](https://www.ici.org/pdf/ppr_17_etf_listing_standards.pdf).

33. SEC. & EXCH. COMM’N., EXCHANGE-TRADED FUNDS (ETFs) (2017), <https://www.sec.gov/fast-answers/answersetfhtm.html>.

34. Fang & Heinrichs, *supra* note 32, at 2.

35. Fang & Heinrichs, *supra* note 32, at 2.

36. Hester M. Pierce, *Dissent of Commissioner Hester M. Pierce to Release No. 34-83723*, U.S. SEC. EXCH. COMM’N (July 26, 2018), <https://www.sec.gov/news/public-statement/peirce-dissent-34-83723> (“An ETP based on bitcoin would offer investors indirect exposure to bitcoin through a product that trades on a regulated securities market and in a manner that eliminates some of the frictions and worries of buying and holding bitcoin directly.”).

37. Mina Down, *What are Bitcoin ETFs and Why are They Controversial?*, HACKERNOON (Aug. 22, 2018), <https://hackernoon.com/what-are-bitcoin-etfs-and-why-are-they-controversial-c9509a925594>.

38. *Id.*

39. *See infra* Part III.

“Trust.”<sup>40</sup> The Trust and Funds are managed by a “Sponsor.”<sup>41</sup> Under this proposed structure, the Fund would invest in bitcoin derivatives, namely futures contracts, which would serve as the benchmark for the Fund.<sup>42</sup> Shares in the Fund would be created and redeemed in “creation units” consisting of, for example, 50,000 shares.<sup>43</sup>

The ETP in the Winklevoss Proposal was structured as a commodity-based trust.<sup>44</sup> The Winklevoss Bitcoin Trust would hold bitcoins as an asset and issue and redeem shares in “Baskets” of 100,000 shares to authorized participants.<sup>45</sup> Transactions for shares or “Baskets” would be made “in kind” for bitcoin only.<sup>46</sup> Shares of the Winklevoss Bitcoin Trust would track the price of bitcoin on the Gemini Exchange which is operated by the Winklevoss Bitcoin Trust.<sup>47</sup> The Net Asset Value (“NAV”) of the Winklevoss Bitcoin Trust would be calculated based on the clearing price of the Gemini Exchange’s daily auction of bitcoin which occurs at 4 p.m. every day.<sup>48</sup>

### III. THE SEC’S RESPONSE TO BITCOIN-BASED ETP PROPOSALS

#### A. *Regulatory Framework*

The SEC has yet to approve a rule change that would establish a bitcoin or cryptocurrency-based ETP.<sup>49</sup> In its disapproval orders, the SEC has applied a regulatory framework derived from the Investment Company Act of 1940 (“the Investment Company Act”) and the Securities Exchange Act of 1934 (“the 1934 Act”). Under the Investment Company Act, ETFs that qualify as “investment companies” must be

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40. U.S. SEC. & EXCH. COMM’N, No. 34-83913, SELF-REGULATORY ORGANIZATIONS; CBOE BZX EXCHANGE, INC.; ORDER DISAPPROVING A PROPOSED RULE CHANGE TO LIST AND TRADE THE SHARES OF THE GRANITESHARES BITCOIN ETF AND THE GRANITESHARES SHORT BITCOIN ETF 3 (August 22, 2018), <https://www.sec.gov/rules/sro/cboebzx/2018/34-83913.pdf> [hereinafter “GRANITESHARES DISAPPROVAL ORDER”].

41. *Id.* at 3.

42. *Id.* at 4.

43. DIREXION DISAPPROVAL ORDER, *supra* note 6, at 3.

44. *See* WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 7 (stating that the fund would physically hold bitcoin).

45. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 7.

46. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 7.

47. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 7.

48. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 7.

49. Subba, *supra* note 6.

registered with the SEC.<sup>50</sup> An ETF is required to obtain relief from the 1934 Act if it is to be listed and traded in the U.S. secondary market.<sup>51</sup> The first ETF began trading in 1993.<sup>52</sup> This ETF was “a broad-based domestic equity fund tracking the S&P 500 index.”<sup>53</sup> Since 1992, the SEC has issued over 300 exemptive orders allowing ETFs to operate under the Investment Company Act.<sup>54</sup> In the U.S., there are over 1,900 ETFs that account for almost 15% of total investment company assets.<sup>55</sup>

The process for SEC approval and review of listing rules has been streamlined for ETFs that meet “generic listing standards.”<sup>56</sup> Exchanges proposing ETFs that do not meet “generic listing standards” must propose specific listing rules for their ETF before the SEC.<sup>57</sup> This regulatory approval format is why the proposals to establish bitcoin-based ETFs are described as a “proposed rule change.”<sup>58</sup> The SEC’s letters and orders in response to these proposed rule changes provide insight into the legal standards and policy considerations that hopefuls must meet in their quest to offer bitcoin-based ETFs.

*B. The SEC’s First Disapproval of a Bitcoin ETP: The Winklevoss Order*

The SEC’s first disapproval of a bitcoin-based ETP was for a commodity-trust ETP based on bitcoin.<sup>59</sup> This disapproval order will be referred to as the “Winklevoss Order” because the proposal was

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50. *Staff Letter on Engaging on Fund Innovation and Cryptocurrency-related Holdings*, SEC. EXCH. COMM’N (Jan. 18, 2018), <https://www.sec.gov/divisions/investment/noaction/2018/cryptocurrency-011818.htm> (applying the Investment Company Act to potential cryptocurrency-based ETPs and presenting five categories of questions for funds that are intending to hold cryptocurrency or related products: (1) Valuation; (2) Liquidity; (3) Custody; (4) Arbitrage for ETFs; (5) Potential Manipulation and Other Risks.); *see also*, Fang & Heinrichs, *supra* note 32, at 2 (explaining how ETFs are regulated under the 1934 Act).

51. *So You Want To Launch An ETF*, ETF.COM (July 1, 2006), <https://www.etf.com/publications/journalofindexes/joi-articles/2305.html?nopaging=1> (explaining how ETFs function and are formed).

52. Fang & Heinrichs, *supra* note 32, at 5.

53. Fang & Heinrichs, *supra* note 32, at 5.

54. Press Release, U.S. Sec. & Exch. Comm’n., SEC Proposes New Approval Process for Certain Exchange-Traded Funds (June 28, 2018) (on file with author), <https://www.sec.gov/news/press-release/2018-118>.

55. *Id.*

56. *So You Want to Launch an ETF*, *supra* note 51.

57. *So You Want to Launch an ETF*, *supra* note 51.

58. *So You Want to Launch an ETF*, *supra* note 51.

59. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 7.

spearheaded by the Winklevoss twins who were early investors in bitcoin.<sup>60</sup> According to the proposal, shares of the Winklevoss Bitcoin Trust were to track the price of bitcoin being traded on the Gemini Exchange and would be listed on the Bats BZX Exchange.<sup>61</sup> The SEC disapproved of this proposal in March of 2018 and reaffirmed its decision in July of 2018 following BZX's petition for review of the decision.<sup>62</sup> In its petition for review of the SEC's March disapproval, BZX presented the SEC with a surveillance-sharing agreement<sup>63</sup> with the Gemini Exchange and also argued that bitcoin markets are inherently resistant to market manipulation.<sup>64</sup> Because it was the first bitcoin-based ETP proposal that the SEC ruled on, the Winklevoss Order set out the SEC's reasoning and statutory analysis regarding bitcoin-ETPs in the greatest amount of detail.<sup>65</sup>

Since the Winklevoss Order, the SEC has pointed to Section 6(b)(5) of the 1934 Act as the legal standard that ETP proposals must meet regardless of whether they are for commodity-trust ETPs or ETFs based on bitcoin futures.<sup>66</sup> Section 6(b)(5) requires that:

The rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, broker, or dealers, or to regulate by virtue of any authority conferred by this chapter matters not

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60. Readers may also recognize the Winklevoss twins as the brothers who sued Mark Zuckerberg for stealing their idea when he created Facebook.

61. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 7.

62. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 1–2.

63. *See infra* Part III.

64. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 4.

65. *Compare* WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, with GRANITESHARES DISAPPROVAL ORDER, *supra* note 40.

66. GRANITESHARES DISAPPROVAL ORDER, *supra* note 40, at 8.

related to the purposes of this chapter or the administration of the exchange.<sup>67</sup>

According to the SEC, ETP proposals fail to meet this standard when they do not design rules to “prevent fraudulent and manipulative acts and practices” that include surveillance-sharing agreements with markets of significant size.<sup>68</sup>

C. *The SEC’s Interpretation of Section 6(b)(5) to Require a Surveillance-Sharing Agreement with a Regulated Market of Significant Size*

In the Winklevoss Order, the SEC designated a section in their discussion to explaining “[t]he history and importance of surveillance-sharing agreements relating to derivative securities products.”<sup>69</sup> The primary goal of surveillance-sharing agreements is to “detect and deter market manipulation and other trading abuses” through the sharing of information between the listing exchange and the exchange trading the underlying stock.<sup>70</sup> The SEC set out five provisions and qualities that surveillance-sharing agreements should provide to accomplish this goal.<sup>71</sup> Agreements should provide for sharing information about: (1) market trading activity; (2) clearing activity; and (3) customer identity.<sup>72</sup> The parties to the agreement should also have (4) the reasonable ability to obtain and produce requested information, and (5) a lack of “existing rules, laws or practices [that] would impede one party to the agreement from obtaining this information from, or producing it to, the other party.”<sup>73</sup>

In her dissent from the SEC majority’s disapproval of BZX’s proposed rule change, Commissioner Hester Pierce argued that whether a proposer has established a surveillance sharing agreement with a “regulated market of significant size” is not “the appropriate test” for approval.<sup>74</sup> She noted that prior to 2017, approval orders for ETPs “seem

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67. Securities Exchange Act of 1934 § 6(b)(5), 15 U.S.C. § 78f(b)(5) (2012).

68. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 76.

69. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 49–54.

70. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 51.

71. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 49–51.

72. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 49–51.

73. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 49–51.

74. Pierce, *supra* note 36.

to place less explicit emphasis on the presence of an agreement with a ‘significant, regulated market.’”<sup>75</sup> The SEC justified its use of this test by differentiating its approvals of ETPs without surveillance-sharing agreements with a regulated market of a significant size from the bitcoin-ETP before it.<sup>76</sup> The SEC has recognized the importance of surveillance-sharing agreements “in the context of exchange listing of security products, such as equity options” since the early 1990s, and that its approval of one of the first commodity-linked ETPs in 1995 was based on the listing exchange’s “surveillance-sharing agreements with each of the futures markets on which pricing of the ETP would be based.”<sup>77</sup> While Commissioner Peirce is correct in noting that the text of Section (6)(b)(5) of the Exchange Act says nothing about surveillance-sharing agreements, it appears that they have become an accepted and ingrained part of the SEC’s consideration of ETPs.<sup>78</sup>

#### 1. The First Prong of the Section 6(b)(5) Surveillance-Sharing Agreement Test: Defining “Regulated Market”

Whether a market is regulated such that it meets the first prong of the SEC’s Section 6(b)(5) test is relatively clear when it comes to bitcoin-based ETPs. In evaluating the sufficiency of the surveillance-sharing agreement between BZX and the Gemini Exchange in the Winklevoss proposal, the SEC established another standard that underlies the “regulated” prong of their Section (6)(b)(5) test.<sup>79</sup> For a market to be “regulated” it must be “comparable to a national securities exchange or to the futures exchanges that are associated with the underlying assets of the commodity-trust ETPs approved to date.”<sup>80</sup>

The Winklevoss proposal failed to meet the first prong of the SEC’s Section 6(b)(5) test because its surveillance-sharing agreement was with the Gemini Exchange.<sup>81</sup> The Gemini Exchange is regulated by the New York State Department of Financial Services (“NYSDFS”) and

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75. Pierce, *supra* note 36, at n.13.

76. Pierce, *supra* note 36, at n.13.

77. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 51–52.

78. Securities Exchange Act of 1934 § 6(b)(5), 15 U.S.C. § 78f(b)(5) (2012).

79. See WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 60 (“Even if the Gemini Exchange were “regulated,” the record does not support a finding that the Gemini Exchange represents a “significant” bitcoin-related market.”).

80. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 60.

81. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 60.

is subject to “capitalization, anti-money-laundering, compliance, consumer protection, and cybersecurity requirements” as a result.<sup>82</sup> However, the SEC listed a variety of additional types of regulations that it looks for in a “regulated market” which are not present under NYSDFS supervision.<sup>83</sup> In sum, the Winklevoss order made it clear that being subject to regulation does not make a market “regulated,” and a proposer must find a market that is regulated to a significant extent in order to meet the first prong of the SEC’s test.<sup>84</sup>

While this is an exacting standard, the SEC preserved some flexibility by stating that the “regulated market” does not have to be the bitcoin spot market.<sup>85</sup> This left open the possibility for a bitcoin commodity-trust ETP to meet the requirements of Section 6(b)(5) by establishing a surveillance-sharing agreement with a regulated bitcoin derivatives market that is of significant size.<sup>86</sup>

The ETF proposals that followed the Winklevoss Order, while also disapproved by the SEC, successfully established surveillance-sharing agreements with markets that qualified as “regulated.” These proposals established agreements to share information with the CME and Cboe<sup>87</sup> Futures Exchange (“CFE”) which are self-regulatory

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82. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 64.

83. See WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 65 (explaining that national securities exchanges are required to have rules “designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest,” and are “subject to Commission oversight of, among other things, their governance, membership qualifications, trading rules, disciplinary procedures, recordkeeping, and fees.”)

84. See WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 65 (providing a list of rules and reporting mechanisms that must be in place for a market to be regulated like a national securities exchange).

85. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 76.

86. See WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 76 (stating that the regulated market does not have to be the bitcoin spot market).

87. On January 22, 2019, the Cboe pulled their proposal, citing the government shutdown and a plan to re-submit once things were resolved. Nikhilesh De, *Cboe Exchange Withdraws Proposal for VanEck-SolidX Bitcoin ETF*, COINDESK (Jan 23, 2019), <https://www.coindesk.com/cboe-withdraws-proposal-for-vaneck-solidx-bitcoin-etf/>; see Jimmy Aki, *U.S. SEC Delays Decision on VanEck’s Bitcoin ETF Until February 2018*, BITCOIN MAG. (Dec. 7, 2018), <https://bitcoinmagazine.com/articles/us-sec-delays-decision-vanecks-bitcoin-etf-until-february-2019/> (explaining how the SEC has postponed their review decision of their disapprovals of every bitcoin ETP that has been proposed to date to the fullest extent permissible under the SEC’s governing rules).

organizations that are subject to CFTC oversight.<sup>88</sup> The SEC found these surveillance-sharing agreements to be insufficient not because the markets were unregulated, but because the markets were not of a “significant size.”<sup>89</sup>

## 2. The Second Prong of the Section 6(b)(5) Surveillance-Sharing Agreement Test: Defining “Significant Size”

In the Winklevoss Order, the SEC defined a “market of significant size” or “significant market” as:

a market (or group of markets) as to which (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, so that a surveillance-sharing agreement would assist the ETP listing market in detecting and deterring misconduct, and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.<sup>90</sup>

In determining that the Gemini Exchange is not a market of “significant size,” the SEC pointed to an overarching concern that it has about the bitcoin market: there is no centralized, official source that captures data about worldwide bitcoin trading.<sup>91</sup> This is a major issue for bitcoin commodity-trust ETPs because the lack of a centralized official source of bitcoin trading data makes it difficult to present information about the volume of trading or liquidity of the underlying exchange to a regulator.<sup>92</sup> This void ultimately prevents the SEC from having clear information about the size of the surveillance-sharing market to show that a person seeking to manipulate the ETP would have to trade on the market and that ETP trading would not seriously influence the market’s prices.<sup>93</sup>

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88. DIREXION DISAPPROVAL ORDER, *supra* note 6, at 1; GRANITESHARES DISAPPROVAL ORDER, *supra* note 36, at 1.

89. DIREXION DISAPPROVAL ORDER, *supra* note 6, at 17; GRANITESHARES DISAPPROVAL ORDER, *supra* note 36, at 13.

90. *See* WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 53 (noting that the definition is “illustrative not exclusive”).

91. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 66.

92. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 66–67.

93. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 66–67.

Post-Winklevoss ETP proposals aimed to meet Section 6(b)(5) by arranging for surveillance-sharing agreements with the CME and CFE on which bitcoin futures have been trading.<sup>94</sup> Although both of these markets are regulated by the CFTC and are members of the Intermarket Surveillance Group, the SEC still found the surveillance-sharing agreement to be insufficient as the CME and CFE markets had not been shown to be “markets of significant size.”<sup>95</sup> In its disapproval of an ETF based on bitcoin futures, the SEC noted that previous ETP proposals dealt with “a large futures market that had been trading for a number of years before an exchange proposed an ETP based on those futures.”<sup>96</sup> In a lengthy footnote, the SEC followed this point with a list of the date on which a future began trading and the date its ETP was approved for trading.<sup>97</sup> For example, ETPs based on fiat currency futures began trading on average seventeen years after the futures began trading in the US market.<sup>98</sup> This precedent may explain the SEC’s hesitance to approve an ETP based on bitcoin futures as bitcoin futures only began trading in 2017.<sup>99</sup>

#### IV. MOVING FORWARD FROM THE SEC’S DISAPPROVALS

##### A. *The Potential for Surveillance-Sharing Agreements with Overseas Exchanges*

The ultimate roadblock that faces cryptocurrency-based ETPs is that no market appears to exist at present that meets the SEC’s definition of a “regulated market of significant size.”<sup>100</sup> Even if an exchange could enter into a surveillance-sharing agreement with an overseas spot or derivatives market that involves a larger volume of bitcoin than the Gemini Exchange, CFE, or CME, this would only address half of the SEC’s concerns.<sup>101</sup> It is likely that even if such a market were large enough to qualify as of “significant size,” it would not meet the regulatory requirements

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94. DIRECTION DISAPPROVAL ORDER, *supra* note 6, at 17.

95. DIRECTION DISAPPROVAL ORDER, *supra* note 6, at 17.

96. GRANITESHARES DISAPPROVAL ORDER, *supra* note 36, at 13.

97. GRANITESHARES DISAPPROVAL ORDER, *supra* note 36, at 13.

98. GRANITESHARES DISAPPROVAL ORDER, *supra* note 36, at 13 n.37.

99. *See* GRANITESHARES DISAPPROVAL ORDER, *supra* note 36, at 27 (“[B]itcoin futures have been trading on CME and CFE only since December 2017.”).

100. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 5.

101. *See* GRANITESHARES DISAPPROVAL ORDER, *supra* note 36, at 27 (“While CME and CFE are regulated markets for bitcoin derivatives, there is no basis in the record for the Commission to conclude that these markets are of significant size.”)

of the SEC's test. The SEC's example is a national securities exchange or futures exchange similar to ones in previously approved ETPs; therefore, it is unlikely that surveillance-sharing agreements with international exchanges would facilitate approval.<sup>102</sup> The SEC appears to be unimpressed with foreign regulatory efforts, as it has specifically mentioned that efforts to create "regulatory sandboxes" for blockchain technology abroad do not provide the fraud detection and prevention required by Section 6(b)(5).<sup>103</sup> Additionally, ETPs that successfully presented surveillance-sharing agreements and received SEC approval in the past entered into agreements with futures exchanges that were not only significant but were also regulated by the CFTC, a domestic federal regulator.<sup>104</sup>

*B. The Innate Dissonance Between Cryptocurrency and the Section 6(b)(5) Test*

Cryptocurrency also has innate characteristics that may prevent its ETPs from ever meeting the Section 6(b)(5) test. Although the SEC has reiterated in its disapproval orders that it is not passing judgment on "bitcoin or blockchain technology . . . as an innovation or an investment,"<sup>105</sup> its statements regarding the anonymity of traders and parties to transactions and lack of regulatory oversight abroad address qualities that may be so ingrained in the nature of cryptocurrency that markets of significant size cannot ever be regulated to the extent that the SEC has deemed necessary.<sup>106</sup>

One of the unique qualities of cryptocurrency is the pseudonymity of the parties involved in transactions.<sup>107</sup> However, this characteristic creates a misalignment between the SEC's ideas about deterring market manipulation and the identifiers available in the cryptocurrency space. As stated in the Winklevoss Order:

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102. See WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 65 (explaining the differences between nationally-regulated exchanges and state-regulated exchanges).

103. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 73.

104. See, e.g., GRANITESHARES DISAPPROVAL ORDER, *supra* note 36, at 9 n.35 (listing the descriptions of "comprehensive surveillance sharing agreements" in past approval orders for exchange traded funds).

105. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 5; GRANITESHARES DISAPPROVAL ORDER, *supra* note 36, at 2; DIREXION DISAPPROVAL ORDER, *supra* note 6, at 2.

106. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 73.

107. Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN.ORG 6 (2008), <https://bitcoin.org/bitcoin.pdf> (discussing the privacy of bitcoin transactions where "the public can see that someone is sending an amount to someone else, but without information linking the transaction to anyone").

[T]he public blockchain ledger, even in combination with the other monitoring abilities BZX identifies, does not provide comprehensive customer trading or identity information, which is particularly important here because pseudonymous bitcoin account holding means, among other things, that the number of accounts or number of trades would not reveal whether a person or group has a dominant ownership position in bitcoin, or is using or attempting to use a dominant ownership position to manipulate bitcoin pricing.<sup>108</sup>

Some issues facing cryptocurrency-based ETPs may be resolved with time. In the Winklevoss Order, the SEC noted its concern that the bitcoin market is at greater risk for manipulation because bitcoin ownership is still relatively concentrated in a small group of early investors.<sup>109</sup> This increases the ability for investors to collude and manipulate the market in their favor using their control over a dominant share.<sup>110</sup> If more people do in fact invest in cryptocurrency, the SEC's concern about consolidated holders of bitcoin should diminish. However, this improvement may not be possible without regulation that encourages more people to feel that bitcoin is a secure investment, creating a catch-22.<sup>111</sup>

C. *The Potential for a Cryptocurrency Self-Regulatory Organization to Address Section 6(b)(5): The Virtual Commodity Association*

The ultimate purpose of Section 6(b)(5) of the Exchange Act is to create national securities exchanges that are able to monitor and deter fraud and manipulation in their market.<sup>112</sup> The surveillance-sharing agreement with a regulated market of significant size is one way to

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108. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 44.

109. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 26–27.

110. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 26–27.

111. *See Bitcoin ETF Will Lead to Billions of New Capital [But Not in 2018]*, CNBC (July 26, 2018) <https://www.ccn.com/bitcoin-etf-will-lead-to-billions-of-new-capital-but-not-in-2018/> (describing investor skepticism towards cryptocurrency).

112. WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 76.

facilitate this goal but it presents a difficult barrier for exchange-traded products in a largely unregulated area. A cryptocurrency self-regulatory organization (“CSRO”), such as the one that has been established by the Winklevoss twins following the second disapproval of their bitcoin-based commodity-trust ETP, has the potential to move cryptocurrency towards meeting the Section 6(b)(5) test.<sup>113</sup>

Self-regulatory organizations (“SROs”) are not at all unusual in the financial markets landscape.<sup>114</sup> Prior to the enactment of federal regulation, the U.S. derivatives market was self-regulated.<sup>115</sup> Today, SROs are heavily involved in the regulation of financial markets and include National Securities Exchanges, Registered Securities Associations (FINRA), and Notice-Registered Securities Future Product Exchanges, including the CFE and CME.<sup>116</sup> CSROs have emerged in other countries including Croatia, Japan, Switzerland, the UK, and Slovenia that have been more friendly to cryptocurrency.<sup>117</sup> While SROs are not perfect entities, the idea of self-regulation carries weight with many in the crypto-community as well as with U.S. regulators who feel that those involved with cryptocurrency directly may be best suited to craft its regulatory framework.<sup>118</sup>

On August 20, 2018, less than a month after the SEC released its second disapproval of their bitcoin-based ETP, the Winklevoss twins announced that they would be working with Bitstamp, Inc., bitFlyer USA, Inc., Bittrex, Inc., and Gemini Trust Company, LLC to form a CSRO.<sup>119</sup> The shared goals of the Virtual Commodity Association (“VCA”) are to improve “transparency, accountability and security across all virtual

113. See Ryan Clements, *Can a Cryptocurrency Self-Regulatory Organization Work? Assessing Its Promise and Likely Challenges*, DUKE FIN. REG. BLOG (June 21, 2018), <https://sites.duke.edu/thefinregblog/2018/06/21/can-a-cryptocurrency-self-regulatory-organization-work-assessing-its-promise-and-likely-challenges/> (discussing “drawbacks and uncertainties” with CSROs as well as support from CFTC Commissioner Brian Quintez).

114. Roger Aitken, *U.S. CFTC Comm’n Says Cryptocurrency Exchanges Adopting ‘Self-Regulation’ Could Spur Standards*, FORBES (Feb. 15, 2018), <https://www.forbes.com/sites/rogeraitken/2018/02/15/u-s-cftc-commissioner-says-cryptocurrency-exchanges-adopting-self-regulation-could-spur-standards/#8d7d9df45e12>.

115. *Id.*

116. SELF-REGULATORY ORGANIZATION RULEMAKING, <https://www.sec.gov/rules/sro.shtml> (last visited Feb. 9, 2019).

117. Clements, *supra* note 113.

118. Clements, *supra* note 113.

119. *The Virtual Commodity Association Working Group Has Formed and is Planning Inaugural Meeting*, BUS. WIRE (Aug. 20, 2018), <https://www.businesswire.com/news/home/20180820005066/en/Virtual-Commodity-Association-Working-Group-Formed-Planning>.

currency trading platforms.”<sup>120</sup> Two of the major ways that the VCA could help alleviate some of the SEC’s concerns are through increased information about trading volumes across platforms and the creation of a group with a combined significant market cap with an international presence. Bitstamp is based in Slovenia, bitFlyer is based in Japan, and Bit-trex and Gemini are based in the U.S.<sup>121</sup> BitFlyer was the world’s largest bitcoin exchange when it entered the U.S. in 2017.<sup>122</sup> The VCA also makes “Information Sharing” one of its early goals, perhaps in a nod to the SEC.<sup>123</sup>

The VCA has a decent chance at meeting the SEC’s “market of significant size” requirement because it is an association of four international platforms including the world’s largest bitcoin exchange in 2017.<sup>124</sup> However, the “regulated” prong of the SEC’s test may prevent the VCA from being the entity with which bitcoin-ETP proposers could successfully enter into a surveillance-sharing agreement.<sup>125</sup> The VCA should take notice of the qualities that the SEC has said it looks for in a regulated market and try to meet them in its self-regulatory policies.<sup>126</sup>

Along with establishing the VCA, the Winklevoss twins hired Deloitte & Touche to conduct an SOC-2 Type 1 examination of the

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120. *Id.*

121. PENGTAO TENG, PROSKAUER ROSE LLP, CRYPTO EXCHANGES JOIN VIRTUAL COMMODITY ASSOCIATION SEEKING TO ESTABLISH INDUSTRY STANDARDS (2018), <https://www.blockchainandthelaw.com/2018/08/crypto-exchanges-join-virtual-commodities-association-seeking-to-establish-industry-standards/>.

122. Evelyn Cheng, *World’s Largest Bitcoin Exchange, bitFlyer, Enters the US*, CNBC (Nov. 28, 2017), <https://www.cnbc.com/2017/11/28/worlds-largest-bitcoin-exchange-bitflyer-enters-the-us.html>.

123. Cameron Winklevoss, *A Proposal for a Self-Regulatory Organization for the U.S. Virtual Currency Organization*, MEDIUM (Mar. 13, 2018), <https://medium.com/gemini/a-proposal-for-a-self-regulatory-organization-for-the-u-s-virtual-currency-industry-79e4d7891cfc>.

124. Cheng, *supra* note 122.

125. See WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 60 (requiring a surveillance sharing agreement with an entity “comparable to a national securities exchange or to the futures exchanges that are associated with the underlying assets of the commodity-trust ETPs approved to date”).

126. See WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 65 (explaining that national securities exchanges are required to have rules “designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest,” and are “subject to Commission oversight of, among other things, their governance, membership qualifications, trading rules, disciplinary procedures, recordkeeping, and fees.”).

Gemini exchange.<sup>127</sup> SOC-2 Type 1 examinations are a type of CPA-conducted audit of an organization that provides services to other entities.<sup>128</sup> The product of an SOC-2 Type 1 examination is a “Report on Controls at a Service Organization Relevant to Security, Availability, Processing Integrity, Confidentiality or Privacy.”<sup>129</sup> The AICPA’s website states that “[t]hese reports play an important role in: oversight of the organization, vendor management programs, internal corporate governance, and risk management processes,” and most interestingly, “regulatory oversight.”<sup>130</sup> This description speaks to the Winklevoss twins’ efforts to do what they can to show the SEC that their exchange is regulated in accordance with the SEC’s Section 6(b)(5) test. While this examination addresses the security of the Gemini exchange platform, it does not address the size of the bitcoin market or lack thereof.<sup>131</sup> Therefore, although the positive results of the SOC-2 Type 1 examination could be used to help the Winklevoss twins argue that Gemini is a secure exchange, the examination does not resolve the SEC’s concerns about the size of the bitcoin market, or provide the kind of regulation that the SEC is looking for.

## V. CONCLUSION

Cryptocurrency is facing a unique set of challenges, many of which stem from its relationship with traditional financial systems regulators such as the SEC.<sup>132</sup> While the SEC has good intentions—to protect investors from fraud and market manipulation—the SEC’s application of Section 6(b)(5) of the Exchange Act of 1934 was strict and left bitcoin-based ETPs with little ability to meet the SEC’s test.<sup>133</sup> This is certainly not the place that ETP hopefuls want to be in but perhaps something good will come out of their inability to gain the SEC’s approval. The SEC’s

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127. Julio Gil-Pulgar, *Gemini Passing SOC-2 Examination A Step Towards Bitcoin ETF Approval*, BITCOINIST (Jan. 30, 2019 3:00PM), <https://bitcoinist.com/winklevoss-gemini-soc-2-bitcoin-etf/>.

128. *SOC for Service Organizations: Information for Service Organizations*, AMERICAN INST. OF CPAs, <https://www.aicpa.org/interestareas/frc/assuranceadvisoryservices/serviceorganization-smanagement.html>.

129. *Id.*

130. *Id.*

131. *Id.*

132. CFTC BACKGROUNDER, *supra* note 3, at 1.

133. See WINKLEVOSS DISAPPROVAL ORDER, *supra* note 7, at 76 (applying the Section 6(b)(5) test).

lengthy disapproval orders pointed out many legitimate weaknesses in the cryptocurrency market and, arguably, this spurred the Winklevoss twins to establish the first cryptocurrency self-regulatory organization in the U.S. in combination with exchanges from around the world.<sup>134</sup>

Through a CSRO, bitcoin has the potential to follow in the footsteps of other nascent financial markets and institute regulation before federal regulators feel comfortable enough to step in.<sup>135</sup> This could break bitcoin ETPs out of the regulatory catch-22 that has formed from the SEC's application and interpretation of Section (6)(b)(5), allowing companies to increase surveillance of the markets, create consolidated data collection about market volumes and liquidity, and deter market manipulation and fraud. Even if these measures do not result in the SEC's approval of a bitcoin-based ETP, they have the potential to increase investor confidence in the stability of bitcoin markets thereby encouraging market growth.<sup>136</sup>

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134. *The Virtual Commodity Association Working Group Has Formed and is Planning Inaugural Meeting*, *supra* note 119.

135. Aitken, *supra* note 114.

136. Aitken, *supra* note 114.

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