

NYSE Arca further asserts that, with the growth of OTC bitcoin funds, so too has grown the potential risk to U.S. investors.¹²⁰ Specifically, NYSE Arca argues that significant and prolonged premiums and discounts, significant premium/discount volatility, high fees, insufficient disclosures, limited liquidity to trade or borrow shares, and the lack of surveillance and oversight through a listed exchange place U.S. investor money at risk in ways that could potentially be eliminated through access to the Shares.¹²¹ As such, the Exchange believes that the proposal would act to limit risk to U.S. investors that are increasingly seeking exposure to bitcoin, while providing benefits such as the elimination of significant and prolonged premiums and discounts, the reduction of significant premium/discount volatility, the reduction of management fees through meaningful competition, the avoidance of risks associated with investing in operating companies that are imperfect proxies for bitcoin exposure, and substantially greater surveillance and regulatory oversight.¹²²

Additionally, the Exchange states that investors holding bitcoin through a cryptocurrency trading platform often face credit risk to the platform for cash balances, and often face risk of loss or theft of their bitcoin as a result of the platform using internet-connected storage (*i.e.*, “hot” wallets) and/or having poor private key management (*e.g.*, insufficient password protection, lost key, etc.).¹²³ The Exchange states that, on the other hand, through use of the Bitcoin Custodian, the Trust would hold bitcoin in 100% “cold” storage, meaning the entire storage process would be done completely offline, with a regulated and licensed entity (*i.e.*, the Bitcoin Custodian) applying industry best practices.¹²⁴

In essence, NYSE Arca argues that the risky nature of direct investment in the underlying bitcoin and the unregulated markets on which bitcoin and OTC bitcoin funds trade compel approval of the proposed rule change. The Commission disagrees. Pursuant to Section 19(b)(2) of the Exchange Act, the Commission must approve a proposed rule change filed by a national

securities exchange if it finds that the proposed rule change is consistent with the applicable requirements of the Exchange Act—including the requirement under Section 6(b)(5) that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices—and it must disapprove the filing if it does not make such a finding.¹²⁵ Thus, even if a proposed rule change purports to protect investors from a particular type of investment risk—such as the susceptibility of an asset to loss or theft—the proposed rule change may still fail to meet the requirements under the Exchange Act.¹²⁶

Here, even if it were true that, compared to trading in unregulated bitcoin spot markets or trading in OTC bitcoin funds, trading in a bitcoin-based ETP on a national securities exchange provides some additional protection to investors, the Commission must consider this potential benefit in the broader context of whether the proposal meets each of the applicable requirements of the Exchange Act.¹²⁷ As explained above, for bitcoin-based ETPs, the Commission has consistently required that the listing exchange have a comprehensive surveillance-sharing agreement with a regulated market of significant size related to bitcoin, or demonstrate that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The listing exchange has not met that requirement here. Therefore, the Commission is unable to find that the proposed rule change is consistent with the statutory standard.

Pursuant to Section 19(b)(2) of the Exchange Act, the Commission must disapprove a proposed rule change filed by a national securities exchange if it does not find that the proposed rule change is consistent with the applicable requirements of the Exchange Act—including the requirement under Section 6(b)(5) that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices.¹²⁸

For the reasons discussed above, NYSE Arca has not met its burden of demonstrating that the proposal is

consistent with Exchange Act Section 6(b)(5),¹²⁹ and, accordingly, the Commission must disapprove the proposal.¹³⁰

D. Other Comments

The Commission received a comment letter that addressed the general nature and intrinsic value of bitcoin.¹³¹ Ultimately, however, additional discussion of these topics is unnecessary, as they do not bear on the basis for the Commission’s decision to disapprove the proposal.

IV. Conclusion

For the reasons set forth above, the Commission does not find, pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with Section 6(b)(5) of the Exchange Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act, that proposed rule change SR-NYSEArca-2021-57 be, and hereby is, disapproved.

By the Commission.

Eduardo A. Aleman,
Deputy Secretary.

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SURFACE TRANSPORTATION BOARD

[Docket No. FD 36593]

OPSEU Pension Plan Trust Fund, Jaguar Transport Holdings, LLC, and Jaguar Rail Holdings, LLC— Continuance in Control Exemption— Charlotte Western Railroad, LLC

OPSEU Pension Plan Trust Fund (OPTrust), Jaguar Transport Holdings, LLC (JTH), and Jaguar Rail Holdings, LLC (JRH), and collectively with OPTrust and JTH, Jaguar, all noncarriers, have filed a verified notice of exemption under 49 CFR 1180.2(d)(2) to continue in control of Charlotte Western Railroad, LLC (CWRR), a noncarrier, upon CWRR’s becoming a Class III rail carrier.

This transaction is related to a concurrently filed verified notice of exemption in *Charlotte Western Railroad, LLC—Change in Operator Exemption—Line in Gaston County,*

¹²⁹ 15 U.S.C. 78f(b)(5).

¹³⁰ In disapproving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹³¹ See Letter from Sam Ahn (July 21, 2021).

¹²⁰ See *id.* at 38136.

¹²¹ See *id.* For example, NYSE Arca states that the largest U.S. OTC bitcoin fund returned 46.41% year-to-date through April 30, 2021, while spot bitcoin returned 95.61% over the same period. NYSE Arca asserts that the deviation in price performance can be attributed to the fluctuation in NAV of this fund. See *id.*

¹²² See *id.*

¹²³ See *id.* at 38134.

¹²⁴ See *id.* See also *supra* note 30.

¹²⁵ See Exchange Act Section 19(b)(2)(C), 15 U.S.C. 78s(b)(2)(C).

¹²⁶ See SolidX Order, 82 FR at 16259; VanEck Order, 86 FR at 54550–51; WisdomTree Order, 86 FR at 69334; Kryptoin Order, 86 FR at 74179; Valkyrie Order, 86 FR at 74163; SkyBridge Order, 87 FR at 3881; Wise Origin Order, 87 FR at 5538.

¹²⁷ See *supra* note 114.

¹²⁸ See 15 U.S.C. 78s(b)(2)(C).

N.C., Docket No. FD 36592. In that proceeding, CWRR has filed a verified notice of exemption pursuant to 49 CFR 1150.31 to assume operation of approximately 13.04 miles of rail line currently operated by Piedmont and Northern Railroad LLC (PNRW) and owned by the North Carolina Department of Transportation (NCDOT), extending from milepost SFC 11.39 at Mt. Holly to milepost SFC 23.0 at Gastonia, including the Belmont Spur extending from milepost SFF 0.13/SFC 13.6 at Mt. Holly to milepost SFF 1.56 at or near Belmont (collectively, the Line), all in Gaston County, N.C. CWRR will assume an existing lease of the Line, to be assigned to CWRR by PNRW with NCDOT's consent.

Jaguar states that it will continue in control of CWRR upon CWRR's becoming a railroad common carrier. According to the verified notice, OPTrust indirectly controls JTH, which directly controls JRH. JTH currently controls, indirectly: Four Class III railroads directly controlled by JRH—Southwestern Railroad, Inc., Texas & Eastern Railroad, LLC, Wyoming and Colorado Railroad, Inc., (WYCO) (which also does business under the name Oregon Eastern Railroad), and Missouri Eastern Railroad, LLC; two Class III railroads indirectly controlled by JRH through WYCO—Cimarron Valley Railroad, L.C., and Washington Eastern Railroad, LLC; and one Class III railroad indirectly controlled by JTH through its subsidiary Jaguar Transport, LLC—West Memphis Base Railroad, L.L.C. The lines of the rail carriers controlled by JTH and JRH are located in Arkansas, Colorado, Kansas, Missouri, New Mexico, Oklahoma, Oregon, Texas, and Washington.

Jaguar states that: (1) The Line does not connect with any other rail lines operated by carriers controlled by Jaguar, and none of those rail lines connect with each other; (2) the continuance in control transaction is not part of a series of anticipated transactions that would connect the Line with any railroad lines controlled by Jaguar or that would connect any of those rail lines with each other; and (3) the transaction does not involve a Class I rail carrier. Therefore, the proposed transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. See 49 CFR 1180.2(d)(2).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. However, 49 U.S.C. 11326(c) does not provide for labor protection for transactions under 49 U.S.C. 11324 and 11325 that involve only Class III rail

carriers. Because this transaction involves Class III rail carriers only, the Board, under the statute, may not impose labor protective conditions for this transaction.

The earliest this transaction may be consummated is March 30, 2022, the effective date of the exemption (30 days after the verified notice was filed). If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions to stay must be filed no later than March 23, 2022.

All pleadings, referring to Docket No. FD 36593, should be filed with the Surface Transportation Board via e-filing on the Board's website. In addition, a copy of each pleading must be served on Jaguar's representative, Robert A. Wimbish, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606–3208.

According to Jaguar, this action is excluded from environmental review under 49 CFR 1105.6(c) and from historic preservation reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at www.stb.gov.

Decided: March 10, 2022.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Kenyatta Clay,
Clearance Clerk.

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SURFACE TRANSPORTATION BOARD

[Docket No. FD 36592]

Charlotte Western Railroad, LLC— Change in Operator Exemption— Piedmont & Northern Railroad, LLC

Charlotte Western Railroad, LLC (CWRR), a noncarrier, has filed a verified notice of exemption pursuant to 49 CFR 1150.31 to assume operation of approximately 13.04 miles of rail line extending from milepost SFC 11.39 at Mt. Holly to milepost SFC 23.0 at Gastonia, including the Belmont Spur extending from milepost SFF 0.13/SFC 13.6 at Mt. Holly to milepost SFF 1.56 at or near Belmont (collectively, the Line), all in Gaston County, N.C. The North Carolina Department of Transportation (NCDOT) owns the Line, and Piedmont and Northern Railroad, LLC (PNRW), currently operates the

Line under a lease with NCDOT (the Lease) and has done so since 2017.¹

According to the verified notice, CWRR has entered into an agreement with PNRW—with NCDOT's consent—under which PNRW will assign its rights and obligations under the Lease to operate the Line to CWRR, and CWRR will commence common carrier operations over the Line in place of PNRW. Based on projected annual revenues for the Line, CWRR expects to become a Class III rail carrier after consummation of the proposed transaction.

This transaction is related to a concurrently filed verified notice in *OPSEU Pension Plan Trust Fund, Jaguar Transport Holdings, LLC, & Jaguar Rail Holdings, LLC—Continuance in Control Exemption—Charlotte Western Railroad, LLC*, Docket No. FD 36593, in which the filings parties seek to continue in control of CWRR upon CWRR's becoming a Class III rail carrier.

As required under 49 CFR 1150.33(h)(1), CWRR certifies in its verified notice that the proposed change of operator on the Line does not involve, and the Lease between NCDOT and PNRW does not include, any provision or agreement that may limit future interchange with a third-party connecting carrier.

CWRR certifies that its projected annual revenues as a result of the transaction will not exceed \$5 million and will not result in the creation of a Class I or Class II rail carrier. Under 49 CFR 1150.32(b), a change in operator exemption requires that notice be given to shippers. CWRR certifies that it has provided notice of the proposed change in operator to the shippers on the Line.

The transaction may be consummated on or after March 30, 2022, the effective date of the exemption (30 days after the verified notice was filed).

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than March 23, 2022 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36592, should be filed with the Surface Transportation Board via e-filing on the Board's website. In addition, a copy of each pleading must be served on CWRR's representative,

¹ See *Piedmont & N. R.R.—Change in Operator Exemption—Piedmont Ry.*, FD 36120 (STB served June 16, 2017).