

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of \* 147

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549  
Form 19b-4

File No. \* SR 2023 - \* 035

Amendment No. (req. for Amendments \*)

Filing by The Nasdaq Stock Market LLC

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input checked="" type="checkbox"/>	Section 19(b)(3)(A) * <input type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
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Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>
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Rule

<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)
<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)
<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010  
Section 806(e)(1) \*

Section 806(e)(2) \*

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934  
Section 3C(b)(2) \*

Exhibit 2 Sent As Paper Document

Exhibit 3 Sent As Paper Document

**Description**

Provide a brief description of the action (limit 250 characters, required when Initial is checked \*).

A proposal to list and trade the shares of the Hashdex Nasdaq Ethereum ETF under Nasdaq Rule 5711(i)

**Contact Information**

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name \* Jonathan Last Name \* Cayne

Title \* Principal Associate General Counsel

E-mail \* jonathan.cayne@nasdaq.com

Telephone \* (301) 978-8493 Fax


**Signature**

Pursuant to the requirements of the Securities Exchange of 1934, The Nasdaq Stock Market LLC has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date 09/20/2023 (Title \*)

By John Zecca EVP and Chief Legal Officer  
(Name \*)

NOTE: Clicking the signature block at right will initiate digitally signing the form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.



Date: 2023.09.20  
16:46:35 -04'00'

Required fields are shown with yellow backgrounds and astericks.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

**Form 19b-4 Information \***

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SR-NASDAQ-2023-035 19b-4.doc

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

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SR-NASDAQ-2023-035 Exhibit 1.doc

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A - Notice of Proposed Rule Change, Security-Based Swap Submission, or Advanced Notice by Clearing Agencies \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2- Notices, Written Comments, Transcripts, Other Communications**

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Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit Sent As Paper Document

**Exhibit 3 - Form, Report, or Questionnaire**

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit Sent As Paper Document

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> Nasdaq Stock Market LLC (“Nasdaq” or the “Exchange”) proposes to list and trade the shares of the Hashdex Nasdaq Ethereum ETF under Nasdaq Rule 5711(i) (“Trust Units”). The units of the Trust are referred to herein as the “Shares.”

A notice of the proposed rule change for publication in the Federal Register is attached hereto as Exhibit 1.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by senior management of the Exchange pursuant to authority delegated by the Board of Directors (the “Board”). Exchange staff will advise the Board of any action taken pursuant to delegated authority. No other action by Nasdaq is necessary for the filing of the rule change.

Questions and comments on the proposed rule change may be directed to:

Jonathan F. Cayne  
Principal Associate General Counsel  
Nasdaq, Inc.  
(301) 978-8493

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

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

3. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

The Exchange proposes to list and trade Shares of the Hashdex Nasdaq Ethereum ETF (the “Fund”) under Nasdaq Rule 5711(i)<sup>3</sup>, which governs the listing and trading of Trust Units on the Exchange.

The Fund is a series of Tidal Commodities Trust I (the “Trust”), a Delaware statutory trust.<sup>4</sup> The Fund is managed and controlled by Toroso Investments LLC (“Sponsor”). The Sponsor is registered as a commodity pool operator (“CPO”) with the Commodity Futures Trading Commission (“CFTC”) and is a member of the National Futures Association (“NFA”).

The Fund’s Investment Objective and Strategy

According to the Registration Statement, the Chicago Mercantile Exchange, Inc. (“CME”) currently offers two Ether futures contracts (“Ether Futures Contracts”), one contract representing 50 ether (“ETH Contracts”) and another contract representing 0.10 ether (“MET Contracts”).<sup>5</sup> Each ETH Contract and MET Contract settles daily to the

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<sup>3</sup> The Commission approved Nasdaq Rule 5711 in Securities Exchange Act Release No. 66648 (March 23, 2012), 77 FR 19428 (March 30, 2012) (SR-NASDAQ-2012-013).

<sup>4</sup> On September 8, 2023, the Trust confidentially filed a draft registration statement under the Securities Act (the “Registration Statement”). The Jumpstart Our Business Startups Act (the “JOBS Act”), enacted on April 5, 2012, added Section 6(e) to the Securities Act. Section 6(e) of the Securities Act provides that an “emerging growth company” may confidentially submit to the Commission a draft registration statement for confidential, non-public review by the Commission staff prior to public filing, provided that the initial confidential submission and all amendments thereto shall be publicly filed not later than 21 days before the date on which the issuer conducts a road show, as such term is defined in Securities Act Rule 433(h)(4). An emerging growth company is defined in Section 2(a)(19) of the Securities Act as an issuer with less than \$1,000,000,000 total annual gross revenues during its most recently completed fiscal year. The Trust meets the definition of an emerging growth company and consequently submitted its Registration Statement to the Commission on a confidential basis. The description of the operation of the Trust and the Fund herein is based, in part, on the Registration Statement.

<sup>5</sup> ETH Contracts began trading on the CME Globex (“Globex”) trading platform on February 8, 2021 under the ticker symbol “ETH” and are cash-settled in U.S. dollars. MET Contracts began

ETH Contract volume-weighted average price (“VWAP”) of all trades that occur between 2:59 p.m. and 3:00 p.m., Central Time, the settlement period, rounded to the nearest tradable tick. ETH Contracts and MET Contracts each expire on the last Friday of the contract month, and the final settlement value for each contract is based on the CME CF Ether Dollar Reference Rate (“ETHUSD\_RR”).<sup>6</sup>

ETH Contracts and MET Contracts each trade six consecutive monthly contracts plus two additional December contract months (if the 6 consecutive months include December, only one additional December contract month is listed). Because ETH Contracts and MET Contracts are exchange-listed, they allow investors to gain exposure to ether (the native cryptocurrency to the Ethereum blockchain, herein referred to interchangeably as “Ether” or “Ethereum”) without having to hold the underlying cryptocurrency. Like a futures contract on a commodity or stock index, ETH Contracts and MET Contracts allow investors to hedge investment positions or speculate on the future price of Ether.

According to the Registration Statement, the Fund’s investment objective is to have the daily changes in the net asset value (“NAV”) of the Shares reflecting the daily changes in the price of the Nasdaq Ether Reference Price (NQETH) (the “Benchmark”), less expenses from the Fund’s operations. The Benchmark is designed to track the price

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trading on the Globex trading platform on December 6, 2021 under the ticker symbol “MET” and are also cash-settled in U.S. dollars.

<sup>6</sup> The ETHUSD\_RR is a daily reference rate of the U.S. dollar price of one ether calculated daily as of 4:00 p.m. London time. It is calculated by the CME based on the ether trading activity on CME-specified constituent spot ether exchanges during a calculation window between 3:00 p.m. and 4:00 p.m. London time. The CME launched the ETHUSD\_RR in May 2018.

performance of Ether. Under normal market conditions,<sup>7</sup> the Fund will invest in Ether, Ether Futures Contracts listed on the CME, and in cash and cash equivalents.<sup>8</sup> Because the Fund’s investment objective is to track the price of the Benchmark by investing in Ether and Ether Futures Contracts, changes in the price of the Shares may vary from changes in the spot price of Ether. The Benchmark is calculated using the Nasdaq Ethereum Reference Price – Settlement (the “NQETHS”).<sup>9</sup> According to the Sponsor, the NQETHS is designed to allow investors to track the price of Ether by applying a rigorous methodology to trade data captured from cryptocurrency exchanges that meet eligibility criteria of the Nasdaq Crypto Index (“NCI”). The NQETHS is calculated once every trading day through the application of a publicly available rules-based pricing methodology to a diverse collection of pricing sources to provide an institutional-grade reference price for Ethereum.<sup>10</sup> The pricing methodology is designed to account for variances in price across a wide range of sources, each of which has been vetted according to criteria identified in the methodology. Specifically, the settlement value is the Time Weighted Average Price (“TWAP”) calculated across VWAPs for each minute in the settlement price window, which is between 2:50:00 and 3:00:00 P.M. New York Time. Where there are no transactions observed in any given minute of the settlement price window, that minute is excluded from the calculation of the TWAP.

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<sup>7</sup> The term “normal market conditions” includes, but is not limited to, the absence of: trading halts in the applicable financial markets generally; operational issues (e.g., systems failure) causing dissemination of inaccurate market information; or force majeure type events such as a natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance. See Nasdaq Rules 4120 and 4121.

<sup>8</sup> The term “cash equivalents” includes short term Treasury bills, money market funds, and demand deposit accounts.

<sup>9</sup> See <https://indexes.nasdaqomx.com/Index/Overview/NQETHS>.

<sup>10</sup> See [https://indexes.nasdaqomx.com/docs/methodology\\_NCI.pdf](https://indexes.nasdaqomx.com/docs/methodology_NCI.pdf).

According to the Sponsor, the NQETHS methodology also utilizes penalty factors to mitigate the impact of anomalous trading activity such as manipulation, illiquidity, large block trading, or operational issues that could compromise price representation. Three types of penalties are applied: abnormal price penalties, abnormal volatility penalties, and abnormal volume penalties. These penalties are defined as adjustment factors on the weight of information from each exchange that contributes pricing information based on the deviation of an exchange's price, volatility, or volume from the median across all exchanges. For example, if a core exchange's price is 2.5 standard deviations away from the median price, its price penalty factor will be a  $1/2.5$  multiplier.

Finally, as a means of achieving the highest degrees of confidence in the reported volume, data is sourced only from "core exchanges" that are screened, selected, and approved by the Nasdaq Crypto Index Oversight Committee (the "NCIOC"). Core exchanges must: (1) have strong forking controls; (2) have effective anti-money laundering (AML) controls; (3) have reliable and transparent application programming interface (API) that provides real-time and historical trading data; (4) charge fees for trading and structure trading incentives that do not interfere with the forces of supply and demand; (5) be licensed by a public independent governing body; (6) include surveillance for manipulative trading practices and erroneous transactions; (7) evidence a robust IT infrastructure; (8) demonstrate active capacity management; (9) evidence cooperation with regulators and law enforcement; and (10) have a minimum market representation for trading volume. Additionally, the NCIOC conducts further diligence to assess an exchange's eligibility and will consider additional criteria such as the exchange's

organizational and ownership structure, security history, and reputation; the list of existing core exchanges will be recertified by the NCIOC at minimum on an annual basis.

The Sponsor believes that the NQETHS is suitable for use in calculating the Benchmark because (i) it would provide reliable pricing for purposes of tracking the actual performance of spot Ether, (ii) it is administered by an independent index administrator, and (iii) its methodology is specifically designed to mitigate potential manipulation coming from unregulated markets. Specifically, the Sponsor believes that (i) by tracking the actual price of spot Ether, NQETHS is transparent and adequate for the Fund's investors; (ii) using a Benchmark that has its own independent index administrator provides investors the best practices in governance and accountability and benchmark quality; and (iii) the pricing methodology underlying the NQETHS is designed to be resistant to potential price manipulation by applying a robust methodology to trade data captured from NCI core exchanges, which have to meet strict criteria created by the NCIOC, thereby drawing on a diverse collection of trustworthy pricing sources to provide an institutional-grade reference price for Ether that accounts for variances in price across a wide range of sources and that adjusts to mitigate the impact of anomalous trading activity that could compromise the integrity of the NQETHS price.

According to the Registration Statement, the Fund seeks to maintain its holdings in Ether Futures Contracts with a roughly constant expiration profile. Therefore, the Fund's positions in Ether Futures Contracts will be changed or "rolled" on a regular basis by closing out first to expire contracts prior to settlement, and then entering into second to expire contracts. Accordingly, the Fund will never carry futures positions all the way to cash settlement – the Fund will price only off of the daily settlement prices of the Ether



Futures Contracts.<sup>11</sup> To achieve this, the Fund will roll its futures holdings prior to cash settlement of the expiring contract.

In seeking to achieve the Fund's investment objective, the Sponsor will employ a "neutral" investment strategy that is intended to track the changes in the Benchmark regardless of whether the Benchmark goes up or goes down. The Fund will endeavor to trade in Ether and Ether Futures Contracts so that the Fund's average daily tracking error against the Benchmark will be less than 10 percent over any period of 30 trading days. The Fund's "neutral" investment strategy is designed to permit investors generally to purchase and sell the Fund's Shares for the purpose of investing in the Ether and Ether Futures Contracts (as discussed below). Such investors may include participants in the Ether market seeking to hedge the risk of losses in their Ether-related transactions, as well as investors seeking price exposure to the Ether market.

According to the Registration Statement, one factor determining the total return from investing in futures contracts is the price relationship between soon to expire contracts and later to expire contracts. If the futures market is in a state of backwardation (i.e., when the price of ETH Contracts and MET Contracts in the future is expected to be less than the current price), the Fund will buy later to expire contracts for a lower price than the sooner to expire contracts that it sells. Hypothetically, and assuming no changes to either prevailing ETH Contracts and MET Contracts' prices or the price relationship between soon to expire contracts and later to expire contracts, the value of a contract will rise as it approaches expiration. Over time, if backwardation remained constant, the performance of a portfolio would continue to be affected. If the futures market is in

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<sup>11</sup> As discussed in more detail below, the CME determines the daily settlements for Ether futures based on trading activity on CME Globex between 14:59:00 and 15:00:00 Central Time (CT), which is the "settlement period."

contango, the Fund will buy later to expire contracts for a higher price than the sooner to expire contracts that it sells. Hypothetically, and assuming no other changes to either prevailing ETH Contracts and MET Contracts' prices or the price relationship between the spot price, soon to expire contracts and later to expire contracts, the value of a contract will fall as it approaches expiration. Over time, if contango remained constant, the performance of a portfolio would continue to be affected. Frequently, whether contango or backwardation exists is a function, among other factors, of the prevailing market conditions of the underlying market and government policy.

The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage. That is, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (e.g., 2Xs, 3Xs, -2Xs, and -3Xs) of the Fund's Benchmark.

According to the Registration Statement, the Fund will seek to achieve its investment objective by investing not only in Ether Futures Contracts, but also in physical Ether to the extent allowed by the Fund's investment restrictions on spot Ether, using a pricing methodology, for purposes of calculating the Fund's NAV, that will derive spot Ether prices from Ether Futures Contracts and not from unregulated exchanges, as further explained below ("Spot Ether"). In doing so, the Sponsor expects to provide Ether exposure to investors while still using Ether Futures Contracts in its strategy and relying on the CME as its "market of relevant size." In particular, to avoid any exposure to potential manipulation from unregulated exchanges, the Fund's NAV will be calculated using a Spot Ether price derived from CME futures prices, as further

explained below, and the Fund expects to purchase and sell physical Ether via CME's Exchange for Physical Transactions, which are subject to CME's market surveillance.

#### The Ethereum Network and Ether Transactions

As discussed in further detail below, Ether is the digital asset that is native to, created and transmitted through the operations of, the peer-to-peer Ethereum network, an open-source protocol of the network of computers that operates on cryptographic protocols and governs the creation, movement, and ownership of Ether and hosts the public ledger, or "blockchain," ("Ethereum Network"). The decentralized nature of the Ethereum Network allows parties to transact directly with one another based on cryptographic proof instead of relying on a trusted third party. No single entity owns or operates the Ethereum Network, the infrastructure of which is collectively maintained by a decentralized user base. The Ethereum Network allows people to exchange tokens of value and settle multiple types of data, which are recorded on the blockchain.

Ether is the native token for the Ethereum Network. Such a statement implies that, in order to settle any information on the Ethereum Network, there will be a fee (named "gas fee") to be paid in Ether, in order to use that block space. Ether may be also used as a medium of exchange, unit of account or store of value. Ethers exist and are stored on the blockchain, which serves as the decentralized transaction ledger for the Ethereum Network. All transactions, including the creation of new ethers through staking, are recorded on the blockchain, ensuring the verification of each ether's location in specific digital wallets.

The responsibility for maintaining the Ether Account lies with the Ether Custodian, who utilizes cold storage mechanisms for the vault account. Digital wallets can be accessed using their respective private keys, which are held by the Ether

Custodians in cold storage at various vaulting locations. The locations of these vaulting premises are kept confidential to enhance security. “Cold storage” refers to a safeguarding method where private keys associated with ethers are kept offline, away from internet-connected devices. This could involve storing the private keys on a non-networked computer or electronic device. To send ethers from a digital wallet with private keys in cold storage, the private keys must be retrieved and entered into an ether software program for transaction signing, or the unsigned transaction is sent to a “cold” server where the private keys are held for signature.

The Ethereum Network is decentralized and does not require governmental authorities or financial institution intermediaries to create, transmit, or determine the value of Ether. In addition, no party may easily censor transactions on the Ethereum Network. As a result, the Ethereum Network is often referred to as decentralized and censorship resistant.

The value of Ether is determined by the supply of and demand for Ether. New tokens are created (or “minted”) and rewarded to the parties providing security to the Ethereum Network (the “stakes”), by staking their own Ether and running a computer node in order to verify transactions and add them to the blockchain.

#### The Crypto Industry Has Progressed and Matured Significantly

Ether and Bitcoin are the two largest and most well-known cryptoassets. In a similar vein to the Ethereum Network, the bitcoin network governs the creation, transaction, and ownership of its native token (“Bitcoin” and “Bitcoin Network”). The Bitcoin Protocol was launched in 2009 and lays out the rate of issuance of new Bitcoins within the Bitcoin Network, a rate that is reduced by half approximately every four years

with an eventual hard cap of 21 million. It is generally understood that the combination of these two features – a systemic hard cap of 21 million Bitcoin and the ability to transact with anyone connected to the Bitcoin Network – gives Bitcoin its value.

After “The Merge,” which marked the merging of Ethereum’s original execution layer with its new “proof-of-stake” consensus layer, known as the Beacon Chain, a significant change occurred. This modification eliminated the resource-intensive mining process, replacing it with the option to secure the network through the utilization of staked Ether. In October 2022, Ether supply dynamics transitioned as more Ether was burned verifying transactions than was created in the same period, which became a constant trend ever since that period. This behavior, similar to Bitcoin’s capped supply (limited to 21 million), plays a significant role in influencing its long-term price dynamics.

The first rule filing proposing to list an exchange-traded product to provide exposure to crypto in the U.S. was submitted by the Cboe BZX Exchange, Inc. on June 30, 2016.<sup>12</sup> At that time, blockchain technology, and digital assets that utilized it, were relatively new to the broader public. No registered offering of digital asset securities or shares in an investment vehicle with exposure to a digital asset had yet been conducted, and the regulated infrastructure for conducting a digital asset securities offering had not begun to develop. Conversely, the first rule filing proposing to list an exchange-traded

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<sup>12</sup> See Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, to List and Trade Shares of the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the “Winklevoss II Order”). This proposal was subsequently disapproved by the Commission.

product to provide exposure to Ether in the U.S. was submitted on August 18, 2021.<sup>13</sup>

When CME Globex began trading ETH Contracts in February 2021, the digital assets financial ecosystem had progressed, and matured significantly.

The development of a regulated market for digital asset securities has significantly evolved, with market participants having conducted registered public offerings of both digital asset securities and shares in investment vehicles holding crypto futures. Additionally, licensed, and regulated service providers have emerged to provide fund custodial services for digital assets, among other services. For example, in December 2020, the Commission adopted a conditional no-action position permitting certain special purpose broker-dealers to custody digital asset securities under Rule 15c3-3 under the Exchange Act.<sup>14</sup> In September 2020, the Commission released a no-action letter permitting certain broker-dealers to operate a non-custodial Alternative Trading System (“ATS”) for digital asset securities, subject to specified conditions.<sup>15</sup> In October 2019, the Commission granted temporary relief from the clearing agency registration requirement to an entity seeking to establish a securities clearance and settlement system

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<sup>13</sup> See <https://www.nasdaq.com/articles/vaneck-proshares-abruptly-withdraw-ether-futures-etf-proposals-2021-08-20>

<sup>14</sup> See Securities Exchange Act Release No. 90788, 86 FR 11627 (February 26, 2021) (File Number S7-25-20) (Custody of Digital Asset Securities by Special Purpose Broker-Dealers).

<sup>15</sup> See Letter from Elizabeth Baird, Deputy Director, Division of Trading and Markets, U.S. Securities and Exchange Commission to Kris Dailey, Vice President, Risk Oversight & Operational Regulation, Financial Industry Regulatory Authority (September 25, 2020), available at: <https://www.sec.gov/divisions/marketreg/mr-noaction/2020/finra-ats-role-in-settlement-of-digital-asset-security-trades-09252020.pdf>.

based on distributed ledger technology;<sup>16</sup> and multiple transfer agents who provide services for digital asset securities have registered with the Commission.<sup>17</sup>

Beyond the Commission’s purview, the regulatory landscape has also changed significantly since 2016, and cryptocurrency markets have grown and evolved as well. The U.S. Office of the Comptroller of the Currency (the “OCC”) has made clear that federally chartered banks are able to provide custody services for cryptocurrencies and other digital assets.<sup>18</sup> The OCC recently granted conditional approval of two charter conversions by state-chartered trust companies to national banks, both of which provide cryptocurrency custody services.<sup>19</sup> NYDFS has granted no fewer than twenty-five BitLicenses, including to established public payment companies like PayPal Holdings, Inc. and Square, Inc., and limited purpose trust charters to entities providing cryptocurrency custody services. The U.S. Treasury Financial Crimes Enforcement Network (“FinCEN”) has released extensive guidance regarding the applicability of the Bank Secrecy Act (“BSA”) and implementing regulations to virtual currency

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<sup>16</sup> See Letter from Jeffrey S. Mooney, Associate Director, Division of Trading and Markets, U.S. Securities and Exchange Commission to Charles G. Cascarilla & Daniel M. Burstein, Paxos Trust Company, LLC (October 28, 2019), available at: <https://www.sec.gov/divisions/marketreg/mr-noaction/2019/paxos-trust-company-102819-17a.pdf>.

<sup>17</sup> See, e.g., Form TA-1/A filed by Tokensoft Transfer Agent LLC (CIK: 0001794142) on January 8, 2021, available at: [https://www.sec.gov/Archives/edgar/data/1794142/000179414219000001/xslFTA1X01/primary\\_doc.xml](https://www.sec.gov/Archives/edgar/data/1794142/000179414219000001/xslFTA1X01/primary_doc.xml).

<sup>18</sup> See OCC News Release 2021-2 (January 4, 2021), available at: <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-2.html>.

<sup>19</sup> See OCC News Release 2021-6 (January 13, 2021), available at: <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-6.html> and OCC News Release 2021-19 (February 5, 2021), available at: <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-19.html>.

businesses,<sup>20</sup> and has proposed rules imposing requirements on entities subject to the BSA that are specific to the technological context of virtual currencies.<sup>21</sup> In addition, the Treasury’s Office of Foreign Assets Control (“OFAC”) has brought enforcement actions over apparent violations of the sanction’s laws in connection with the provision of wallet management services for digital assets.<sup>22</sup>

In addition to the mentioned regulatory advancements, there is a noticeable trend of increased acceptance of digital assets among traditional financial market participants. Notably, major insurance companies,<sup>23</sup> investment banks,<sup>24</sup> asset managers,<sup>25</sup> credit card

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<sup>20</sup> See FinCEN Guidance FIN-2019-G001 (May 9, 2019) (Application of FinCEN’s Regulations to Certain Business Models Involving Convertible Virtual Currencies), available at: <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>.

<sup>21</sup> See U.S. Department of the Treasury Press Release: “The Financial Crimes Enforcement Network Proposes Rule Aimed at Closing Anti-Money Laundering Regulatory Gaps for Certain Convertible Virtual Currency and Digital Asset Transactions” (December 18, 2020), available at: <https://home.treasury.gov/news/press-releases/sm1216>.

<sup>22</sup> See U.S. Department of the Treasury Enforcement Release: “OFAC Enters Into \$98,830 Settlement with BitGo, Inc. for Apparent Violations of Multiple Sanctions Programs Related to Digital Currency Transactions” (December 30, 2020), available at: [https://home.treasury.gov/system/files/126/20201230\\_bitgo.pdf](https://home.treasury.gov/system/files/126/20201230_bitgo.pdf).

<sup>23</sup> On December 10, 2020, Massachusetts Mutual Life Insurance Company (MassMutual) announced that it had purchased \$100 million in Bitcoin for its general investment account. See MassMutual Press Release “Institutional Bitcoin provider NYDIG announces minority stake purchase by MassMutual” (December 10, 2020), available at: <https://www.massmutual.com/about-us/news-and-press-releases/press-releases/2020/12/institutional-bitcoin-provider-nydig-announces-minority-stake-purchase-by-massmutual>.

See, e.g., “Morgan Stanley to Offer Rich Clients Access to Bitcoin Funds” (March 17, 2021) available at: <https://www.bloomberg.com/news/articles/2021-03-17/morgan-stanley-to-offer-rich-clients-access-to-bitcoin-funds>.

<sup>25</sup> See, e.g., “BlackRock’s Rick Rieder says the world’s largest asset manager has ‘started to dabble’ in Bitcoin” (February 17, 2021), available at: <https://www.cnbc.com/2021/02/17/blackrock-has-started-to-dabble-in-bitcoin-says-rick-rieder.html> and “Guggenheim’s Scott Miner Says Bitcoin Should Be Worth \$400,000” (December 16, 2020), available at: <https://www.bloomberg.com/news/articles/2020-12-16/guggenheim-s-scott-miner-says-bitcoin-should-be-worth-400-000>.



companies,<sup>26</sup> university endowments,<sup>27</sup> pension funds,<sup>28</sup> and even previously crypto-wary fund managers<sup>29</sup> are now allocating funds to the crypto space.

The Ether Futures Market Has Developed Alongside the Ether Spot Market into a Strong and Viable Marketplace that Stands On Its Own

CME began offering trading in Ether Futures Contracts in 2021, and each of the contract's final cash settlement is based on the CME CF Ether Dollar Reference Rate (the "ETHUSD\_RR").<sup>30</sup> The contracts trade and settle like other cash-settled commodity futures contracts. According to the Sponsor, trading in CME Ether futures contracts has increased significantly, in particular with respect to ETH Contracts. Nearly every measurable metric related to ETH Contracts has trended consistently up since launch and/or accelerated upward. For example, there was approximately \$12.53 billion in trading in ETH Contracts in July 2023 compared to \$7.53 billion in total trading in December 2022. ETH Contracts traded over \$544.78 million per day in July 2023 and

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<sup>26</sup> See, e.g., "Visa Moves to Allow Payment Settlements Using Cryptocurrency" (March 29, 2021), available at: <https://www.reuters.com/business/autos-transportation/exclusive-visa-moves-allow-payment-settlements-using-cryptocurrency-2021-03-29/>.

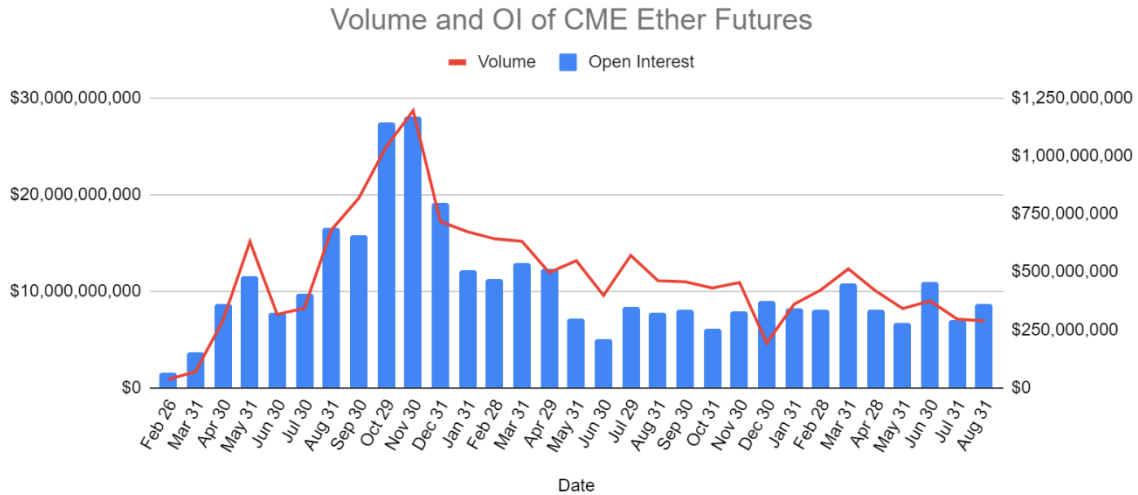
<sup>27</sup> See, e.g., "Harvard and Yale Endowments Among Those Reportedly Buying Crypto" (January 25, 2021), available at: <https://www.bloomberg.com/news/articles/2021-01-26/harvard-and-yale-endowments-among-those-reportedly-buying-crypto>.

<sup>28</sup> See, e.g., "Virginia Police Department Reveals Why its Pension Fund is Betting on Bitcoin" (February 14, 2019), available at: <https://finance.yahoo.com/news/virginia-police-department-reveals-why-194558505.html>.

<sup>29</sup> See, e.g., "Bridgewater: Our Thoughts on Bitcoin" (January 28, 2021) available at: <https://www.bridgewater.com/research-and-insights/our-thoughts-on-bitcoin> and "Paul Tudor Jones says he likes bitcoin even more now, rally still in the 'first inning'" (October 22, 2020), available at: <https://www.cnbc.com/2020/10/22/-paul-tudor-jones-says-he-likes-bitcoin-even-more-now-rally-still-in-the-first-inning.html>.

<sup>30</sup> According to the CME, the ETHUSD\_RR aggregates the trade flow of major Ether spot exchanges during a specific calculation window into a once-a-day reference rate of the U.S. dollar price of Ether. Calculation rules are geared toward maximum transparency and real-time replicability in underlying spot markets, including Bitstamp, Coinbase, Gemini, itBit, and Kraken. For additional information, refer to <https://www.cmegroup.com/trading/files/ether-futures-fact-card-launch.pdf>.

represented \$403.58 million in open interest compared to \$337.99 million in December 2022. This general upward trend in trading volume and open interest is captured in the following chart.



Similarly, the number of large open interest holders has continued to increase even as the price of Ether has risen, as have the number of unique accounts trading Ether Futures Contracts.<sup>31</sup>

The Structure and Operation of the Trust Satisfies Commission Requirements for Cryptocurrencies-Based Exchange Traded Products

The Sponsor believes that the Fund's holding a combination of Ether Futures Contracts, Spot Ether, and cash could significantly mitigate the risk of market manipulation while still providing the market with a regulated product that tracks the actual price of Ethereum, creating a secure way for U.S. investors to gain exposure to Spot Ether without having to rely on unregulated products, offshore regulated products, or indirect strategies such as investing in publicly traded companies that hold Ether.

<sup>31</sup>

See <https://www.cmegroup.com/newsletters/quarterly-cryptocurrencies-report/2022-q3-cryptocurrency-recap.html>.

In determining whether to approve listing and trading of new exchange-traded products (“ETPs”), the Commission conducts a thorough analysis to ensure the proposal is consistent with Section 6(b)(5) of the Act. Section 6(b)(5) of the Act mandates that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest. With respect to ETPs, the Commission often considers how the listing exchange would access necessary information to detect and deter market manipulation, illegal trading, and other abuses, which listing exchanges may accomplish by entering into a comprehensive surveillance-sharing agreement (“CSSA”) with other entities, such as the markets trading the ETP’s underlying assets. Historically, for commodity-trust ETPs, there has always been at least one regulated market of significant size for trading futures on the underlying commodity — whether gold, silver, platinum, palladium, or copper. Then, the listing exchange would enter into CSSA with, or hold Intermarket Surveillance Group (“ISG”) membership in common with, that regulated market.<sup>32</sup> As the Commission has stated, it considers two markets to have a comprehensive surveillance-sharing agreement with one another if they are both members of the ISG, even if they do not have a separate bilateral surveillance-sharing agreement.

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<sup>32</sup> See Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To List and Trade Shares of the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 at 37592-94 (Aug. 1, 2018) (SR-BatsBZX-2016-30) (the “Winklevoss Order”); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the Bitwise Bitcoin ETF Trust Under NYSE Arca Rule 8.201-E, Securities Exchange Act Release No. 87267 (Oct. 9, 2019), 84 FR 55382 at 55383, 55410 (Oct. 16, 2019) (SR-NYSEArca-2019-01) (the “Bitwise Order”); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to Amend NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares) and to List and Trade Shares of the United States Bitcoin and Treasury Investment Trust Under NYSE Arca Rule 8.201-E, Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 at 12609 (March 3, 2020) (SR-NYSEArca-2019-39) (the “Wilshire Phoenix Order”).

In the context of Ethereum, the CME Ether Futures Market (the “CME Market”) is currently the only regulated market in the U.S.

The Commission has previously interpreted the terms “significant market” and “market of significant size” to include a market (or group of markets) where:

1. 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, such that a surveillance-sharing agreement would assist the ETP listing market in detecting and deterring misconduct; and
2. It is unlikely that trading in the ETP would be the predominant influence on prices in that market.<sup>33</sup>

With respect to the first prong of the Commission’s interpretation, the Commission has previously explained that the lead/lag relationship between the Bitcoin futures market and the spot market is central to understanding this first prong. With respect to the second prong, the Commission’s prior analysis has focused on the potential size and liquidity of the ETP compared to the size and liquidity of the market.

The Commission recognized in the Teucrium Approval Order<sup>34</sup> that “the CME [Market] is a ‘significant market’ related to CME bitcoin futures contracts,” and thus that the Exchange has entered into the requisite surveillance-sharing agreement with respect to its Bitcoin Futures Contracts holdings. However, there is still a lack of consensus on

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<sup>33</sup> See, e.g., Winklevoss Order, 83 FR at 37594. The Commission further noted that “[t]here could be other types of ‘significant markets’ and ‘markets of significant size,’ but this definition is an example that will provide guidance to market participants.” *Id.*

<sup>34</sup> See Securities Exchange Act Release No. 34-94620 (April 6, 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)) (the “Teucrium Approval Order”).

whether the CME Market is of “significant size” in relation to the spot Bitcoin or Ether market based on the test historically applied by the Commission.

Interrelationship between the CME and the Fund

The Commission has previously stated that “the interpretation of the term market of significant size depends on the interrelationship between the market with which the listing exchange has a surveillance-sharing agreement and the proposed ETP.”<sup>35</sup> The Sponsor intends to adopt an innovative approach to mitigate the risks of fraud and manipulation that are unique to the Fund. The core principle of this approach would be to structure the operation of the Fund such that the regulated market of significant size in relation to the Fund is the CME Market because it is the same market on which the Fund trades its non-cash assets. Therefore, the Sponsor’s strategy aims to establish a comprehensive interrelationship between the CME Market and the Fund to unequivocally classify the CME Market as the market of significant size in relation to the ETP. The Sponsor notes that, although the Fund may, as proposed, hold physical ether, it does not rely on any information or services from unregulated ether spot exchanges (such as Coinbase or Binance). Therefore, no spot ether exchange could be considered a “market of relevant size” in relation to the Fund.

The Sponsor has designed the Fund to have five features that underscore its significant interrelationship with the CME:

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<sup>35</sup> See Securities Exchange Act Release No. 95180 (June 29, 2022), 87 FR 40299 at 40312 (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)).

- 1. Investment strategy:** The Fund will hold a mix of Ether Futures Contracts, Spot Ether, and cash and cash equivalents, subject to certain investment restrictions (as further discussed below).
- 2. Futures-based pricing for Spot Ether:** The price determination for Spot Ether holdings in the NAV calculation will be derived from the CME Market’s Ether futures curve. As a result, the price of Spot Ether holdings will depend solely on Ether futures settlement prices on the CME Market and will not depend directly on price information from unregulated spot Ether markets (as further below).
- 3. Investment restrictions on Spot Ether:** The Fund will be subject to dynamic investment restrictions that are designed to mitigate the risk that Shares of the Fund could be manipulated by manipulating the Ether spot market and ensuring that the CME Market is the only “market of significant size” with respect to the Fund.
- 4. Physical Ether purchases on the CME Market:** The Fund will use the CME Market’s Exchange for Physical (“EFP”)<sup>36</sup> transactions to acquire and dispose of Spot Ether, instead of transactions on unregulated spot exchanges. Moreover, as described below, the transactions are quoted as basis points over the Ethereum futures contracts prices, creating a direct and unequivocal lead-lag relationship between the prices on CME and the spot market transaction prices that the Fund engages. Accordingly, the only non-cash assets held by the Fund (Ether Futures Contracts and Ether via EFP) would be traded on the CME Market,

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<sup>36</sup>See <https://www.cmegroup.com/trading/equity-index/exchange-for-physical-efp-transactions.html>.

such that the exchanges' ability to share information pursuant to their common ISG membership could assist in detecting and deterring fraudulent or manipulative misconduct related to those assets.

**5. Creations and redemptions:** The Fund will use cash creations and redemptions<sup>37</sup> to deter intraday Share price manipulation that could originate from in kind creation or redemption from physical spot Ether sourced in unregulated spot markets. Investment in Spot Ether thus would not be directly related to creation/redemptions, but instead on target portfolio exposure, as allowed by the investment restrictions on spot Ether. Trading for Spot Ether could thus be accomplished in smaller sizes and at unpredictable times, reducing the risk of manipulation in the creation or redemption processes.

The Sponsor believes that these features of the Fund are designed to provide a robust framework for mitigating the risks of market manipulation, thereby protecting investors, and maintaining the integrity of the market, and further believes that, given these features of the Fund, the CME Market would be considered the regulated market of significant size in relation to the Fund.

Additionally, as further discussed below, the Sponsor believes that the Fund investment strategy is designed such that it would be highly unlikely that a person attempting to manipulate the Fund could be successful by trading on unregulated spot and derivatives markets. Thus, no market other than CME could be considered as of significant size in relation to the Fund.

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<sup>37</sup> In a cash creation/redemption format, the AP delivers cash to the fund instead of Spot Ether.

The Sponsor further believes that the novel approach proposed is in line with the first prong of the Commission’s interpretation of the definition of “regulated market of significant size” as to the CME Market and that there is a reasonable likelihood that a person attempting to manipulate the Fund would also have to trade on the CME Market to successfully manipulate the ETP (and, accordingly, the exchange’s common ISG membership would aid the Exchange in detecting and deterring potential misconduct).

According to the Sponsor, the Sponsor’s approach is designed in such a way that any attempt to manipulate the Fund would require trading on the CME Market, for the following reasons:

1. **Futures-based pricing for Spot Ether:** Because the price determination for Spot Ether holdings in the Fund would be derived from the CME Market futures curve, any attempt to manipulate the price of the Fund would require influencing the futures curve on the CME Market because the spot price (which could be a target for manipulation) does not directly influence the price of the Fund. There is thus a direct and unequivocal lead-lag relationship in which CME Market prices lead both the spot price used by the Fund to determine its NAV and the Fund’s market price.
2. **Investment restrictions on Spot Ether:** The dynamic investment restrictions in place for the Fund (as discussed in the section below entitled “Investment Restrictions on Spot Ether”) ensure that any significant trading activity aimed at the Fund would likely spill over into the CME Market because the investment restrictions are designed to prevent the Fund from becoming so large in relation to the unregulated



spot market that the cost-benefit tradeoff is favorable for the potential manipulator to execute without influencing the futures market.

3. **Spot Ether operations via EFP on the CME Market:** Because the Fund's Spot Ether operations would take place via CME Market EFP transactions, any attempt to manipulate the Fund's transactions in Spot Ether holdings would need to occur on the CME Market. Accordingly, any potential manipulation of the Fund is closely tied to the CME Market.
4. **Creations and redemptions:** The Fund's use of cash creations and redemptions also reduces the potential for manipulation through the creation and redemption processes. Any significant creation or redemption activity aimed at manipulating the Fund would likely influence the futures market, given that the investment in spot is based on target portfolio exposure and not directly related to creations or redemptions.

Given these factors, the Sponsor believes that the Exchange and CME Market's common membership in the ISG would be an effective tool in assisting the Exchange in detecting and deterring potential misconduct. The agreement would provide the Exchange with access to necessary trading data from the CME Market, which is intrinsically linked to the Fund, allowing for comprehensive oversight and the ability to quickly identify and investigate any suspicious trading activity.

The Sponsor believes that trading in the Fund is unlikely to have a predominant impact on prices in the CME Market, primarily due to the volume and size of the CME futures market, and the significant liquidity available in the spot market. In addition,

considering the Investment Restrictions on Spot Ether detailed below, the holding of Ether Spot by the Fund will not alter its impact on prices in the “significant market”.

In relation to crypto futures market, the Commission has previously stated that the CME “comprehensively surveils futures market conditions and price movements on a real-time and ongoing basis in order to detect and prevent price distortions, including price distortions caused by manipulative efforts” and that the “CME’s surveillance can reasonably be relied upon to capture the effects on the CME bitcoin futures market caused by a person attempting to manipulate the [Fund] by manipulating the price of CME Bitcoin Futures Contracts, whether that attempt is made by directly trading on the CME bitcoin futures market or indirectly by trading outside of the CME bitcoin futures market.”<sup>38</sup> The Commission further noted that, as a result, “when the CME shares its surveillance information with Arca, the information would assist in detecting and deterring fraudulent or manipulative misconduct related to the non-cash assets held by the [Fund]”.<sup>39</sup> The Sponsor further believes that CME surveillance can be relied upon to capture any possible manipulation of the CME Ether futures markets, even when the attempt is made indirectly by trading outside the CME in unregulated markets.

When discussing the second prong of the analysis in the Teucrium Approval Order, the Commission observed that the CME bitcoin futures market has progressed and matured significantly, and nearly every measurable metric related to bitcoin futures contracts has trended consistently up since the launch of 1940 Act<sup>40</sup>-registered bitcoin futures ETFs. This fact persuaded the Commission that trading in the proposed ETP is

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<sup>38</sup> See Teucrium Approval Order of the Hashdex Bitcoin Futures ETF, 87 FR at 21679.

<sup>39</sup> Id.

<sup>40</sup> Investment Company Act of 1940 (“1940 Act”).

not likely to be the predominant influence on prices in the CME bitcoin futures market. In that case, the Commission concluded that the CME bitcoin futures market had sufficiently developed to support ETPs seeking exposure to bitcoin by holding CME futures contracts.

The Sponsor understands that a similar effect would happen to Ether: the approval of Ether products could potentially facilitate the maturation of the market. Moreover, based on the Commission's findings regarding the Bitcoin futures market, the Sponsor anticipates that the approval of the proposed ETP is unlikely to significantly impact prices in the CME Ether futures market. Market dynamics and the influence of these cryptocurrencies-based products on prices are expected to follow comparable patterns. Just as the bitcoin futures ETF did not disrupt the CME bitcoin futures market's equilibrium, the Sponsor anticipates a similar behavior upon the introduction of an Ether-based ETP.

Nevertheless, the Sponsor believes that the analysis below illustrates that the progress observed in the Ether Futures Contracts and Ether Spot markets in the last few years is on par with what was observed for the bitcoin futures and spot markets right before the approval of the 1940 Act-registered bitcoin futures ETFs. Nearly every measurable metric related to Ether is trending up and the Ether market is still growing in volume and liquidity, approaching the size of markets for other commodity interests.

As the CME Market continues to develop and more closely resemble other commodity futures markets, the Sponsor believes that it is reasonable to expect that the relationship between the Ether futures market and Ether spot market will behave similarly

to other future/spot market relationships, where the spot market may have no relationship to the futures market (although the current proposal does not depend on such similarity).

Despite the negative price performance of Ether in 2022, there has been significant growth in CME Ether Futures Markets relative to unregulated spot and derivatives markets. The Sponsor also notes that in the same period during which CME Market trading volume increased 11.3%, the trading volume of unregulated Ether futures and spot markets had a significant drawdown of 38%.

TRADING VOLUME			
	August 31, 2022	August 31, 2023	1-year % variation
CME Ether Futures Market <sup>41</sup>	\$327 million	\$364 million	11.3%
Unregulated Futures Market <sup>42</sup>	\$7,930 million	\$4,930 million	-37.8%
Spot Ether Market <sup>43</sup>	\$7,950 million	\$4,930 million	-38%

The Sponsor believes that the data above suggests an increase in market appetite for regulated products (e.g., CME Market Ether futures) vis-a-vis a significant decrease in interest for unregulated products (e.g., unregulated futures and spot Ether).

The Sponsor further considers that the CME Market managed to maintain its open interest level despite the price volatility that Ether experienced in 2022, demonstrating its

<sup>41</sup> Data in this table is sourced from: Bloomberg.

<sup>42</sup> <https://www.theblock.co/data/crypto-markets/futures>.

<sup>43</sup> <https://www.coinglass.com/currencies/ETH>.

resilience and that it is sufficiently developed such that it is unlikely that trading in the Fund would be the predominant influence on its prices.

CHICAGO MERCANTILE EXCHANGE ETHER FUTURES		
	August 31, 2022	August 31, 2023
Open Interest	207,650 ETH	219,650 ETH

The CME Market is also sufficiently developed to support ETPs that seek exposure to Ether by holding a mix of CME Market Ether Futures Contracts and physical Ether through the use of CME Market EFP transactions, and thus the CME Market is the only market on which the Fund’s only proposed non-cash assets would trade. Thus, the CME Market remains the “significant market” in relation to the Fund, as proposed.

Moreover, as detailed above, the Sponsor’s proposed investment strategy ensures that no unregulated spot exchange could be considered a “market of relevant size” in relation to the Fund, given that the Fund does not rely on any information or services coming from unregulated markets. All of the Fund’s operations, including the purchase and sale of spot Ether and its NAV determination, are conducted through the CME Market. Thus, all transactions are registered and monitored on a regulated exchange, providing an additional layer of security and transparency. Because any attempt to manipulate the Fund would require significant trading on the CME Market, and not on any unregulated spot Ether exchange, there is significantly reduced potential for manipulation and fraud, further protecting investors and maintaining the integrity of the market.

The Sponsor further believes that the holding of Spot Ether would not significantly alter the influence of the Fund’s trading on the CME Market. The Spot

Ether in the Fund's portfolio would be converted from futures positions using EFP transactions on the CME Market. The Fund's Spot Ether holdings would thus be directly linked to the futures market and would not introduce a new, independent variable that could significantly influence the futures market. Indeed, because both sides of the trade track the same benchmark, an EFP is market-neutral and, as such, the pricing of an EFP is quoted in terms of the basis between the price of the futures contract and the level of the underlying index.

Additionally, the dynamic investment restrictions and futures-based pricing for Spot Ether would ensure that the Fund's Spot Ether holdings remain at a level where they are unlikely to impact the futures market significantly and that the futures market continues to influence the price of the Fund's Spot Ether holdings (and not the other way around).

The Sponsor believes that, even with the holding of Spot Ether by using EFP transactions on the CME Market, the Fund's trading would not become the predominant influence on prices of the futures market. Therefore, considering the maturation of the CME Ether futures market since its inception, including but not limited to the overall size, volume, liquidity, and number of years of trading, the Sponsor considers that the second prong of the standard for "market of significant size" has been established.

In reviewing prior proposals to list and trade shares of various cryptoassets-based trust issued receipts, the Commission noted that some of such proposals did not adequately demonstrate that they were designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest, consistent with Section

6(b)(5) of the Act.<sup>44</sup> The Commission does not apply a “cannot be manipulated” standard, but instead seeks to examine whether a proposal meets the requirements of the Act.<sup>45</sup> The Commission has explained that a proposal could satisfy the requirements of the Act in the first instance by demonstrating that the listing exchange has entered into a CSSA with a regulated “market of significant size” related to the underlying or reference crypto-assets.<sup>46</sup> The Commission has also recognized that a listing exchange would not necessarily need to enter into such an agreement with a regulated significant market if the underlying commodity market inherently possessed a unique resistance to manipulation beyond the protections that are utilized by traditional commodity or securities markets or if the listing exchange could demonstrate that there were sufficient “other means to prevent fraudulent and manipulative acts and practices.”<sup>47</sup> As the Commission explained in the Teucrium Approval Order, the approval of that fund was based on a finding that

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<sup>44</sup> See, e.g., 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, Securities Exchange Act Release No. 80206 (March 10, 2017), 82 FR 14076 (March 16, 2017) (SR-BatsBZX-2016-30) (the “Winklevoss I Order”); the Winklevoss II Order; Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the Bitwise Bitcoin ETF Trust Under NYSE Arca Rule 8.201-E, Securities Exchange Act Release No. 87267 (October 9, 2019), 84 FR 55382 (October 16, 2019) (SR-NYSEArca-2019-01) (the “Bitwise Order”); the Wilshire Phoenix Order; Order Disapproving a Proposed Rule Change to List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF, Securities Exchange Act Release No. 83904 (August 22, 2018), 83 FR 43934 (August 28, 2018) (SR-NYSEArca-2017-139); 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, Securities Exchange Act Release No. 83912 (August 22, 2018), 83 FR 43912 (August 28, 2018) (SR-NYSEArca-2018-02); Order Disapproving a Proposed Rule Change to List and Trade the Shares of the GraniteShares Bitcoin ETF and the GraniteShares Short Bitcoin ETF, Securities Exchange Act Release No. 83913 (August 22, 2018), 83 FR 43923 (August 28, 2018) (SR-CboeBZX-2018-01) (the “GraniteShares Order”).

<sup>45</sup> See Winklevoss II Order, 83 FR at 37582.

<sup>46</sup> See Wilshire Phoenix Order, 85 FR at 12596-97.

<sup>47</sup> See Winklevoss II Order, 83 FR at 37580, 37582-91; Bitwise Order, 84 FR at 55383, 55385-406; Wilshire Phoenix Order, 85 FR at 12597.

the CME is a “significant market” related to the exclusive non-cash holdings of the proposed ETPs, which in that case would be CME bitcoin futures contracts.<sup>48</sup>

As described below, the Sponsor believes the structure and operation of the Trust are designed to prevent fraudulent and manipulative acts and practices, to protect investors and the public interest, and to respond to the specific concerns that the Commission has identified with respect to potential fraud and manipulation in the context of a crypto product. Further, as the Commission has previously acknowledged, trading in an Ether-based ETP on a national securities exchange, as compared to trading in an unregulated Ether spot market, may provide additional protection to investors.<sup>49</sup> The Sponsor also believes that listing of the Shares on the Exchange will provide investors with such an opportunity to obtain exposure to Ether within a regulated environment.

#### Futures-Based Spot Price (“FBSP”)

The value of Spot Ether held by the Fund would be determined by the Sponsor and by Hashdex Asset Management Ltd. (the “Digital Asset Adviser”) in good faith based on a methodology that is entirely derived from the settlement prices of Ether Futures Contracts on the CME Market and that considers all available facts and all available information on the valuation date.

The method involves a calculation that is sensitive to both the length of time (the “tenor”) until each Ether Futures Contract is due for settlement and the final settlement

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<sup>48</sup> See Teucrium Approval Order.

<sup>49</sup> See GraniteShares Order, 83 FR at 43931. See also Hester M. Peirce, U.S. Sec. Exch. Comm’n, Dissent of Commissioner Hester M. Peirce to Release No. 34-83723 (July 26, 2018), available at: <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. If we were to approve the ETP at issue here, investors could choose whether to buy it or avoid it.”).



price for each contract. The calculation takes into account each contract's tenor and the tenor squared. This approach is designed to give more importance to contracts that are due for settlement in the near term, considering that the prices of these near-term contracts are more reliable indicators of the current spot price of Ether and are also more heavily traded. The calculation produces a set of weighting factors, with each factor indicating the contribution of the corresponding Ether Futures Contract to the estimated current spot price of Ether. The estimated spot price is the component of the result corresponding to a tenor of zero days. The Sponsor and Digital Asset Advisor do not use data from Ether exchanges or directly from spot Ether trading activity in determining the value of Spot Ether held by the Fund.

As an example, the table below demonstrates how the weights of each hypothetical Ether Futures Contract change over time as the first contract gets closer to maturity.

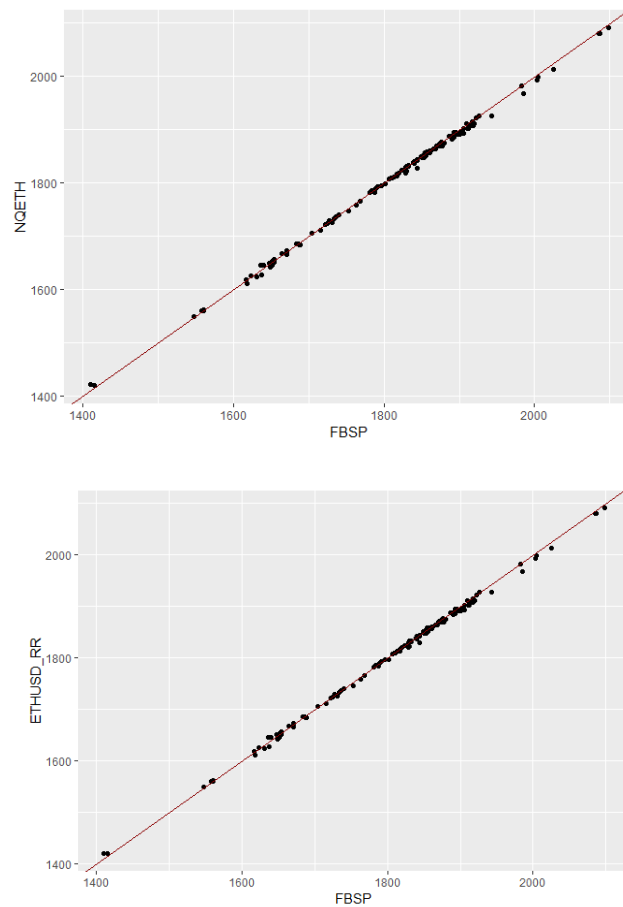
Future	First future tenor				
	27 days	21 days	15 days	9 days	3 days
1st	130.81%	125.92%	120.39%	113.79%	105.33%
2nd	1.91%	-0.84%	-2.94%	-3.80%	-2.26%
3rd	-8.92%	-7.57%	-5.86%	-3.76%	-1.31%
4th	-9.19%	-7.05%	-4.89%	-2.78%	-0.83%
5th	-7.81%	-5.73%	-3.78%	-2.02%	-0.57%
6th	-6.26%	-4.47%	-2.86%	-1.47%	-0.39%
9th	-2.61%	-1.76%	-1.05%	-0.50%	-0.12%
12th	-0.29%	-0.14%	-0.04%	0.01%	0.01%
18th	2.35%	1.65%	1.04%	0.53%	0.14%
Total	100.00%	100.00%	100.00%	100.00%	100.00%

The Sponsor believes that the accuracy of the proposed pricing methodology can be measured by comparing its pricing results to the real time version of Ether price benchmarks such as ETHUSD\_RR and NQETHS. FBSP is derived from futures settlement prices, which are usually VWAPs from all contracts traded on Globex between 14:59:00 and 15:00:00 Central Time (“CT”). Accordingly, for purposes of developing a useful proxy, the Sponsor’s analysis uses the arithmetic average of the Benchmark closing prices at 14:59:00 and 15:00:00 CT, which is not sensitive to the fluctuations that occur within this minute. By design, this difference in the price metric introduces an artificial distortion in the comparison, resulting in figures that are less adherent than in reality. Therefore, the figures set forth below represent a conservative estimation of the true adherence between FBSP and the Benchmark, considering that the actual adherence to the Benchmark is higher than these results can indicate.<sup>50</sup>

Using data available on Bloomberg on August 28, 2023, the Sponsor compared FBSP to NQETHS and ETHUSD\_RR from February 16, 2023 to August 28, 2023 and determined that FBSP behaves very similarly to both indexes. The following charts show a direct comparison between those two benchmark values and FBSP:

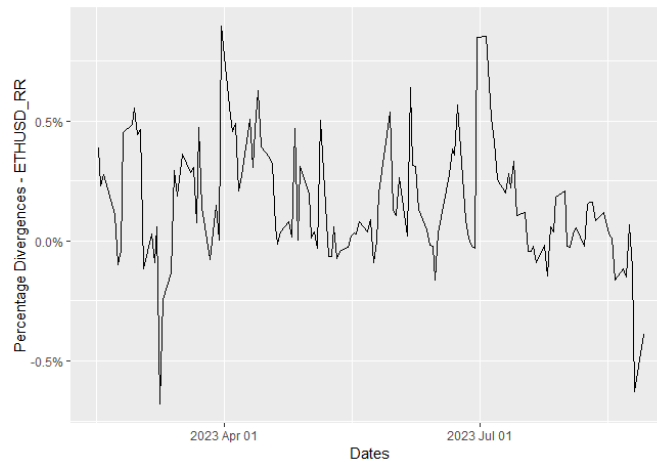
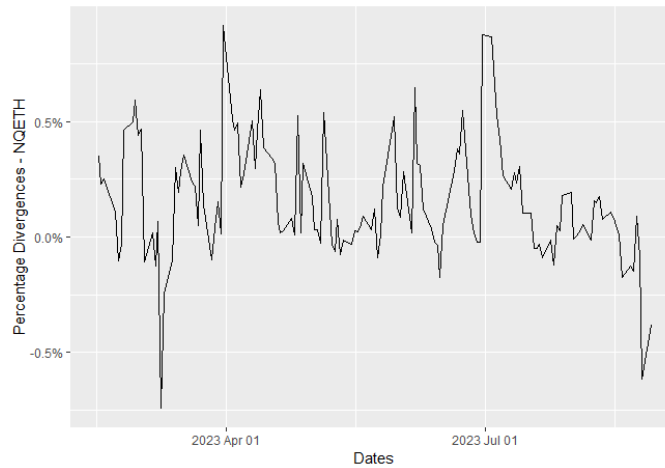
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<sup>50</sup> The difference in the price metrics introduces an artificial distortion in the comparison. Indeed, a regression analysis shows that the ratio between the maximum and minimum spot prices within the Ether Futures VWAP window is a significant variable that explains the absolute divergences between FBSP and the spot prices. The higher the ratio between the maximum and minimum spot prices, the higher expected absolute divergence between FBSP and the spot prices. The correlation of these two metrics in the case of the real time version of NQETHS is approximately 17%, suggesting that the actual adherence between FBSP and the spot benchmarks is even higher than the figures discussed herein indicate.



In the above charts, each black point indicates one day, and their proximity to the red line shows how similar FBSP is to each of NQETHS and ETHUSD\_RR. The correlations between FBSP and each of NQETHS and ETHUSD\_RR exceed 99.8%, and the mean absolute percentage divergences are 21 basis points (“bps”) and 21 bps, respectively, while the median absolute percentage divergences are 12 bps and 13 bps, respectively.

The charts below provide another visualization of the results of this comparison, as time series of the percentage divergences:



These charts show that there are no clusters of abnormal divergences. In both cases, more than 90% of the days exhibit percentage divergences below 51 bps. The highest percentage divergence in absolute terms, with 91 bps for the NQETHS and 89 bps for the ETHUSD\_RR, was observed on March 31, 2023, and coincided with significant volatility in the Ether markets; on that day, NQETHS gain 2.60% from \$1780.66 to \$1826.99 and the FBSP, which settles one hour later, gain 3.54%, from \$1781.28 to \$1844.39. The Sponsor notes that, even on the day with the highest percentage divergence between FBSP and the other two benchmarks, that percentage

divergence was insignificant in comparison to the intraday volatility of Ether itself and could be attributable to the different market structures of the regulated CME Market and the unregulated spot markets.

The Sponsor believes that this data strongly suggests that FBSP is a suitable choice for the NAV calculation, both for the settlement and the real time proxy, and that the following additional considerations further support the soundness of the FBSP methodology:

- Ether is a highly volatile asset traded in multiple venues across the world, and divergences of the magnitude found in this analysis are not unusual across different price sources or exchanges.
- As noted above, the mean absolute percentage divergences are 21 bps and 21 bps respectively, the median absolute percentage divergences are 12 bps and 13 bps, and March 31, 2023 was the day with the highest percentage divergence in absolute terms, with 91 bps for the NQETHS and 89 bps for ETHUSD\_RR. The Sponsor believes that these divergences between FBSP and the underlying benchmarks are in a reasonable range and support that FBSP closely tracks NQETHS and ETHUSD\_RR.

Finally, the Sponsor notes that, even considering that FBSP could create some level of uncertainty due to the potential divergences between the FBSP and the spot prices observed in unregulated markets, the authorized participants (“APs”) are able to hedge potential exposure by buying the basket of futures that represents FBSP and selling it during the futures settlement window. In doing so, APs can emulate a situation where they know ex ante the value of the creation basket. The opposite trade can have the same

effect for the case of redemptions. Thus, the APs providing liquidity on the secondary market during the day will always be in a position to hedge their exposure using exclusively the CME Market, which will make them more likely to provide liquidity to the Fund thus making its market price converge to its NAV.

#### Preventing Manipulation

While the Commission has raised valid concerns about the potential influence of unregulated Ether markets on the daily settlement price on CME Market, the Sponsor believes that the proposed methodology described above provides a significant and sufficient degree of insulation from such influences, for the following reasons:

1. **Regulated market influence:** The daily settlement price of Ether Futures Contracts on the CME Market, which is the basis for the NAV calculation of both futures contracts and physical holdings of the Fund, is primarily influenced by trading activity within the regulated futures market itself. This market is subject to stringent oversight and surveillance mechanisms designed to detect and deter manipulative and fraudulent practices, thus significantly limiting the possible influence of unregulated Ether markets on the daily settlement price.
2. **High liquidity and volume:** The CME Market is characterized by high liquidity and trading volume, such that any attempt to influence the daily settlement price through trading activity in other, unregulated Ether markets would require a significant amount of capital and coordination. The Sponsor thus believes that any such manipulation attempts would be highly detectable by the CME Market's market surveillance.

3. **Complex pricing methodology:** The NAV calculation methodology is comprehensive and accounts for both the tenor and final settlement price of each futures contract. In addition, the FBSP used in the NAV calculation methodology incorporates all maturities of Ether Futures Contracts, which exhibit a robust price relationship among themselves. As a result, attempting to manipulate these prices in a coordinated manner to generate a substantial impact on NAV would be very challenging for potential manipulators and likely financially unfeasible. The Sponsor thus believes that the complexity of the methodology provides an additional layer of protection against manipulation, as it would be extremely difficult for a manipulator to influence all these factors in a coordinated way to impact the Fund's NAV without leaving a detectable trail that would alert market surveillance.
4. **Focus on near-term contracts:** The Fund's methodology gives more importance to futures contracts that are due for settlement in the near term because such contracts are more heavily traded, and their prices are more reliable indicators of the current spot price of Ether. The Sponsor believes that the methodology's focus on near-term contracts further reduces the potential for manipulation, as these contracts are less susceptible to manipulation due to their higher trading volumes and liquidity.

The Sponsor also believes that it is highly unlikely that a person attempting to manipulate the NAV of the Fund could do so successfully by trading on unregulated spot and derivatives markets. Because of direct arbitrage, it is reasonable to assume that the

ETP's market price (in the secondary market) would be highly adherent to the Fund's Intraday Net Asset Value, since APs can always create and redeem shares of the Fund hedging with a basket of Ether Futures Contracts and the value of the creation basket is determined based on the NAV of the Fund, which is calculated using the FBSP prices that is based on such basket of Ether Futures Contracts. Consequently, the likelihood of a potential manipulator of the ETP to succeed by exclusively trading in unregulated Ether markets would depend on how much the prices in these markets have an impact over the CME Ether Futures Contracts prices. The likelihood that a potential manipulator would undertake such an effort is also decreased when considering the financial burden of manipulating the unregulated markets and the overall expected profitability of any such manipulation.

To further assess such likelihood, the Sponsor carried out the following analysis to investigate the relationship between prices from relevant unregulated Ether markets and the prices of the CME Ether Futures Contracts, to assess the impact that a manipulation on those markets would have on CME. The Sponsor collected one-minute bars data between February 21 and September 6<sup>51</sup> of prices for the nearest CME Ether Futures Contract ("CME Futures") and the following alternative Ether prices ("AEP"): spot Ether (in USD) on BitStamp, Coinbase, Gemini and Kraken, spot Ether (in USDT), and ETHUSDT USDs-Margined Perpetuals on Binance. For each day and each AEP, a simple regression model was estimated with one-minute CME Futures log-returns as the dependent variable, and two independent variables: (1) the log CME Futures closing price of the previous minute (as a control variable) and (2) the difference between the

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<sup>51</sup> This date range represents days with intraday data available on Bloomberg as of September 6. Days with less than 40 observations for a given AEP were excluded from the analysis of such AEP.



AEP log return and the CME Futures log return in the previous minute (as the variable of interest).

The estimated coefficients associated with the variable of interest are a measure of the expected response from the CME Futures (as measured by its returns) to a divergence between its own return information and the one from AEP in the near past (one-minute lagged returns). Such divergences are expected to occur in cases of manipulation. A higher coefficient (closer to one) would indicate that CME Futures are more sensitive to and strongly influenced by the divergence, while a lower coefficient (closer to zero) would suggest that CME Futures are less responsive and not significantly influenced by the information coming from AEP. The Sponsor believes that these coefficients can be considered a conservative estimation of the real impact that manipulation in an AEP would have over the CME Futures price because the estimations are calculated under normal circumstances rather than under a manipulative attack, in which some other indicators, such as abnormal volume and volatility, would warn market participants and undermine their perception of the attacked AEP as a reliable price reference. The results of the Sponsor's analysis are summarized in the table below:<sup>52</sup>

ABP	Estimated Parameters				Market Depth	
	Average	1st Decile	Median	9th Decile	+2% Depth	-2% Depth
Binance (spot USDT)	0.33	0.12	0.33	0.47	\$6,931,230	\$9,006,045
Binance (perpetual USDT)	0.32	0.15	0.33	0.47		
Coinbase (spot USD)	0.23	-0.03	0.24	0.53	\$9,540,548	\$10,509,099
Kraken (spot USD)	0.18	-0.02	0.19	0.37	\$3,401,860	\$5,115,258
Bitstamp (spot USD)	0.18	0.02	0.18	0.36		
Gemini (spot USD)	0.15	-0.05	0.15	0.32		

The Sponsor's analysis suggests that the influence of AEP over the CME Futures prices is relatively low. For instance, if a would-be manipulator chose to attack Binance

<sup>52</sup> The market depth information was obtained from CoinMarketCap on August 31, 2023. The AEPs with blank cells in this table were not included in the August 31, 2023 snapshot.

Spot (ETH-USDT), which is an AEP with higher coefficients and thus higher potential to impact CME futures, the average coefficient of 0.33 means that in order to manipulate CME Futures prices by 1%, the would-be manipulator would have to distort Binance's prices by 3% (1% divided by 0.33) on average. To be successful with 90% confidence (1st Decile) this manipulator would have to distort Binance's prices by more than 8.3% (1% divided by 0.12). The Sponsor believes that its analysis supports that, even considering these conservative estimations, indirect manipulation would be extremely inefficient.

The market depth columns in the above table indicate that substantial financial resources, running into millions of dollars, are present on both sides of the order book for the most influential AEPs (even without including hidden orders, bots, and arbitrageurs that effectively enhance liquidity). The considerable financial commitment that would be required makes the manipulation of these prices an expensive endeavor.

The Sponsor believes that its analysis demonstrates that the low efficiency of attempts to manipulate AEPs, coupled with the significant cost involved in influencing impactful AEPs, makes potential manipulation of spot Ether markets an unattractive proposition, and that it is therefore highly unlikely that a potential manipulator of the ETP could succeed by exclusively trading in unregulated Ether markets. The combination of the high costs and the inefficiencies associated with manipulation makes it a daunting and unprofitable venture.

In summary, while the Sponsor acknowledges the potential for influence from trades settled in unregulated Ether markets, the Sponsor believes that the NAV calculation methodology, coupled with the inherent characteristics of the CME, provides

a significant degree of protection against such influence being deliberately used to manipulate the Fund's market price or NAV without it being subject to detection by CME market surveillance.

### Investment Strategy

The Sponsor believes that the investment strategy of the Fund is designed to mitigate the risk of manipulation by diversifying its holdings and is responsive to the Commission's concerns with respect to an ETP that holds spot Ether. Instead of holding 100% spot Ether, which could make it more susceptible to price manipulation in the spot market, the Fund will hold a mix of Spot Ether, Ether Futures Contracts, and cash. This diversified portfolio is subject to investment restrictions, which further reduces the potential for manipulation, as explained below:

1. **Diversification:** By holding a combination of Spot Ether, Ether Futures Contracts, and cash, the Fund reduces its exposure to any single asset class. This diversification also makes it more difficult for a would-be manipulator to influence the NAV of the Fund by manipulating the price of spot Ether alone; for instance, even if a manipulator were able to influence the spot price of Ether, their actions would only affect a portion of the Fund's portfolio, thereby limiting the overall impact of such manipulation on the Fund's NAV.
2. **Investment restrictions:** The Fund's holdings of Spot Ether would be subject to investment restrictions, which are further discussed below. These restrictions cap the amount of Spot Ether that the Fund can hold, further reducing the potential for manipulation by, for example, preventing the Fund from becoming so large in relation to the spot market that it could be manipulated

without influencing the futures market. The Sponsor believes that these investment restrictions ensure that any significant trading activity aimed at manipulating the Fund would likely spill over into the CME Market, a regulated market with robust surveillance mechanisms in place to detect and deter manipulation, and with which the Exchange could receive information pursuant to common ISG membership.

3. **Reduced dependence on spot market:** By holding Ether Futures Contracts and cash in addition to Spot Ether, the Fund reduces its dependence on the spot market, thereby mitigating concerns about potential manipulation in unregulated Ether spot exchanges. Instead, the Fund will rely on Ether Futures Contracts and Ether futures EFPs that are traded on the CME Market, a regulated exchange, which provides a higher level of transparency and oversight compared to unregulated spot exchanges.

4. **Dynamic adjustment:** The mix of Spot Ether, Ether Futures Contracts, and cash in the Fund's portfolio can be dynamically adjusted based on market conditions and regulatory developments. This flexibility allows the Fund to respond quickly to any signs of potential manipulation or other market abuses, further enhancing its resilience against manipulation.

In summary, by diversifying its holdings and imposing investment restrictions, the Fund reduces its vulnerability to manipulation in any single market, thereby protecting investors and maintaining the integrity of the Fund.

#### Investment Restrictions on Spot Ether

According to the Sponsor, the Fund will be subject to investment restrictions on Spot Ether (the “Investment Restrictions”) that are specific constraints on its exposure to Ether, particularly with respect to spot holdings. These investment restrictions, which are designed to mitigate the risk of manipulation of the Fund’s Shares by insulating the Fund from events impacting the Ether spot market, are variable based on factors such as the Commission’s recognition of the CME as a regulated market of significant size related to spot Ether, the NAV of the Fund, and the prevailing trading conditions on the core exchanges of the Benchmark.

The first constraint, termed in the Registration Statement as the “Spot Ether Relative Position Restriction,” caps the Fund’s exposure to the ether spot market to a specified proportion of the Fund’s NAV. This limit is designed to curb the potential success of any attempts to materially manipulate the Fund’s Share prices through undue influence on the ether spot market.

The second constraint, referred to in the Registration Statement as the “Spot Ether Notional Exposure Restriction,” restricts the Fund’s notional exposure to ether to a set proportion. The dual objectives of this second constraint are: (a) to deter potential manipulative actions on the Shares by making the cost-benefit tradeoff highly unfavorable for the manipulator, as it would require them to transact a volume that surpasses the Fund’s total exposure in the ether spot market, thus making the potential costs of manipulation outweigh the benefits, and (b) to restrict the Fund’s trading activities in such a way that they are not expected to become the primary driving force behind price variations in the ether spot market.

The Sponsor believes that the Investment Restrictions serve two main purposes:

1. They deter potential manipulative actions directed towards the Fund's Shares by making the cost-benefit tradeoff highly unfavorable for the manipulator. To manipulate the Fund's price using an unregulated spot market, a manipulator would need to transact a volume that surpasses the Fund's total exposure in spot Ether, making the potential costs of manipulation outweigh the benefits.
2. They ensure that the Fund's trading activities do not become the primary driving force behind price variations in the Ether spot market. By restricting the Fund's notional exposure to a proportion of the ADTV, this constraint ensures that the Fund's trading activities are always a fraction of the overall market activity, thereby reducing the potential for the Fund to unduly influence market prices.

As an example, in the 30-day period ending on August 31, 2023, the ADTV of spot Ether on Coinbase was \$146 million. Thus, the Fund's notional exposure to Ether is restricted to up to \$146 million, meaning that if the Fund's AUM is, for example, \$100 million, it could have up to 100% allocation to Spot Ether. However, if the Fund's AUM is, for example, \$1 billion, it could still only have up to \$146 million of notional exposure to Spot Ether, which would be the equivalent of up to 14.6% of the Fund's NAV, and the rest of the portfolio would need to be allocated to Ether Futures Contracts, cash, or cash equivalents.

To ensure that the Fund's trading activities do not become the primary driving force of the Spot Ether price, the Sponsor intends to keep its notional allocation to spot Ether as a small proportion of the overall trading activity of spot Ether.

The Sponsor intends to do so by restricting the maximum notional exposure to Spot Ether to a proportion of the 30-day ADTV, with the ADTV data based on the most trusted exchanges (meeting the double requirements of being a core exchange per the NQETHS methodology and being subject to regulatory and reporting rules in the United States, which make them liable for any false volume data reporting).

Currently, only one exchange meets those requirements, and over the last three months, it accounted for 9.75% to 11.83% of all Ether trading, whereas the largest unregulated spot Ether exchange accounted for 35% to 40% of the spot Ether volume over the same period.<sup>53</sup>

Spot Ether 30-day ADTV <sup>54</sup>			
	June 30, 2023	July 31, 2023	August 31 2023
Top 10 Exchanges	\$2,012.24 million	\$1,560.15 million	\$1,499.43 million
Single Core Exchange meeting Sponsor's requirement	\$203.56 million	\$184.64 million	\$146.22 million
Single Core Exchange's market share	10.12%	11.83%	9.75%
All 5 Core Exchanges	\$271.02 million	\$227.84 million	\$187.53 million
All 5 Core Exchanges' market share	13.47%	14.60%	12.51%

<sup>53</sup> See <https://www.theblock.co/data/crypto-markets/spot/the-block-legitimate-volume-index-eth-only>.

<sup>54</sup> See Messari, volume data is for USD, USDT and USDC traded against Bitcoin. Core Exchanges.

The Sponsor believes that it is therefore unlikely that the single exchange on which the Sponsor bases the ADTV data on will be the primary driver of spot Ether price given its relatively small market share. As a result, even with the Fund's notional Spot Ether exposure limited at 100% of the ADTV on that single exchange, the Fund's Spot Ether holdings would likely represent only 9.75% to 11.83% of the daily liquidity of the spot Ether market (on the biggest 10 exchanges by volume) and thus is unlikely to become the primary driver of the spot market price formation.

Additionally, with the spot Ether notional exposure at 9.75% to 11.83% of ADTV, a would-be manipulator would need to trade on exchanges that account for most of the liquidity and, in particular, the largest one. The Sponsor believes that the cost benefit analysis of attempting to distort the price on the largest exchange, which accounts for approximately 35% to 40% of the liquidity (or approximately 3 to 4 times the size of the Fund), to manipulate the price of the Fund would not be compelling.

In summary, the Sponsor believes that the Investment Restrictions are a key tool in the Fund's strategy to prevent manipulation. By limiting the Fund's exposure to the spot market and ensuring that the Fund's trading activities do not become the predominant influence on market prices, these restrictions provide a robust defense against potential manipulation attempts.

#### Investor Protection and Spot and Proxy Exposure

The Sponsor believes that U.S. investor exposure to Ether directly through holding Ether itself has grown and the potential risk to U.S. investors has also grown. As described, premium and discount volatility, high fees, insufficient disclosures, and



technical hurdles are exposing U.S. investors to risks that could potentially be eliminated through access to an Ether futures-based fund with investment restrictions on its exposure to Spot Ether. The Sponsor believes that the Commission's concerns have been sufficiently mitigated by the use of futures contracts, the investment restrictions and EFP transactions. Accordingly, the Sponsor believes that the Fund represents an opportunity for U.S. investors to gain price exposure to Ether in a regulated and transparent exchange-traded vehicle that limits risks by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; and (iii) reducing risks associated with investing in operating companies that are imperfect proxies for Ether exposure.

According to the Sponsor, exposure to Ether through the Fund also presents certain advantages for retail investors compared to buying spot Ether directly. A retail investor holding Spot Ether directly in a self-hosted wallet may suffer from inexperience in private key management (e.g., insufficient password protection, lost key, etc.), which could cause them to lose some or all of their Ether holdings. In addition, retail investors will be able to hold the Shares in traditional brokerage accounts which provide SIPC protection if a brokerage firm fails.

#### Creations and Redemptions

According to the Sponsor (and as discussed further below), the Fund uses cash creations and redemptions. With respect to Spot Ether, an AP delivers cash to the Fund instead of Spot Ether in the creation process, and an AP receives cash instead of Spot Ether in the redemption process. The cash delivered or received during the creation or redemption process is then used by the Sponsor to purchase or sell Ether Futures

Contracts with an aggregate market value that approximates the amount of cash received or paid upon the creation or redemption. On a daily basis, the Sponsor will analyze the current portfolio allocation of the Fund between Spot Ether and Ether Futures Contracts and, based on the Investment Restrictions and target portfolio exposure, may decide to engage in an EFP transaction on CME to buy or sell Spot Ether for the equivalent position in Ether Futures Contracts.

The Sponsor believes that this method protects against manipulation in the creation and redemption process and of the Fund's market price from trading in unregulated spot markets. Investment in spot Ether will not be directly related to creation or redemption of Fund Shares, but instead on target portfolio exposure, such that trades can be performed in smaller sizes and at unpredictable times, reducing the risk of creation or redemption manipulation.

The Sponsor believes that the use of cash creations and redemptions in the Fund serves as a deterrent to manipulation in several ways:

1. **Decoupling from spot market:** By using cash instead of Spot Ether for creations and redemptions, the Fund's operations are decoupled from the unregulated spot market. The creation and redemption process does not directly influence the unregulated spot market or vice versa, thereby reducing the potential for manipulation through this process.
2. **Unpredictable trading times:** The Fund's investment in Spot Ether is not directly related to creations or redemptions, but instead on target portfolio exposure. As a result, trading can be done in smaller sizes and at

unpredictable times, making it harder for potential manipulators to time their actions.

3. **Reduced impact of large trades:** By effecting creations and redemptions in cash, large trades that could potentially influence the unregulated spot market are mitigated. Instead, these trades are absorbed in the CME Market, which is sufficiently liquid and can reasonably be relied upon to assist in detecting and deterring fraudulent or manipulative misconduct.
4. **Reduced influence of Ether sourced from unregulated spot exchanges:** In-kind creation may create a direct relationship between the Fund's market price and prices on unregulated exchanges such as Binance by arbitrage, because an AP could buy or sell Ether from Binance and receive or deliver Ether from the Fund through the creation or redemption process. With creations and redemptions in cash, however, that arbitrage cannot be executed without going through pricing and trading on the CME Market.

The Sponsor believes that the Fund's creation and redemption process is designed to minimize the potential for market manipulation, thereby protecting investors and maintaining the integrity of the markets.

#### Exchange for Physical Transactions

EFP transactions, also known as Exchange for Related Position or EFRP transactions,<sup>55</sup> are a type of private agreement between two parties to trade a futures position for the underlying asset. In the context of the Fund, these transactions will be used to purchase and sell Spot Ether by delivering or receiving the equivalent futures

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<sup>55</sup> See <https://www.cmegroup.com/clearing/operations-and-deliveries/accepted-trade-types/efp-efr-coo-trades.html>.

position.

In an EFP transaction, two parties exchange equivalent but offsetting positions in an Ether Futures Contract and the underlying physical Ether. One party is the buyer of futures and the seller of the physical Ether, and the other party takes the opposite position (seller of futures and buyer of physical). While the EFP is a privately-negotiated transaction between the two parties to the trade, the consummated transaction must be reported to CME Market and its conditions and prices are subject to CME Market's market regulation oversight.

EFPs may be transacted at such commercially reasonable prices as are mutually agreed upon by the parties to the transaction, provided that the price conforms to the applicable futures price increments set forth for the relevant futures contract. The Sponsor believes that EFPs executed at off-market prices are more likely to be reviewed by CME's Market Regulation. CME's Rule 538 establishes that "EFPs may not be priced off-market for the purpose of shifting substantial sums of cash from one party to another, to allocate gains and losses between the futures or options on futures and the cash or OTC derivative components of the EFRP, to evade taxes, to circumvent financial controls by disguising a firm's financial condition, or to accomplish some other unlawful purpose."

Because both sides of the trade track the same benchmark (Ether), an EFP is market-neutral. As such, the pricing of an EFP is quoted in terms of the basis between the price of the futures contract and the level of the underlying Ether. Because the Fund proposes to use EFP transactions to purchase and sell Spot Ether, the only non-cash assets held by the Fund (Ether Futures Contracts and Ether) are traded on CME Market.

Because the Exchange and the CME Market are both ISG members, information shared by the CME Market with the Exchange can be used to assist in detecting and deterring fraudulent or manipulative misconduct related to those assets.

In the proposed strategy for the operation of the Fund, every time the Fund is required to purchase or sell Ether, the Sponsor will perform a request for quotation auction (“RFQ Auction”) with multiple market makers using the settlement price as the reference for the futures contracts. Market makers present their quotes in terms of basis points (“bps”), where 1bp = 0.01% between the futures contract price and the spot price. The Sponsor will then confirm the trade with the best offer and report the EFP transaction to the CME Market. The Sponsor believes that performing an RFQ Auction with multiple market makers is an efficient price formation mechanism that generates enough competition and attracts sufficient liquidity to minimize the transaction costs for the ETP.

As an example, assume that the Fund needs to buy 500 ethers (ETH) in exchange for 10 units of the next maturity of Ether Futures Contracts (“ETHA”). The Sponsor will perform an RFQ Auction by requesting 3 market makers to provide their best price for buying ETHA versus ETH. The Market Makers provide a bid/ask quote in terms of basis between the futures and spot. Market Maker 1 (MM1) bids +22bps, Market Maker 2 (MM2) bids +20bps, and Market Maker 3 (MM3) bids +25bps. The Sponsor will then agree to pay the best bid of +25bps from MM3. Assuming ETHA is at \$1,634, the price for the spot transaction is fixed at \$1,629.92. The transaction is then reported within the time period and in the manner specified by the CME Market. Upon completion of the EFP, the Fund and MM3 would have different positions but same exposure:

- The Fund was long 10 Ether Futures Contracts and now has converted this

exposure into 500 Ethers.

- MM3 had 500 Ethers and now holds an equal position long 10 Ether Futures Contracts.

The table below illustrates the steps in this EFP transaction:

Steps	MM3	Fund
1. Starting Position	500 ETH	10 ETHA
2. EFP is privately negotiated	MM3 and the Fund agree to terms of the EFP: <ul style="list-style-type: none"> <li>• Fund sells/MM3 buys 10 ETHA at \$1,634</li> <li>• Fund buys / MM3 sells 500 ETH at 1,629.92 (+25bps)</li> </ul>	
3. MM3 sends Ether to the Fund	-500 ETH	+ 500 ETH
4. EFP reported to CME	+ 10 ETHA	-10 ETHA
5. Final Position	10 ETHA	500 ETH

As required by CME Market's regulation, the Fund and all other parties related to the transaction will maintain all records relevant to this transaction, including order tickets, RFQ Auction message history, and custody transaction records, and provide them to CME upon request for surveillance purposes pursuant to CFTC Regulation 1.35.

EFP volumes are reported daily on the CME Group website. Historically, trading activity in EFP transactions is sporadic as it depends on the demand for a regulated conversion between futures and spot positions. Nonetheless, the Sponsor believes that a large number of liquidity providers are ready to execute this type of transaction and can provide enough liquidity to support the proposed ETP's demand. A subset of firms that are ready to provide liquidity on EFP Ether transactions is available on CME's website.<sup>56</sup>

<sup>56</sup>

See <https://www.cmegroup.com/trading/bitcoin-brokers-and-block-liquidity-providers.html>.

The Sponsor believes that EFP transactions are a powerful tool in preventing market manipulation for several reasons:

1. **Regulated environment:** EFP transactions occur on the CME Market, which is a regulated exchange with processes in place to prevent market manipulation, including monitoring transaction prices and investigating potential manipulations, as outlined in CME Rule 538.<sup>57</sup> All transactions are monitored and subject to rules and regulations designed to prevent market manipulation. Moreover, all parties to an EFP transaction are required to maintain all records relevant to the transaction pursuant to CFTC Regulation 1.35, thus providing the ability for CME and the CFTC to conduct surveillance inquiries and investigations in an efficient and effective manner for the protection of customers and ensuring market integrity. Since the transactions are quoted as basis points based on the ethereum futures contracts prices, the Sponsor believes that there is a direct and unequivocal lead-lag relationship between the prices on CME and the spot market price that the Fund trades. Furthermore, as an additional protection measure, to enforce the highest standard on the sourcing of such underlying physical Ether, the Sponsor represents that it will only participate in EFP transactions with broker-dealers that are FINRA regulated or part of corporate groups that are, which would provide another layer of regulatory oversight in how Ether exposures are sourced, as those counterparties already have an ongoing commercial

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<sup>57</sup>

See <https://www.cmegroup.com/rulebook/files/cme-group-Rule-538.pdf>.

relationship with the Sponsor and are active participants in trading Ether regulated products worldwide.

2. **Surveillance-sharing agreement:** Nasdaq and the CME Market are both members of the ISG, which allows for the sharing of information and cooperation in investigations, which can help detect and deter market manipulation.
3. **Transparency:** EFP transactions must be reported to the CME Market, which is a regulated exchange, providing transparency and making it more difficult for manipulative practices to go unnoticed. Parties to EFP transactions must maintain all records relevant to the CME futures contract and the related position transaction, pursuant to CFTC Regulation 1.35, adding another layer of regulatory scrutiny and transparency. In addition, EFP transactions volumes are required to be reported with the daily large trader positions by each clearing member, omnibus account, and foreign broker.
4. **Market-neutrality:** Because EFP transactions involve exchanging equivalent but offsetting positions, they are market-neutral. As a result, EFP transactions do not create imbalances in the market that could be exploited for manipulative purposes.
5. **Unpredictability:** EFP transactions are privately negotiated between the fund and other parties, making them less predictable and therefore more difficult to manipulate.

The Sponsor believes that, by using EFP transactions to purchase and sell spot



Ether, the Fund would ensure that its operations are conducted in a regulated, transparent, and market-neutral manner, significantly reducing the dependency on and the risk of manipulation from unregulated spot exchanges.

#### Settlement of ETH and MET Contracts

According to the Registration Statement, each ETH Contract and MET Contract settles daily to the ETH Contract volume-weighted average price (“VWAP”) of all trades that occur between 2:59 p.m. and 3:00 p.m., Central Time, the settlement period, rounded to the nearest tradable tick.<sup>58</sup> ETH Contracts and MET Contracts each expire on the last Friday of the contract month and are settled with cash. The final settlement value is based on the ETHUSD\_RR at 4:00 p.m. London time on the expiration day of the futures contract.<sup>59</sup>

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<sup>58</sup> VWAP is calculated based first on Tier 1 (if there are trades during the settlement period); then Tier 2 (if there are no trades during the settlement period); and then Tier 3 (in the absence of any trade activity or bid/ask in a given contract month during the current trading day, as follows:

Tier 1: Each contract month settles to its VWAP of all trades that occur between 14:59:00 and 15:00:00 CT, the settlement period, rounded to the nearest tradable tick. If the VWAP is exactly in the middle of two tradable ticks, then the settlement will be the tradable price that is closer to the contract’s prior day settlement price.

Tier 2: If no trades occur on CME Globex between 14:59:00 and 15:00:00 CT, the settlement period, then the last trade (or the contract’s settlement price from the previous day in the absence of a last trade price) is used to determine whether to settle to the bid or the ask during this period.

- a. If the last trade price is outside of the bid/ask spread, then the contract month settles to the nearest bid or ask price.
- b. If the last trade price is within the bid/ask spread, or if a bid/ask spread is not available, then the contract month settles to the last trade price.

Tier 3: In the absence of any trade activity or bid/ask in a given contract month during the current trading day, the daily settlement price will be determined by applying the net change from the preceding contract month to the given contract month’s prior daily settlement price.]

<sup>59</sup> The ETHUSD\_RR is a daily reference rate of the U.S. dollar price of one ether calculated daily as of 4:00 p.m. London time. It is calculated by the CME based on the ether trading activity on CME-specified constituent spot ether exchanges during a calculation window between 3:00 p.m. and 4:00 p.m. London time. The CME launched the ETHUSD\_RR in May 2018.

As proposed, the Fund will rollover its soon to expire Ether Futures Contracts to extend the expiration or maturity of its position forward by closing the initial contract holdings and opening a new longer-term contract holding for the same underlying asset at the then-current market price. The Fund does not intend to hold any Ether futures positions into cash settlement.

#### Net Asset Value

According to the Registration Statement, the Fund's NAV per Share will be calculated by taking the current market value of its total assets, subtracting any liabilities, and dividing that total by the number of Shares.

The Sub-Administrator of the Fund will calculate the NAV once each trading day, as of the earlier of the close of the Nasdaq or 4:00 p.m. New York time.

According to the Registration Statement, to determine the value of Ether Futures Contracts, the Fund's Sub-Administrator will use the Ether Futures Contract settlement price on the exchange on which the contract is traded, except that the "fair value" of Ether Futures Contracts (as described in more detail below) may be used when Ether Futures Contracts close at their price fluctuation limit for the day. The Fund's Sub-Administrator will determine the value of Fund investments as of the earlier of the close of the New York Stock Exchange or 4:00 p.m. New York time. The Fund's NAV will include any unrealized profit or loss on open Ether futures contracts and any other credit or debit accruing to the Fund but unpaid or not received by the Fund.

According to the Registration Statement, the value of spot Ether held by the Fund is determined by the Sponsor in good faith based on a methodology that is entirely derived from the settlement prices of Ether Futures Contracts on the CME. The method

involves a calculation that is a function of both the length of time (the tenor) until each Ether Futures Contract is due for settlement, and the final settlement price for each contract on that day. The calculation takes into account each contract's tenor and the tenor squared. This approach is designed to give more importance to contracts that are due for settlement in the near term, considering that the prices of these near-term contracts are more reliable indicators of the current spot price of Ether and are also more heavily traded. The calculation produces a set of weighting factors, with each factor indicating the contribution of the corresponding Ether Futures Contract to the estimated current spot price of Ether. The estimated spot price is the component of the result corresponding to a tenor of zero days. The Fund does not use data from ether exchanges or from spot ether trading activity. By way of example, the table below shows how the weights of each hypothetical Ether Futures Contract change over time as the first contract gets closer to maturity.

First future tenor					
Future	27 days	21 days	15 days	9 days	3 days
1st	130.81%	125.92%	120.39%	113.79%	105.33%
2nd	1.91%	-0.84%	-2.94%	-3.80%	-2.26%
3rd	-8.92%	-7.57%	-5.86%	-3.76%	-1.31%
4th	-9.19%	-7.05%	-4.89%	-2.78%	-0.83%
5th	-7.81%	-5.73%	-3.78%	-2.02%	-0.57%
6th	-6.26%	-4.47%	-2.86%	-1.47%	-0.39%
9th	-2.61%	-1.76%	-1.05%	-0.50%	-0.12%
12th	-0.29%	-0.14%	-0.04%	0.01%	0.01%
18th	2.35%	1.65%	1.04%	0.53%	0.14%
Total	100.00%	100.00%	100.00%	100.00%	100.00%

First future tenor					
Future	27 days	21 days	15 days	9 days	3 days
1st	130.81%	125.92%	120.39%	113.79%	105.33%
2nd	1.91%	-0.84%	-2.94%	-3.80%	-2.26%
3rd	-8.92%	-7.57%	-5.86%	-3.76%	-1.31%
4th	-9.19%	-7.05%	-4.89%	-2.78%	-0.83%
5th	-7.81%	-5.73%	-3.78%	-2.02%	-0.57%
6th	-6.26%	-4.47%	-2.86%	-1.47%	-0.39%
9th	-2.61%	-1.76%	-1.05%	-0.50%	-0.12%
12th	-0.29%	-0.14%	-0.04%	0.01%	0.01%
18th	2.35%	1.65%	1.04%	0.53%	0.14%
Total	100.00%	100.00%	100.00%	100.00%	100.00%

The Fund's Sub-Administrator will determine the value of Fund investments as of the earlier of the close of the Nasdaq or 4:00 p.m. New York time. The Fund's NAV will include any unrealized profit or loss on open Ether futures contracts and any other credit or debit accruing to the Fund but unpaid or not received by the Fund.

According to the Registration Statement, the fair value of the Fund's holdings will be determined by the Fund's Sponsor in good faith and in a manner that assesses the future Ether market value based on a consideration of all available facts and all available information on the valuation date. When an Ether Futures Contract has closed at its price fluctuation limit, the fair value determination will attempt to estimate the price at which such Ether Futures Contract would be trading in the absence of the price fluctuation limit (either above such limit when an upward limit has been reached or below such limit when

a downward limit has been reached). Typically, this estimate will be made primarily by reference to exchange traded instruments at 4:00 p.m. New York time on settlement day. The fair value of ETH Contracts and MET Contracts may not reflect such security's market value or the amount that the Fund might reasonably expect to receive for the ETH Contracts and MET Contracts upon its current sale.

According to the Registration Statement and as discussed above, the value of Spot Ether held by the Fund would be determined by the Sponsor and by Hashdex Asset Management Ltd. (the "Digital Asset Adviser") via an FBSP methodology that is sensitive to both the tenor of an Ether Futures Contract and the final settlement price for such contract. The calculation produces a set of weighting factors, with each factor indicating the contribution of the corresponding Ether Futures Contract to the estimated current spot price of Ether. The estimated spot price is the component of the result corresponding to a tenor of zero days. The Sponsor and Digital Asset Advisor will not use data from Ether exchanges or directly from spot Ether trading activity in determining the value of Spot Ether held by the Fund.

#### Indicative Fund Value

According to the Registration Statement, in order to provide updated information relating to the Fund for use by investors and market professionals, a third party financial data provider will calculate an updated Indicative Fund Value ("IFV"). The IFV will be calculated by using the prior day's closing NAV per Share of the Fund as a base and will be updated throughout the Core Trading Session of 9:30 a.m. E.T. to 4:00 p.m. E.T. to reflect changes in the value of the Fund's holdings during the trading day.

The IFV will be disseminated on a per Share basis every 15 seconds during the Exchange's Core Trading Session and be widely disseminated by one or more major market data vendors during the Exchange's Core Trading Session.<sup>60</sup>

#### Creation and Redemption of Shares

According to the Registration Statement, the Shares issued by the Fund may only be purchased by APs and only in blocks of 10,000 Shares called "Creation Baskets." The amount of the purchase payment for a Creation Basket is equal to the total NAV of Shares in the Creation Basket. Similarly, only APs may redeem Shares and only in blocks of 10,000 Shares called "Redemption Baskets." The amount of the redemption proceeds for a Redemption Basket is equal to the total NAV of Shares in the Redemption Basket. The purchase price for Creation Baskets and the redemption price for Redemption Baskets are the actual NAV calculated at the end of the business day when a request for a purchase or redemption is received by the Fund.

"APs" will be the only persons that may place orders to create and redeem Creation Baskets. APs must be (1) either registered broker-dealers or other securities market participants, such as banks and other financial institutions, that are not required to register as broker-dealers to engage in securities transactions, and (2) DTC Participants. An AP is an entity that has entered into an Authorized Purchaser Agreement with the Sponsor.

With respect to Spot Ether, an AP delivers cash to the Fund instead of Spot Ether in the creation process, and an AP receives cash instead of Spot Ether in the redemption process. The cash delivered or received during the creation or redemption process is then

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<sup>60</sup> Several major market data vendors display and/or make widely available IFVs taken from the Consolidated Tape Association ("CTA") or other data feeds.

used by the Sponsor to purchase or sell Ether Futures Contracts with an aggregate market value that approximates the amount of cash received or paid upon the creation or redemption. On a daily basis, the Sponsor will analyze the current portfolio allocation of the Fund between Spot Ether and Ether Futures Contracts and, based on the Investment Restrictions and target portfolio exposure, may decide to engage in an EFP transaction on CME to buy or sell Spot Ether for the equivalent position in Ether Futures Contracts.

#### Creation Procedures

According to the Registration Statement, on any “Business Day,” an AP may place an order with the Transfer Agent to create one or more Creation Baskets. For purposes of processing both purchase and redemption orders, a “Business Day” means any day other than a day when the CME or Nasdaq is closed for regular trading. Purchase orders for Creation Baskets must be placed by 3:00 p.m. New York time or one hour prior to the close of trading on Nasdaq, whichever is earlier. The day on which the Distributor receives a valid purchase order is referred to as the purchase order date. If the purchase order is received after the applicable cut-off time, the purchase order date will be the next Business Day. Purchase orders are irrevocable.

By placing a purchase order, an AP agrees to deposit cash with the Custodian.

#### Redemption Procedures

According to the Registration Statement, the procedures by which an AP can redeem one or more Creation Baskets will mirror the procedures for the creation of Creation Baskets. On any Business Day, an AP may place an order with the Transfer Agent to redeem one or more Creation Baskets.

The redemption procedures allow APs to redeem Creation Baskets. Individual shareholders may not redeem directly from the Fund. By placing a redemption order, an AP agrees to deliver the Creation Baskets to be redeemed through DTC's book entry system to the Fund by the end of the next Business Day following the effective date of the redemption order or by the end of such later business day.

#### Determination of Redemption Distribution

According to the Registration Statement, the redemption distribution from the Fund will consist of an amount of cash, that is in the same proportion to the total assets of the Fund on the date that the order to redeem is properly received as the number of Shares to be redeemed under the redemption order is in proportion to the total number of Shares outstanding on the date the order is received.

#### Delivery of Redemption Distribution

According to the Registration Statement, an AP who places a purchase order will transfer to the Custodian the required amount of cash, cash equivalents and/or Ether futures by the end of the next business day following the purchase order date or by the end of such later business day, not to exceed three business days after the purchase order date, as agreed to between the AP and the Custodian when the purchase order is placed (the "Purchase Settlement Date"). Upon receipt of the deposit amount, the Custodian will direct DTC to credit the number of Creation Baskets ordered to the AP's DTC account on the Purchase Settlement Date.

#### Availability of Information

The NAV for the Fund's Shares will be disseminated daily to all market participants at the same time. The intraday, closing prices, and settlement prices of the



Ether Futures Contracts will be readily available from the applicable futures exchange websites, automated quotation systems, published or other public sources, or major market data vendors. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services.

Complete real-time data for the Ether Futures Contracts will be available by subscription through on-line information services. Nasdaq and CME also provide delayed futures and options on futures information on current and past trading sessions and market news free of charge on their respective websites. The specific contract specifications for Ether Futures Contracts will also be available on such websites, as well as other financial informational sources. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. Quotation information for cash equivalents and commodity futures may be obtained from brokers and dealers who make markets in such instruments. Intra-day price and closing price level information for the Benchmark will be available from major market data vendors. The Benchmark value will be disseminated once every 15 seconds. The IFV will be available through on-line information services.

In addition, the Fund's website, <https://hashdex-etfs.com/>, will display the applicable end of day closing NAV and the daily holdings of the Fund. The Fund's website will also include a form of the prospectus for the Fund that may be downloaded. The website will include the Shares' ticker and CUSIP information along with additional quantitative information updated on a daily basis, including: (1) the prior Business Day's reported NAV and closing price and a calculation of the premium and discount of the

closing price or mid-point of the bid/ask spread at the time of NAV calculation (the “Bid/Ask Price”) against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price or Bid/Ask Price against the NAV, within appropriate ranges, for at least each of the four previous calendar quarters. The website disclosure of portfolio holdings will be made daily and will include, as applicable, (i) the name, quantity, price, and market value of the Fund’s holdings, (ii) the counterparty to and value of forward contracts and any other financial instruments tracking the Benchmark, and (iii) the total cash and cash equivalents held in the Fund’s portfolio, if applicable.

The Fund’s website will be publicly available at the time of the public offering of the Shares and accessible at no charge.

#### Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. The Exchange will halt trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121, including without limitation the conditions specified in Nasdaq Rule 4120(a)(9) and the trading pauses under Nasdaq Rules 4120(a)(11) and (12).

Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (i) the extent to which trading is not occurring in the Ether Futures Contracts or the Ether underlying the Shares; or (ii) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

If the intraday indicative value of the Fund's NAV ("IIV") or the value of the underlying Ether Futures Contracts or underlying Ether is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the IIV or the value of the underlying Ether Futures Contracts or underlying Ether occurs. If the interruption to the dissemination of the IIV or the value of the underlying Ether Futures Contracts or underlying Ether persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

In addition, if the Exchange becomes aware that the NAV with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

#### Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. The Exchange will allow trading in the Shares from 4:00 a.m. to 8:00 p.m. (ET). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. The Shares of the Fund will conform to the initial and continued listing criteria set forth in Nasdaq Rule 5711(i).

#### Surveillance

The Exchange represents that trading in the Shares of the Fund will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by the Financial Industry Regulatory Authority, Inc. ("FINRA") on behalf of the Exchange, which are designed to detect violations of

Exchange rules and applicable federal securities laws.<sup>61</sup> The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and the Fund's holdings with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and the Fund's holdings from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the Fund's holdings from markets and other entities that are members of ISG or with which the Exchange has in place a CSSA. The Exchange is also able to obtain information regarding trading in the Shares, the physical commodities underlying the futures contracts through ETP Holders, in connection with such ETP Holders' proprietary or customer trades which they effect through ETP Holders on any relevant market. The Exchange can obtain market surveillance information, including customer identity information, with respect to transactions (including transactions in futures contracts) occurring on US futures

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<sup>61</sup> FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

exchanges, which are members of the ISG. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

All statements and representations made in this filing regarding (a) the description of the portfolios of the Funds or Benchmark, (b) limitations on portfolio holdings or the Benchmark, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing requirements for listing the Shares on the Exchange.

The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq Rule 5800 Series.

#### Information Circular

Prior to the commencement of trading of the Shares, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (1) the procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (2) Section 10 of Nasdaq General Rule 9, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (3) how information regarding the IIV is disseminated; (4) the risks involved in trading the Shares during the Pre-Market and Post-Market Sessions when an updated IIV will not be calculated or publicly disseminated; (5) the requirement that members deliver a prospectus to investors

purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

Additionally, the Information Circular will reference that the Trust is subject to various fees and expenses described in the Registration Statement. The Information Circular will also disclose the trading hours of the Shares. The Information Circular will disclose that information about the Shares will be publicly available on the Trust's website.

(b) Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)<sup>62</sup> that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria set forth in Nasdaq Rule 5711(i). The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange or FINRA, on behalf of the Exchange, or both,

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<sup>62</sup> 15 U.S.C. 78f(b)(5).

will communicate as needed regarding trading in the Shares and the Fund's holdings with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and the Fund's holdings from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the Fund's holdings from markets and other entities that are members of ISG or with which the Exchange has in place a CSSA. The Exchange is also able to obtain information regarding trading in the Shares and the Fund's holdings through ETP Holders, in connection with such ETP Holders' proprietary or customer trades which they effect through ETP Holders on any relevant market. The Exchange can obtain market surveillance information, including customer identity information, with respect to transactions (including transactions in Ether Futures Contracts) occurring on US futures exchanges, which are members of the ISG. The intraday, closing prices, and settlement prices of the Ether Futures Contracts will be readily available from the applicable futures exchange websites, automated quotation systems, published or other public sources, or major market data vendors website or on-line information services.

Complete real-time data for the Ether Futures Contracts will be available by subscription from on-line information services. Nasdaq and CME also provide delayed futures information on current and past trading sessions and market news free of charge on the Fund's website. The specific contract specifications for Ether Futures Contracts will also be available on such websites, as well as other financial informational sources. Information regarding options will be available from the applicable exchanges or major market data vendors. Quotation and last-sale information regarding the Shares will be

disseminated through the facilities of the CTA. The IFV will be disseminated on a per Share basis every 15 seconds during the Exchange's Core Trading Session and be widely disseminated by one or more major market data vendors during the Exchange's Core Trading Session. The Fund's website will also include a form of the prospectus for the Fund that may be downloaded. The website will include the Share's ticker and CUSIP information along with additional quantitative information updated on a daily basis, including, for the Fund: (1) the prior business day's reported NAV and closing price and a calculation of the premium and discount of the closing price or mid-point of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price or Bid/Ask Price against the NAV, within appropriate ranges, for at least each of the four previous calendar quarters. The website disclosure of portfolio holdings will be made daily and will include, as applicable, (i) the name, quantity, price, and market value of Ether Futures Contracts, (ii) the counterparty to and value of forward contracts, and (iii) other financial instruments, if any, and the characteristics of such instruments and cash equivalents, and amount of cash held in the Fund's portfolio, if applicable.

Trading in Shares of the Fund will be halted if the circuit breaker parameters have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in ETH and/or MET Contracts and the securities and/or the financial instruments composing the daily disclosed portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.



The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of Trust Units based on Ether that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

4. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of Trust Units based on Ether and that will enhance competition among market participants, to the benefit of investors and the marketplace.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

6. Extension of Time Period for Commission Action

Not applicable.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

The proposed rule change is not based on the rules of another self-regulatory

organization or of the Commission.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

1. Notice of proposed rule change for publication in the Federal Register.

**EXHIBIT 1**

SECURITIES AND EXCHANGE COMMISSION  
(Release No. \_\_\_\_\_ ; File No. SR-NASDAQ-2023-035)

September \_\_, 2023

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to List and Trade the Shares of the Hashdex Nasdaq Ethereum ETF under Nasdaq Rule 5711(i)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup>, and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 20, 2023, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade the shares of the Hashdex Nasdaq Ethereum ETF under Nasdaq Rule 5711(i) (“Trust Units”). The units of the Trust are referred to herein as the “Shares.”

The text of the proposed rule change is available on the Exchange’s Website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

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

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade Shares of the Hashdex Nasdaq Ethereum ETF (the “Fund”) under Nasdaq Rule 5711(i)<sup>3</sup>, which governs the listing and trading of Trust Units on the Exchange.

The Fund is a series of Tidal Commodities Trust I (the “Trust”), a Delaware statutory trust.<sup>4</sup> The Fund is managed and controlled by Toroso Investments LLC (“Sponsor”). The Sponsor is registered as a commodity pool operator (“CPO”) with the

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<sup>3</sup> The Commission approved Nasdaq Rule 5711 in Securities Exchange Act Release No. 66648 (March 23, 2012), 77 FR 19428 (March 30, 2012) (SR-NASDAQ-2012-013).

<sup>4</sup> On September 8, 2023, the Trust confidentially filed a draft registration statement under the Securities Act (the “Registration Statement”). The Jumpstart Our Business Startups Act (the “JOBS Act”), enacted on April 5, 2012, added Section 6(e) to the Securities Act. Section 6(e) of the Securities Act provides that an “emerging growth company” may confidentially submit to the Commission a draft registration statement for confidential, non-public review by the Commission staff prior to public filing, provided that the initial confidential submission and all amendments thereto shall be publicly filed not later than 21 days before the date on which the issuer conducts a road show, as such term is defined in Securities Act Rule 433(h)(4). An emerging growth company is defined in Section 2(a)(19) of the Securities Act as an issuer with less than \$1,000,000,000 total annual gross revenues during its most recently completed fiscal year. The Trust meets the definition of an emerging growth company and consequently submitted its Registration Statement to the Commission on a confidential basis. The description of the operation of the Trust and the Fund herein is based, in part, on the Registration Statement.

Commodity Futures Trading Commission (“CFTC”) and is a member of the National Futures Association (“NFA”).

#### The Fund’s Investment Objective and Strategy

According to the Registration Statement, the Chicago Mercantile Exchange, Inc. (“CME”) currently offers two Ether futures contracts (“Ether Futures Contracts”), one contract representing 50 ether (“ETH Contracts”) and another contract representing 0.10 ether (“MET Contracts”).<sup>5</sup> Each ETH Contract and MET Contract settles daily to the ETH Contract volume-weighted average price (“VWAP”) of all trades that occur between 2:59 p.m. and 3:00 p.m., Central Time, the settlement period, rounded to the nearest tradable tick. ETH Contracts and MET Contracts each expire on the last Friday of the contract month, and the final settlement value for each contract is based on the CME CF Ether Dollar Reference Rate (“ETHUSD\_RR”).<sup>6</sup>

ETH Contracts and MET Contracts each trade six consecutive monthly contracts plus two additional December contract months (if the 6 consecutive months include December, only one additional December contract month is listed). Because ETH Contracts and MET Contracts are exchange-listed, they allow investors to gain exposure to ether (the native cryptocurrency to the Ethereum blockchain, herein referred to interchangeably as “Ether” or “Ethereum”) without having to hold the underlying cryptocurrency. Like a futures contract on a commodity or stock index, ETH Contracts

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<sup>5</sup> ETH Contracts began trading on the CME Globex (“Globex”) trading platform on February 8, 2021 under the ticker symbol “ETH” and are cash-settled in U.S. dollars. MET Contracts began trading on the Globex trading platform on December 6, 2021 under the ticker symbol “MET” and are also cash-settled in U.S. dollars.

<sup>6</sup> The ETHUSD\_RR is a daily reference rate of the U.S. dollar price of one ether calculated daily as of 4:00 p.m. London time. It is calculated by the CME based on the ether trading activity on CME-specified constituent spot ether exchanges during a calculation window between 3:00 p.m. and 4:00 p.m. London time. The CME launched the ETHUSD\_RR in May 2018.

and MET Contracts allow investors to hedge investment positions or speculate on the future price of Ether.

According to the Registration Statement, the Fund’s investment objective is to have the daily changes in the net asset value (“NAV”) of the Shares reflecting the daily changes in the price of the Nasdaq Ether Reference Price (NQETH) (the “Benchmark”), less expenses from the Fund’s operations. The Benchmark is designed to track the price performance of Ether. Under normal market conditions,<sup>7</sup> the Fund will invest in Ether, Ether Futures Contracts listed on the CME, and in cash and cash equivalents.<sup>8</sup> Because the Fund’s investment objective is to track the price of the Benchmark by investing in Ether and Ether Futures Contracts, changes in the price of the Shares may vary from changes in the spot price of Ether. The Benchmark is calculated using the Nasdaq Ethereum Reference Price – Settlement (the “NQETHS”).<sup>9</sup> According to the Sponsor, the NQETHS is designed to allow investors to track the price of Ether by applying a rigorous methodology to trade data captured from cryptocurrency exchanges that meet eligibility criteria of the Nasdaq Crypto Index (“NCI”). The NQETHS is calculated once every trading day through the application of a publicly available rules-based pricing methodology to a diverse collection of pricing sources to provide an institutional-grade reference price for Ethereum.<sup>10</sup> The pricing methodology is designed to account for

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<sup>7</sup> The term “normal market conditions” includes, but is not limited to, the absence of: trading halts in the applicable financial markets generally; operational issues (e.g., systems failure) causing dissemination of inaccurate market information; or force majeure type events such as a natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance. See Nasdaq Rules 4120 and 4121.

<sup>8</sup> The term “cash equivalents” includes short term Treasury bills, money market funds, and demand deposit accounts.

<sup>9</sup> See <https://indexes.nasdaqomx.com/Index/Overview/NQETHS>.

<sup>10</sup> See [https://indexes.nasdaqomx.com/docs/methodology\\_NCI.pdf](https://indexes.nasdaqomx.com/docs/methodology_NCI.pdf).

variances in price across a wide range of sources, each of which has been vetted according to criteria identified in the methodology. Specifically, the settlement value is the Time Weighted Average Price (“TWAP”) calculated across VWAPs for each minute in the settlement price window, which is between 2:50:00 and 3:00:00 P.M. New York Time. Where there are no transactions observed in any given minute of the settlement price window, that minute is excluded from the calculation of the TWAP.

According to the Sponsor, the NQETHS methodology also utilizes penalty factors to mitigate the impact of anomalous trading activity such as manipulation, illiquidity, large block trading, or operational issues that could compromise price representation. Three types of penalties are applied: abnormal price penalties, abnormal volatility penalties, and abnormal volume penalties. These penalties are defined as adjustment factors on the weight of information from each exchange that contributes pricing information based on the deviation of an exchange’s price, volatility, or volume from the median across all exchanges. For example, if a core exchange’s price is 2.5 standard deviations away from the median price, its price penalty factor will be a  $1/2.5$  multiplier.

Finally, as a means of achieving the highest degrees of confidence in the reported volume, data is sourced only from “core exchanges” that are screened, selected, and approved by the Nasdaq Crypto Index Oversight Committee (the “NCIOC”). Core exchanges must: (1) have strong forking controls; (2) have effective anti-money laundering (AML) controls; (3) have reliable and transparent application programming interface (API) that provides real-time and historical trading data; (4) charge fees for trading and structure trading incentives that do not interfere with the forces of supply and demand; (5) be licensed by a public independent governing body; (6) include surveillance

for manipulative trading practices and erroneous transactions; (7) evidence a robust IT infrastructure; (8) demonstrate active capacity management; (9) evidence cooperation with regulators and law enforcement; and (10) have a minimum market representation for trading volume. Additionally, the NCIOC conducts further diligence to assess an exchange's eligibility and will consider additional criteria such as the exchange's organizational and ownership structure, security history, and reputation; the list of existing core exchanges will be recertified by the NCIOC at minimum on an annual basis.

The Sponsor believes that the NQETHS is suitable for use in calculating the Benchmark because (i) it would provide reliable pricing for purposes of tracking the actual performance of spot Ether, (ii) it is administered by an independent index administrator, and (iii) its methodology is specifically designed to mitigate potential manipulation coming from unregulated markets. Specifically, the Sponsor believes that (i) by tracking the actual price of spot Ether, NQETHS is transparent and adequate for the Fund's investors; (ii) using a Benchmark that has its own independent index administrator provides investors the best practices in governance and accountability and benchmark quality; and (iii) the pricing methodology underlying the NQETHS is designed to be resistant to potential price manipulation by applying a robust methodology to trade data captured from NCI core exchanges, which have to meet strict criteria created by the NCIOC, thereby drawing on a diverse collection of trustworthy pricing sources to provide an institutional-grade reference price for Ether that accounts for variances in price across a wide range of sources and that adjusts to mitigate the impact of anomalous trading activity that could compromise the integrity of the NQETHS price.



According to the Registration Statement, the Fund seeks to maintain its holdings in Ether Futures Contracts with a roughly constant expiration profile. Therefore, the Fund's positions in Ether Futures Contracts will be changed or "rolled" on a regular basis by closing out first to expire contracts prior to settlement, and then entering into second to expire contracts. Accordingly, the Fund will never carry futures positions all the way to cash settlement – the Fund will price only off of the daily settlement prices of the Ether Futures Contracts.<sup>11</sup> To achieve this, the Fund will roll its futures holdings prior to cash settlement of the expiring contract.

In seeking to achieve the Fund's investment objective, the Sponsor will employ a "neutral" investment strategy that is intended to track the changes in the Benchmark regardless of whether the Benchmark goes up or goes down. The Fund will endeavor to trade in Ether and Ether Futures Contracts so that the Fund's average daily tracking error against the Benchmark will be less than 10 percent over any period of 30 trading days. The Fund's "neutral" investment strategy is designed to permit investors generally to purchase and sell the Fund's Shares for the purpose of investing in the Ether and Ether Futures Contracts (as discussed below). Such investors may include participants in the Ether market seeking to hedge the risk of losses in their Ether-related transactions, as well as investors seeking price exposure to the Ether market.

According to the Registration Statement, one factor determining the total return from investing in futures contracts is the price relationship between soon to expire contracts and later to expire contracts. If the futures market is in a state of backwardation (i.e., when the price of ETH Contracts and MET Contracts in the future is expected to be

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<sup>11</sup> As discussed in more detail below, the CME determines the daily settlements for Ether futures based on trading activity on CME Globex between 14:59:00 and 15:00:00 Central Time (CT), which is the "settlement period."

less than the current price), the Fund will buy later to expire contracts for a lower price than the sooner to expire contracts that it sells. Hypothetically, and assuming no changes to either prevailing ETH Contracts and MET Contracts' prices or the price relationship between soon to expire contracts and later to expire contracts, the value of a contract will rise as it approaches expiration. Over time, if backwardation remained constant, the performance of a portfolio would continue to be affected. If the futures market is in contango, the Fund will buy later to expire contracts for a higher price than the sooner to expire contracts that it sells. Hypothetically, and assuming no other changes to either prevailing ETH Contracts and MET Contracts' prices or the price relationship between the spot price, soon to expire contracts and later to expire contracts, the value of a contract will fall as it approaches expiration. Over time, if contango remained constant, the performance of a portfolio would continue to be affected. Frequently, whether contango or backwardation exists is a function, among other factors, of the prevailing market conditions of the underlying market and government policy.

The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage. That is, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (e.g., 2Xs, 3Xs, -2Xs, and -3Xs) of the Fund's Benchmark.

According to the Registration Statement, the Fund will seek to achieve its investment objective by investing not only in Ether Futures Contracts, but also in physical Ether to the extent allowed by the Fund's investment restrictions on spot Ether, using a pricing methodology, for purposes of calculating the Fund's NAV, that will derive spot Ether prices from Ether Futures Contracts and not from unregulated

exchanges, as further explained below (“Spot Ether”). In doing so, the Sponsor expects to provide Ether exposure to investors while still using Ether Futures Contracts in its strategy and relying on the CME as its “market of relevant size.” In particular, to avoid any exposure to potential manipulation from unregulated exchanges, the Fund’s NAV will be calculated using a Spot Ether price derived from CME futures prices, as further explained below, and the Fund expects to purchase and sell physical Ether via CME’s Exchange for Physical Transactions, which are subject to CME’s market surveillance.

#### The Ethereum Network and Ether Transactions

As discussed in further detail below, Ether is the digital asset that is native to, created and transmitted through the operations of, the peer-to-peer Ethereum network, an open-source protocol of the network of computers that operates on cryptographic protocols and governs the creation, movement, and ownership of Ether and hosts the public ledger, or “blockchain,” (“Ethereum Network”). The decentralized nature of the Ethereum Network allows parties to transact directly with one another based on cryptographic proof instead of relying on a trusted third party. No single entity owns or operates the Ethereum Network, the infrastructure of which is collectively maintained by a decentralized user base. The Ethereum Network allows people to exchange tokens of value and settle multiple types of data, which are recorded on the blockchain.

Ether is the native token for the Ethereum Network. Such a statement implies that, in order to settle any information on the Ethereum Network, there will be a fee (named “gas fee”) to be paid in Ether, in order to use that block space. Ether may be also used as a medium of exchange, unit of account or store of value. Ethers exist and are stored on the blockchain, which serves as the decentralized transaction ledger for the Ethereum Network. All transactions, including the creation of new ethers through

staking, are recorded on the blockchain, ensuring the verification of each ether's location in specific digital wallets.

The responsibility for maintaining the Ether Account lies with the Ether Custodian, who utilizes cold storage mechanisms for the vault account. Digital wallets can be accessed using their respective private keys, which are held by the Ether Custodians in cold storage at various vaulting locations. The locations of these vaulting premises are kept confidential to enhance security. "Cold storage" refers to a safeguarding method where private keys associated with ethers are kept offline, away from internet-connected devices. This could involve storing the private keys on a non-networked computer or electronic device. To send ethers from a digital wallet with private keys in cold storage, the private keys must be retrieved and entered into an ether software program for transaction signing, or the unsigned transaction is sent to a "cold" server where the private keys are held for signature.

The Ethereum Network is decentralized and does not require governmental authorities or financial institution intermediaries to create, transmit, or determine the value of Ether. In addition, no party may easily censor transactions on the Ethereum Network. As a result, the Ethereum Network is often referred to as decentralized and censorship resistant.

The value of Ether is determined by the supply of and demand for Ether. New tokens are created (or "minted") and rewarded to the parties providing security to the Ethereum Network (the "stakes"), by staking their own Ether and running a computer node in order to verify transactions and add them to the blockchain.

### The Crypto Industry Has Progressed and Matured Significantly

Ether and Bitcoin are the two largest and most well-known cryptoassets. In a similar vein to the Ethereum Network, the bitcoin network governs the creation, transaction, and ownership of its native token (“Bitcoin” and “Bitcoin Network”). The Bitcoin Protocol was launched in 2009 and lays out the rate of issuance of new Bitcoins within the Bitcoin Network, a rate that is reduced by half approximately every four years with an eventual hard cap of 21 million. It is generally understood that the combination of these two features – a systemic hard cap of 21 million Bitcoin and the ability to transact with anyone connected to the Bitcoin Network – gives Bitcoin its value.

After “The Merge,” which marked the merging of Ethereum’s original execution layer with its new “proof-of-stake” consensus layer, known as the Beacon Chain, a significant change occurred. This modification eliminated the resource-intensive mining process, replacing it with the option to secure the network through the utilization of staked Ether. In October 2022, Ether supply dynamics transitioned as more Ether was burned verifying transactions than was created in the same period, which became a constant trend ever since that period. This behavior, similar to Bitcoin’s capped supply (limited to 21 million), plays a significant role in influencing its long-term price dynamics.

The first rule filing proposing to list an exchange-traded product to provide exposure to crypto in the U.S. was submitted by the Cboe BZX Exchange, Inc. on June 30, 2016.<sup>12</sup> At that time, blockchain technology, and digital assets that utilized it, were

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<sup>12</sup> See Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, to List and Trade Shares of the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August

relatively new to the broader public. No registered offering of digital asset securities or shares in an investment vehicle with exposure to a digital asset had yet been conducted, and the regulated infrastructure for conducting a digital asset securities offering had not begun to develop. Conversely, the first rule filing proposing to list an exchange-traded product to provide exposure to Ether in the U.S. was submitted on August 18, 2021.<sup>13</sup> When CME Globex began trading ETH Contracts in February 2021, the digital assets financial ecosystem had progressed, and matured significantly.

The development of a regulated market for digital asset securities has significantly evolved, with market participants having conducted registered public offerings of both digital asset securities and shares in investment vehicles holding crypto futures. Additionally, licensed, and regulated service providers have emerged to provide fund custodial services for digital assets, among other services. For example, in December 2020, the Commission adopted a conditional no-action position permitting certain special purpose broker-dealers to custody digital asset securities under Rule 15c3-3 under the Exchange Act.<sup>14</sup> In September 2020, the Commission released a no-action letter permitting certain broker-dealers to operate a non-custodial Alternative Trading System (“ATS”) for digital asset securities, subject to specified conditions.<sup>15</sup> In October 2019, the Commission granted temporary relief from the clearing agency registration

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1, 2018) (the “Winklevoss II Order”). This proposal was subsequently disapproved by the Commission.

<sup>13</sup> See <https://www.nasdaq.com/articles/vaneck-proshares-abruptly-withdraw-ether-futures-etf-proposals-2021-08-20>

<sup>14</sup> See Securities Exchange Act Release No. 90788, 86 FR 11627 (February 26, 2021) (File Number S7-25-20) (Custody of Digital Asset Securities by Special Purpose Broker-Dealers).

<sup>15</sup> See Letter from Elizabeth Baird, Deputy Director, Division of Trading and Markets, U.S. Securities and Exchange Commission to Kris Dailey, Vice President, Risk Oversight & Operational Regulation, Financial Industry Regulatory Authority (September 25, 2020), available at: <https://www.sec.gov/divisions/marketreg/mr-noaction/2020/finra-ats-role-in-settlement-of-digital-asset-security-trades-09252020.pdf>.

requirement to an entity seeking to establish a securities clearance and settlement system based on distributed ledger technology;<sup>16</sup> and multiple transfer agents who provide services for digital asset securities have registered with the Commission.<sup>17</sup>

Beyond the Commission's purview, the regulatory landscape has also changed significantly since 2016, and cryptocurrency markets have grown and evolved as well. The U.S. Office of the Comptroller of the Currency (the "OCC") has made clear that federally chartered banks are able to provide custody services for cryptocurrencies and other digital assets.<sup>18</sup> The OCC recently granted conditional approval of two charter conversions by state-chartered trust companies to national banks, both of which provide cryptocurrency custody services.<sup>19</sup> NYDFS has granted no fewer than twenty-five BitLicenses, including to established public payment companies like PayPal Holdings, Inc. and Square, Inc., and limited purpose trust charters to entities providing cryptocurrency custody services. The U.S. Treasury Financial Crimes Enforcement Network ("FinCEN") has released extensive guidance regarding the applicability of the Bank Secrecy Act ("BSA") and implementing regulations to virtual currency

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<sup>16</sup> See Letter from Jeffrey S. Mooney, Associate Director, Division of Trading and Markets, U.S. Securities and Exchange Commission to Charles G. Cascarilla & Daniel M. Burstein, Paxos Trust Company, LLC (October 28, 2019), available at: <https://www.sec.gov/divisions/marketreg/mr-noaction/2019/paxos-trust-company-102819-17a.pdf>.

<sup>17</sup> See, e.g., Form TA-1/A filed by Tokensoft Transfer Agent LLC (CIK: 0001794142) on January 8, 2021, available at: [https://www.sec.gov/Archives/edgar/data/1794142/000179414219000001/xsIFTA1X01/p\\_rimary\\_doc.xml](https://www.sec.gov/Archives/edgar/data/1794142/000179414219000001/xsIFTA1X01/p_rimary_doc.xml).

<sup>18</sup> See OCC News Release 2021-2 (January 4, 2021), available at: <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-2.html>.

<sup>19</sup> See OCC News Release 2021-6 (January 13, 2021), available at: <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-6.html> and OCC News Release 2021-19 (February 5, 2021), available at: <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-19.html>.

businesses,<sup>20</sup> and has proposed rules imposing requirements on entities subject to the BSA that are specific to the technological context of virtual currencies.<sup>21</sup> In addition, the Treasury’s Office of Foreign Assets Control (“OFAC”) has brought enforcement actions over apparent violations of the sanction’s laws in connection with the provision of wallet management services for digital assets.<sup>22</sup>

In addition to the mentioned regulatory advancements, there is a noticeable trend of increased acceptance of digital assets among traditional financial market participants. Notably, major insurance companies,<sup>23</sup> investment banks,<sup>24</sup> asset managers,<sup>25</sup> credit card

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<sup>20</sup> See FinCEN Guidance FIN-2019-G001 (May 9, 2019) (Application of FinCEN’s Regulations to Certain Business Models Involving Convertible Virtual Currencies), available at: <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>.

<sup>21</sup> See U.S. Department of the Treasury Press Release: “The Financial Crimes Enforcement Network Proposes Rule Aimed at Closing Anti-Money Laundering Regulatory Gaps for Certain Convertible Virtual Currency and Digital Asset Transactions” (December 18, 2020), available at: <https://home.treasury.gov/news/press-releases/sm1216>.

<sup>22</sup> See U.S. Department of the Treasury Enforcement Release: “OFAC Enters Into \$98,830 Settlement with BitGo, Inc. for Apparent Violations of Multiple Sanctions Programs Related to Digital Currency Transactions” (December 30, 2020), available at: [https://home.treasury.gov/system/files/126/20201230\\_bitgo.pdf](https://home.treasury.gov/system/files/126/20201230_bitgo.pdf).

<sup>23</sup> On December 10, 2020, Massachusetts Mutual Life Insurance Company (MassMutual) announced that it had purchased \$100 million in Bitcoin for its general investment account. See MassMutual Press Release “Institutional Bitcoin provider NYDIG announces minority stake purchase by MassMutual” (December 10, 2020), available at: <https://www.massmutual.com/about-us/news-and-press-releases/press-releases/2020/12/institutional-bitcoin-provider-nydig-announces-minority-stake-purchase-by-massmutual>.

See, e.g., “Morgan Stanley to Offer Rich Clients Access to Bitcoin Funds” (March 17, 2021) available at: <https://www.bloomberg.com/news/articles/2021-03-17/morgan-stanley-to-offer-rich-clients-access-to-bitcoin-funds>.

<sup>25</sup> See, e.g., “BlackRock’s Rick Rieder says the world’s largest asset manager has ‘started to dabble’ in Bitcoin” (February 17, 2021), available at: <https://www.cnbc.com/2021/02/17/blackrock-has-started-to-dabble-in-bitcoin-says-rick-rieder.html> and “Guggenheim’s Scott Miner Says Bitcoin Should Be Worth \$400,000” (December 16, 2020), available at: <https://www.bloomberg.com/news/articles/2020-12-16/guggenheim-s-scott-miner-says-bitcoin-should-be-worth-400-000>.



companies,<sup>26</sup> university endowments,<sup>27</sup> pension funds,<sup>28</sup> and even previously crypto-wary fund managers<sup>29</sup> are now allocating funds to the crypto space.

The Ether Futures Market Has Developed Alongside the Ether Spot Market into a Strong and Viable Marketplace that Stands On Its Own

CME began offering trading in Ether Futures Contracts in 2021, and each of the contract's final cash settlement is based on the CME CF Ether Dollar Reference Rate (the "ETHUSD\_RR").<sup>30</sup> The contracts trade and settle like other cash-settled commodity futures contracts. According to the Sponsor, trading in CME Ether futures contracts has increased significantly, in particular with respect to ETH Contracts. Nearly every measurable metric related to ETH Contracts has trended consistently up since launch and/or accelerated upward. For example, there was approximately \$12.53 billion in trading in ETH Contracts in July 2023 compared to \$7.53 billion in total trading in December 2022. ETH Contracts traded over \$544.78 million per day in July 2023 and represented \$403.58 million in open interest compared to \$337.99 million in December

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<sup>26</sup> See, e.g., "Visa Moves to Allow Payment Settlements Using Cryptocurrency" (March 29, 2021), available at: <https://www.reuters.com/business/autos-transportation/exclusive-visa-moves-allow-payment-settlements-using-cryptocurrency-2021-03-29/>.

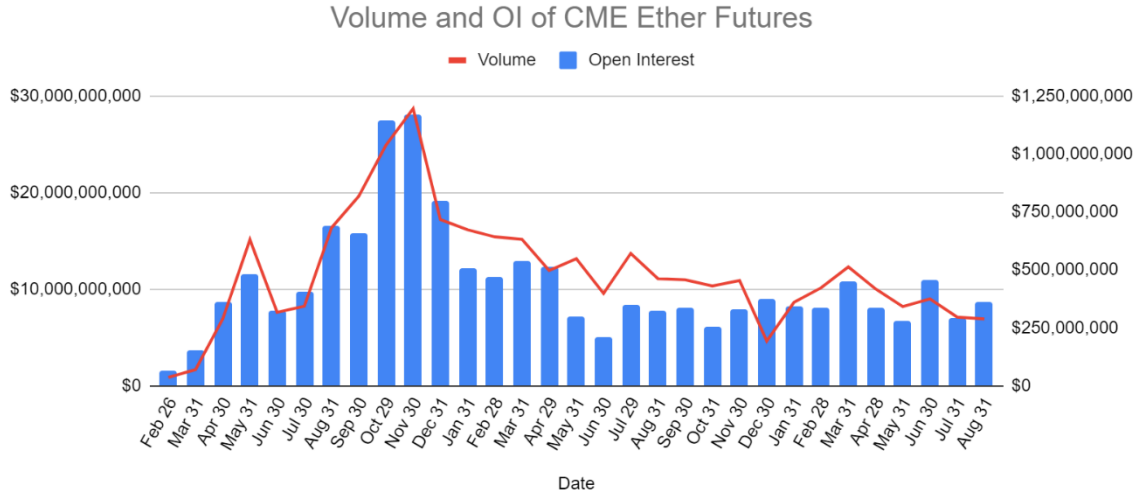
<sup>27</sup> See, e.g., "Harvard and Yale Endowments Among Those Reportedly Buying Crypto" (January 25, 2021), available at: <https://www.bloomberg.com/news/articles/2021-01-26/harvard-and-yale-endowments-among-those-reportedly-buying-crypto>.

<sup>28</sup> See, e.g., "Virginia Police Department Reveals Why its Pension Fund is Betting on Bitcoin" (February 14, 2019), available at: <https://finance.yahoo.com/news/virginia-police-department-reveals-why-194558505.html>.

<sup>29</sup> See, e.g., "Bridgewater: Our Thoughts on Bitcoin" (January 28, 2021) available at: <https://www.bridgewater.com/research-and-insights/our-thoughts-on-bitcoin> and "Paul Tudor Jones says he likes bitcoin even more now, rally still in the 'first inning'" (October 22, 2020), available at: <https://www.cnbc.com/2020/10/22/-paul-tudor-jones-says-he-likes-bitcoin-even-more-now-rally-still-in-the-first-inning.html>.

<sup>30</sup> According to the CME, the ETHUSD\_RR aggregates the trade flow of major Ether spot exchanges during a specific calculation window into a once-a-day reference rate of the U.S. dollar price of Ether. Calculation rules are geared toward maximum transparency and real-time replicability in underlying spot markets, including Bitstamp, Coinbase, Gemini, itBit, and Kraken. For additional information, refer to <https://www.cmegroup.com/trading/files/ether-futures-fact-card-launch.pdf>.

2022. This general upward trend in trading volume and open interest is captured in the following chart.



Similarly, the number of large open interest holders has continued to increase even as the price of Ether has risen, as have the number of unique accounts trading Ether Futures Contracts.<sup>31</sup>

#### The Structure and Operation of the Trust Satisfies Commission Requirements for Cryptocurrencies-Based Exchange Traded Products

The Sponsor believes that the Fund's holding a combination of Ether Futures Contracts, Spot Ether, and cash could significantly mitigate the risk of market manipulation while still providing the market with a regulated product that tracks the actual price of Ethereum, creating a secure way for U.S. investors to gain exposure to Spot Ether without having to rely on unregulated products, offshore regulated products, or indirect strategies such as investing in publicly traded companies that hold Ether.

In determining whether to approve listing and trading of new exchange-traded products ("ETPs"), the Commission conducts a thorough analysis to ensure the proposal

<sup>31</sup> See <https://www.cmegroup.com/newsletters/quarterly-cryptocurrencies-report/2022-q3-cryptocurrency-recap.html>.

is consistent with Section 6(b)(5) of the Act. Section 6(b)(5) of the Act mandates that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest. With respect to ETPs, the Commission often considers how the listing exchange would access necessary information to detect and deter market manipulation, illegal trading, and other abuses, which listing exchanges may accomplish by entering into a comprehensive surveillance-sharing agreement (“CSSA”) with other entities, such as the markets trading the ETP’s underlying assets. Historically, for commodity-trust ETPs, there has always been at least one regulated market of significant size for trading futures on the underlying commodity — whether gold, silver, platinum, palladium, or copper. Then, the listing exchange would enter into CSSA with, or hold Intermarket Surveillance Group (“ISG”) membership in common with, that regulated market.<sup>32</sup> As the Commission has stated, it considers two markets to have a comprehensive surveillance-sharing agreement with one another if they are both members of the ISG, even if they do not have a separate bilateral surveillance-sharing agreement.

In the context of Ethereum, the CME Ether Futures Market (the “CME Market”) is currently the only regulated market in the U.S.

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<sup>32</sup> See Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To List and Trade Shares of the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 at 37592-94 (Aug. 1, 2018) (SR-BatsBZX-2016-30) (the “Winklevoss Order”); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the Bitwise Bitcoin ETF Trust Under NYSE Arca Rule 8.201-E, Securities Exchange Act Release No. 87267 (Oct. 9, 2019), 84 FR 55382 at 55383, 55410 (Oct. 16, 2019) (SR-NYSEArca-2019-01) (the “Bitwise Order”); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to Amend NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares) and to List and Trade Shares of the United States Bitcoin and Treasury Investment Trust Under NYSE Arca Rule 8.201-E, Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 at 12609 (March 3, 2020) (SR-NYSEArca-2019-39) (the “Wilshire Phoenix Order”).

The Commission has previously interpreted the terms “significant market” and “market of significant size” to include a market (or group of markets) where:

1. 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, such that a surveillance-sharing agreement would assist the ETP listing market in detecting and deterring misconduct; and
2. It is unlikely that trading in the ETP would be the predominant influence on prices in that market.<sup>33</sup>

With respect to the first prong of the Commission’s interpretation, the Commission has previously explained that the lead/lag relationship between the Bitcoin futures market and the spot market is central to understanding this first prong. With respect to the second prong, the Commission’s prior analysis has focused on the potential size and liquidity of the ETP compared to the size and liquidity of the market.

The Commission recognized in the Teucrium Approval Order<sup>34</sup> that “the CME [Market] is a ‘significant market’ related to CME bitcoin futures contracts,” and thus that the Exchange has entered into the requisite surveillance-sharing agreement with respect to its Bitcoin Futures Contracts holdings. However, there is still a lack of consensus on whether the CME Market is of “significant size” in relation to the spot Bitcoin or Ether market based on the test historically applied by the Commission.

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<sup>33</sup> See, e.g., Winklevoss Order, 83 FR at 37594. The Commission further noted that “[t]here could be other types of ‘significant markets’ and ‘markets of significant size,’ but this definition is an example that will provide guidance to market participants.” Id.

<sup>34</sup> See Securities Exchange Act Release No. 34-94620 (April 6, 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)) (the “Teucrium Approval Order”).

### Interrelationship between the CME and the Fund

The Commission has previously stated that “the interpretation of the term market of significant size depends on the interrelationship between the market with which the listing exchange has a surveillance-sharing agreement and the proposed ETP.”<sup>35</sup> The Sponsor intends to adopt an innovative approach to mitigate the risks of fraud and manipulation that are unique to the Fund. The core principle of this approach would be to structure the operation of the Fund such that the regulated market of significant size in relation to the Fund is the CME Market because it is the same market on which the Fund trades its non-cash assets. Therefore, the Sponsor’s strategy aims to establish a comprehensive interrelationship between the CME Market and the Fund to unequivocally classify the CME Market as the market of significant size in relation to the ETP. The Sponsor notes that, although the Fund may, as proposed, hold physical ether, it does not rely on any information or services from unregulated ether spot exchanges (such as Coinbase or Binance). Therefore, no spot ether exchange could be considered a “market of relevant size” in relation to the Fund.

The Sponsor has designed the Fund to have five features that underscore its significant interrelationship with the CME:

- 1. Investment strategy:** The Fund will hold a mix of Ether Futures Contracts, Spot Ether, and cash and cash equivalents, subject to certain investment restrictions (as further discussed below).

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<sup>35</sup> See Securities Exchange Act Release No. 95180 (June 29, 2022), 87 FR 40299 at 40312 (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)).

**2. Futures-based pricing for Spot Ether:** The price determination for Spot Ether holdings in the NAV calculation will be derived from the CME Market's Ether futures curve. As a result, the price of Spot Ether holdings will depend solely on Ether futures settlement prices on the CME Market and will not depend directly on price information from unregulated spot Ether markets (as further below).

**3. Investment restrictions on Spot Ether:** The Fund will be subject to dynamic investment restrictions that are designed to mitigate the risk that Shares of the Fund could be manipulated by manipulating the Ether spot market and ensuring that the CME Market is the only "market of significant size" with respect to the Fund.

**4. Physical Ether purchases on the CME Market:** The Fund will use the CME Market's Exchange for Physical ("EFP")<sup>36</sup> transactions to acquire and dispose of Spot Ether, instead of transactions on unregulated spot exchanges. Moreover, as described below, the transactions are quoted as basis points over the Ethereum futures contracts prices, creating a direct and unequivocal lead-lag relationship between the prices on CME and the spot market transaction prices that the Fund engages. Accordingly, the only non-cash assets held by the Fund (Ether Futures Contracts and Ether via EFP) would be traded on the CME Market, such that the exchanges' ability to share information pursuant to their common ISG membership could assist in detecting and deterring fraudulent or manipulative misconduct related to those assets.

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See <https://www.cmegroup.com/trading/equity-index/exchange-for-physical-efp-transactions.html>.

**5. Creations and redemptions:** The Fund will use cash creations and redemptions<sup>37</sup> to deter intraday Share price manipulation that could originate from in kind creation or redemption from physical spot Ether sourced in unregulated spot markets. Investment in Spot Ether thus would not be directly related to creation/redemptions, but instead on target portfolio exposure, as allowed by the investment restrictions on spot Ether. Trading for Spot Ether could thus be accomplished in smaller sizes and at unpredictable times, reducing the risk of manipulation in the creation or redemption processes.

The Sponsor believes that these features of the Fund are designed to provide a robust framework for mitigating the risks of market manipulation, thereby protecting investors, and maintaining the integrity of the market, and further believes that, given these features of the Fund, the CME Market would be considered the regulated market of significant size in relation to the Fund.

Additionally, as further discussed below, the Sponsor believes that the Fund investment strategy is designed such that it would be highly unlikely that a person attempting to manipulate the Fund could be successful by trading on unregulated spot and derivatives markets. Thus, no market other than CME could be considered as of significant size in relation to the Fund.

The Sponsor further believes that the novel approach proposed is in line with the first prong of the Commission's interpretation of the definition of "regulated market of significant size" as to the CME Market and that there is a reasonable likelihood that a person attempting to manipulate the Fund would also have to trade on the CME Market

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<sup>37</sup> In a cash creation/redemption format, the AP delivers cash to the fund instead of Spot Ether.

to successfully manipulate the ETP (and, accordingly, the exchange's common ISG membership would aid the Exchange in detecting and deterring potential misconduct).

According to the Sponsor, the Sponsor's approach is designed in such a way that any attempt to manipulate the Fund would require trading on the CME Market, for the following reasons:

1. **Futures-based pricing for Spot Ether:** Because the price determination for Spot Ether holdings in the Fund would be derived from the CME Market futures curve, any attempt to manipulate the price of the Fund would require influencing the futures curve on the CME Market because the spot price (which could be a target for manipulation) does not directly influence the price of the Fund. There is thus a direct and unequivocal lead-lag relationship in which CME Market prices lead both the spot price used by the Fund to determine its NAV and the Fund's market price.
2. **Investment restrictions on Spot Ether:** The dynamic investment restrictions in place for the Fund (as discussed in the section below entitled "Investment Restrictions on Spot Ether") ensure that any significant trading activity aimed at the Fund would likely spill over into the CME Market because the investment restrictions are designed to prevent the Fund from becoming so large in relation to the unregulated spot market that the cost-benefit tradeoff is favorable for the potential manipulator to execute without influencing the futures market.
3. **Spot Ether operations via EFP on the CME Market:** Because the Fund's Spot Ether operations would take place via CME Market EFP



transactions, any attempt to manipulate the Fund's transactions in Spot Ether holdings would need to occur on the CME Market. Accordingly, any potential manipulation of the Fund is closely tied to the CME Market.

4. **Creations and redemptions:** The Fund's use of cash creations and redemptions also reduces the potential for manipulation through the creation and redemption processes. Any significant creation or redemption activity aimed at manipulating the Fund would likely influence the futures market, given that the investment in spot is based on target portfolio exposure and not directly related to creations or redemptions.

Given these factors, the Sponsor believes that the Exchange and CME Market's common membership in the ISG would be an effective tool in assisting the Exchange in detecting and deterring potential misconduct. The agreement would provide the Exchange with access to necessary trading data from the CME Market, which is intrinsically linked to the Fund, allowing for comprehensive oversight and the ability to quickly identify and investigate any suspicious trading activity.

The Sponsor believes that trading in the Fund is unlikely to have a predominant impact on prices in the CME Market, primarily due to the volume and size of the CME futures market, and the significant liquidity available in the spot market. In addition, considering the Investment Restrictions on Spot Ether detailed below, the holding of Ether Spot by the Fund will not alter its impact on prices in the "significant market".

In relation to crypto futures market, the Commission has previously stated that the CME "comprehensively surveils futures market conditions and price movements on a

real-time and ongoing basis in order to detect and prevent price distortions, including price distortions caused by manipulative efforts” and that the “CME’s surveillance can reasonably be relied upon to capture the effects on the CME bitcoin futures market caused by a person attempting to manipulate the [Fund] by manipulating the price of CME Bitcoin Futures Contracts, whether that attempt is made by directly trading on the CME bitcoin futures market or indirectly by trading outside of the CME bitcoin futures market.”<sup>38</sup> The Commission further noted that, as a result, “when the CME shares its surveillance information with Arca, the information would assist in detecting and deterring fraudulent or manipulative misconduct related to the non-cash assets held by the [Fund]”.<sup>39</sup> The Sponsor further believes that CME surveillance can be relied upon to capture any possible manipulation of the CME Ether futures markets, even when the attempt is made indirectly by trading outside the CME in unregulated markets.

When discussing the second prong of the analysis in the Teucrium Approval Order, the Commission observed that the CME bitcoin futures market has progressed and matured significantly, and nearly every measurable metric related to bitcoin futures contracts has trended consistently up since the launch of 1940 Act<sup>40</sup>-registered bitcoin futures ETFs. This fact persuaded the Commission that trading in the proposed ETP is not likely to be the predominant influence on prices in the CME bitcoin futures market. In that case, the Commission concluded that the CME bitcoin futures market had sufficiently developed to support ETPs seeking exposure to bitcoin by holding CME futures contracts.

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<sup>38</sup> See Teucrium Approval Order of the Hashdex Bitcoin Futures ETF, 87 FR at 21679.

<sup>39</sup> Id.

<sup>40</sup> Investment Company Act of 1940 (“1940 Act”).

The Sponsor understands that a similar effect would happen to Ether: the approval of Ether products could potentially facilitate the maturation of the market. Moreover, based on the Commission's findings regarding the Bitcoin futures market, the Sponsor anticipates that the approval of the proposed ETP is unlikely to significantly impact prices in the CME Ether futures market. Market dynamics and the influence of these cryptocurrencies-based products on prices are expected to follow comparable patterns. Just as the bitcoin futures ETF did not disrupt the CME bitcoin futures market's equilibrium, the Sponsor anticipates a similar behavior upon the introduction of an Ether-based ETP.

Nevertheless, the Sponsor believes that the analysis below illustrates that the progress observed in the Ether Futures Contracts and Ether Spot markets in the last few years is on par with what was observed for the bitcoin futures and spot markets right before the approval of the 1940 Act-registered bitcoin futures ETFs. Nearly every measurable metric related to Ether is trending up and the Ether market is still growing in volume and liquidity, approaching the size of markets for other commodity interests.

As the CME Market continues to develop and more closely resemble other commodity futures markets, the Sponsor believes that it is reasonable to expect that the relationship between the Ether futures market and Ether spot market will behave similarly to other future/spot market relationships, where the spot market may have no relationship to the futures market (although the current proposal does not depend on such similarity).

Despite the negative price performance of Ether in 2022, there has been significant growth in CME Ether Futures Markets relative to unregulated spot and derivatives markets. The Sponsor also notes that in the same period during which CME

Market trading volume increased 11.3%, the trading volume of unregulated Ether futures and spot markets had a significant drawdown of 38%.

TRADING VOLUME			
	August 31, 2022	August 31, 2023	1-year % variation
CME Ether Futures Market <sup>41</sup>	\$327 million	\$364 million	11.3%
Unregulated Futures Market <sup>42</sup>	\$7,930 million	\$4,930 million	-37.8%
Spot Ether Market <sup>43</sup>	\$7,950 million	\$4,930 million	-38%

The Sponsor believes that the data above suggests an increase in market appetite for regulated products (e.g., CME Market Ether futures) vis-a-vis a significant decrease in interest for unregulated products (e.g., unregulated futures and spot Ether).

The Sponsor further considers that the CME Market managed to maintain its open interest level despite the price volatility that Ether experienced in 2022, demonstrating its resilience and that it is sufficiently developed such that it is unlikely that trading in the Fund would be the predominant influence on its prices.

CHICAGO MERCANTILE EXCHANGE ETHER FUTURES		
	August 31, 2022	August 31, 2023
Open Interest	207,650 ETH	219,650 ETH

<sup>41</sup> Data in this table is sourced from: Bloomberg.

<sup>42</sup> <https://www.theblock.co/data/crypto-markets/futures>.

<sup>43</sup> <https://www.coinglass.com/currencies/ETH>.

The CME Market is also sufficiently developed to support ETPs that seek exposure to Ether by holding a mix of CME Market Ether Futures Contracts and physical Ether through the use of CME Market EFP transactions, and thus the CME Market is the only market on which the Fund's only proposed non-cash assets would trade. Thus, the CME Market remains the "significant market" in relation to the Fund, as proposed.

Moreover, as detailed above, the Sponsor's proposed investment strategy ensures that no unregulated spot exchange could be considered a "market of relevant size" in relation to the Fund, given that the Fund does not rely on any information or services coming from unregulated markets. All of the Fund's operations, including the purchase and sale of spot Ether and its NAV determination, are conducted through the CME Market. Thus, all transactions are registered and monitored on a regulated exchange, providing an additional layer of security and transparency. Because any attempt to manipulate the Fund would require significant trading on the CME Market, and not on any unregulated spot Ether exchange, there is significantly reduced potential for manipulation and fraud, further protecting investors and maintaining the integrity of the market.

The Sponsor further believes that the holding of Spot Ether would not significantly alter the influence of the Fund's trading on the CME Market. The Spot Ether in the Fund's portfolio would be converted from futures positions using EFP transactions on the CME Market. The Fund's Spot Ether holdings would thus be directly linked to the futures market and would not introduce a new, independent variable that could significantly influence the futures market. Indeed, because both sides of the trade track the same benchmark, an EFP is market-neutral and, as such, the pricing of an EFP

is quoted in terms of the basis between the price of the futures contract and the level of the underlying index.

Additionally, the dynamic investment restrictions and futures-based pricing for Spot Ether would ensure that the Fund's Spot Ether holdings remain at a level where they are unlikely to impact the futures market significantly and that the futures market continues to influence the price of the Fund's Spot Ether holdings (and not the other way around).

The Sponsor believes that, even with the holding of Spot Ether by using EFP transactions on the CME Market, the Fund's trading would not become the predominant influence on prices of the futures market. Therefore, considering the maturation of the CME Ether futures market since its inception, including but not limited to the overall size, volume, liquidity, and number of years of trading, the Sponsor considers that the second prong of the standard for "market of significant size" has been established.

In reviewing prior proposals to list and trade shares of various cryptoassets-based trust issued receipts, the Commission noted that some of such proposals did not adequately demonstrate that they were designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest, consistent with Section 6(b)(5) of the Act.<sup>44</sup> The Commission does not apply a "cannot be manipulated"

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<sup>44</sup> See, e.g., 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, Securities Exchange Act Release No. 80206 (March 10, 2017), 82 FR 14076 (March 16, 2017) (SR-BatsBZX-2016-30) (the "Winklevoss I Order"); the Winklevoss II Order; Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the Bitwise Bitcoin ETF Trust Under NYSE Arca Rule 8.201-E, Securities Exchange Act Release No. 87267 (October 9, 2019), 84 FR 55382 (October 16, 2019) (SR-NYSEArca-2019-01) (the "Bitwise Order"); the Wilshire Phoenix Order; Order Disapproving a Proposed Rule Change to List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF, Securities Exchange Act Release No. 83904 (August 22, 2018), 83 FR 43934 (August 28, 2018) (SR-NYSEArca-2017-139); Order Disapproving a

standard, but instead seeks to examine whether a proposal meets the requirements of the Act.<sup>45</sup> The Commission has explained that a proposal could satisfy the requirements of the Act in the first instance by demonstrating that the listing exchange has entered into a CSSA with a regulated “market of significant size” related to the underlying or reference crypto-assets.<sup>46</sup> The Commission has also recognized that a listing exchange would not necessarily need to enter into such an agreement with a regulated significant market if the underlying commodity market inherently possessed a unique resistance to manipulation beyond the protections that are utilized by traditional commodity or securities markets or if the listing exchange could demonstrate that there were sufficient “other means to prevent fraudulent and manipulative acts and practices.”<sup>47</sup> As the Commission explained in the Teucrium Approval Order, the approval of that fund was based on a finding that the CME is a “significant market” related to the exclusive non-cash holdings of the proposed ETPs, which in that case would be CME bitcoin futures contracts.<sup>48</sup>

As described below, the Sponsor believes the structure and operation of the Trust are designed to prevent fraudulent and manipulative acts and practices, to protect investors and the public interest, and to respond to the specific concerns that the

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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, Securities Exchange Act Release No. 83912 (August 22, 2018), 83 FR 43912 (August 28, 2018) (SR-NYSEArca-2018-02); Order Disapproving a Proposed Rule Change to List and Trade the Shares of the GraniteShares Bitcoin ETF and the GraniteShares Short Bitcoin ETF, Securities Exchange Act Release No. 83913 (August 22, 2018), 83 FR 43923 (August 28, 2018) (SR-CboeBZX-2018-01) (the “GraniteShares Order”).

<sup>45</sup> See Winklevoss II Order, 83 FR at 37582.

<sup>46</sup> See Wilshire Phoenix Order, 85 FR at 12596-97.

<sup>47</sup> See Winklevoss II Order, 83 FR at 37580, 37582-91; Bitwise Order, 84 FR at 55383, 55385-406; Wilshire Phoenix Order, 85 FR at 12597.

<sup>48</sup> See Teucrium Approval Order.

Commission has identified with respect to potential fraud and manipulation in the context of a crypto product. Further, as the Commission has previously acknowledged, trading in an Ether-based ETP on a national securities exchange, as compared to trading in an unregulated Ether spot market, may provide additional protection to investors.<sup>49</sup> The Sponsor also believes that listing of the Shares on the Exchange will provide investors with such an opportunity to obtain exposure to Ether within a regulated environment.

#### Futures-Based Spot Price (“FBSP”)

The value of Spot Ether held by the Fund would be determined by the Sponsor and by Hashdex Asset Management Ltd. (the “Digital Asset Adviser”) in good faith based on a methodology that is entirely derived from the settlement prices of Ether Futures Contracts on the CME Market and that considers all available facts and all available information on the valuation date.

The method involves a calculation that is sensitive to both the length of time (the “tenor”) until each Ether Futures Contract is due for settlement and the final settlement price for each contract. The calculation takes into account each contract’s tenor and the tenor squared. This approach is designed to give more importance to contracts that are due for settlement in the near term, considering that the prices of these near-term contracts are more reliable indicators of the current spot price of Ether and are also more heavily traded. The calculation produces a set of weighting factors, with each factor indicating the contribution of the corresponding Ether Futures Contract to the estimated

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<sup>49</sup> See GraniteShares Order, 83 FR at 43931. See also Hester M. Peirce, U.S. Sec. Exch. Comm’n, Dissent of Commissioner Hester M. Peirce to Release No. 34-83723 (July 26, 2018), available at: <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. If we were to approve the ETP at issue here, investors could choose whether to buy it or avoid it.”).



current spot price of Ether. The estimated spot price is the component of the result corresponding to a tenor of zero days. The Sponsor and Digital Asset Advisor do not use data from Ether exchanges or directly from spot Ether trading activity in determining the value of Spot Ether held by the Fund.

As an example, the table below demonstrates how the weights of each hypothetical Ether Futures Contract change over time as the first contract gets closer to maturity.

Future	First future tenor				
	27 days	21 days	15 days	9 days	3 days
1st	130.81%	125.92%	120.39%	113.79%	105.33%
2nd	1.91%	-0.84%	-2.94%	-3.80%	-2.26%
3rd	-8.92%	-7.57%	-5.86%	-3.76%	-1.31%
4th	-9.19%	-7.05%	-4.89%	-2.78%	-0.83%
5th	-7.81%	-5.73%	-3.78%	-2.02%	-0.57%
6th	-6.26%	-4.47%	-2.86%	-1.47%	-0.39%
9th	-2.61%	-1.76%	-1.05%	-0.50%	-0.12%
12th	-0.29%	-0.14%	-0.04%	0.01%	0.01%
18th	2.35%	1.65%	1.04%	0.53%	0.14%
Total	100.00%	100.00%	100.00%	100.00%	100.00%

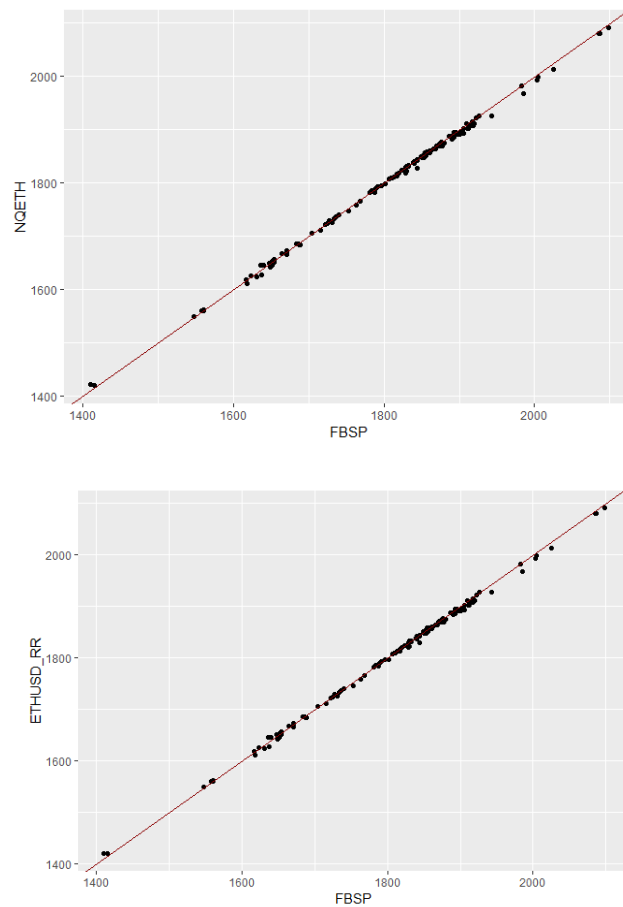
The Sponsor believes that the accuracy of the proposed pricing methodology can be measured by comparing its pricing results to the real time version of Ether price benchmarks such as ETHUSD\_RR and NQETHS. FBSP is derived from futures settlement prices, which are usually VWAPs from all contracts traded on Globex between 14:59:00 and 15:00:00 Central Time (“CT”). Accordingly, for purposes of developing a useful proxy, the Sponsor’s analysis uses the arithmetic average of the Benchmark closing prices at 14:59:00 and 15:00:00 CT, which is not sensitive to the fluctuations that

occur within this minute. By design, this difference in the price metric introduces an artificial distortion in the comparison, resulting in figures that are less adherent than in reality. Therefore, the figures set forth below represent a conservative estimation of the true adherence between FBSP and the Benchmark, considering that the actual adherence to the Benchmark is higher than these results can indicate.<sup>50</sup>

Using data available on Bloomberg on August 28, 2023, the Sponsor compared FBSP to NQETHS and ETHUSD\_RR from February 16, 2023 to August 28, 2023 and determined that FBSP behaves very similarly to both indexes. The following charts show a direct comparison between those two benchmark values and FBSP:

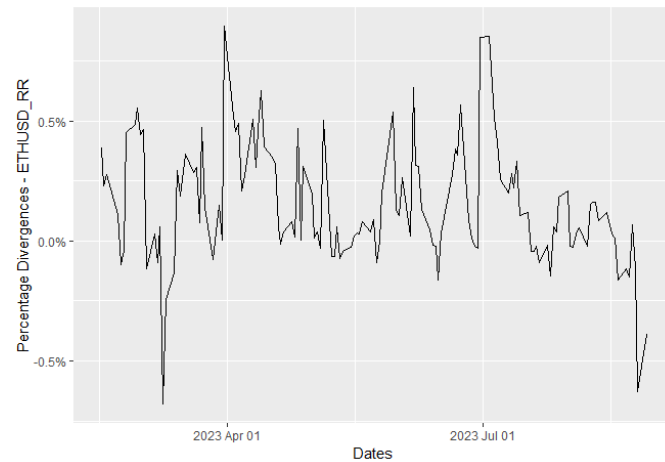
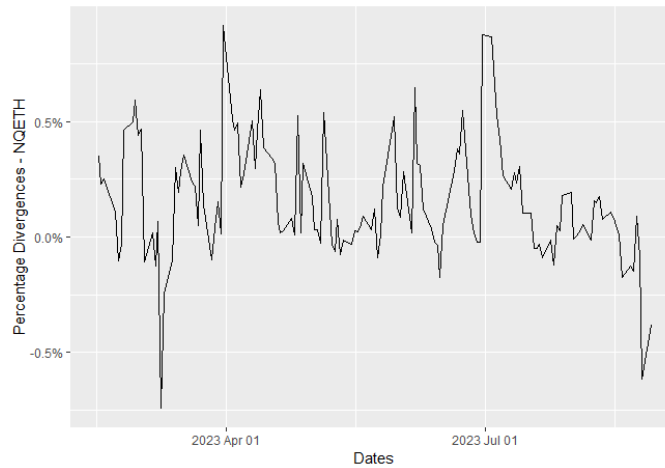
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<sup>50</sup> The difference in the price metrics introduces an artificial distortion in the comparison. Indeed, a regression analysis shows that the ratio between the maximum and minimum spot prices within the Ether Futures VWAP window is a significant variable that explains the absolute divergences between FBSP and the spot prices. The higher the ratio between the maximum and minimum spot prices, the higher expected absolute divergence between FBSP and the spot prices. The correlation of these two metrics in the case of the real time version of NQETHS is approximately 17%, suggesting that the actual adherence between FBSP and the spot benchmarks is even higher than the figures discussed herein indicate.



In the above charts, each black point indicates one day, and their proximity to the red line shows how similar FBSP is to each of NQETHS and ETHUSD\_RR. The correlations between FBSP and each of NQETHS and ETHUSD\_RR exceed 99.8%, and the mean absolute percentage divergences are 21 basis points (“bps”) and 21 bps, respectively, while the median absolute percentage divergences are 12 bps and 13 bps, respectively.

The charts below provide another visualization of the results of this comparison, as time series of the percentage divergences:



These charts show that there are no clusters of abnormal divergences. In both cases, more than 90% of the days exhibit percentage divergences below 51 bps. The highest percentage divergence in absolute terms, with 91 bps for the NQETHS and 89 bps for the ETHUSD\_RR, was observed on March 31, 2023, and coincided with significant volatility in the Ether markets; on that day, NQETHS gain 2.60% from \$1780.66 to \$1826.99 and the FBSP, which settles one hour later, gain 3.54%, from \$1781.28 to \$1844.39. The Sponsor notes that, even on the day with the highest percentage divergence between FBSP and the other two benchmarks, that percentage

divergence was insignificant in comparison to the intraday volatility of Ether itself and could be attributable to the different market structures of the regulated CME Market and the unregulated spot markets.

The Sponsor believes that this data strongly suggests that FBSP is a suitable choice for the NAV calculation, both for the settlement and the real time proxy, and that the following additional considerations further support the soundness of the FBSP methodology:

- Ether is a highly volatile asset traded in multiple venues across the world, and divergences of the magnitude found in this analysis are not unusual across different price sources or exchanges.
- As noted above, the mean absolute percentage divergences are 21 bps and 21 bps respectively, the median absolute percentage divergences are 12 bps and 13 bps, and March 31, 2023 was the day with the highest percentage divergence in absolute terms, with 91 bps for the NQETHS and 89 bps for ETHUSD\_RR. The Sponsor believes that these divergences between FBSP and the underlying benchmarks are in a reasonable range and support that FBSP closely tracks NQETHS and ETHUSD\_RR.

Finally, the Sponsor notes that, even considering that FBSP could create some level of uncertainty due to the potential divergences between the FBSP and the spot prices observed in unregulated markets, the authorized participants (“APs”) are able to hedge potential exposure by buying the basket of futures that represents FBSP and selling it during the futures settlement window. In doing so, APs can emulate a situation where they know ex ante the value of the creation basket. The opposite trade can have the same

effect for the case of redemptions. Thus, the APs providing liquidity on the secondary market during the day will always be in a position to hedge their exposure using exclusively the CME Market, which will make them more likely to provide liquidity to the Fund thus making its market price converge to its NAV.

#### Preventing Manipulation

While the Commission has raised valid concerns about the potential influence of unregulated Ether markets on the daily settlement price on CME Market, the Sponsor believes that the proposed methodology described above provides a significant and sufficient degree of insulation from such influences, for the following reasons:

1. **Regulated market influence:** The daily settlement price of Ether Futures Contracts on the CME Market, which is the basis for the NAV calculation of both futures contracts and physical holdings of the Fund, is primarily influenced by trading activity within the regulated futures market itself. This market is subject to stringent oversight and surveillance mechanisms designed to detect and deter manipulative and fraudulent practices, thus significantly limiting the possible influence of unregulated Ether markets on the daily settlement price.
2. **High liquidity and volume:** The CME Market is characterized by high liquidity and trading volume, such that any attempt to influence the daily settlement price through trading activity in other, unregulated Ether markets would require a significant amount of capital and coordination. The Sponsor thus believes that any such manipulation attempts would be highly detectable by the CME Market's market surveillance.

3. **Complex pricing methodology:** The NAV calculation methodology is comprehensive and accounts for both the tenor and final settlement price of each futures contract. In addition, the FBSP used in the NAV calculation methodology incorporates all maturities of Ether Futures Contracts, which exhibit a robust price relationship among themselves. As a result, attempting to manipulate these prices in a coordinated manner to generate a substantial impact on NAV would be very challenging for potential manipulators and likely financially unfeasible. The Sponsor thus believes that the complexity of the methodology provides an additional layer of protection against manipulation, as it would be extremely difficult for a manipulator to influence all these factors in a coordinated way to impact the Fund's NAV without leaving a detectable trail that would alert market surveillance.
4. **Focus on near-term contracts:** The Fund's methodology gives more importance to futures contracts that are due for settlement in the near term because such contracts are more heavily traded, and their prices are more reliable indicators of the current spot price of Ether. The Sponsor believes that the methodology's focus on near-term contracts further reduces the potential for manipulation, as these contracts are less susceptible to manipulation due to their higher trading volumes and liquidity.

The Sponsor also believes that it is highly unlikely that a person attempting to manipulate the NAV of the Fund could do so successfully by trading on unregulated spot and derivatives markets. Because of direct arbitrage, it is reasonable to assume that the

ETP's market price (in the secondary market) would be highly adherent to the Fund's Intraday Net Asset Value, since APs can always create and redeem shares of the Fund hedging with a basket of Ether Futures Contracts and the value of the creation basket is determined based on the NAV of the Fund, which is calculated using the FBSP prices that is based on such basket of Ether Futures Contracts. Consequently, the likelihood of a potential manipulator of the ETP to succeed by exclusively trading in unregulated Ether markets would depend on how much the prices in these markets have an impact over the CME Ether Futures Contracts prices. The likelihood that a potential manipulator would undertake such an effort is also decreased when considering the financial burden of manipulating the unregulated markets and the overall expected profitability of any such manipulation.

To further assess such likelihood, the Sponsor carried out the following analysis to investigate the relationship between prices from relevant unregulated Ether markets and the prices of the CME Ether Futures Contracts, to assess the impact that a manipulation on those markets would have on CME. The Sponsor collected one-minute bars data between February 21 and September 6<sup>51</sup> of prices for the nearest CME Ether Futures Contract ("CME Futures") and the following alternative Ether prices ("AEP"): spot Ether (in USD) on BitStamp, Coinbase, Gemini and Kraken, spot Ether (in USDT), and ETHUSDT USDs-Margined Perpetuals on Binance. For each day and each AEP, a simple regression model was estimated with one-minute CME Futures log-returns as the dependent variable, and two independent variables: (1) the log CME Futures closing price of the previous minute (as a control variable) and (2) the difference between the

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<sup>51</sup> This date range represents days with intraday data available on Bloomberg as of September 6. Days with less than 40 observations for a given AEP were excluded from the analysis of such AEP.



AEP log return and the CME Futures log return in the previous minute (as the variable of interest).

The estimated coefficients associated with the variable of interest are a measure of the expected response from the CME Futures (as measured by its returns) to a divergence between its own return information and the one from AEP in the near past (one-minute lagged returns). Such divergences are expected to occur in cases of manipulation. A higher coefficient (closer to one) would indicate that CME Futures are more sensitive to and strongly influenced by the divergence, while a lower coefficient (closer to zero) would suggest that CME Futures are less responsive and not significantly influenced by the information coming from AEP. The Sponsor believes that these coefficients can be considered a conservative estimation of the real impact that manipulation in an AEP would have over the CME Futures price because the estimations are calculated under normal circumstances rather than under a manipulative attack, in which some other indicators, such as abnormal volume and volatility, would warn market participants and undermine their perception of the attacked AEP as a reliable price reference. The results of the Sponsor's analysis are summarized in the table below:<sup>52</sup>

ABP	Estimated Parameters				Market Depth	
	Average	1st Decile	Median	9th Decile	+2% Depth	-2% Depth
Binance (spot USDT)	0.33	0.12	0.33	0.47	\$6,931,230	\$9,006,045
Binance (perpetual USDT)	0.32	0.15	0.33	0.47		
Coinbase (spot USD)	0.23	-0.03	0.24	0.53	\$9,540,548	\$10,509,099
Kraken (spot USD)	0.18	-0.02	0.19	0.37	\$3,401,860	\$5,115,258
Bitstamp (spot USD)	0.18	0.02	0.18	0.36		
Gemini (spot USD)	0.15	-0.05	0.15	0.32		

The Sponsor's analysis suggests that the influence of AEP over the CME Futures prices is relatively low. For instance, if a would-be manipulator chose to attack Binance

<sup>52</sup> The market depth information was obtained from CoinMarketCap on August 31, 2023. The AEPs with blank cells in this table were not included in the August 31, 2023 snapshot.

Spot (ETH-USDT), which is an AEP with higher coefficients and thus higher potential to impact CME futures, the average coefficient of 0.33 means that in order to manipulate CME Futures prices by 1%, the would-be manipulator would have to distort Binance's prices by 3% (1% divided by 0.33) on average. To be successful with 90% confidence (1st Decile) this manipulator would have to distort Binance's prices by more than 8.3% (1% divided by 0.12). The Sponsor believes that its analysis supports that, even considering these conservative estimations, indirect manipulation would be extremely inefficient.

The market depth columns in the above table indicate that substantial financial resources, running into millions of dollars, are present on both sides of the order book for the most influential AEPs (even without including hidden orders, bots, and arbitrageurs that effectively enhance liquidity). The considerable financial commitment that would be required makes the manipulation of these prices an expensive endeavor.

The Sponsor believes that its analysis demonstrates that the low efficiency of attempts to manipulate AEPs, coupled with the significant cost involved in influencing impactful AEPs, makes potential manipulation of spot Ether markets an unattractive proposition, and that it is therefore highly unlikely that a potential manipulator of the ETP could succeed by exclusively trading in unregulated Ether markets. The combination of the high costs and the inefficiencies associated with manipulation makes it a daunting and unprofitable venture.

In summary, while the Sponsor acknowledges the potential for influence from trades settled in unregulated Ether markets, the Sponsor believes that the NAV calculation methodology, coupled with the inherent characteristics of the CME, provides

a significant degree of protection against such influence being deliberately used to manipulate the Fund's market price or NAV without it being subject to detection by CME market surveillance.

### Investment Strategy

The Sponsor believes that the investment strategy of the Fund is designed to mitigate the risk of manipulation by diversifying its holdings and is responsive to the Commission's concerns with respect to an ETP that holds spot Ether. Instead of holding 100% spot Ether, which could make it more susceptible to price manipulation in the spot market, the Fund will hold a mix of Spot Ether, Ether Futures Contracts, and cash. This diversified portfolio is subject to investment restrictions, which further reduces the potential for manipulation, as explained below:

1. **Diversification:** By holding a combination of Spot Ether, Ether Futures Contracts, and cash, the Fund reduces its exposure to any single asset class. This diversification also makes it more difficult for a would-be manipulator to influence the NAV of the Fund by manipulating the price of spot Ether alone; for instance, even if a manipulator were able to influence the spot price of Ether, their actions would only affect a portion of the Fund's portfolio, thereby limiting the overall impact of such manipulation on the Fund's NAV.
2. **Investment restrictions:** The Fund's holdings of Spot Ether would be subject to investment restrictions, which are further discussed below. These restrictions cap the amount of Spot Ether that the Fund can hold, further reducing the potential for manipulation by, for example, preventing the Fund from becoming so large in relation to the spot market that it could be manipulated

without influencing the futures market. The Sponsor believes that these investment restrictions ensure that any significant trading activity aimed at manipulating the Fund would likely spill over into the CME Market, a regulated market with robust surveillance mechanisms in place to detect and deter manipulation, and with which the Exchange could receive information pursuant to common ISG membership.

3. **Reduced dependence on spot market:** By holding Ether Futures Contracts and cash in addition to Spot Ether, the Fund reduces its dependence on the spot market, thereby mitigating concerns about potential manipulation in unregulated Ether spot exchanges. Instead, the Fund will rely on Ether Futures Contracts and Ether futures EFPs that are traded on the CME Market, a regulated exchange, which provides a higher level of transparency and oversight compared to unregulated spot exchanges.

4. **Dynamic adjustment:** The mix of Spot Ether, Ether Futures Contracts, and cash in the Fund's portfolio can be dynamically adjusted based on market conditions and regulatory developments. This flexibility allows the Fund to respond quickly to any signs of potential manipulation or other market abuses, further enhancing its resilience against manipulation.

In summary, by diversifying its holdings and imposing investment restrictions, the Fund reduces its vulnerability to manipulation in any single market, thereby protecting investors and maintaining the integrity of the Fund.

### Investment Restrictions on Spot Ether

According to the Sponsor, the Fund will be subject to investment restrictions on Spot Ether (the “Investment Restrictions”) that are specific constraints on its exposure to Ether, particularly with respect to spot holdings. These investment restrictions, which are designed to mitigate the risk of manipulation of the Fund’s Shares by insulating the Fund from events impacting the Ether spot market, are variable based on factors such as the Commission’s recognition of the CME as a regulated market of significant size related to spot Ether, the NAV of the Fund, and the prevailing trading conditions on the core exchanges of the Benchmark.

The first constraint, termed in the Registration Statement as the “Spot Ether Relative Position Restriction,” caps the Fund’s exposure to the ether spot market to a specified proportion of the Fund’s NAV. This limit is designed to curb the potential success of any attempts to materially manipulate the Fund’s Share prices through undue influence on the ether spot market.

The second constraint, referred to in the Registration Statement as the “Spot Ether Notional Exposure Restriction,” restricts the Fund’s notional exposure to ether to a set proportion. The dual objectives of this second constraint are: (a) to deter potential manipulative actions on the Shares by making the cost-benefit tradeoff highly unfavorable for the manipulator, as it would require them to transact a volume that surpasses the Fund’s total exposure in the ether spot market, thus making the potential costs of manipulation outweigh the benefits, and (b) to restrict the Fund’s trading activities in such a way that they are not expected to become the primary driving force behind price variations in the ether spot market.

The Sponsor believes that the Investment Restrictions serve two main purposes:

1. They deter potential manipulative actions directed towards the Fund's Shares by making the cost-benefit tradeoff highly unfavorable for the manipulator. To manipulate the Fund's price using an unregulated spot market, a manipulator would need to transact a volume that surpasses the Fund's total exposure in spot Ether, making the potential costs of manipulation outweigh the benefits.
2. They ensure that the Fund's trading activities do not become the primary driving force behind price variations in the Ether spot market. By restricting the Fund's notional exposure to a proportion of the ADTV, this constraint ensures that the Fund's trading activities are always a fraction of the overall market activity, thereby reducing the potential for the Fund to unduly influence market prices.

As an example, in the 30-day period ending on August 31, 2023, the ADTV of spot Ether on Coinbase was \$146 million. Thus, the Fund's notional exposure to Ether is restricted to up to \$146 million, meaning that if the Fund's AUM is, for example, \$100 million, it could have up to 100% allocation to Spot Ether. However, if the Fund's AUM is, for example, \$1 billion, it could still only have up to \$146 million of notional exposure to Spot Ether, which would be the equivalent of up to 14.6% of the Fund's NAV, and the rest of the portfolio would need to be allocated to Ether Futures Contracts, cash, or cash equivalents.

To ensure that the Fund’s trading activities do not become the primary driving force of the Spot Ether price, the Sponsor intends to keep its notional allocation to spot Ether as a small proportion of the overall trading activity of spot Ether.

The Sponsor intends to do so by restricting the maximum notional exposure to Spot Ether to a proportion of the 30-day ADTV, with the ADTV data based on the most trusted exchanges (meeting the double requirements of being a core exchange per the NQETHS methodology and being subject to regulatory and reporting rules in the United States, which make them liable for any false volume data reporting).

Currently, only one exchange meets those requirements, and over the last three months, it accounted for 9.75% to 11.83% of all Ether trading, whereas the largest unregulated spot Ether exchange accounted for 35% to 40% of the spot Ether volume over the same period.<sup>53</sup>

Spot Ether 30-day ADTV <sup>54</sup>			
	June 30, 2023	July 31, 2023	August 31 2023
Top 10 Exchanges	\$2,012.24 million	\$1,560.15 million	\$1,499.43 million
Single Core Exchange meeting Sponsor’s requirement	\$203.56 million	\$184.64 million	\$146.22 million
Single Core Exchange’s market share	10.12%	11.83%	9.75%

<sup>53</sup> See <https://www.theblock.co/data/crypto-markets/spot/the-block-legitimate-volume-index-eth-only>.

<sup>54</sup> See Messari, volume data is for USD, USDT and USDC traded against Bitcoin. Core Exchanges.

All 5 Core Exchanges	\$271.02 million	\$227.84 million	\$187.53 million
All 5 Core Exchanges' market share	13.47%	14.60%	12.51%

The Sponsor believes that it is therefore unlikely that the single exchange on which the Sponsor bases the ADTV data on will be the primary driver of spot Ether price given its relatively small market share. As a result, even with the Fund's notional Spot Ether exposure limited at 100% of the ADTV on that single exchange, the Fund's Spot Ether holdings would likely represent only 9.75% to 11.83% of the daily liquidity of the spot Ether market (on the biggest 10 exchanges by volume) and thus is unlikely to become the primary driver of the spot market price formation.

Additionally, with the spot Ether notional exposure at 9.75% to 11.83 of ADTV, a would-be manipulator would need to trade on exchanges that account for most of the liquidity and, in particular, the largest one. The Sponsor believes that the cost benefit analysis of attempting to distort the price on the largest exchange, which accounts for approximately 35% to 40% of the liquidity (or approximately 3 to 4 times the size of the Fund), to manipulate the price of the Fund would not be compelling.

In summary, the Sponsor believes that the Investment Restrictions are a key tool in the Fund's strategy to prevent manipulation. By limiting the Fund's exposure to the spot market and ensuring that the Fund's trading activities do not become the predominant influence on market prices, these restrictions provide a robust defense against potential manipulation attempts.



Investor Protection and Spot and Proxy Exposure

The Sponsor believes that U.S. investor exposure to Ether directly through holding Ether itself has grown and the potential risk to U.S. investors has also grown. As described, premium and discount volatility, high fees, insufficient disclosures, and technical hurdles are exposing U.S. investors to risks that could potentially be eliminated through access to an Ether futures-based fund with investment restrictions on its exposure to Spot Ether. The Sponsor believes that the Commission's concerns have been sufficiently mitigated by the use of futures contracts, the investment restrictions and EFP transactions. Accordingly, the Sponsor believes that the Fund represents an opportunity for U.S. investors to gain price exposure to Ether in a regulated and transparent exchange-traded vehicle that limits risks by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; and (iii) reducing risks associated with investing in operating companies that are imperfect proxies for Ether exposure.

According to the Sponsor, exposure to Ether through the Fund also presents certain advantages for retail investors compared to buying spot Ether directly. A retail investor holding Spot Ether directly in a self-hosted wallet may suffer from inexperience in private key management (e.g., insufficient password protection, lost key, etc.), which could cause them to lose some or all of their Ether holdings. In addition, retail investors will be able to hold the Shares in traditional brokerage accounts which provide SIPC protection if a brokerage firm fails.

### Creations and Redemptions

According to the Sponsor (and as discussed further below), the Fund uses cash creations and redemptions. With respect to Spot Ether, an AP delivers cash to the Fund instead of Spot Ether in the creation process, and an AP receives cash instead of Spot Ether in the redemption process. The cash delivered or received during the creation or redemption process is then used by the Sponsor to purchase or sell Ether Futures Contracts with an aggregate market value that approximates the amount of cash received or paid upon the creation or redemption. On a daily basis, the Sponsor will analyze the current portfolio allocation of the Fund between Spot Ether and Ether Futures Contracts and, based on the Investment Restrictions and target portfolio exposure, may decide to engage in an EFP transaction on CME to buy or sell Spot Ether for the equivalent position in Ether Futures Contracts.

The Sponsor believes that this method protects against manipulation in the creation and redemption process and of the Fund's market price from trading in unregulated spot markets. Investment in spot Ether will not be directly related to creation or redemption of Fund Shares, but instead on target portfolio exposure, such that trades can be performed in smaller sizes and at unpredictable times, reducing the risk of creation or redemption manipulation.

The Sponsor believes that the use of cash creations and redemptions in the Fund serves as a deterrent to manipulation in several ways:

1. **Decoupling from spot market:** By using cash instead of Spot Ether for creations and redemptions, the Fund's operations are decoupled from the unregulated spot market. The creation and redemption process does not

directly influence the unregulated spot market or vice versa, thereby reducing the potential for manipulation through this process.

2. **Unpredictable trading times:** The Fund's investment in Spot Ether is not directly related to creations or redemptions, but instead on target portfolio exposure. As a result, trading can be done in smaller sizes and at unpredictable times, making it harder for potential manipulators to time their actions.
3. **Reduced impact of large trades:** By effecting creations and redemptions in cash, large trades that could potentially influence the unregulated spot market are mitigated. Instead, these trades are absorbed in the CME Market, which is sufficiently liquid and can reasonably be relied upon to assist in detecting and deterring fraudulent or manipulative misconduct.
4. **Reduced influence of Ether sourced from unregulated spot exchanges:** In-kind creation may create a direct relationship between the Fund's market price and prices on unregulated exchanges such as Binance by arbitrage, because an AP could buy or sell Ether from Binance and receive or deliver Ether from the Fund through the creation or redemption process. With creations and redemptions in cash, however, that arbitrage cannot be executed without going through pricing and trading on the CME Market.

The Sponsor believes that the Fund's creation and redemption process is designed to minimize the potential for market manipulation, thereby protecting investors and maintaining the integrity of the markets.

#### Exchange for Physical Transactions

EFP transactions, also known as Exchange for Related Position or EFRP transactions,<sup>55</sup> are a type of private agreement between two parties to trade a futures position for the underlying asset. In the context of the Fund, these transactions will be used to purchase and sell Spot Ether by delivering or receiving the equivalent futures position.

In an EFP transaction, two parties exchange equivalent but offsetting positions in an Ether Futures Contract and the underlying physical Ether. One party is the buyer of futures and the seller of the physical Ether, and the other party takes the opposite position (seller of futures and buyer of physical). While the EFP is a privately-negotiated transaction between the two parties to the trade, the consummated transaction must be reported to CME Market and its conditions and prices are subject to CME Market's market regulation oversight.

EFPs may be transacted at such commercially reasonable prices as are mutually agreed upon by the parties to the transaction, provided that the price conforms to the applicable futures price increments set forth for the relevant futures contract. The Sponsor believes that EFPs executed at off-market prices are more likely to be reviewed by CME's Market Regulation. CME's Rule 538 establishes that "EFPs may not be priced off-market for the purpose of shifting substantial sums of cash from one party to another, to allocate gains and losses between the futures or options on futures and the cash or OTC derivative components of the EFRP, to evade taxes, to circumvent financial controls by disguising a firm's financial condition, or to accomplish some other unlawful purpose."

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<sup>55</sup> See <https://www.cmegroup.com/clearing/operations-and-deliveries/accepted-trade-types/efp-efr-coo-trades.html>.

Because both sides of the trade track the same benchmark (Ether), an EFP is market-neutral. As such, the pricing of an EFP is quoted in terms of the basis between the price of the futures contract and the level of the underlying Ether. Because the Fund proposes to use EFP transactions to purchase and sell Spot Ether, the only non-cash assets held by the Fund (Ether Futures Contracts and Ether) are traded on CME Market. Because the Exchange and the CME Market are both ISG members, information shared by the CME Market with the Exchange can be used to assist in detecting and deterring fraudulent or manipulative misconduct related to those assets.

In the proposed strategy for the operation of the Fund, every time the Fund is required to purchase or sell Ether, the Sponsor will perform a request for quotation auction (“RFQ Auction”) with multiple market makers using the settlement price as the reference for the futures contracts. Market makers present their quotes in terms of basis points (“bps”), where 1bp = 0.01% between the futures contract price and the spot price. The Sponsor will then confirm the trade with the best offer and report the EFP transaction to the CME Market. The Sponsor believes that performing an RFQ Auction with multiple market makers is an efficient price formation mechanism that generates enough competition and attracts sufficient liquidity to minimize the transaction costs for the ETP.

As an example, assume that the Fund needs to buy 500 ethers (ETH) in exchange for 10 units of the next maturity of Ether Futures Contracts (“ETHA”). The Sponsor will perform an RFQ Auction by requesting 3 market makers to provide their best price for buying ETHA versus ETH. The Market Makers provide a bid/ask quote in terms of basis between the futures and spot. Market Maker 1 (MM1) bids +22bps, Market Maker 2 (MM2) bids +20bps, and Market Maker 3 (MM3) bids +25bps. The Sponsor will then

agree to pay the best bid of +25bps from MM3. Assuming ETHA is at \$1,634, the price for the spot transaction is fixed at \$1,629.92. The transaction is then reported within the time period and in the manner specified by the CME Market. Upon completion of the EFP, the Fund and MM3 would have different positions but same exposure:

- The Fund was long 10 Ether Futures Contracts and now has converted this exposure into 500 Ethers.
- MM3 had 500 Ethers and now holds an equal position long 10 Ether Futures Contracts.

The table below illustrates the steps in this EFP transaction:

Steps	MM3	Fund
1. Starting Position	500 ETH	10 ETHA
2. EFP is privately negotiated	MM3 and the Fund agree to terms of the EFP: <ul style="list-style-type: none"> <li>• Fund sells/MM3 buys 10 ETHA at \$1,634</li> <li>• Fund buys / MM3 sells 500 ETH at 1,629.92 (+25bps)</li> </ul>	
3. MM3 sends Ether to the Fund	-500 ETH	+ 500 ETH
4. EFP reported to CME	+ 10 ETHA	-10 ETHA
5. Final Position	10 ETHA	500 ETH

As required by CME Market's regulation, the Fund and all other parties related to the transaction will maintain all records relevant to this transaction, including order tickets, RFQ Auction message history, and custody transaction records, and provide them to CME upon request for surveillance purposes pursuant to CFTC Regulation 1.35.

EFP volumes are reported daily on the CME Group website. Historically, trading activity in EFP transactions is sporadic as it depends on the demand for a regulated

conversion between futures and spot positions. Nonetheless, the Sponsor believes that a large number of liquidity providers are ready to execute this type of transaction and can provide enough liquidity to support the proposed ETP's demand. A subset of firms that are ready to provide liquidity on EFP Ether transactions is available on CME's website.<sup>56</sup>

The Sponsor believes that EFP transactions are a powerful tool in preventing market manipulation for several reasons:

1. **Regulated environment:** EFP transactions occur on the CME Market, which is a regulated exchange with processes in place to prevent market manipulation, including monitoring transaction prices and investigating potential manipulations, as outlined in CME Rule 538.<sup>57</sup> All transactions are monitored and subject to rules and regulations designed to prevent market manipulation. Moreover, all parties to an EFP transaction are required to maintain all records relevant to the transaction pursuant to CFTC Regulation 1.35, thus providing the ability for CME and the CFTC to conduct surveillance inquiries and investigations in an efficient and effective manner for the protection of customers and ensuring market integrity. Since the transactions are quoted as basis points based on the ethereum futures contracts prices, the Sponsor believes that there is a direct and unequivocal lead-lag relationship between the prices on CME and the spot market price that the Fund trades. Furthermore, as an additional protection measure, to enforce the highest standard on the sourcing of such underlying physical Ether, the Sponsor represents that it

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<sup>56</sup> See <https://www.cmegroup.com/trading/bitcoin-brokers-and-block-liquidity-providers.html>.

<sup>57</sup> See <https://www.cmegroup.com/rulebook/files/cme-group-Rule-538.pdf>.

will only participate in EFP transactions with broker-dealers that are FINRA regulated or part of corporate groups that are, which would provide another layer of regulatory oversight in how Ether exposures are sourced, as those counterparties already have an ongoing commercial relationship with the Sponsor and are active participants in trading Ether regulated products worldwide.

2. **Surveillance-sharing agreement:** Nasdaq and the CME Market are both members of the ISG, which allows for the sharing of information and cooperation in investigations, which can help detect and deter market manipulation.
3. **Transparency:** EFP transactions must be reported to the CME Market, which is a regulated exchange, providing transparency and making it more difficult for manipulative practices to go unnoticed. Parties to EFP transactions must maintain all records relevant to the CME futures contract and the related position transaction, pursuant to CFTC Regulation 1.35, adding another layer of regulatory scrutiny and transparency. In addition, EFP transactions volumes are required to be reported with the daily large trader positions by each clearing member, omnibus account, and foreign broker.
4. **Market-neutrality:** Because EFP transactions involve exchanging equivalent but offsetting positions, they are market-neutral. As a result, EFP transactions do not create imbalances in the market that could be exploited for manipulative purposes.



5. **Unpredictability:** EFP transactions are privately negotiated between the fund and other parties, making them less predictable and therefore more difficult to manipulate.

The Sponsor believes that, by using EFP transactions to purchase and sell spot Ether, the Fund would ensure that its operations are conducted in a regulated, transparent, and market-neutral manner, significantly reducing the dependency on and the risk of manipulation from unregulated spot exchanges.

#### Settlement of ETH and MET Contracts

According to the Registration Statement, each ETH Contract and MET Contract settles daily to the ETH Contract volume-weighted average price (“VWAP”) of all trades that occur between 2:59 p.m. and 3:00 p.m., Central Time, the settlement period, rounded to the nearest tradable tick.<sup>58</sup> ETH Contracts and MET Contracts each expire on the last Friday of the contract month and are settled with cash. The final settlement value is

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<sup>58</sup> VWAP is calculated based first on Tier 1 (if there are trades during the settlement period); then Tier 2 (if there are no trades during the settlement period); and then Tier 3 (in the absence of any trade activity or bid/ask in a given contract month during the current trading day, as follows:

Tier 1: Each contract month settles to its VWAP of all trades that occur between 14:59:00 and 15:00:00 CT, the settlement period, rounded to the nearest tradable tick. If the VWAP is exactly in the middle of two tradable ticks, then the settlement will be the tradable price that is closer to the contract’s prior day settlement price.

Tier 2: If no trades occur on CME Globex between 14:59:00 and 15:00:00 CT, the settlement period, then the last trade (or the contract’s settlement price from the previous day in the absence of a last trade price) is used to determine whether to settle to the bid or the ask during this period.

a. If the last trade price is outside of the bid/ask spread, then the contract month settles to the nearest bid or ask price.

b. If the last trade price is within the bid/ask spread, or if a bid/ask spread is not available, then the contract month settles to the last trade price.

Tier 3: In the absence of any trade activity or bid/ask in a given contract month during the current trading day, the daily settlement price will be determined by applying the net change from the preceding contract month to the given contract month’s prior daily settlement price.]

based on the ETHUSD\_RR at 4:00 p.m. London time on the expiration day of the futures contract.<sup>59</sup>

As proposed, the Fund will rollover its soon to expire Ether Futures Contracts to extend the expiration or maturity of its position forward by closing the initial contract holdings and opening a new longer-term contract holding for the same underlying asset at the then-current market price. The Fund does not intend to hold any Ether futures positions into cash settlement.

#### Net Asset Value

According to the Registration Statement, the Fund's NAV per Share will be calculated by taking the current market value of its total assets, subtracting any liabilities, and dividing that total by the number of Shares.

The Sub-Administrator of the Fund will calculate the NAV once each trading day, as of the earlier of the close of the Nasdaq or 4:00 p.m. New York time.

According to the Registration Statement, to determine the value of Ether Futures Contracts, the Fund's Sub-Administrator will use the Ether Futures Contract settlement price on the exchange on which the contract is traded, except that the "fair value" of Ether Futures Contracts (as described in more detail below) may be used when Ether Futures Contracts close at their price fluctuation limit for the day. The Fund's Sub-Administrator will determine the value of Fund investments as of the earlier of the close of the New York Stock Exchange or 4:00 p.m. New York time. The Fund's NAV will

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<sup>59</sup> The ETHUSD\_RR is a daily reference rate of the U.S. dollar price of one ether calculated daily as of 4:00 p.m. London time. It is calculated by the CME based on the ether trading activity on CME-specified constituent spot ether exchanges during a calculation window between 3:00 p.m. and 4:00 p.m. London time. The CME launched the ETHUSD\_RR in May 2018.

include any unrealized profit or loss on open Ether futures contracts and any other credit or debit accruing to the Fund but unpaid or not received by the Fund.

According to the Registration Statement, the value of spot Ether held by the Fund is determined by the Sponsor in good faith based on a methodology that is entirely derived from the settlement prices of Ether Futures Contracts on the CME. The method involves a calculation that is a function of both the length of time (the tenor) until each Ether Futures Contract is due for settlement, and the final settlement price for each contract on that day. The calculation takes into account each contract's tenor and the tenor squared. This approach is designed to give more importance to contracts that are due for settlement in the near term, considering that the prices of these near-term contracts are more reliable indicators of the current spot price of Ether and are also more heavily traded. The calculation produces a set of weighting factors, with each factor indicating the contribution of the corresponding Ether Futures Contract to the estimated current spot price of Ether. The estimated spot price is the component of the result corresponding to a tenor of zero days. The Fund does not use data from ether exchanges or from spot ether trading activity. By way of example, the table below shows how the weights of each hypothetical Ether Futures Contract change over time as the first contract gets closer to maturity.

First future tenor					
Future	27 days	21 days	15 days	9 days	3 days
1st	130.81%	125.92%	120.39%	113.79%	105.33%
2nd	1.91%	-0.84%	-2.94%	-3.80%	-2.26%
3rd	-8.92%	-7.57%	-5.86%	-3.76%	-1.31%
4th	-9.19%	-7.05%	-4.89%	-2.78%	-0.83%
5th	-7.81%	-5.73%	-3.78%	-2.02%	-0.57%
6th	-6.26%	-4.47%	-2.86%	-1.47%	-0.39%
9th	-2.61%	-1.76%	-1.05%	-0.50%	-0.12%
12th	-0.29%	-0.14%	-0.04%	0.01%	0.01%
18th	2.35%	1.65%	1.04%	0.53%	0.14%
Total	100.00%	100.00%	100.00%	100.00%	100.00%

First future tenor					
Future	27 days	21 days	15 days	9 days	3 days
1st	130.81%	125.92%	120.39%	113.79%	105.33%
2nd	1.91%	-0.84%	-2.94%	-3.80%	-2.26%
3rd	-8.92%	-7.57%	-5.86%	-3.76%	-1.31%
4th	-9.19%	-7.05%	-4.89%	-2.78%	-0.83%
5th	-7.81%	-5.73%	-3.78%	-2.02%	-0.57%
6th	-6.26%	-4.47%	-2.86%	-1.47%	-0.39%
9th	-2.61%	-1.76%	-1.05%	-0.50%	-0.12%
12th	-0.29%	-0.14%	-0.04%	0.01%	0.01%
18th	2.35%	1.65%	1.04%	0.53%	0.14%
Total	100.00%	100.00%	100.00%	100.00%	100.00%

The Fund's Sub-Administrator will determine the value of Fund investments as of the earlier of the close of the Nasdaq or 4:00 p.m. New York time. The Fund's NAV will include any unrealized profit or loss on open Ether futures contracts and any other credit or debit accruing to the Fund but unpaid or not received by the Fund.

According to the Registration Statement, the fair value of the Fund's holdings will be determined by the Fund's Sponsor in good faith and in a manner that assesses the future Ether market value based on a consideration of all available facts and all available information on the valuation date. When an Ether Futures Contract has closed at its price fluctuation limit, the fair value determination will attempt to estimate the price at which such Ether Futures Contract would be trading in the absence of the price fluctuation limit (either above such limit when an upward limit has been reached or below such limit when

a downward limit has been reached). Typically, this estimate will be made primarily by reference to exchange traded instruments at 4:00 p.m. New York time on settlement day. The fair value of ETH Contracts and MET Contracts may not reflect such security's market value or the amount that the Fund might reasonably expect to receive for the ETH Contracts and MET Contracts upon its current sale.

According to the Registration Statement and as discussed above, the value of Spot Ether held by the Fund would be determined by the Sponsor and by Hashdex Asset Management Ltd. (the "Digital Asset Adviser") via an FBSP methodology that is sensitive to both the tenor of an Ether Futures Contract and the final settlement price for such contract. The calculation produces a set of weighting factors, with each factor indicating the contribution of the corresponding Ether Futures Contract to the estimated current spot price of Ether. The estimated spot price is the component of the result corresponding to a tenor of zero days. The Sponsor and Digital Asset Advisor will not use data from Ether exchanges or directly from spot Ether trading activity in determining the value of Spot Ether held by the Fund.

#### Indicative Fund Value

According to the Registration Statement, in order to provide updated information relating to the Fund for use by investors and market professionals, a third party financial data provider will calculate an updated Indicative Fund Value ("IFV"). The IFV will be calculated by using the prior day's closing NAV per Share of the Fund as a base and will be updated throughout the Core Trading Session of 9:30 a.m. E.T. to 4:00 p.m. E.T. to reflect changes in the value of the Fund's holdings during the trading day.

The IFV will be disseminated on a per Share basis every 15 seconds during the Exchange's Core Trading Session and be widely disseminated by one or more major market data vendors during the Exchange's Core Trading Session.<sup>60</sup>

#### Creation and Redemption of Shares

According to the Registration Statement, the Shares issued by the Fund may only be purchased by APs and only in blocks of 10,000 Shares called "Creation Baskets." The amount of the purchase payment for a Creation Basket is equal to the total NAV of Shares in the Creation Basket. Similarly, only APs may redeem Shares and only in blocks of 10,000 Shares called "Redemption Baskets." The amount of the redemption proceeds for a Redemption Basket is equal to the total NAV of Shares in the Redemption Basket. The purchase price for Creation Baskets and the redemption price for Redemption Baskets are the actual NAV calculated at the end of the business day when a request for a purchase or redemption is received by the Fund.

"APs" will be the only persons that may place orders to create and redeem Creation Baskets. APs must be (1) either registered broker-dealers or other securities market participants, such as banks and other financial institutions, that are not required to register as broker-dealers to engage in securities transactions, and (2) DTC Participants. An AP is an entity that has entered into an Authorized Purchaser Agreement with the Sponsor.

With respect to Spot Ether, an AP delivers cash to the Fund instead of Spot Ether in the creation process, and an AP receives cash instead of Spot Ether in the redemption process. The cash delivered or received during the creation or redemption process is then

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<sup>60</sup> Several major market data vendors display and/or make widely available IFVs taken from the Consolidated Tape Association ("CTA") or other data feeds.

used by the Sponsor to purchase or sell Ether Futures Contracts with an aggregate market value that approximates the amount of cash received or paid upon the creation or redemption. On a daily basis, the Sponsor will analyze the current portfolio allocation of the Fund between Spot Ether and Ether Futures Contracts and, based on the Investment Restrictions and target portfolio exposure, may decide to engage in an EFP transaction on CME to buy or sell Spot Ether for the equivalent position in Ether Futures Contracts.

#### Creation Procedures

According to the Registration Statement, on any “Business Day,” an AP may place an order with the Transfer Agent to create one or more Creation Baskets. For purposes of processing both purchase and redemption orders, a “Business Day” means any day other than a day when the CME or Nasdaq is closed for regular trading. Purchase orders for Creation Baskets must be placed by 3:00 p.m. New York time or one hour prior to the close of trading on Nasdaq, whichever is earlier. The day on which the Distributor receives a valid purchase order is referred to as the purchase order date. If the purchase order is received after the applicable cut-off time, the purchase order date will be the next Business Day. Purchase orders are irrevocable.

By placing a purchase order, an AP agrees to deposit cash with the Custodian.

#### Redemption Procedures

According to the Registration Statement, the procedures by which an AP can redeem one or more Creation Baskets will mirror the procedures for the creation of Creation Baskets. On any Business Day, an AP may place an order with the Transfer Agent to redeem one or more Creation Baskets.

The redemption procedures allow APs to redeem Creation Baskets. Individual shareholders may not redeem directly from the Fund. By placing a redemption order, an AP agrees to deliver the Creation Baskets to be redeemed through DTC's book entry system to the Fund by the end of the next Business Day following the effective date of the redemption order or by the end of such later business day.

#### Determination of Redemption Distribution

According to the Registration Statement, the redemption distribution from the Fund will consist of an amount of cash, that is in the same proportion to the total assets of the Fund on the date that the order to redeem is properly received as the number of Shares to be redeemed under the redemption order is in proportion to the total number of Shares outstanding on the date the order is received.

#### Delivery of Redemption Distribution

According to the Registration Statement, an AP who places a purchase order will transfer to the Custodian the required amount of cash, cash equivalents and/or Ether futures by the end of the next business day following the purchase order date or by the end of such later business day, not to exceed three business days after the purchase order date, as agreed to between the AP and the Custodian when the purchase order is placed (the "Purchase Settlement Date"). Upon receipt of the deposit amount, the Custodian will direct DTC to credit the number of Creation Baskets ordered to the AP's DTC account on the Purchase Settlement Date.

#### Availability of Information

The NAV for the Fund's Shares will be disseminated daily to all market participants at the same time. The intraday, closing prices, and settlement prices of the



Ether Futures Contracts will be readily available from the applicable futures exchange websites, automated quotation systems, published or other public sources, or major market data vendors. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services.

Complete real-time data for the Ether Futures Contracts will be available by subscription through on-line information services. Nasdaq and CME also provide delayed futures and options on futures information on current and past trading sessions and market news free of charge on their respective websites. The specific contract specifications for Ether Futures Contracts will also be available on such websites, as well as other financial informational sources. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. Quotation information for cash equivalents and commodity futures may be obtained from brokers and dealers who make markets in such instruments. Intra-day price and closing price level information for the Benchmark will be available from major market data vendors. The Benchmark value will be disseminated once every 15 seconds. The IFV will be available through on-line information services.

In addition, the Fund's website, <https://hashdex-etfs.com/>, will display the applicable end of day closing NAV and the daily holdings of the Fund. The Fund's website will also include a form of the prospectus for the Fund that may be downloaded. The website will include the Shares' ticker and CUSIP information along with additional quantitative information updated on a daily basis, including: (1) the prior Business Day's reported NAV and closing price and a calculation of the premium and discount of the

closing price or mid-point of the bid/ask spread at the time of NAV calculation (the “Bid/Ask Price”) against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price or Bid/Ask Price against the NAV, within appropriate ranges, for at least each of the four previous calendar quarters. The website disclosure of portfolio holdings will be made daily and will include, as applicable, (i) the name, quantity, price, and market value of the Fund’s holdings, (ii) the counterparty to and value of forward contracts and any other financial instruments tracking the Benchmark, and (iii) the total cash and cash equivalents held in the Fund’s portfolio, if applicable.

The Fund’s website will be publicly available at the time of the public offering of the Shares and accessible at no charge.

#### Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. The Exchange will halt trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121, including without limitation the conditions specified in Nasdaq Rule 4120(a)(9) and the trading pauses under Nasdaq Rules 4120(a)(11) and (12).

Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (i) the extent to which trading is not occurring in the Ether Futures Contracts or the Ether underlying the Shares; or (ii) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

If the intraday indicative value of the Fund's NAV ("IIV") or the value of the underlying Ether Futures Contracts or underlying Ether is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the IIV or the value of the underlying Ether Futures Contracts or underlying Ether occurs. If the interruption to the dissemination of the IIV or the value of the underlying Ether Futures Contracts or underlying Ether persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

In addition, if the Exchange becomes aware that the NAV with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

#### Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. The Exchange will allow trading in the Shares from 4:00 a.m. to 8:00 p.m. (ET). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. The Shares of the Fund will conform to the initial and continued listing criteria set forth in Nasdaq Rule 5711(i).

#### Surveillance

The Exchange represents that trading in the Shares of the Fund will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by the Financial Industry Regulatory Authority, Inc. ("FINRA") on behalf of the Exchange, which are designed to detect violations of

Exchange rules and applicable federal securities laws.<sup>61</sup> The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and the Fund's holdings with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and the Fund's holdings from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the Fund's holdings from markets and other entities that are members of ISG or with which the Exchange has in place a CSSA. The Exchange is also able to obtain information regarding trading in the Shares, the physical commodities underlying the futures contracts through ETP Holders, in connection with such ETP Holders' proprietary or customer trades which they effect through ETP Holders on any relevant market. The Exchange can obtain market surveillance information, including customer identity information, with respect to transactions (including transactions in futures contracts) occurring on US futures

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<sup>61</sup> FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

exchanges, which are members of the ISG. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

All statements and representations made in this filing regarding (a) the description of the portfolios of the Funds or Benchmark, (b) limitations on portfolio holdings or the Benchmark, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing requirements for listing the Shares on the Exchange.

The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq Rule 5800 Series.

#### Information Circular

Prior to the commencement of trading of the Shares, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (1) the procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (2) Section 10 of Nasdaq General Rule 9, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (3) how information regarding the IIV is disseminated; (4) the risks involved in trading the Shares during the Pre-Market and Post-Market Sessions when an updated IIV will not be calculated or publicly disseminated; (5) the requirement that members deliver a prospectus to investors

purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

Additionally, the Information Circular will reference that the Trust is subject to various fees and expenses described in the Registration Statement. The Information Circular will also disclose the trading hours of the Shares. The Information Circular will disclose that information about the Shares will be publicly available on the Trust's website.

## 2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)<sup>62</sup> that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria set forth in Nasdaq Rule 5711(i). The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange or FINRA, on behalf of the Exchange, or both,

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<sup>62</sup> 15 U.S.C. 78f(b)(5).

will communicate as needed regarding trading in the Shares and the Fund's holdings with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and the Fund's holdings from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the Fund's holdings from markets and other entities that are members of ISG or with which the Exchange has in place a CSSA. The Exchange is also able to obtain information regarding trading in the Shares and the Fund's holdings through ETP Holders, in connection with such ETP Holders' proprietary or customer trades which they effect through ETP Holders on any relevant market. The Exchange can obtain market surveillance information, including customer identity information, with respect to transactions (including transactions in Ether Futures Contracts) occurring on US futures exchanges, which are members of the ISG. The intraday, closing prices, and settlement prices of the Ether Futures Contracts will be readily available from the applicable futures exchange websites, automated quotation systems, published or other public sources, or major market data vendors website or on-line information services.

Complete real-time data for the Ether Futures Contracts will be available by subscription from on-line information services. Nasdaq and CME also provide delayed futures information on current and past trading sessions and market news free of charge on the Fund's website. The specific contract specifications for Ether Futures Contracts will also be available on such websites, as well as other financial informational sources. Information regarding options will be available from the applicable exchanges or major market data vendors. Quotation and last-sale information regarding the Shares will be

disseminated through the facilities of the CTA. The IFV will be disseminated on a per Share basis every 15 seconds during the Exchange's Core Trading Session and be widely disseminated by one or more major market data vendors during the Exchange's Core Trading Session. The Fund's website will also include a form of the prospectus for the Fund that may be downloaded. The website will include the Share's ticker and CUSIP information along with additional quantitative information updated on a daily basis, including, for the Fund: (1) the prior business day's reported NAV and closing price and a calculation of the premium and discount of the closing price or mid-point of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price or Bid/Ask Price against the NAV, within appropriate ranges, for at least each of the four previous calendar quarters. The website disclosure of portfolio holdings will be made daily and will include, as applicable, (i) the name, quantity, price, and market value of Ether Futures Contracts, (ii) the counterparty to and value of forward contracts, and (iii) other financial instruments, if any, and the characteristics of such instruments and cash equivalents, and amount of cash held in the Fund's portfolio, if applicable.

Trading in Shares of the Fund will be halted if the circuit breaker parameters have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in ETH and/or MET Contracts and the securities and/or the financial instruments composing the daily disclosed portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.



The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of Trust Units based on Ether that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of Trust Units based on Ether and that will enhance competition among market participants, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-NASDAQ-2023-035 on the subject line.

##### Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-NASDAQ-2023-035. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3

p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NASDAQ-2023-035 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>63</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>63</sup> 17 CFR 200.30-3(a)(12).