

Required fields are shown with yellow backgrounds and asterisks.

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

File No. * SR 2023 - * 045

Amendment No. (req. for Amendments *)

Filing by The Nasdaq Stock Market LLC

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

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|--|---|--|---|---|---|
| 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

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|--------------------------------------|--------------------------------------|
| <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 proposed rule change to list and trade shares of the iShares EthereumTrust.

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 * AVP 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 11/21/2023 (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: 2023.11.21
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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 EDFS website.

Form 19b-4 Information *

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SR-NASDAQ-2023-045 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-2023-045 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, as amended (the “Act”)¹ and Rule 19b-4 thereunder,² The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) is filing with the Securities and Exchange Commission (“Commission”) a proposed rule change to list and trade shares of the iShares Ethereum Trust (the “Trust”) under Nasdaq Rule 5711(d) (“Commodity-Based Trust Shares”). The shares of the Trust are referred to herein as the “Shares.”

(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

¹ 15 U.S.C. 78s(b)(1).

² 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 the Shares under Nasdaq Rule 5711(d),³ which governs the listing and trading of Commodity-Based Trust Shares on the Exchange. iShares Delaware Trust Sponsor LLC, a Delaware limited liability company and an indirect subsidiary of BlackRock, Inc. (“BlackRock”), is the sponsor of the Trust (the “Sponsor”). The Shares will be registered with the SEC by means of the Trust’s registration statement on Form S-1 (the “Registration Statement”).⁴

Description of the Trust

The Shares will be issued by the Trust, a Delaware statutory trust. The Trust will operate pursuant to a trust agreement (the “Trust Agreement”) between the Sponsor, BlackRock Fund Advisors (the “Trustee”) as the trustee of the Trust and will appoint a Delaware Trustee of the Trust (the “Delaware Trustee”) by such time that the Registration Statement is effective. The Trust issues Shares representing fractional undivided beneficial interests in its net assets. The assets of the Trust consist primarily of ether held by a custodian on behalf of the Trust. Coinbase Custody Trust Company, LLC (the “Ether Custodian”), is the custodian for the Trust’s ether holdings; and another entity will be the custodian for the Trust’s cash holdings (the “Cash Custodian” and together with the Ether Custodian, the “Custodians”) and the administrator of the Trust (the “Trust Administrator”). Under the Trust Agreement, the Trustee may delegate all or a portion of

³ 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).

⁴ The descriptions of the Trust contained herein are based, in part, on information in the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

its duties to any agent, and has delegated the bulk of the day-to-day responsibilities to the Trust Administrator and certain other administrative and record-keeping functions to its affiliates and other agents. The Trust is not an investment company registered under the Investment Company Act of 1940, as amended (the “1940 Act”).

The investment objective of the Trust is to reflect generally the performance of the price of ether. The Trust seeks to reflect such performance before payment of the Trust’s expenses and liabilities. The Shares are intended to constitute a simple means of making an investment similar to an investment in ether rather than by acquiring, holding and trading ether directly on a peer-to-peer or other basis or via a digital asset exchange. The Shares have been designed to remove the obstacles represented by the complexities and operational burdens involved in a direct investment in ether, while at the same time having an intrinsic value that reflects, at any given time, the investment exposure to the price of ether owned by the Trust at such time, less the Trust’s expenses and liabilities. Although the Shares are not the exact equivalent of a direct investment in ether, they provide investors with an alternative method of achieving investment exposure to the price of ether through the public securities market, which may be more familiar to them.

Custody of the Trust’s Ether

An investment in the Shares is backed by ether held by the Ether Custodian on behalf of the Trust. The Ether Custodian will keep custody of all of the Trust’s ether, other than that which is maintained in the Trading Balance with the Prime Broker, in accounts that are required to be segregated from the assets held by the Ether Custodian as principal and the assets of its other customers (the “Vault Balance”), with any remainder

of the Vault Balance held as part of a “hot storage”.⁵ The Ether Custodian will keep a substantial portion of the private keys associated with the Trust’s ether in “cold storage”⁶ (the “Cold Vault Balance”) The hardware, software, systems, and procedures of the Ether Custodian may not be available or cost-effective for many investors to access directly.

Net Asset Value

The net asset value of the Trust will be equal to the total assets of the Trust, including but not limited to, all ether and cash less total liabilities of the Trust, each determined by the Trustee pursuant to policies established from time to time by the Trustee or its affiliates or otherwise described herein. The methodology used to calculate an index (the “Index”) price to value ether in determining the net asset value of the Trust may not be deemed consistent with U.S. generally accepted accounting principles (“GAAP”).

The Sponsor has the exclusive authority to determine the Trust’s net asset value, which it has delegated to the Trustee under the Trust Agreement. The Trustee has delegated to the Trust Administrator the responsibility to calculate the net asset value of

⁵ A portion of the Trust’s ether holdings and cash holdings from time to time may be held with the Prime Broker, an affiliate of the Ether Custodian, in the Trading Balance, in connection with in-kind creations and redemptions of Baskets and the sale of ether to pay the Sponsor’s Fee and Trust expenses not assumed by the Sponsor. These periodic holdings held in the Trading Balance with the Prime Broker represent an omnibus claim on the Prime Broker’s ether held on behalf of clients; these holdings exist across a combination of omnibus hot wallets, omnibus cold wallets, or in accounts in the Prime Broker’s name on a trading venue (including third-party venues and the Prime Broker’s own execution venue) where the Prime Broker executes orders to buy and sell ether on behalf of its clients.

⁶ The term “cold storage” refers to a safeguarding method by which the private keys corresponding to ether stored on a digital wallet are removed from any computers actively connected to the internet. Cold storage of private keys may involve keeping such wallet on a non-networked computer or electronic device or storing the public key and private keys relating to the digital wallet on a storage device (for example, a USB thumb drive) or printed medium (for example, papyrus or paper) and deleting the digital wallet from all computers.

the Trust and the NAV, based on a pricing source selected by the Trustee. In determining the Trust's net asset value, the Trust Administrator values the ether held by the Trust based on the Index, unless otherwise determined by the Sponsor in its sole discretion. The CME CF Ether-Dollar Reference Rate -New York Variant (the "CF Benchmarks Index") shall constitute the Index, unless the CF Benchmarks Index is not available or the Sponsor in its sole discretion determines not to use the CF Benchmarks Index as the Index. If the CF Benchmarks Index is not available or the Sponsor determines, in its sole discretion, that the CF Benchmarks Index should not be used, the Trust's holdings may be fair valued in accordance with the policy approved by the Sponsor.

The Trust's periodic financial statements may not utilize net asset value or NAV to the extent the methodology used to calculate the Index is deemed not to be consistent with GAAP. For purposes of the Trust's periodic financial statements, the Trust will utilize a pricing source that is consistent with GAAP, as of the financial statement measurement date. The Sponsor will determine in its sole discretion the valuation sources and policies used to prepare the Trust's financial statements in accordance with GAAP.

The Sponsor may declare a suspension of the calculation of the NAV of the Trust under certain circumstances.

Net Asset Value

On each Business Day, as soon as practicable after 4:00 p.m. Eastern Time ("ET"), the Trust Administrator evaluates the ether held by the Trust as reflected by the CF Benchmarks Index and determines the net asset value of the Trust and the NAV. For purposes of making these calculations, a Business Day means any day other than a day

when Nasdaq is closed for regular trading.

The CF Benchmarks Index employed by the Trust is calculated on each Business Day by aggregating the notional value of ether U.S. dollar trading activity across major ether spot platforms. The CF Benchmarks Index is designed and administered in accordance with IOSCO Principles for Financial Benchmarks. The Administrator of the CF Benchmarks Index is CF Benchmarks Ltd. (the “Index Administrator”). The CF Benchmarks Index serves as a once-a-day benchmark rate of the U.S. dollar price of ether denominated in U.S. dollars (USD/ETH), calculated as of 4:00 p.m. ET. The CF Benchmarks Index aggregates the trade flow of ether-U.S. dollar markets operated by several ether spot trading platforms, during an observation window between 3:00 p.m. and 4:00 p.m. ET into the U.S. dollar price of ether at 4:00 p.m. ET. Specifically, the CF Benchmarks Index is calculated based on the “Relevant Transactions”⁷ of all spot trading platforms for ether-USD that meet the CME CF Constituent Exchange Criteria, which are currently: Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital (the “Constituent Exchanges”), and which may change from time to time. Any changes to this composition of spot trading platforms are announced on the Administrator’s website (www.cfbenchmarks.com).

If the CF Benchmarks Index is not available or the Sponsor determines, in its sole discretion, that the CF Benchmarks Index should not be used, the Trust’s holdings may be fair valued in accordance with the policy approved by the Sponsor.

The Trust is intended to provide a way for Shareholders to obtain exposure to

⁷ A “Relevant Transaction” is any cryptocurrency versus U.S. dollar spot trade that occurs during the observation window between 3:00 p.m. and 4:00 p.m. ET on a Constituent Exchange in the ETH/USD pair that is reported and disseminated by a Constituent Exchange through its publicly available API and observed by the Index Administrator.

ether by investing in the Shares rather than by acquiring, holding and trading ether directly on a peer-to-peer or other basis or via a digital asset exchange. An investment in Shares of the Trust is not the same as an investment directly in ether on a peer-to-peer or other basis or via a digital asset exchange.

Creation and Redemption of Shares

The Trust issues and redeems baskets (“Baskets”)⁸ on a continuous basis. Baskets are only issued or redeemed in exchange for an amount of ether determined by the Trustee on each day that Nasdaq is open for regular trading. No Shares are issued unless the Ether Custodian or Prime Broker has allocated to the Trust’s account the corresponding amount of ether. The amount of ether necessary for the creation of a Basket, or to be received upon redemption of a Basket, will decrease over the life of the Trust, due to the payment or accrual of fees and other expenses or liabilities payable by the Trust. Baskets may be created or redeemed only by Authorized Participants, who pay BlackRock Investments, LLC (“BRIL”), an affiliate of the Trustee that has been retained by the Trust to perform certain order processing, Authorized Participant communications, and related services in connection with the issuance and redemption of Baskets (“ETF Services”), a transaction fee for each order to create or redeem Baskets.

Background

Ethereum is free software that is hosted on computers distributed throughout the

⁸ The Trust issues and redeems Shares only in blocks of a certain specified size or integral multiples thereof. A block of Shares is called a “Basket.” These transactions take place in exchange for ether. Baskets will be offered continuously at the net asset value per Share (“NAV”) for the Basket of Shares on the day that an order to create a Basket is accepted by the Trust. The Trust may change the number of Shares in a Basket. Only registered broker-dealers that become authorized participants by entering into a contract with the Sponsor and the Trustee (“Authorized Participants”) may purchase or redeem Baskets. Shares will be offered to the public from time to time at varying prices that will reflect the price of ether and the trading price of the Shares on Nasdaq at the time of the offer.

globe. It employs an array of computer code-based logic, called a protocol, to create a unified understanding of ownership, commercial activity, and economic logic. This allows users to engage in commerce without the need to trust any of its participants or counterparties. Ethereum code creates verifiable and unambiguous rules that assign clear, strong property rights to create a platform for unrestrained business formation and free exchange. No single intermediary or entity operates or controls the Ethereum network (referred to as “decentralization”), the transaction validation and recordkeeping infrastructure of which is collectively maintained by a disparate user base. The Ethereum network allows people to exchange tokens of value, or ether (“ETH”), which are recorded on a distributed public recordkeeping system or ledger known as a blockchain (the “Ethereum Blockchain”), and which can be used to pay for goods and services, including computational power on the Ethereum network, or converted to fiat currencies, such as the U.S. dollar, at rates determined on digital asset exchanges or in individual peer-to-peer transactions. Furthermore, by combining the recordkeeping system of the Ethereum Blockchain with a flexible scripting language that is programmable and can be used to implement sophisticated logic and execute a wide variety of instructions, the Ethereum network is intended to act as a foundational infrastructure layer on top of which users can build their own custom software programs, as an alternative to centralized web servers. In theory, anyone can build their own custom software programs on the Ethereum network. In this way, the Ethereum network represents a project to expand blockchain deployment beyond a peer-to-peer private money system into a flexible, distributed alternative computing infrastructure that is available to all. On the Ethereum network, ETH is the unit of account that users pay for the computational resources consumed by running their

programs.

Up to now, U.S. retail investors have lacked a U.S. regulated, U.S. exchange-traded vehicle to gain exposure to ETH. Instead, current options include: (i) facing the counter-party risk, legal uncertainty, technical risk, and complexity associated with accessing spot ether or (ii) over-the-counter ether funds (“OTC ETH Funds”) with high management fees and potentially volatile premiums and discounts. Meanwhile, investors in other countries, including Germany, Switzerland and France, are able to use more traditional exchange listed and traded products (including exchange-traded funds holding physical ETH) to gain exposure to ETH. Investors across Europe have access to products which trade on regulated exchanges and provide exposure to a broad array of spot crypto assets. U.S. investors, by contrast, are left with fewer and more risky means of getting ether exposure.⁹

To this point, the lack of an ETP that holds spot ETH (a “Spot ETH ETP”) exposes U.S. investor assets to significant risk because investors that would otherwise seek cryptoasset exposure through a Spot ETH ETP are forced to find alternative exposure through generally riskier means. For example, investors in OTC ETH Funds are not afforded the benefits and protections of regulated Spot ETH ETPs, resulting in retail investors suffering losses due to drastic movements in the premium/discount of OTC ETH Funds. An investor who purchased the largest OTC ETH Fund in January 2021 and held the position at the end of 2022 would have suffered a 30% loss due to the change in the premium/discount, even if the price of ETH did not change. Many retail

⁹ The Exchange notes that the list of countries above is not exhaustive and that securities regulators in a number of additional countries have either approved or otherwise allowed the listing and trading of Spot ETH ETPs.

investors likely suffered losses due to this premium/discount in OTC ETH Fund trading; all such losses could have been avoided if a Spot ETH ETP had been available.

Additionally, many U.S. investors that held their digital assets in accounts at FTX,¹⁰ Celsius Network LLC,¹¹ BlockFi Inc.¹² and Voyager Digital Holdings, Inc.¹³ have become unsecured creditors in the insolvencies of those entities. If a Spot ETH ETP was available, it is likely that at least a portion of the billions of dollars tied up in those proceedings would still reside in the brokerage accounts of U.S. investors, having instead been invested in a transparent, regulated, and well-understood structure – a Spot ETH ETP. To this point, approval of a Spot ETH ETP would represent a major win for the protection of U.S. investors in the cryptoasset space. The Trust, like all other series of Commodity-Based Trust Shares, is designed to protect investors against the risk of losses through fraud and insolvency that arise by holding digital assets, including ETH, on centralized platforms.

Applicable Standard

The Commission has historically approved or disapproved exchange filings to list and trade series of Trust Issued Receipts, including spot based Commodity-Based Trust Shares, on the basis of whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size related to the

¹⁰ See FTX Trading Ltd., et al., Case No. 22-11068.

¹¹ See Celsius Network LLC, et al., Case No. 22-10964.

¹² See BlockFi Inc., Case No. 22-19361.

¹³ See Voyager Digital Holdings, Inc., et al., Case No. 22-10943.

underlying commodity to be held.¹⁴ Prior orders from the Commission have pointed out that in every prior approval order for Commodity-Based Trust Shares, there has been a derivatives market that represents the regulated market of significant size, generally a Commodity Futures Trading Commission regulated futures market.¹⁵ Further to this

¹⁴ See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018). This proposal was subsequently disapproved by the Commission. See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the “Winklevoss Order”). Prior orders from the Commission have pointed out that in every prior approval order for Commodity-Based Trust Shares, there has been a derivatives market that represents the regulated market of significant size, generally a Commodity Futures Trading Commission (the “CFTC”) regulated futures market. Further to this point, the Commission’s prior orders have noted that the spot commodities and currency markets for which it has previously approved spot ETPs are generally unregulated and that the Commission relied on the underlying futures market as the regulated market of significant size that formed the basis for approving the series of Currency and Commodity-Based Trust Shares, including gold, silver, platinum, palladium, copper, and other commodities and currencies. The Commission specifically noted in the Winklevoss Order that the approval order issued related to the first spot gold ETP “was based on an assumption that the currency market and the spot gold market were largely unregulated.” See Winklevoss Order at 37592. As such, the regulated market of significant size test does not require that the spot ether market be regulated in order for the Commission to approve this proposal, and precedent makes clear that an underlying market for a spot commodity or currency being a regulated market would actually be an exception to the norm. These largely unregulated currency and commodity markets do not provide the same protections as the markets that are subject to the Commission’s oversight, but the Commission has consistently looked to surveillance sharing agreements with the underlying futures market in order to determine whether such products were consistent with the Act.

¹⁵ See streetTRACKS Gold Shares, Exchange Act Release No. 50603 (Oct. 28, 2004), 69 FR 64614, 64618–19 (Nov. 5, 2004) (SR-NYSE-2004-22) (the “First Gold Approval Order”); iShares COMEX Gold Trust, Exchange Act Release No. 51058 (Jan. 19, 2005), 70 FR 3749, 3751, 3754–55 (Jan. 26, 2005) (SR-Amex-2004-38); iShares Silver Trust, Exchange Act Release No. 53521 (Mar. 20, 2006), 71 FR 14967, 14968, 14973–74 (Mar. 24, 2006) (SR-Amex-2005-072); ETFS Gold Trust, Exchange Act Release No. 59895 (May 8, 2009), 74 FR 22993, 22994–95, 22998, 23000 (May 15, 2009) (SR-NYSEArca-2009-40); ETFS Silver Trust, Exchange Act Release No. 59781 (Apr. 17, 2009), 74 FR 18771, 18772, 18775–77 (Apr. 24, 2009) (SR-NYSEArca-2009-28); ETFS Palladium Trust, Exchange Act Release No. 61220 (Dec. 22, 2009), 74 FR 68895, 68896 (Dec. 29, 2009) (SR-NYSEArca-2009-94) (notice of proposed rule change included NYSE Arca’s representation that “[t]he most significant palladium futures exchanges are the NYMEX and the Tokyo Commodity Exchange,” that “NYMEX is the largest exchange in the world for trading precious metals futures and options,” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which NYMEX is a member, Exchange Act Release No. 60971 (Nov. 9, 2009), 74 FR 59283, 59285–86, 59291 (Nov. 17, 2009)); ETFS Platinum Trust, Exchange Act Release No. 61219 (Dec. 22, 2009), 74 FR 68886, 68887–88 (Dec. 29, 2009) (SR-NYSEArca-2009-95) (notice of proposed rule change included NYSE Arca’s representation that “[t]he most significant platinum futures exchanges are the NYMEX and the Tokyo Commodity Exchange,” that “NYMEX is the largest exchange in the world for trading precious metals futures and options,” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which NYMEX is a member, Exchange Act Release No. 60970 (Nov. 9, 2009), 74 FR 59319, 59321, 59327 (Nov. 17, 2009)); Sprout

Physical Gold Trust, Exchange Act Release No. 61496 (Feb. 4, 2010), 75 FR 6758, 6760 (Feb. 10, 2010) (SR-NYSEArca-2009-113) (notice of proposed rule change included NYSE Arca’s representation that the COMEX is one of the “major world gold markets,” that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” and that NYMEX, of which COMEX is a division, is a member of the Intermarket Surveillance Group, Exchange Act Release No. 61236 (Dec. 23, 2009), 75 FR 170, 171, 174 (Jan. 4, 2010)); Sprott Physical Silver Trust, Exchange Act Release No. 63043 (Oct. 5, 2010), 75 FR 62615, 62616, 62619, 62621 (Oct. 12, 2010) (SR-NYSEArca-2010-84); ETFS Precious Metals Basket Trust, Exchange Act Release No. 62692 (Aug. 11, 2010), 75 FR 50789, 50790 (Aug. 17, 2010) (SR-NYSEArca-2010-56) (notice of proposed rule change included NYSE Arca’s representation that “the most significant gold, silver, platinum and palladium futures exchanges are the COMEX and the TOCOM” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 62402 (Jun. 29, 2010), 75 FR 39292, 39295, 39298 (July 8, 2010)); ETFS White Metals Basket Trust, Exchange Act Release No. 62875 (Sept. 9, 2010), 75 FR 56156, 56158 (Sept. 15, 2010) (SR-NYSEArca-2010-71) (notice of proposed rule change included NYSE Arca’s representation that “the most significant silver, platinum and palladium futures exchanges are the COMEX and the TOCOM” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 62620 (July 30, 2010), 75 FR 47655, 47657, 47660 (Aug. 6, 2010)); ETFS Asian Gold Trust, Exchange Act Release No. 63464 (Dec. 8, 2010), 75 FR 77926, 77928 (Dec. 14, 2010) (SR-NYSEArca-2010-95) (notice of proposed rule change included NYSE Arca’s representation that “the most significant gold futures exchanges are the COMEX and the Tokyo Commodity Exchange,” that “COMEX is the largest exchange in the world for trading precious metals futures and options,” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 63267 (Nov. 8, 2010), 75 FR 69494, 69496, 69500–01 (Nov. 12, 2010)); Sprott Physical Platinum and Palladium Trust, Exchange Act Release No. 68430 (Dec. 13, 2012), 77 FR 75239, 75240–41 (Dec. 19, 2012) (SR-NYSEArca-2012-111) (notice of proposed rule change included NYSE Arca’s representation that “[f]utures on platinum and palladium are traded on two major exchanges: The New York Mercantile Exchange ... and Tokyo Commodities Exchange” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 68101 (Oct. 24, 2012), 77 FR 65732, 65733, 65739 (Oct. 30, 2012)); APMEX Physical—1 oz. Gold Redeemable Trust, Exchange Act Release No. 66930 (May 7, 2012), 77 FR 27817, 27818 (May 11, 2012) (SR-NYSEArca-2012-18) (notice of proposed rule change included NYSE Arca’s representation that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, and that gold futures are traded on COMEX and the Tokyo Commodity Exchange, with a cross-reference to the proposed rule change to list and trade shares of the ETFS Gold Trust, in which NYSE Arca represented that COMEX is one of the “major world gold markets,” Exchange Act Release No. 66627 (Mar. 20, 2012), 77 FR 17539, 17542–43, 17547 (Mar. 26, 2012)); JPM XF Physical Copper Trust, Exchange Act Release No. 68440 (Dec. 14, 2012), 77 FR 75468, 75469–70, 75472, 75485–86 (Dec. 20, 2012) (SR-NYSEArca-2012-28); iShares Copper Trust, Exchange Act Release No. 68973 (Feb. 22, 2013), 78 FR 13726, 13727, 13729–30, 13739–40 (Feb. 28, 2013) (SR-NYSEArca-2012-66); First Trust Gold Trust, Exchange Act Release No. 70195 (Aug. 14, 2013), 78 FR 51239, 51240 (Aug. 20, 2013) (SR-NYSEArca-2013-61) (notice of proposed rule change included NYSE Arca’s representation that FINRA, on behalf of the exchange, may obtain trading information regarding gold futures and options on gold futures from members of the Intermarket Surveillance Group, including COMEX, or from markets “with which [NYSE Arca] has in place a comprehensive surveillance sharing agreement,” and that gold futures are traded on COMEX and the Tokyo Commodity Exchange, with a cross-reference to the proposed rule change to list and trade shares of the ETFS Gold Trust, in which NYSE Arca represented that COMEX is one of the “major world gold markets,” Exchange Act Release No. 69847 (June 25, 2013), 78 FR 39399, 39400, 39405 (July 1, 2013)); Merk Gold Trust, Exchange Act Release No. 71378 (Jan. 23, 2014), 79 FR 4786, 4786–87 (Jan. 29, 2014) (SR-NYSEArca-2013-137) (notice of proposed rule change included NYSE Arca’s representation that “COMEX is the largest gold futures and

point, the Commission’s prior orders have noted that the spot commodities and currency markets for which it has previously approved spot exchange traded products (“ETPs”) are generally unregulated and that the Commission relied on the underlying futures market as the regulated market of significant size that formed the basis for approving the series of Currency and Commodity-Based Trust Shares, including gold, silver, platinum, palladium, copper, and other commodities and currencies. The Commission specifically noted in the Winklevoss Order that the First Gold Approval Order “was based on an assumption that the currency market and the spot gold market were largely unregulated.”¹⁶

As such, the regulated market of significant size test does not require that the spot ether market be regulated in order for the Commission to approve this proposal, and precedent makes clear that an underlying market for a spot commodity or currency being a regulated market would actually be an exception to the norm. These largely unregulated currency and commodity markets do not provide the same protections as the markets that are subject to the Commission’s oversight, but the Commission has consistently looked to surveillance sharing agreements with the underlying futures market in order to determine whether such products were consistent with the Act. With this in mind, the Bitcoin Futures market, as defined below, is the proper market to consider in determining whether there is a related regulated market of significant size.

options exchange” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” including with respect to transactions occurring on COMEX pursuant to CME and NYMEX’s membership, or from exchanges “with which [NYSE Arca] has in place a comprehensive surveillance sharing agreement,” Exchange Act Release No. 71038 (Dec. 11, 2013), 78 FR 76367, 76369, 76374 (Dec. 17, 2013)); Long Dollar Gold Trust, Exchange Act Release No. 79518 (Dec. 9, 2016), 81 FR 90876, 90881, 90886, 90888 (Dec. 15, 2016) (SR-NYSEArca-2016-84).

¹⁶ See Winklevoss Order at 37592.

Further to this point, the Exchange notes that the Commission has approved proposals related to the listing and trading of funds that would primarily hold Bitcoin Futures that are registered under the Securities Act of 1933 (“1933 Act”) instead of the 1940 Act.¹⁷ In the Teucrium Approval, the Commission found the Bitcoin Futures market to be a regulated market of significant size as it relates to Bitcoin Futures, which was inconsistent with prior disapproval orders for ETPs that would hold actual bitcoin instead of derivatives contracts (“Spot Bitcoin ETPs”) that use the same pricing methodology as the Bitcoin Futures. However, and as discussed below, in recent weeks the SEC has approved a number of ETH-based exchange-traded funds (“ETFs”) for trading.

Meanwhile, the Commission has continued to disapprove proposals to list and trade Spot Bitcoin ETPs that would hold spot bitcoin on the seemingly conflicting basis that the CME Bitcoin Futures market is not a regulated market of significant size.¹⁸ In the recently decided Grayscale Investments, LLC v. Securities and Exchange Commission,¹⁹ however, the court resolved this conflict by finding that the SEC had failed to provide a coherent explanation as to why it had approved the Bitcoin Futures ETPs while disapproving the proposal to list and trade shares of the Grayscale Bitcoin Trust and vacating the disapproval order.²⁰

¹⁷ See Exchange Act Release No. 94620 (April 6, 2022), 87 FR 21676 (April 12, 2022) (the “Teucrium Approval”) and 94853 (May 5, 2022) (collectively, with the Teucrium Approval, the “Bitcoin Futures Approvals”).

¹⁸ The proposed spot bitcoin funds are nearly identical to the Trust but proposed to hold bitcoin instead of ETH.

¹⁹ Grayscale Investments, LLC v. Securities and Exchange Commission, et al., Case No. 22-1142 (the “Grayscale Order”).

²⁰ Id.

As mentioned above, on October 2, 2023 the SEC approved nine ETH-based ETFs for trading.²¹ The ETFs hold ETH futures contracts that trade on the CME and settle using the CME CF Ethereum Reference Rate (“ERR”), which is priced based on the spot ETH markets Coinbase, Kraken, LMAX, Bitstamp, Gemini, and itBit, essentially the same spot markets that are included in the Index that the Trust uses to value its ETH holdings. Given that the Commission has approved ETFs that offer exposure to ETH futures, which themselves are priced based on the underlying spot ETH market, the Sponsor believes that the Commission must also approve ETPs that offer exposure to spot ETH, like the Trust.

In the context of other digital asset-based ETF and ETP proposals for Bitcoin, the SEC has sought to justify treating futures-based ETFs differently from spot-based ETFs because of (i) distinctions between the regulations under which the two products would be registered (under the 1940 Act for digital-asset futures ETFs and 1933 Act for spot digital-asset ETPs), and (ii) the existence of regulation and surveillance-sharing over the CME digital-asset futures market through the Intermarket Surveillance Group (“ISG”), as compared to the spot market for those digital assets.²²

²¹ These ETFs included the Bitwise Ethereum Strategy ETF, Bitwise Bitcoin & Ether Equal Weight Strategy ETF, Hashdex Ether Strategy ETF, ProShares Ether Strategy ETF, ProShares Bitcoin & Ether Strategy ETF, ProShares Bitcoin & Ether Equal Weight Strategy ETF, Valkyrie Bitcoin & Ethereum Strategy ETF, VanEck Ethereum Strategy ETF, and Volatility Shares Ethereum Strategy ETF (collectively, the “ETH Futures Approvals”).

²² See, e.g., Chair Gary Gensler Public Statement, “Remarks Before the Aspen Security Forum,” (August 3, 2021), stating that the Chair looked forward to the Commission’s review of Bitcoin-based ETF proposals registered under the 1940 Act, “particularly if those are limited to [the] CME-traded Bitcoin futures,” noting the “significant investor protection” offered by the 1940 Act, <https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03>; Securities Exchange Act Release No. 93559 (November 12, 2021), 86 FR 64539 (November 18, 2021) (SR–CboeBZX–2021–019) (Order Disapproving a Proposed Rule Change to List and Trade Shares of the VanEck Bitcoin Trust under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares) (“VanEck Order”) (denying the first spot bitcoin ETP registered under the 1933 Act following the first approval of a bitcoin futures ETF registered under the 1940 Act, noting the differences in the

While the 1940 Act has certain added investor protections that the 1933 Act does not require, these protections do not seek to allay harms arising from underlying assets or markets of assets that ETFs hold, such as the potential for fraud or manipulation in such markets. In other words, the Sponsor does not believe that the application of the 1940 Act supports the purported justifications the Commission has made in denying other spot digital asset ETPs. Instead, the 1940 Act seeks to remedy certain abusive practices in the management of investment companies such as ETFs, and thus places certain restrictions on ETFs and ETF sponsors. The 1940 Act explicitly lists out the types of abuses it seeks to prevent, and places certain restrictions related to accounting, borrowing, custody, fees, and independent boards, among others. Notably, none of these restrictions address an ETF's underlying assets, whether ETH futures or spot ETH, or the markets from which such assets' pricing is derived, whether the CME ETH futures market or spot ETH markets. As a result, the Sponsor believes that the distinction between registration of ETH futures ETFs under the 1940 Act and the registration of spot ETH ETPs under the 1933 Act is one without a difference in the context of ETH-based ETP proposals.

As to (i) above, the Sponsor believes that because the CME ETH futures market is priced based on the underlying spot ETH market, any fraud or manipulation in the spot

standard of review that applies to such products); Securities Exchange Act Release No. 94620 (April 6, 2022), 87 FR 21676 (April 12, 2022) (SR-NYSEArca-2021-53) (Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to List and Trade Shares of the Teucrium Bitcoin Futures Fund under NYSE ARCA Rule 8.200-E, Commentary .02 (Trust Issued Receipts)) ("Teucrium Order") (approving the first bitcoin futures ETP registered under the 1933 Act, stating that "With respect to the proposed ETP, the underlying bitcoin assets are CME bitcoin futures contracts. The relevant analysis, therefore, is whether Arca has a comprehensive surveillance sharing agreement with a regulated market of significant size related to CME bitcoin futures contracts. As discussed below, taking into consideration the direct relationship between the regulated market with which Arca has a surveillance-sharing agreement and the assets held by the proposed ETP, as well as developments with respect to the CME bitcoin futures market—including the launch of exchange-traded funds registered under the Investment Company Act of 1940 ("1940 Act") that hold CME bitcoin futures ("Bitcoin Futures ETFs")—the Commission concludes that the Exchange has the requisite surveillance-sharing agreement.")

market would necessarily affect the price of ETH futures, thereby affecting the net asset value of an ETP holding spot ETH or an ETF holding ETH futures, as well as the price investors pay for such product's shares. Accordingly, either CME surveillance can detect spot-market fraud that affects both futures ETFs and spot ETPs, or that surveillance cannot do so for either type of product. Having approved ETH futures ETFs in part on the basis of such surveillance, the Commission has clearly determined that CME surveillance can detect spot-market fraud that would affect spot ETPs, and the Sponsor thus believes that it must also approve spot ETH ETPs on that basis.

In summary, both the Exchange and the Sponsor believe that this proposal and the included analysis are sufficient to establish that the CME ETH Futures market represents a regulated market of significant size as it relates both to the CME ETH Futures market and to the spot ETH market and that this proposal should be approved.

Additionally, the Sponsor believes that the distinctions between the 1940 Act and the 1933 Act, and the surveillance-sharing available for the CME ETH futures market versus the spot ETH market, are not meaningful in the context of ETH-based ETF and ETP proposals, and that such reasoning cannot be a basis for the Commission treating ETH futures ETFs differently from spot ETH ETPs like the Trust. The Sponsor believes that the Commission's approval of ETH futures ETFs means it must also approve spot ETH ETPs like the Trust.

CME ETH Futures

CME began offering trading in Ether Futures in February 2021. Each contract

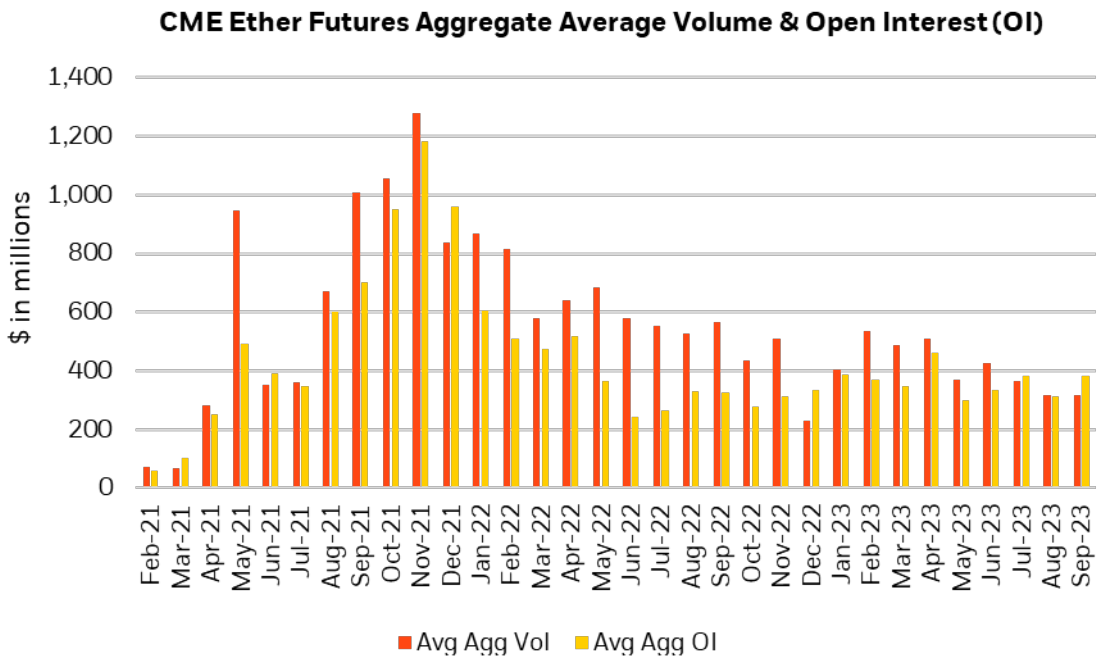
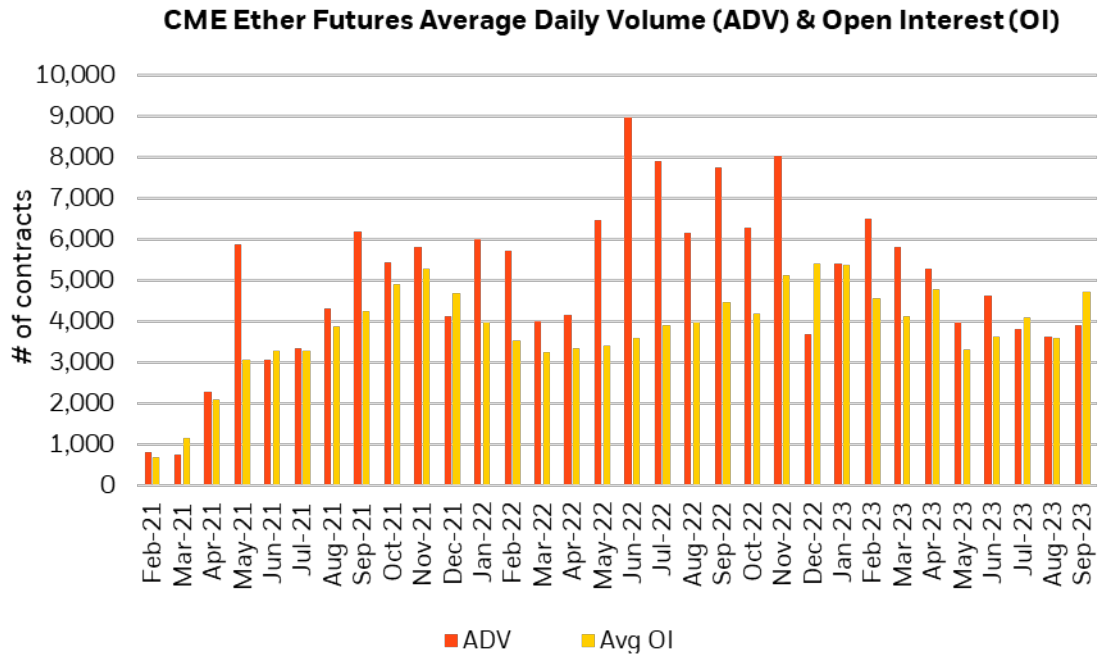
represents 50 ETH and is based on the CME CF Ether-Dollar Reference Rate.²³ The contracts trade and settle like other cash-settled commodity futures contracts. Most measurable metrics related to CME ETH Futures have generally trended up since launch, although some metrics have slowed recently. For example, there were 78,571 CME ETH Futures contracts traded in September 2023 (approximately \$6.3 billion) compared to 163,114 (\$11.9 billion) and 130,546 (\$21.2 billion) contracts traded in September 2022, and September 2022 respectively.²⁴ The daily correlation between the spot ETH and the CME ETH Futures is 0.9993 from the period of 10/13/22 through 10/13/23.²⁵ The number of large open interest holders²⁶ and unique accounts trading CME ETH Futures have both increased, even in the face of heightened Ether price volatility.

²³ The CME CF Ether-Dollar Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto exchanges and trading platforms, including Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.

²⁴ Source: Bloomberg, BlackRock calculations. Data as of 10/18/2023 for period shown (2/8/2021 to 9/30/2023).

²⁵ Source: S&P Ethereum Index, S&P CME Ether Futures Index (Spot).

²⁶ A large open interest holder in CME ETH Futures is an entity that holds at least 25 contracts, which is the equivalent of 1250 ether. At a price of approximately \$1,867 per ether on 7/31/2023, more than 59 firms had outstanding positions of greater than \$2.3 million in CME ETH Futures.



Preventing Fraudulent and Manipulative Practices

In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices;²⁷ and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that this filing sufficiently demonstrates that the CME ETH Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

(i) Designed to Prevent Fraudulent and Manipulative Acts and Practices

²⁷ The Exchange believes that ETH is resistant to price manipulation and that "other means to prevent fraudulent and manipulative acts and practices" exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ETH trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ETH platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ETH prices through continuous trading activity challenging. To the extent that there are ETH exchanges engaged in or allowing wash trading or other activity intended to manipulate the price of ETH on other markets, such pricing does not normally impact prices on other exchange because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ETH markets and the presence of arbitrageurs in those markets means that the manipulation of the price of ETH price on any single venue would require manipulation of the global ETH price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ETH exchange or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance sharing agreement in place²⁸ with a regulated market of significant size. Both the Exchange and CME are members of ISG.²⁹ The only remaining issue to be addressed is whether the ETH Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.³⁰

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent

²⁸ As previously articulated by the Commission, “The standard requires such surveillance-sharing agreements since “they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.” The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.” The Commission has historically held that joint membership in the ISG constitutes such a surveillance sharing agreement. See Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR-NYSEArca-2019-39) (the “Wilshire Phoenix Disapproval”).

²⁹ For a list of the current members and affiliate members of ISG, see <https://www.isgportal.com/>.

³⁰ See Wilshire Phoenix Disapproval.

fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance sharing agreement.³¹

(A) *Reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP*

In light of the similarly high correlation between spot ETH/CME ETH Futures and spot bitcoin/CME Bitcoin Futures (.998 vs. .999, respectively),³² applying the same rationale that the Commission applied to a Bitcoin Futures ETF in the Bitcoin Futures Approvals and the ETH Futures ETFs in the ETH Futures Approvals also indicates that this test is satisfied for this proposal. In the Teucrium Approval, the SEC stated:

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.” Thus, the CME’s surveillance can reasonably be relied upon to capture the effects on the CME futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME futures contracts, whether that attempt is made by directly trading on the CME futures market or indirectly by trading outside of the CME futures market. As such, 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 proposed ETP.³³

The assumptions from this statement are also true for CME ETH Futures, a number of which have recently been approved by the Commission.³⁴ CME ETH Futures pricing is based on pricing from spot ETH markets. The statement from the Teucrium Approval that “CME’s surveillance can reasonably be relied upon to capture the effects

³¹ See Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a ‘cannot be manipulated’ standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.” Id. at 37582.

³² Source: S&P Ethereum Index, S&P CME Ether Futures Index (Spot), S&P Bitcoin Index, and S&P CME Bitcoin Futures Index (Spot).

³³ See Teucrium Approval at 21679.

³⁴ See supra footnote 21.

on the CME BTC futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME BTC futures contracts ... indirectly by trading outside of the CME BTC futures market,” makes clear that the Commission believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME BTC Futures. This same logic would extend to CME ETH Futures markets where CME’s surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME ETH Futures. This was further acknowledged in the Grayscale lawsuit when Judge Rao stated “...the Commission in the Teucrium order recognizes that the futures prices are influenced by the spot prices, and the Commission concludes in approving futures ETPs that any fraud on the spot market can be adequately addressed by the fact that the futures market is a regulated one...” The Exchange agrees with the Commission on this point and notes that the pricing mechanism applicable to the Shares is similar to that of the CME ETH Futures.

As such, the part (a) of the significant market test outlined above is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the Shares in the same way that it would be for the Bitcoin Futures ETPs, the ETH Futures ETPs and Spot Bitcoin ETPs.

(B) Predominant Influence on Prices in Spot and ETH Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME ETH Futures market or spot market for a number of reasons. First, because the Trust would not hold CME ETH Futures contracts, the only way that it could be the predominant force on prices in that market is through the

spot markets that CME ETH Futures contracts use for pricing.³⁵ The Sponsor notes that ETH total 24-hour spot trading volume has averaged \$9.1B over the year ending October 16, 2023,³⁶ with approximately \$1.7B occurring on venues whose trades are included in the sponsor's benchmark.³⁷ The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ETH market even in its most aggressive projections for the Trust's assets and, thus, the Trust would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME ETH Futures market. Second, much like the CME Bitcoin Futures market, the CME ETH Futures market has progressed and matured significantly. As the court found in the Grayscale Order "Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less." The Exchange and sponsor agree with this sentiment and believe it applies equally to the spot ETH and CME ETH Futures markets.

(C) Other Means to Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that "other means to prevent fraudulent and manipulative acts and practices" are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present.

SSA with Ether Spot Market

³⁵ This logic is reflected by the court in the Grayscale Order at 17-18. Specifically, the court found that "Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market...But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin."

³⁶ Source: CoinGecko.

³⁷ Source: CoinGecko, The Block, and BlackRock calculations.

The Exchange is also proposing to take additional steps to those described above to supplement its ability to obtain information that would be helpful in detecting, investigating, and deterring fraud and market manipulation in the Commodity-Based Trust Shares.

On June 8, 2023, the Exchange reached an agreement on terms with Coinbase, Inc. (“Coinbase”) to enter into a Surveillance-Sharing Agreement, and the associated term sheet became effective as of June 16, 2023. Based on this agreement on terms, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares. Trading of ETH on Coinbase represents a significant portion of US-based ETH trading. The Sponsor has stated to the Exchange that, based on publicly available data reported by spot ether platforms active in the U.S. market, trading on Coinbase has represented approximately 66% of US-dollar to ether trading on such U.S.-based platforms out of total YTD volume across these platforms of approximately U.S. \$93 billion, as of October 16, 2023.³⁸

The Surveillance Sharing Agreement is expected to be a bilateral surveillance-sharing agreement between Nasdaq and Coinbase that is intended to supplement the Exchange’s market surveillance program. The Surveillance Sharing Agreement is expected to have the hallmarks of a surveillance-sharing agreement between two members of the ISG, which would give the Exchange supplemental access to data regarding spot ether trades on Coinbase where the Exchange determines it is necessary as part of its surveillance program for the Commodity-Based Trust Shares. This means that

³⁸ This analysis is based on the following spot ether platforms: Coinbase, Binance US, Kraken, Bitstamp, Gemini, and itBit.

the Exchange expects to receive market data for orders and trades from Coinbase, which it will utilize in surveillance of the trading of Commodity-Based Trust Shares. In addition, the Exchange can request further information from Coinbase related to spot ether trading activity on the Coinbase exchange platform, if the Exchange determines that such information would be necessary to detect and investigate potential manipulation in the trading of the Commodity-Based Trust Shares.

(ii) Designed to Protect Investors and the Public Interest

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ETH through OTC ETH Funds is greater than \$5 billion. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through premium/discount volatility and management fees for OTC ETH Funds. The Exchange believes that, as described above, the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, such concerns are now at the very least outweighed by investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ETH in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in ETH Futures ETFs and operating companies that are imperfect proxies for ETH exposure; and (iv) providing an alternative to custodial spot ETH.

Spot and Proxy Exposure to Ether

Exposure to ether through an ETP also presents certain advantages for retail investors compared to buying spot ether directly. The most notable advantage from the Sponsor's perspective is the elimination of the need for an individual retail investor to either manage their own private keys or to hold ether through a cryptocurrency exchange that lacks sufficient protections. Typically, retail exchanges hold most, if not all, retail investors' ether in "hot" (internet connected) storage and do not make any commitments to indemnify retail investors or to observe any particular cybersecurity standard. Meanwhile, 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 point of failure could cause them to lose some or all of their ether holdings. Thus, with respect to custody of the Trust's ether assets, the Trust presents advantages from an investment protection standpoint for retail investors compared to owning spot ether directly or via a digital asset exchange.

Availability of Information

The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the prior business day's NAV; (b) the prior business day's Official Closing Price; (c) calculation of the premium or discount of such Official Closing Price against such NAV; (d) data in chart form displaying the frequency distribution of discounts and premiums of the Official Closing Price against the NAV, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (e) the prospectus; and (f) other applicable quantitative information. The Trust Administrator will also disseminate the Trust's holdings on a daily basis on the

Trust's website. The price of ether will be made available by one or more major market data vendors, updated at least every 15 seconds during the Regular Market Session. Information about the CF Benchmarks Index, including key elements of how the CF Benchmarks Index is calculated, will be publicly available at <https://www.cfbenchmarks.com/>. Also, an estimated value that reflects an estimated intraday value of the Trust's portfolio (the "Intraday Indicative Value" or "IIV"), will be disseminated.

One or more major market data vendors will provide an IIV per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Market Session (9:30 a.m. to 4:00 p.m. (ET)). The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during the Exchange's Regular Market Session to reflect changes in the value of the Trust's NAV during the trading day.

The IIV disseminated during the Exchange's Regular Market Session should not be viewed as an actual real time update of the NAV, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Market Session by one or more major market data vendors. In addition, the IIV will be available through online information services.

The NAV for the Trust will be calculated by the Trust Administrator once a day and will be disseminated daily to all market participants at the same time. Quotation and last sale information regarding the Shares will be disseminated through the facilities of the Consolidated Tape Association ("CTA").

Initial and Continued Listing

The Shares will be subject to Nasdaq Rule 5711(d)(vi), which sets forth the initial and continued listing criteria applicable to Commodity-Based Trust Shares. The Exchange will obtain a representation that the Trust's NAV will be calculated daily and will be made available to all market participants at the same time. Upon termination of the Trust, the Shares will be removed from listing. The Delaware Trustee, will be a trust company having substantial capital and surplus and the experience and facilities for handling corporate trust business, as required under Nasdaq Rule 5711(d)(vi)(D) and no change will be made to the Delaware Trustee without prior notice to and approval of the Exchange.

As required in Nasdaq Rule 5711(d)(vii), the Exchange notes that any registered market maker ("Market Maker") in the Shares must file with the Exchange, in a manner prescribed by the Exchange, and keep current a list identifying all accounts for trading the underlying commodity, related futures or options on futures, or any other related derivatives, which the registered Market Maker may have or over which it may exercise investment discretion. No registered Market Maker in the Shares shall trade in the underlying commodity, related futures or options on futures, or any other related derivatives, in an account in which a registered Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by Nasdaq Rule 5711(d). In addition to the existing obligations under Exchange rules regarding the production of books and records, the registered Market Maker in the Shares shall make available to the Exchange such books, records or other information pertaining to transactions by such entity or any

limited partner, officer or approved person thereof, registered or non-registered employee affiliated with such entity for its or their own accounts in the underlying commodity, related futures or options on futures, or any other related derivatives, as may be requested by the Exchange.

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 Trust will conform to the initial and continued listing criteria set forth in Nasdaq Rule 5711(d).

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: (1) the extent to which trading is not occurring in the ether underlying the Shares; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

If the IIV or the value of the underlying futures contract 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 futures contract occurs. If the interruption to the dissemination of the IIV or the value of the 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.

Surveillance

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of Shares on the Exchange will be subject to the Exchange's surveillance procedures for derivative products. The Exchange will require the Trust to represent to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Additionally, on June 8, 2023, the Exchange reached an agreement on terms with

Coinbase to enter into a Surveillance Sharing Agreement, and the associated term sheet became effective as of June 16, 2023. Based on this agreement on terms, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares. Trading of ether on Coinbase represents a significant portion of US-based ether trading. The Sponsor has stated to the Exchange that, based on publicly available data reported by spot ether platforms active in the U.S. market, trading on Coinbase has represented approximately 66% of US-dollar to ETH trading on such U.S.-based platforms out of total YTD volume across these platforms of approximately U.S. \$93 billion, as of October 16, 2023.³⁹

The Surveillance Sharing Agreement is expected to be a bilateral surveillance-sharing agreement between Nasdaq and Coinbase that is intended to supplement the Exchange's market surveillance program. The Surveillance Sharing Agreement is expected to have the hallmarks of a surveillance-sharing agreement between two members of the ISG, which would give the Exchange supplemental access to data regarding spot ether trades on Coinbase where the Exchange determines it is necessary as part of its surveillance program for the Commodity-Based Trust Shares. This means that the Exchange expects to receive market data for orders and trades from Coinbase, which it will utilize in surveillance of the trading of Commodity-Based Trust Shares. In addition, the Exchange can request further information from Coinbase related to spot ether trading activity on the Coinbase exchange platform, if the Exchange determines that

³⁹ This analysis is based on the following spot ether platforms: Coinbase, Binance US, Kraken, Bitstamp, Gemini, and itBit.

such information would be necessary to detect and investigate potential manipulation in the trading of the Commodity-Based Trust Shares.

Information Circular

Prior to the commencement of trading, 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 Draft 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 Exchange believes that the proposal is consistent with Section 6(b) of the

Act⁴⁰ in general and Section 6(b)(5) of the Act⁴¹ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Commission has approved numerous series of Trust Issued Receipts,⁴² including Commodity-Based Trust Shares,⁴³ to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices; and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act because this filing sufficiently demonstrates that the CME ETH Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

⁴⁰ 15 U.S.C. 78f.

⁴¹ 15 U.S.C. 78f(b)(5).

⁴² See Exchange Rule 5720.

⁴³ Commodity-Based Trust Shares, as described in Exchange Rule 5711(d), are a type of Trust Issued Receipt.

Designed to Prevent Fraudulent and Manipulative Acts and Practices

In order for a proposal to list and trade a series of Commodity-Based Trust Shares to be deemed consistent with the Act, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place with a regulated market of significant size. Both the Exchange and CME are members of ISG.⁴⁴ As such, the only remaining issue to be addressed is whether the ETH Futures market constitutes a market of significant size, which the Exchange and the Sponsor believes that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.⁴⁵

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.⁴⁶

(a) *Reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP*

⁴⁴ For a list of the current members and affiliate members of ISG, see <https://www.isgportal.com/>.

⁴⁵ See Wilshire Phoenix Disapproval.

⁴⁶ See Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a “cannot be manipulated” standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met. *Id.* at 37582.

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct.

In light of the similarly high correlation between spot ETH/CME ETH Futures and spot bitcoin/CME Bitcoin Futures (.998 vs. .999, respectively),⁴⁷ applying the same rationale that the Commission applied to a Bitcoin Futures ETF in the Bitcoin Futures Approvals also indicates that this test is satisfied for this proposal. In the Teucrium Approval, the SEC stated:

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.” Thus, the CME’s surveillance can reasonably be relied upon to capture the effects on the CME futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME futures contracts, whether that attempt is made by directly trading on the CME futures market or indirectly by trading outside of the CME futures market. As such, 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 proposed ETP.⁴⁸

The assumptions from this statement are also true for CME ETH Futures. CME ETH Futures pricing is based on pricing from spot ETH markets. The statement from the Teucrium Approval that “CME’s surveillance can reasonably be relied upon to capture the effects on the CME BTC futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME BTC futures contracts ... indirectly by trading outside of the CME BTC futures market,” makes clear that the

⁴⁷ Source: S&P Ethereum Index, S&P CME Ether Futures Index (Spot), S&P Bitcoin Index, and S&P CME Bitcoin Futures Index (Spot).

⁴⁸ See Teucrium Approval at 21679.

Commission believes that CME's surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME BTC Futures. This same logic would extend to CME ETH Futures markets where CME's surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME ETH Futures. This was further acknowledged in the Grayscale lawsuit when Judge Rao stated "...the Commission in the Teucrium order recognizes that the futures prices are influenced by the spot prices, and the Commission concludes in approving futures ETPs that any fraud on the spot market can be adequately addressed by the fact that the futures market is a regulated one..." The Exchange agrees with the Commission on this point and notes that the pricing mechanism applicable to the Shares is similar to that of the CME ETH Futures. This view is also consistent with the Sponsor's research.

As such, the Exchange believes that part (a) of the significant market test outlined above is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the Shares in the same way that it would be for both Bitcoin Futures ETPs and Spot Bitcoin ETPs.

(b) Predominant Influence on Prices in Spot and ETH Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in CME ETH Futures market or spot market for a number of reasons. First, because the Trust would not hold CME ETH Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME ETH Futures contracts use for pricing.⁴⁹ The Sponsor notes that

⁴⁹ This logic is reflected by the court in the Grayscale Order at 17-18. Specifically, the court found that "Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market...But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin."

ETH total 24-hour spot trading volume has averaged \$9.1B over the year ending October 16, 2023,⁵⁰ with approximately \$1.7B occurring on venues whose trades are included in the sponsor's benchmark.⁵¹ The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ETH market even in its most aggressive projections for the Trust's assets and, thus, the Trust would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME ETH Futures market. Second, much like the CME Bitcoin Futures market, the CME ETH Futures market has progressed and matured significantly. As the court found in the Grayscale Order "Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less." The Exchange and sponsor agree with this sentiment and believe it applies equally to the spot ETH and CME ETH Futures markets.

(c) Other Means to Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that "other means to prevent fraudulent and manipulative acts and practices" are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present.

Surveillance Sharing Agreement with Ether Spot Market

The Exchange is also proposing to take additional steps to those described above to supplement its ability to obtain information that would be helpful in detecting,

⁵⁰ Source: CoinGecko..

⁵¹ Source: CoinGecko, The Block, and BlackRock calculations.

investigating, and deterring fraud and market manipulation in the Commodity-Based Trust Shares.

On June 8, 2023 the Exchange reached an agreement on terms with Coinbase, to enter into a Surveillance-Sharing Agreement, and the associated term sheet became effective as of June 16, 2023. Based on this agreement on terms, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares. Trading of ETH on Coinbase represents a significant portion of US-based ETH trading. The Sponsor has stated to the Exchange that, based on publicly available data reported by spot ether platforms active in the U.S. market, trading on Coinbase has represented approximately 66% of US-dollar to ether trading on such U.S.-based platforms out of total YTD volume across these platforms of approximately U.S. \$93 billion, as of October 16, 2023.⁵²

The Surveillance Sharing Agreement is expected to be a bilateral surveillance-sharing agreement between Nasdaq and Coinbase that is intended to supplement the Exchange's market surveillance program. The Surveillance Sharing Agreement is expected to have the hallmarks of a surveillance-sharing agreement between two members of the ISG, which would give the Exchange supplemental access to data regarding spot ether trades on Coinbase where the Exchange determines it is necessary as part of its surveillance program for the Commodity-Based Trust Shares. This means that the Exchange expects to receive market data for orders and trades from Coinbase, which it will utilize in surveillance of the trading of Commodity-Based Trust Shares. In

⁵² This analysis is based on the following spot ether platforms: Coinbase, Binance US, Kraken, Bitstamp, Gemini, and itBit.

addition, the Exchange can request further information from Coinbase related to spot ether trading activity on the Coinbase exchange platform, if the Exchange determines that such information would be necessary to detect and investigate potential manipulation in the trading of the Commodity-Based Trust Shares.

Designed to Protect Investors and the Public Interest

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ETH through OTC ETH Funds is greater than \$5 billion. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through premium/discount volatility and management fees for OTC ETH Funds. The Exchange believes that, as described above, the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, such concerns are now at the very least outweighed by investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ETH in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in ETH Futures ETFs and operating companies that are imperfect proxies for ETH exposure; and (iv) providing an alternative to custodial spot ETH.

Commodity-Based Trust Shares – Nasdaq Rule 5711(d)

The Exchange believes that the proposed rule change is designed to prevent

fraudulent and manipulative acts and practices in that the Shares will be listed on the Exchange pursuant to the initial and continued listing criteria in Nasdaq Rule 5711(d). The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series. The Exchange may obtain information regarding trading in the Shares and listed ETH derivatives via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

Availability of Information

The Exchange also believes that the proposal promotes market transparency in that a large amount of information is currently available about ETH and will be available regarding the Trust and the Shares. In addition to the price transparency of the CF Benchmarks Index, the Trust will provide information regarding the Trust's ETH holdings as well as additional data regarding the Trust.

The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the prior business day's NAV; (b) the prior business day's Official Closing Price; (c) calculation of the premium or discount of such Official Closing Price against such NAV; (d) data in chart form displaying the frequency distribution of discounts and premiums of the Official Closing Price against the NAV, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (e) the prospectus; and (f) other applicable quantitative information. The Trust Administrator will also disseminate the Trust's holdings on a daily basis on the Trust's website. The price of ether will be made available by one or more major market data vendors, updated at least every 15 seconds during the Regular Market Session. Information about the CF Benchmarks Index, including key elements of how the CF Benchmarks Index is calculated, will be publicly available at <https://www.cfbenchmarks.com/>. Also, an estimated value that reflects an estimated IIV, will be disseminated.

One or more major market data vendors will provide an IIV per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Market Session (9:30 a.m. to 4:00 p.m. (ET)). The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during the Exchange's Regular Market Session to reflect changes in the value of the Trust's NAV during the trading day.

The IIV disseminated during the Exchange's Regular Market Session should not be viewed as an actual real time update of the NAV, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis

every 15 seconds during the Exchange's Regular Market Session by one or more major market data vendors. In addition, the IIV will be available through online information services.

The NAV for the Trust will be calculated by the Trust Administrator once a day and will be disseminated daily to all market participants at the same time. Quotation and last sale information regarding the Shares will be disseminated through the facilities of the CTA.

Quotation and last sale information for ether is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters, as well as CF Benchmarks. Information relating to trading, including price and volume information, in ETH is available from major market data vendors and from the exchanges on which ETH is traded. Depth of book information is also available from ETH exchanges. The normal trading hours for ETH exchanges are 24 hours per day, 365 days per year.

In sum, the Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act, that this filing sufficiently demonstrates that the e CME ETH Futures market represents a regulated market of significant size, and that on the whole the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by investor protection issues that would be resolved by approving this proposal.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

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 rather will facilitate the listing and trading of additional exchange-traded product that will enhance competition among both market participants and listing venues, 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 Rule of Another Self-Regulatory Organization or of the Commission

Not applicable.

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-2023-045)

November __, 2023

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to list and trade shares of the iShares Ethereum Trust

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹, and Rule 19b-4 thereunder,² notice is hereby given that on November 21, 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 a proposed rule change to list and trade shares of the iShares Ethereum Trust (the “Trust”) under Nasdaq Rule 5711(d) (“Commodity-Based Trust Shares”). The shares 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.

¹ 15 U.S.C. 78s(b)(1).

² 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 the Shares under Nasdaq Rule 5711(d),³ which governs the listing and trading of Commodity-Based Trust Shares on the Exchange. iShares Delaware Trust Sponsor LLC, a Delaware limited liability company and an indirect subsidiary of BlackRock, Inc. (“BlackRock”), is the sponsor of the Trust (the “Sponsor”). The Shares will be registered with the SEC by means of the Trust’s registration statement on Form S-1 (the “Registration Statement”).⁴

Description of the Trust

The Shares will be issued by the Trust, a Delaware statutory trust. The Trust will operate pursuant to a trust agreement (the “Trust Agreement”) between the Sponsor, BlackRock Fund Advisors (the “Trustee”) as the trustee of the Trust and will appoint a Delaware Trustee of the Trust (the “Delaware Trustee”) by such time that the Registration Statement is effective. The Trust issues Shares representing fractional

³ 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).

⁴ The descriptions of the Trust contained herein are based, in part, on information in the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

undivided beneficial interests in its net assets. The assets of the Trust consist primarily of ether held by a custodian on behalf of the Trust. Coinbase Custody Trust Company, LLC (the “Ether Custodian”), is the custodian for the Trust’s ether holdings; and another entity will be the custodian for the Trust’s cash holdings (the “Cash Custodian” and together with the Ether Custodian, the “Custodians”) and the administrator of the Trust (the “Trust Administrator”). Under the Trust Agreement, the Trustee may delegate all or a portion of its duties to any agent, and has delegated the bulk of the day-to-day responsibilities to the Trust Administrator and certain other administrative and record-keeping functions to its affiliates and other agents. The Trust is not an investment company registered under the Investment Company Act of 1940, as amended (the “1940 Act”).

The investment objective of the Trust is to reflect generally the performance of the price of ether. The Trust seeks to reflect such performance before payment of the Trust’s expenses and liabilities. The Shares are intended to constitute a simple means of making an investment similar to an investment in ether rather than by acquiring, holding and trading ether directly on a peer-to-peer or other basis or via a digital asset exchange. The Shares have been designed to remove the obstacles represented by the complexities and operational burdens involved in a direct investment in ether, while at the same time having an intrinsic value that reflects, at any given time, the investment exposure to the price of ether owned by the Trust at such time, less the Trust’s expenses and liabilities. Although the Shares are not the exact equivalent of a direct investment in ether, they provide investors with an alternative method of achieving investment exposure to the price of ether through the public securities market, which may be more familiar to them.

Custody of the Trust's Ether

An investment in the Shares is backed by ether held by the Ether Custodian on behalf of the Trust. The Ether Custodian will keep custody of all of the Trust's ether, other than that which is maintained in the Trading Balance with the Prime Broker, in accounts that are required to be segregated from the assets held by the Ether Custodian as principal and the assets of its other customers (the "Vault Balance"), with any remainder of the Vault Balance held as part of a "hot storage".⁵ The Ether Custodian will keep a substantial portion of the private keys associated with the Trust's ether in "cold storage"⁶ (the "Cold Vault Balance") The hardware, software, systems, and procedures of the Ether Custodian may not be available or cost-effective for many investors to access directly.

Net Asset Value

The net asset value of the Trust will be equal to the total assets of the Trust, including but not limited to, all ether and cash less total liabilities of the Trust, each determined by the Trustee pursuant to policies established from time to time by the Trustee or its affiliates or otherwise described herein. The methodology used to calculate

⁵ A portion of the Trust's ether holdings and cash holdings from time to time may be held with the Prime Broker, an affiliate of the Ether Custodian, in the Trading Balance, in connection with in-kind creations and redemptions of Baskets and the sale of ether to pay the Sponsor's Fee and Trust expenses not assumed by the Sponsor. These periodic holdings held in the Trading Balance with the Prime Broker represent an omnibus claim on the Prime Broker's ether held on behalf of clients; these holdings exist across a combination of omnibus hot wallets, omnibus cold wallets, or in accounts in the Prime Broker's name on a trading venue (including third-party venues and the Prime Broker's own execution venue) where the Prime Broker executes orders to buy and sell ether on behalf of its clients.

⁶ The term "cold storage" refers to a safeguarding method by which the private keys corresponding to ether stored on a digital wallet are removed from any computers actively connected to the internet. Cold storage of private keys may involve keeping such wallet on a non-networked computer or electronic device or storing the public key and private keys relating to the digital wallet on a storage device (for example, a USB thumb drive) or printed medium (for example, papyrus or paper) and deleting the digital wallet from all computers.

an index (the “Index”) price to value ether in determining the net asset value of the Trust may not be deemed consistent with U.S. generally accepted accounting principles (“GAAP”).

The Sponsor has the exclusive authority to determine the Trust’s net asset value, which it has delegated to the Trustee under the Trust Agreement. The Trustee has delegated to the Trust Administrator the responsibility to calculate the net asset value of the Trust and the NAV, based on a pricing source selected by the Trustee. In determining the Trust’s net asset value, the Trust Administrator values the ether held by the Trust based on the Index, unless otherwise determined by the Sponsor in its sole discretion. The CME CF Ether-Dollar Reference Rate -New York Variant (the “CF Benchmarks Index”) shall constitute the Index, unless the CF Benchmarks Index is not available or the Sponsor in its sole discretion determines not to use the CF Benchmarks Index as the Index. If the CF Benchmarks Index is not available or the Sponsor determines, in its sole discretion, that the CF Benchmarks Index should not be used, the Trust’s holdings may be fair valued in accordance with the policy approved by the Sponsor.

The Trust’s periodic financial statements may not utilize net asset value or NAV to the extent the methodology used to calculate the Index is deemed not to be consistent with GAAP. For purposes of the Trust’s periodic financial statements, the Trust will utilize a pricing source that is consistent with GAAP, as of the financial statement measurement date. The Sponsor will determine in its sole discretion the valuation sources and policies used to prepare the Trust's financial statements in accordance with GAAP.

The Sponsor may declare a suspension of the calculation of the NAV of the Trust

under certain circumstances.

Net Asset Value

On each Business Day, as soon as practicable after 4:00 p.m. Eastern Time (“ET”), the Trust Administrator evaluates the ether held by the Trust as reflected by the CF Benchmarks Index and determines the net asset value of the Trust and the NAV. For purposes of making these calculations, a Business Day means any day other than a day when Nasdaq is closed for regular trading.

The CF Benchmarks Index employed by the Trust is calculated on each Business Day by aggregating the notional value of ether U.S. dollar trading activity across major ether spot platforms. The CF Benchmarks Index is designed and administered in accordance with IOSCO Principles for Financial Benchmarks. The Administrator of the CF Benchmarks Index is CF Benchmarks Ltd. (the “Index Administrator”). The CF Benchmarks Index serves as a once-a-day benchmark rate of the U.S. dollar price of ether denominated in U.S. dollars (USD/ETH), calculated as of 4:00 p.m. ET. The CF Benchmarks Index aggregates the trade flow of ether-U.S. dollar markets operated by several ether spot trading platforms, during an observation window between 3:00 p.m. and 4:00 p.m. ET into the U.S. dollar price of ether at 4:00 p.m. ET. Specifically, the CF Benchmarks Index is calculated based on the “Relevant Transactions”⁷ of all spot trading platforms for ether-USD that meet the CME CF Constituent Exchange Criteria, which are currently: Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital (the “Constituent Exchanges”), and which may change from time to time. Any changes to

⁷ A “Relevant Transaction” is any cryptocurrency versus U.S. dollar spot trade that occurs during the observation window between 3:00 p.m. and 4:00 p.m. ET on a Constituent Exchange in the ETH/USD pair that is reported and disseminated by a Constituent Exchange through its publicly available API and observed by the Index Administrator.

this composition of spot trading platforms are announced on the Administrator's website (www.cfbenchmarks.com).

If the CF Benchmarks Index is not available or the Sponsor determines, in its sole discretion, that the CF Benchmarks Index should not be used, the Trust's holdings may be fair valued in accordance with the policy approved by the Sponsor.

The Trust is intended to provide a way for Shareholders to obtain exposure to ether by investing in the Shares rather than by acquiring, holding and trading ether directly on a peer-to-peer or other basis or via a digital asset exchange. An investment in Shares of the Trust is not the same as an investment directly in ether on a peer-to-peer or other basis or via a digital asset exchange.

Creation and Redemption of Shares

The Trust issues and redeems baskets ("Baskets")⁸ on a continuous basis. Baskets are only issued or redeemed in exchange for an amount of ether determined by the Trustee on each day that Nasdaq is open for regular trading. No Shares are issued unless the Ether Custodian or Prime Broker has allocated to the Trust's account the corresponding amount of ether. The amount of ether necessary for the creation of a Basket, or to be received upon redemption of a Basket, will decrease over the life of the Trust, due to the payment or accrual of fees and other expenses or liabilities payable by the Trust. Baskets may be created or redeemed only by Authorized Participants, who pay

⁸ The Trust issues and redeems Shares only in blocks of a certain specified size or integral multiples thereof. A block of Shares is called a "Basket." These transactions take place in exchange for ether. Baskets will be offered continuously at the net asset value per Share ("NAV") for the Basket of Shares on the day that an order to create a Basket is accepted by the Trust. The Trust may change the number of Shares in a Basket. Only registered broker-dealers that become authorized participants by entering into a contract with the Sponsor and the Trustee ("Authorized Participants") may purchase or redeem Baskets. Shares will be offered to the public from time to time at varying prices that will reflect the price of ether and the trading price of the Shares on Nasdaq at the time of the offer.

BlackRock Investments, LLC (“BRIL”), an affiliate of the Trustee that has been retained by the Trust to perform certain order processing, Authorized Participant communications, and related services in connection with the issuance and redemption of Baskets (“ETF Services”), a transaction fee for each order to create or redeem Baskets.

Background

Ethereum is free software that is hosted on computers distributed throughout the globe. It employs an array of computer code-based logic, called a protocol, to create a unified understanding of ownership, commercial activity, and economic logic. This allows users to engage in commerce without the need to trust any of its participants or counterparties. Ethereum code creates verifiable and unambiguous rules that assign clear, strong property rights to create a platform for unrestrained business formation and free exchange. No single intermediary or entity operates or controls the Ethereum network (referred to as “decentralization”), the transaction validation and recordkeeping infrastructure of which is collectively maintained by a disparate user base. The Ethereum network allows people to exchange tokens of value, or ether (“ETH”), which are recorded on a distributed public recordkeeping system or ledger known as a blockchain (the “Ethereum Blockchain”), and which can be used to pay for goods and services, including computational power on the Ethereum network, or converted to fiat currencies, such as the U.S. dollar, at rates determined on digital asset exchanges or in individual peer-to-peer transactions. Furthermore, by combining the recordkeeping system of the Ethereum Blockchain with a flexible scripting language that is programmable and can be used to implement sophisticated logic and execute a wide variety of instructions, the Ethereum network is intended to act as a foundational infrastructure layer on top of which users can

build their own custom software programs, as an alternative to centralized web servers. In theory, anyone can build their own custom software programs on the Ethereum network. In this way, the Ethereum network represents a project to expand blockchain deployment beyond a peer-to-peer private money system into a flexible, distributed alternative computing infrastructure that is available to all. On the Ethereum network, ETH is the unit of account that users pay for the computational resources consumed by running their programs.

Up to now, U.S. retail investors have lacked a U.S. regulated, U.S. exchange-traded vehicle to gain exposure to ETH. Instead, current options include: (i) facing the counter-party risk, legal uncertainty, technical risk, and complexity associated with accessing spot ether or (ii) over-the-counter ether funds (“OTC ETH Funds”) with high management fees and potentially volatile premiums and discounts. Meanwhile, investors in other countries, including Germany, Switzerland and France, are able to use more traditional exchange listed and traded products (including exchange-traded funds holding physical ETH) to gain exposure to ETH. Investors across Europe have access to products which trade on regulated exchanges and provide exposure to a broad array of spot crypto assets. U.S. investors, by contrast, are left with fewer and more risky means of getting ether exposure.⁹

To this point, the lack of an ETP that holds spot ETH (a “Spot ETH ETP”) exposes U.S. investor assets to significant risk because investors that would otherwise seek cryptoasset exposure through a Spot ETH ETP are forced to find alternative

⁹ The Exchange notes that the list of countries above is not exhaustive and that securities regulators in a number of additional countries have either approved or otherwise allowed the listing and trading of Spot ETH ETPs.

exposure through generally riskier means. For example, investors in OTC ETH Funds are not afforded the benefits and protections of regulated Spot ETH ETPs, resulting in retail investors suffering losses due to drastic movements in the premium/discount of OTC ETH Funds. An investor who purchased the largest OTC ETH Fund in January 2021 and held the position at the end of 2022 would have suffered a 30% loss due to the change in the premium/discount, even if the price of ETH did not change. Many retail investors likely suffered losses due to this premium/discount in OTC ETH Fund trading; all such losses could have been avoided if a Spot ETH ETP had been available.

Additionally, many U.S. investors that held their digital assets in accounts at FTX,¹⁰ Celsius Network LLC,¹¹ BlockFi Inc.¹² and Voyager Digital Holdings, Inc.¹³ have become unsecured creditors in the insolvencies of those entities. If a Spot ETH ETP was available, it is likely that at least a portion of the billions of dollars tied up in those proceedings would still reside in the brokerage accounts of U.S. investors, having instead been invested in a transparent, regulated, and well-understood structure – a Spot ETH ETP. To this point, approval of a Spot ETH ETP would represent a major win for the protection of U.S. investors in the cryptoasset space. The Trust, like all other series of Commodity-Based Trust Shares, is designed to protect investors against the risk of losses through fraud and insolvency that arise by holding digital assets, including ETH, on centralized platforms.

Applicable Standard

¹⁰ See FTX Trading Ltd., et al., Case No. 22-11068.

¹¹ See Celsius Network LLC, et al., Case No. 22-10964.

¹² See BlockFi Inc., Case No. 22-19361.

¹³ See Voyager Digital Holdings, Inc., et al., Case No. 22-10943.

The Commission has historically approved or disapproved exchange filings to list and trade series of Trust Issued Receipts, including spot based Commodity-Based Trust Shares, on the basis of whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size related to the underlying commodity to be held.¹⁴ Prior orders from the Commission have pointed out that in every prior approval order for Commodity-Based Trust Shares, there has been a derivatives market that represents the regulated market of significant size, generally a Commodity Futures Trading Commission regulated futures market.¹⁵ Further to this

¹⁴ See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018). This proposal was subsequently disapproved by the Commission. See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the “Winklevoss Order”). Prior orders from the Commission have pointed out that in every prior approval order for Commodity-Based Trust Shares, there has been a derivatives market that represents the regulated market of significant size, generally a Commodity Futures Trading Commission (the “CFTC”) regulated futures market. Further to this point, the Commission’s prior orders have noted that the spot commodities and currency markets for which it has previously approved spot ETPs are generally unregulated and that the Commission relied on the underlying futures market as the regulated market of significant size that formed the basis for approving the series of Currency and Commodity-Based Trust Shares, including gold, silver, platinum, palladium, copper, and other commodities and currencies. The Commission specifically noted in the Winklevoss Order that the approval order issued related to the first spot gold ETP “was based on an assumption that the currency market and the spot gold market were largely unregulated.” See Winklevoss Order at 37592. As such, the regulated market of significant size test does not require that the spot ether market be regulated in order for the Commission to approve this proposal, and precedent makes clear that an underlying market for a spot commodity or currency being a regulated market would actually be an exception to the norm. These largely unregulated currency and commodity markets do not provide the same protections as the markets that are subject to the Commission’s oversight, but the Commission has consistently looked to surveillance sharing agreements with the underlying futures market in order to determine whether such products were consistent with the Act.

¹⁵ See streetTRACKS Gold Shares, Exchange Act Release No. 50603 (Oct. 28, 2004), 69 FR 64614, 64618–19 (Nov. 5, 2004) (SR-NYSE-2004-22) (the “First Gold Approval Order”); iShares COMEX Gold Trust, Exchange Act Release No. 51058 (Jan. 19, 2005), 70 FR 3749, 3751, 3754–55 (Jan. 26, 2005) (SR-Amex-2004-38); iShares Silver Trust, Exchange Act Release No. 53521 (Mar. 20, 2006), 71 FR 14967, 14968, 14973–74 (Mar. 24, 2006) (SR-Amex-2005-072); ETFs Gold Trust, Exchange Act Release No. 59895 (May 8, 2009), 74 FR 22993, 22994–95, 22998, 23000 (May 15, 2009) (SR-NYSEArca-2009-40); ETFs Silver Trust, Exchange Act Release No. 59781 (Apr. 17, 2009), 74 FR 18771, 18772, 18775–77 (Apr. 24, 2009) (SR-NYSEArca-2009-28); ETFs Palladium Trust, Exchange Act Release No. 61220 (Dec. 22, 2009), 74 FR 68895, 68896 (Dec. 29, 2009) (SR-NYSEArca-2009-94) (notice of proposed rule change included NYSE Arca’s representation that “[t]he most significant palladium futures exchanges are the NYMEX and the Tokyo Commodity Exchange,” that “NYMEX is the largest exchange in the world for trading precious metals futures and options,” and that NYSE Arca “may

obtain trading information via the Intermarket Surveillance Group,” of which NYMEX is a member, Exchange Act Release No. 60971 (Nov. 9, 2009), 74 FR 59283, 59285–86, 59291 (Nov. 17, 2009)); ETFS Platinum Trust, Exchange Act Release No. 61219 (Dec. 22, 2009), 74 FR 68886, 68887–88 (Dec. 29, 2009) (SR-NYSEArca-2009-95) (notice of proposed rule change included NYSE Arca’s representation that “[t]he most significant platinum futures exchanges are the NYMEX and the Tokyo Commodity Exchange,” that “NYMEX is the largest exchange in the world for trading precious metals futures and options,” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which NYMEX is a member, Exchange Act Release No. 60970 (Nov. 9, 2009), 74 FR 59319, 59321, 59327 (Nov. 17, 2009)); Sprott Physical Gold Trust, Exchange Act Release No. 61496 (Feb. 4, 2010), 75 FR 6758, 6760 (Feb. 10, 2010) (SR-NYSEArca-2009-113) (notice of proposed rule change included NYSE Arca’s representation that the COMEX is one of the “major world gold markets,” that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” and that NYMEX, of which COMEX is a division, is a member of the Intermarket Surveillance Group, Exchange Act Release No. 61236 (Dec. 23, 2009), 75 FR 170, 171, 174 (Jan. 4, 2010)); Sprott Physical Silver Trust, Exchange Act Release No. 63043 (Oct. 5, 2010), 75 FR 62615, 62616, 62619, 62621 (Oct. 12, 2010) (SR-NYSEArca-2010-84); ETFS Precious Metals Basket Trust, Exchange Act Release No. 62692 (Aug. 11, 2010), 75 FR 50789, 50790 (Aug. 17, 2010) (SR-NYSEArca-2010-56) (notice of proposed rule change included NYSE Arca’s representation that “the most significant gold, silver, platinum and palladium futures exchanges are the COMEX and the TOCOM” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 62402 (Jun. 29, 2010), 75 FR 39292, 39295, 39298 (July 8, 2010)); ETFS White Metals Basket Trust, Exchange Act Release No. 62875 (Sept. 9, 2010), 75 FR 56156, 56158 (Sept. 15, 2010) (SR-NYSEArca-2010-71) (notice of proposed rule change included NYSE Arca’s representation that “the most significant silver, platinum and palladium futures exchanges are the COMEX and the TOCOM” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 62620 (July 30, 2010), 75 FR 47655, 47657, 47660 (Aug. 6, 2010)); ETFS Asian Gold Trust, Exchange Act Release No. 63464 (Dec. 8, 2010), 75 FR 77926, 77928 (Dec. 14, 2010) (SR-NYSEArca-2010-95) (notice of proposed rule change included NYSE Arca’s representation that “the most significant gold futures exchanges are the COMEX and the Tokyo Commodity Exchange,” that “COMEX is the largest exchange in the world for trading precious metals futures and options,” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 63267 (Nov. 8, 2010), 75 FR 69494, 69496, 69500–01 (Nov. 12, 2010)); Sprott Physical Platinum and Palladium Trust, Exchange Act Release No. 68430 (Dec. 13, 2012), 77 FR 75239, 75240–41 (Dec. 19, 2012) (SR-NYSEArca-2012-111) (notice of proposed rule change included NYSE Arca’s representation that “[f]utures on platinum and palladium are traded on two major exchanges: The New York Mercantile Exchange ... and Tokyo Commodities Exchange” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 68101 (Oct. 24, 2012), 77 FR 65732, 65733, 65739 (Oct. 30, 2012)); APMEX Physical—1 oz. Gold Redeemable Trust, Exchange Act Release No. 66930 (May 7, 2012), 77 FR 27817, 27818 (May 11, 2012) (SR-NYSEArca-2012-18) (notice of proposed rule change included NYSE Arca’s representation that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, and that gold futures are traded on COMEX and the Tokyo Commodity Exchange, with a cross-reference to the proposed rule change to list and trade shares of the ETFS Gold Trust, in which NYSE Arca represented that COMEX is one of the “major world gold markets,” Exchange Act Release No. 66627 (Mar. 20, 2012), 77 FR 17539, 17542–43, 17547 (Mar. 26, 2012)); JPM XF Physical Copper Trust, Exchange Act Release No. 68440 (Dec. 14, 2012), 77 FR 75468, 75469–70, 75472, 75485–86 (Dec. 20, 2012) (SR-NYSEArca-2012-28); iShares Copper Trust, Exchange Act Release No. 68973 (Feb. 22, 2013), 78 FR 13726, 13727, 13729–30, 13739–40 (Feb. 28, 2013) (SR-NYSEArca-2012-66); First Trust Gold Trust, Exchange Act Release No. 70195 (Aug. 14, 2013), 78 FR 51239, 51240 (Aug. 20, 2013) (SR-NYSEArca-2013-61) (notice of proposed rule change included NYSE Arca’s representation that FINRA, on behalf of the exchange, may

point, the Commission’s prior orders have noted that the spot commodities and currency markets for which it has previously approved spot exchange traded products (“ETPs”) are generally unregulated and that the Commission relied on the underlying futures market as the regulated market of significant size that formed the basis for approving the series of Currency and Commodity-Based Trust Shares, including gold, silver, platinum, palladium, copper, and other commodities and currencies. The Commission specifically noted in the Winklevoss Order that the First Gold Approval Order “was based on an assumption that the currency market and the spot gold market were largely unregulated.”¹⁶

As such, the regulated market of significant size test does not require that the spot ether market be regulated in order for the Commission to approve this proposal, and precedent makes clear that an underlying market for a spot commodity or currency being a regulated market would actually be an exception to the norm. These largely unregulated currency and commodity markets do not provide the same protections as the markets that are subject to the Commission’s oversight, but the Commission has

obtain trading information regarding gold futures and options on gold futures from members of the Intermarket Surveillance Group, including COMEX, or from markets “with which [NYSE Arca] has in place a comprehensive surveillance sharing agreement,” and that gold futures are traded on COMEX and the Tokyo Commodity Exchange, with a cross-reference to the proposed rule change to list and trade shares of the ETFs Gold Trust, in which NYSE Arca represented that COMEX is one of the “major world gold markets,” Exchange Act Release No. 69847 (June 25, 2013), 78 FR 39399, 39400, 39405 (July 1, 2013)); Merk Gold Trust, Exchange Act Release No. 71378 (Jan. 23, 2014), 79 FR 4786, 4786–87 (Jan. 29, 2014) (SR-NYSEArca-2013-137) (notice of proposed rule change included NYSE Arca’s representation that “COMEX is the largest gold futures and options exchange” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” including with respect to transactions occurring on COMEX pursuant to CME and NYMEX’s membership, or from exchanges “with which [NYSE Arca] has in place a comprehensive surveillance sharing agreement,” Exchange Act Release No. 71038 (Dec. 11, 2013), 78 FR 76367, 76369, 76374 (Dec. 17, 2013)); Long Dollar Gold Trust, Exchange Act Release No. 79518 (Dec. 9, 2016), 81 FR 90876, 90881, 90886, 90888 (Dec. 15, 2016) (SR-NYSEArca-2016-84).

¹⁶ See Winklevoss Order at 37592.

consistently looked to surveillance sharing agreements with the underlying futures market in order to determine whether such products were consistent with the Act. With this in mind, the Bitcoin Futures market, as defined below, is the proper market to consider in determining whether there is a related regulated market of significant size.

Further to this point, the Exchange notes that the Commission has approved proposals related to the listing and trading of funds that would primarily hold Bitcoin Futures that are registered under the Securities Act of 1933 (“1933 Act”) instead of the 1940 Act.¹⁷ In the Teucrium Approval, the Commission found the Bitcoin Futures market to be a regulated market of significant size as it relates to Bitcoin Futures, which was inconsistent with prior disapproval orders for ETPs that would hold actual bitcoin instead of derivatives contracts (“Spot Bitcoin ETPs”) that use the same pricing methodology as the Bitcoin Futures. However, and as discussed below, in recent weeks the SEC has approved a number of ETH-based exchange-traded funds (“ETFs”) for trading.

Meanwhile, the Commission has continued to disapprove proposals to list and trade Spot Bitcoin ETPs that would hold spot bitcoin on the seemingly conflicting basis that the CME Bitcoin Futures market is not a regulated market of significant size.¹⁸ In the recently decided Grayscale Investments, LLC v. Securities and Exchange Commission,¹⁹ however, the court resolved this conflict by finding that the SEC had failed to provide a

¹⁷ See Exchange Act Release No. 94620 (April 6, 2022), 87 FR 21676 (April 12, 2022) (the “Teucrium Approval”) and 94853 (May 5, 2022) (collectively, with the Teucrium Approval, the “Bitcoin Futures Approvals”).

¹⁸ The proposed spot bitcoin funds are nearly identical to the Trust but proposed to hold bitcoin instead of ETH.

¹⁹ Grayscale Investments, LLC v. Securities and Exchange Commission, et al., Case No. 22-1142 (the “Grayscale Order”).

coherent explanation as to why it had approved the Bitcoin Futures ETPs while disapproving the proposal to list and trade shares of the Grayscale Bitcoin Trust and vacating the disapproval order.²⁰

As mentioned above, on October 2, 2023 the SEC approved nine ETH-based ETFs for trading.²¹ The ETFs hold ETH futures contracts that trade on the CME and settle using the CME CF Ethereum Reference Rate (“ERR”), which is priced based on the spot ETH markets Coinbase, Kraken, LMAX, Bitstamp, Gemini, and itBit, essentially the same spot markets that are included in the Index that the Trust uses to value its ETH holdings. Given that the Commission has approved ETFs that offer exposure to ETH futures, which themselves are priced based on the underlying spot ETH market, the Sponsor believes that the Commission must also approve ETPs that offer exposure to spot ETH, like the Trust.

In the context of other digital asset-based ETF and ETP proposals for Bitcoin, the SEC has sought to justify treating futures-based ETFs differently from spot-based ETFs because of (i) distinctions between the regulations under which the two products would be registered (under the 1940 Act for digital-asset futures ETFs and 1933 Act for spot digital-asset ETPs), and (ii) the existence of regulation and surveillance-sharing over the CME digital-asset futures market through the Intermarket Surveillance Group (“ISG”), as compared to the spot market for those digital assets.²²

²⁰ Id.

²¹ These ETFs included the Bitwise Ethereum Strategy ETF, Bitwise Bitcoin & Ether Equal Weight Strategy ETF, Hashdex Ether Strategy ETF, ProShares Ether Strategy ETF, ProShares Bitcoin & Ether Strategy ETF, ProShares Bitcoin & Ether Equal Weight Strategy ETF, Valkyrie Bitcoin & Ethereum Strategy ETF, VanEck Ethereum Strategy ETF, and Volatility Shares Ethereum Strategy ETF (collectively, the “ETH Futures Approvals”).

²² See, e.g., Chair Gary Gensler Public Statement, “Remarks Before the Aspen Security Forum,” (August 3, 2021), stating that the Chair looked forward to the Commission’s review of Bitcoin-

While the 1940 Act has certain added investor protections that the 1933 Act does not require, these protections do not seek to allay harms arising from underlying assets or markets of assets that ETFs hold, such as the potential for fraud or manipulation in such markets. In other words, the Sponsor does not believe that the application of the 1940 Act supports the purported justifications the Commission has made in denying other spot digital asset ETPs. Instead, the 1940 Act seeks to remedy certain abusive practices in the management of investment companies such as ETFs, and thus places certain restrictions on ETFs and ETF sponsors. The 1940 Act explicitly lists out the types of abuses it seeks to prevent, and places certain restrictions related to accounting, borrowing, custody, fees, and independent boards, among others. Notably, none of these restrictions address an ETF's underlying assets, whether ETH futures or spot ETH, or the markets from which such assets' pricing is derived, whether the CME ETH futures market or spot ETH markets. As a result, the Sponsor believes that the distinction between registration of ETH futures ETFs under the 1940 Act and the registration of spot ETH ETPs under the

based ETF proposals registered under the 1940 Act, “particularly if those are limited to [the] CME-traded Bitcoin futures,” noting the “significant investor protection” offered by the 1940 Act, <https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03>; Securities Exchange Act Release No. 93559 (November 12, 2021), 86 FR 64539 (November 18, 2021) (SR-CboeBZX-2021-019) (Order Disapproving a Proposed Rule Change to List and Trade Shares of the VanEck Bitcoin Trust under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares) (“VanEck Order”) (denying the first spot bitcoin ETP registered under the 1933 Act following the first approval of a bitcoin futures ETF registered under the 1940 Act, noting the differences in the standard of review that applies to such products); Securities Exchange Act Release No. 94620 (April 6, 2022), 87 FR 21676 (April 12, 2022) (SR-NYSEArca-2021-53) (Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to List and Trade Shares of the Teucrium Bitcoin Futures Fund under NYSE ARCA Rule 8.200-E, Commentary .02 (Trust Issued Receipts)) (“Teucrium Order”) (approving the first bitcoin futures ETP registered under the 1933 Act, stating that “With respect to the proposed ETP, the underlying bitcoin assets are CME bitcoin futures contracts. The relevant analysis, therefore, is whether Arca has a comprehensive surveillance sharing agreement with a regulated market of significant size related to CME bitcoin futures contracts. As discussed below, taking into consideration the direct relationship between the regulated market with which Arca has a surveillance-sharing agreement and the assets held by the proposed ETP, as well as developments with respect to the CME bitcoin futures market—including the launch of exchange-traded funds registered under the Investment Company Act of 1940 (“1940 Act”) that hold CME bitcoin futures (“Bitcoin Futures ETFs”)—the Commission concludes that the Exchange has the requisite surveillance-sharing agreement.”)

1933 Act is one without a difference in the context of ETH-based ETP proposals.

As to (i) above, the Sponsor believes that because the CME ETH futures market is priced based on the underlying spot ETH market, any fraud or manipulation in the spot market would necessarily affect the price of ETH futures, thereby affecting the net asset value of an ETP holding spot ETH or an ETF holding ETH futures, as well as the price investors pay for such product's shares. Accordingly, either CME surveillance can detect spot-market fraud that affects both futures ETFs and spot ETPs, or that surveillance cannot do so for either type of product. Having approved ETH futures ETFs in part on the basis of such surveillance, the Commission has clearly determined that CME surveillance can detect spot-market fraud that would affect spot ETPs, and the Sponsor thus believes that it must also approve spot ETH ETPs on that basis.

In summary, both the Exchange and the Sponsor believe that this proposal and the included analysis are sufficient to establish that the CME ETH Futures market represents a regulated market of significant size as it relates both to the CME ETH Futures market and to the spot ETH market and that this proposal should be approved.

Additionally, the Sponsor believes that the distinctions between the 1940 Act and the 1933 Act, and the surveillance-sharing available for the CME ETH futures market versus the spot ETH market, are not meaningful in the context of ETH-based ETF and ETP proposals, and that such reasoning cannot be a basis for the Commission treating ETH futures ETFs differently from spot ETH ETPs like the Trust. The Sponsor believes that the Commission's approval of ETH futures ETFs means it must also approve spot ETH ETPs like the Trust.

CME ETH Futures

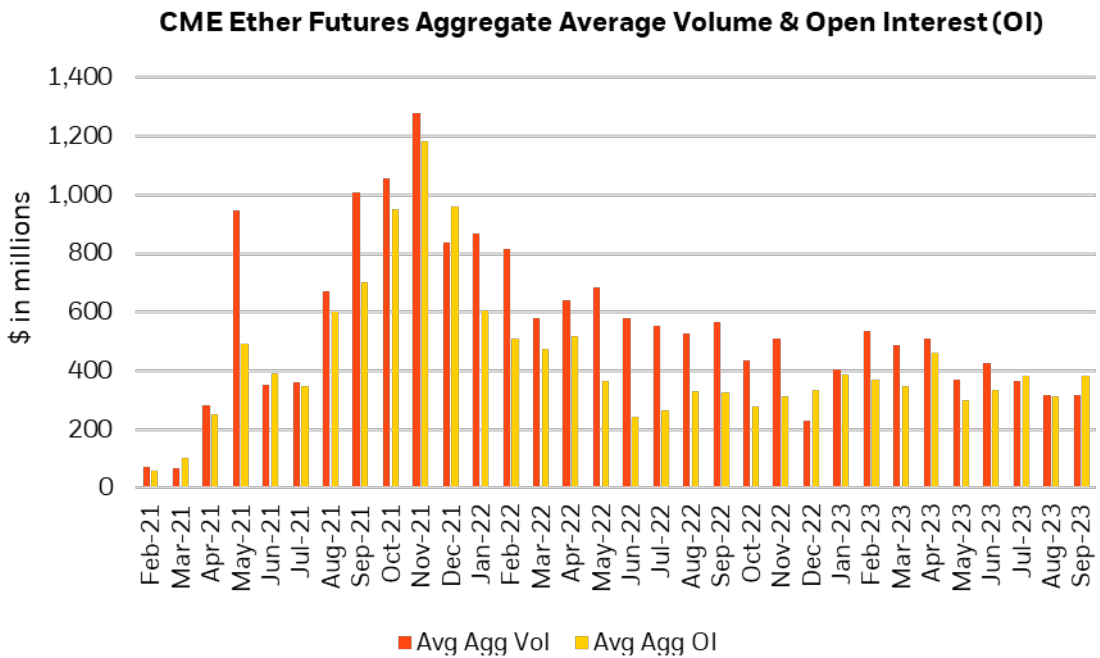
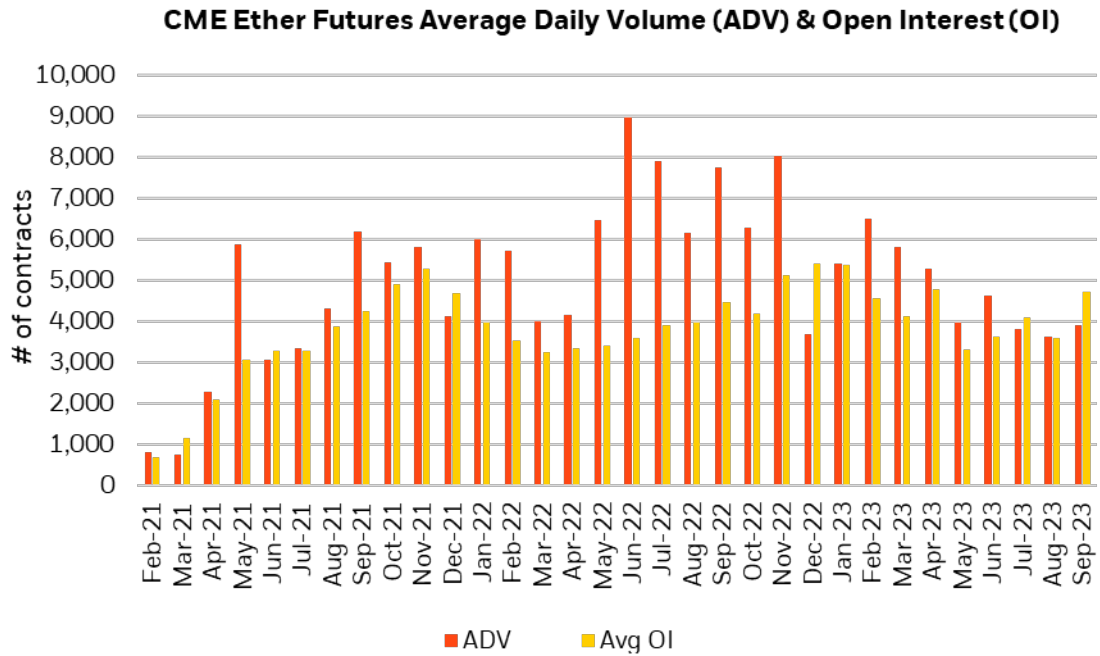
CME began offering trading in Ether Futures in February 2021. Each contract represents 50 ETH and is based on the CME CF Ether-Dollar Reference Rate.²³ The contracts trade and settle like other cash-settled commodity futures contracts. Most measurable metrics related to CME ETH Futures have generally trended up since launch, although some metrics have slowed recently. For example, there were 78,571 CME ETH Futures contracts traded in September 2023 (approximately \$6.3 billion) compared to 163,114 (\$11.9 billion) and 130,546 (\$21.2 billion) contracts traded in September 2022, and September 2022 respectively.²⁴ The daily correlation between the spot ETH and the CME ETH Futures is 0.9993 from the period of 10/13/22 through 10/13/23.²⁵ The number of large open interest holders²⁶ and unique accounts trading CME ETH Futures have both increased, even in the face of heightened Ether price volatility.

²³ The CME CF Ether-Dollar Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto exchanges and trading platforms, including Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.

²⁴ Source: Bloomberg, BlackRock calculations. Data as of 10/18/2023 for period shown (2/8/2021 to 9/30/2023).

²⁵ Source: S&P Ethereum Index, S&P CME Ether Futures Index (Spot).

²⁶ A large open interest holder in CME ETH Futures is an entity that holds at least 25 contracts, which is the equivalent of 1250 ether. At a price of approximately \$1,867 per ether on 7/31/2023, more than 59 firms had outstanding positions of greater than \$2.3 million in CME ETH Futures.



Preventing Fraudulent and Manipulative Practices

In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices;²⁷ and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that this filing sufficiently demonstrates that the CME ETH Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

(i) Designed to Prevent Fraudulent and Manipulative Acts and Practices

²⁷ The Exchange believes that ETH is resistant to price manipulation and that "other means to prevent fraudulent and manipulative acts and practices" exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ETH trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ETH platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ETH prices through continuous trading activity challenging. To the extent that there are ETH exchanges engaged in or allowing wash trading or other activity intended to manipulate the price of ETH on other markets, such pricing does not normally impact prices on other exchange because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ETH markets and the presence of arbitrageurs in those markets means that the manipulation of the price of ETH price on any single venue would require manipulation of the global ETH price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ETH exchange or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance sharing agreement in place²⁸ with a regulated market of significant size. Both the Exchange and CME are members of ISG.²⁹ The only remaining issue to be addressed is whether the ETH Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.³⁰

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent

²⁸ As previously articulated by the Commission, “The standard requires such surveillance-sharing agreements since “they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.” The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.” The Commission has historically held that joint membership in the ISG constitutes such a surveillance sharing agreement. See Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR-NYSEArca-2019-39) (the “Wilshire Phoenix Disapproval”).

²⁹ For a list of the current members and affiliate members of ISG, see <https://www.isgportal.com/>.

³⁰ See Wilshire Phoenix Disapproval.

fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance sharing agreement.³¹

(A) *Reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP*

In light of the similarly high correlation between spot ETH/CME ETH Futures and spot bitcoin/CME Bitcoin Futures (.998 vs. .999, respectively),³² applying the same rationale that the Commission applied to a Bitcoin Futures ETF in the Bitcoin Futures Approvals and the ETH Futures ETFs in the ETH Futures Approvals also indicates that this test is satisfied for this proposal. In the Teucrium Approval, the SEC stated:

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.” Thus, the CME’s surveillance can reasonably be relied upon to capture the effects on the CME futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME futures contracts, whether that attempt is made by directly trading on the CME futures market or indirectly by trading outside of the CME futures market. As such, 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 proposed ETP.³³

The assumptions from this statement are also true for CME ETH Futures, a number of which have recently been approved by the Commission.³⁴ CME ETH Futures pricing is based on pricing from spot ETH markets. The statement from the Teucrium Approval that “CME’s surveillance can reasonably be relied upon to capture the effects

³¹ See Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a ‘cannot be manipulated’ standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.” *Id.* at 37582.

³² Source: S&P Ethereum Index, S&P CME Ether Futures Index (Spot), S&P Bitcoin Index, and S&P CME Bitcoin Futures Index (Spot).

³³ See Teucrium Approval at 21679.

³⁴ See *supra* footnote 21.

on the CME BTC futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME BTC futures contracts ... indirectly by trading outside of the CME BTC futures market,” makes clear that the Commission believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME BTC Futures. This same logic would extend to CME ETH Futures markets where CME’s surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME ETH Futures. This was further acknowledged in the Grayscale lawsuit when Judge Rao stated “...the Commission in the Teucrium order recognizes that the futures prices are influenced by the spot prices, and the Commission concludes in approving futures ETPs that any fraud on the spot market can be adequately addressed by the fact that the futures market is a regulated one...” The Exchange agrees with the Commission on this point and notes that the pricing mechanism applicable to the Shares is similar to that of the CME ETH Futures.

As such, the part (a) of the significant market test outlined above is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the Shares in the same way that it would be for the Bitcoin Futures ETPs, the ETH Futures ETPs and Spot Bitcoin ETPs.

(B) Predominant Influence on Prices in Spot and ETH Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME ETH Futures market or spot market for a number of reasons. First, because the Trust would not hold CME ETH Futures contracts, the only way that it could be the predominant force on prices in that market is through the

spot markets that CME ETH Futures contracts use for pricing.³⁵ The Sponsor notes that ETH total 24-hour spot trading volume has averaged \$9.1B over the year ending October 16, 2023,³⁶ with approximately \$1.7B occurring on venues whose trades are included in the sponsor's benchmark.³⁷ The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ETH market even in its most aggressive projections for the Trust's assets and, thus, the Trust would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME ETH Futures market. Second, much like the CME Bitcoin Futures market, the CME ETH Futures market has progressed and matured significantly. As the court found in the Grayscale Order "Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less." The Exchange and sponsor agree with this sentiment and believe it applies equally to the spot ETH and CME ETH Futures markets.

(C) Other Means to Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that "other means to prevent fraudulent and manipulative acts and practices" are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present.

SSA with Ether Spot Market

³⁵ This logic is reflected by the court in the Grayscale Order at 17-18. Specifically, the court found that "Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market...But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin."

³⁶ Source: CoinGecko.

³⁷ Source: CoinGecko, The Block, and BlackRock calculations.

The Exchange is also proposing to take additional steps to those described above to supplement its ability to obtain information that would be helpful in detecting, investigating, and deterring fraud and market manipulation in the Commodity-Based Trust Shares.

On June 8, 2023, the Exchange reached an agreement on terms with Coinbase, Inc. (“Coinbase”) to enter into a Surveillance-Sharing Agreement, and the associated term sheet became effective as of June 16, 2023. Based on this agreement on terms, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares. Trading of ETH on Coinbase represents a significant portion of US-based ETH trading. The Sponsor has stated to the Exchange that, based on publicly available data reported by spot ether platforms active in the U.S. market, trading on Coinbase has represented approximately 66% of US-dollar to ether trading on such U.S.-based platforms out of total YTD volume across these platforms of approximately U.S. \$93 billion, as of October 16, 2023.³⁸

The Surveillance Sharing Agreement is expected to be a bilateral surveillance-sharing agreement between Nasdaq and Coinbase that is intended to supplement the Exchange’s market surveillance program. The Surveillance Sharing Agreement is expected to have the hallmarks of a surveillance-sharing agreement between two members of the ISG, which would give the Exchange supplemental access to data regarding spot ether trades on Coinbase where the Exchange determines it is necessary as part of its surveillance program for the Commodity-Based Trust Shares. This means that

³⁸ This analysis is based on the following spot ether platforms: Coinbase, Binance US, Kraken, Bitstamp, Gemini, and itBit.

the Exchange expects to receive market data for orders and trades from Coinbase, which it will utilize in surveillance of the trading of Commodity-Based Trust Shares. In addition, the Exchange can request further information from Coinbase related to spot ether trading activity on the Coinbase exchange platform, if the Exchange determines that such information would be necessary to detect and investigate potential manipulation in the trading of the Commodity-Based Trust Shares.

(ii) Designed to Protect Investors and the Public Interest

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ETH through OTC ETH Funds is greater than \$5 billion. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through premium/discount volatility and management fees for OTC ETH Funds. The Exchange believes that, as described above, the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, such concerns are now at the very least outweighed by investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ETH in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in ETH Futures ETFs and operating companies that are imperfect proxies for ETH exposure; and (iv) providing an alternative to custodial spot ETH.

Spot and Proxy Exposure to Ether

Exposure to ether through an ETP also presents certain advantages for retail investors compared to buying spot ether directly. The most notable advantage from the Sponsor's perspective is the elimination of the need for an individual retail investor to either manage their own private keys or to hold ether through a cryptocurrency exchange that lacks sufficient protections. Typically, retail exchanges hold most, if not all, retail investors' ether in "hot" (internet connected) storage and do not make any commitments to indemnify retail investors or to observe any particular cybersecurity standard. Meanwhile, 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 point of failure could cause them to lose some or all of their ether holdings. Thus, with respect to custody of the Trust's ether assets, the Trust presents advantages from an investment protection standpoint for retail investors compared to owning spot ether directly or via a digital asset exchange.

Availability of Information

The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the prior business day's NAV; (b) the prior business day's Official Closing Price; (c) calculation of the premium or discount of such Official Closing Price against such NAV; (d) data in chart form displaying the frequency distribution of discounts and premiums of the Official Closing Price against the NAV, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (e) the prospectus; and (f) other applicable quantitative information. The Trust Administrator will also disseminate the Trust's holdings on a daily basis on the

Trust's website. The price of ether will be made available by one or more major market data vendors, updated at least every 15 seconds during the Regular Market Session. Information about the CF Benchmarks Index, including key elements of how the CF Benchmarks Index is calculated, will be publicly available at <https://www.cfbenchmarks.com/>. Also, an estimated value that reflects an estimated intraday value of the Trust's portfolio (the "Intraday Indicative Value" or "IIV"), will be disseminated.

One or more major market data vendors will provide an IIV per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Market Session (9:30 a.m. to 4:00 p.m. (ET)). The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during the Exchange's Regular Market Session to reflect changes in the value of the Trust's NAV during the trading day.

The IIV disseminated during the Exchange's Regular Market Session should not be viewed as an actual real time update of the NAV, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Market Session by one or more major market data vendors. In addition, the IIV will be available through online information services.

The NAV for the Trust will be calculated by the Trust Administrator once a day and will be disseminated daily to all market participants at the same time. Quotation and last sale information regarding the Shares will be disseminated through the facilities of the Consolidated Tape Association ("CTA").

Initial and Continued Listing

The Shares will be subject to Nasdaq Rule 5711(d)(vi), which sets forth the initial and continued listing criteria applicable to Commodity-Based Trust Shares. The Exchange will obtain a representation that the Trust's NAV will be calculated daily and will be made available to all market participants at the same time. Upon termination of the Trust, the Shares will be removed from listing. The Delaware Trustee, will be a trust company having substantial capital and surplus and the experience and facilities for handling corporate trust business, as required under Nasdaq Rule 5711(d)(vi)(D) and no change will be made to the Delaware Trustee without prior notice to and approval of the Exchange.

As required in Nasdaq Rule 5711(d)(vii), the Exchange notes that any registered market maker ("Market Maker") in the Shares must file with the Exchange, in a manner prescribed by the Exchange, and keep current a list identifying all accounts for trading the underlying commodity, related futures or options on futures, or any other related derivatives, which the registered Market Maker may have or over which it may exercise investment discretion. No registered Market Maker in the Shares shall trade in the underlying commodity, related futures or options on futures, or any other related derivatives, in an account in which a registered Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by Nasdaq Rule 5711(d). In addition to the existing obligations under Exchange rules regarding the production of books and records, the registered Market Maker in the Shares shall make available to the Exchange such books, records or other information pertaining to transactions by such entity or any

limited partner, officer or approved person thereof, registered or non-registered employee affiliated with such entity for its or their own accounts in the underlying commodity, related futures or options on futures, or any other related derivatives, as may be requested by the Exchange.

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 Trust will conform to the initial and continued listing criteria set forth in Nasdaq Rule 5711(d).

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: (1) the extent to which trading is not occurring in the ether underlying the Shares; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

If the IIV or the value of the underlying futures contract 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 futures contract occurs. If the interruption to the dissemination of the IIV or the value of the 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.

Surveillance

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of Shares on the Exchange will be subject to the Exchange's surveillance procedures for derivative products. The Exchange will require the Trust to represent to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Additionally, on June 8, 2023, the Exchange reached an agreement on terms with

Coinbase to enter into a Surveillance Sharing Agreement, and the associated term sheet became effective as of June 16, 2023. Based on this agreement on terms, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares. Trading of ether on Coinbase represents a significant portion of US-based ether trading. The Sponsor has stated to the Exchange that, based on publicly available data reported by spot ether platforms active in the U.S. market, trading on Coinbase has represented approximately 66% of US-dollar to ETH trading on such U.S.-based platforms out of total YTD volume across these platforms of approximately U.S. \$93 billion, as of October 16, 2023.³⁹

The Surveillance Sharing Agreement is expected to be a bilateral surveillance-sharing agreement between Nasdaq and Coinbase that is intended to supplement the Exchange's market surveillance program. The Surveillance Sharing Agreement is expected to have the hallmarks of a surveillance-sharing agreement between two members of the ISG, which would give the Exchange supplemental access to data regarding spot ether trades on Coinbase where the Exchange determines it is necessary as part of its surveillance program for the Commodity-Based Trust Shares. This means that the Exchange expects to receive market data for orders and trades from Coinbase, which it will utilize in surveillance of the trading of Commodity-Based Trust Shares. In addition, the Exchange can request further information from Coinbase related to spot ether trading activity on the Coinbase exchange platform, if the Exchange determines that

³⁹ This analysis is based on the following spot ether platforms: Coinbase, Binance US, Kraken, Bitstamp, Gemini, and itBit.

such information would be necessary to detect and investigate potential manipulation in the trading of the Commodity-Based Trust Shares.

Information Circular

Prior to the commencement of trading, 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 Draft 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 Exchange believes that the proposal is consistent with Section 6(b) of the

Act⁴⁰ in general and Section 6(b)(5) of the Act⁴¹ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Commission has approved numerous series of Trust Issued Receipts,⁴² including Commodity-Based Trust Shares,⁴³ to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices; and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act because this filing sufficiently demonstrates that the CME ETH Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

⁴⁰ 15 U.S.C. 78f.

⁴¹ 15 U.S.C. 78f(b)(5).

⁴² See Exchange Rule 5720.

⁴³ Commodity-Based Trust Shares, as described in Exchange Rule 5711(d), are a type of Trust Issued Receipt.

Designed to Prevent Fraudulent and Manipulative Acts and Practices

In order for a proposal to list and trade a series of Commodity-Based Trust Shares to be deemed consistent with the Act, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place with a regulated market of significant size. Both the Exchange and CME are members of ISG.⁴⁴ As such, the only remaining issue to be addressed is whether the ETH Futures market constitutes a market of significant size, which the Exchange and the Sponsor believes that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.⁴⁵

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.⁴⁶

(a) *Reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP*

⁴⁴ For a list of the current members and affiliate members of ISG, see <https://www.isgportal.com/>.

⁴⁵ See Wilshire Phoenix Disapproval.

⁴⁶ See Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a “cannot be manipulated” standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met. *Id.* at 37582.

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct.

In light of the similarly high correlation between spot ETH/CME ETH Futures and spot bitcoin/CME Bitcoin Futures (.998 vs. .999, respectively),⁴⁷ applying the same rationale that the Commission applied to a Bitcoin Futures ETF in the Bitcoin Futures Approvals also indicates that this test is satisfied for this proposal. In the Teucrium Approval, the SEC stated:

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.” Thus, the CME’s surveillance can reasonably be relied upon to capture the effects on the CME futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME futures contracts, whether that attempt is made by directly trading on the CME futures market or indirectly by trading outside of the CME futures market. As such, 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 proposed ETP.⁴⁸

The assumptions from this statement are also true for CME ETH Futures. CME ETH Futures pricing is based on pricing from spot ETH markets. The statement from the Teucrium Approval that “CME’s surveillance can reasonably be relied upon to capture the effects on the CME BTC futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME BTC futures contracts ... indirectly by trading outside of the CME BTC futures market,” makes clear that the

⁴⁷ Source: S&P Ethereum Index, S&P CME Ether Futures Index (Spot), S&P Bitcoin Index, and S&P CME Bitcoin Futures Index (Spot).

⁴⁸ See Teucrium Approval at 21679.

Commission believes that CME's surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME BTC Futures. This same logic would extend to CME ETH Futures markets where CME's surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME ETH Futures. This was further acknowledged in the Grayscale lawsuit when Judge Rao stated "...the Commission in the Teucrium order recognizes that the futures prices are influenced by the spot prices, and the Commission concludes in approving futures ETPs that any fraud on the spot market can be adequately addressed by the fact that the futures market is a regulated one..." The Exchange agrees with the Commission on this point and notes that the pricing mechanism applicable to the Shares is similar to that of the CME ETH Futures. This view is also consistent with the Sponsor's research.

As such, the Exchange believes that part (a) of the significant market test outlined above is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the Shares in the same way that it would be for both Bitcoin Futures ETPs and Spot Bitcoin ETPs.

(b) Predominant Influence on Prices in Spot and ETH Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in CME ETH Futures market or spot market for a number of reasons. First, because the Trust would not hold CME ETH Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME ETH Futures contracts use for pricing.⁴⁹ The Sponsor notes that

⁴⁹ This logic is reflected by the court in the Grayscale Order at 17-18. Specifically, the court found that "Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market...But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin."

ETH total 24-hour spot trading volume has averaged \$9.1B over the year ending October 16, 2023,⁵⁰ with approximately \$1.7B occurring on venues whose trades are included in the sponsor's benchmark.⁵¹ The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ETH market even in its most aggressive projections for the Trust's assets and, thus, the Trust would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME ETH Futures market. Second, much like the CME Bitcoin Futures market, the CME ETH Futures market has progressed and matured significantly. As the court found in the Grayscale Order "Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less." The Exchange and sponsor agree with this sentiment and believe it applies equally to the spot ETH and CME ETH Futures markets.

(c) Other Means to Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that "other means to prevent fraudulent and manipulative acts and practices" are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present.

Surveillance Sharing Agreement with Ether Spot Market

The Exchange is also proposing to take additional steps to those described above to supplement its ability to obtain information that would be helpful in detecting, investigating, and deterring fraud and market manipulation in the Commodity-Based Trust Shares.

⁵⁰ Source: CoinGecko..

⁵¹ Source: CoinGecko, The Block, and BlackRock calculations.

On June 8, 2023 the Exchange reached an agreement on terms with Coinbase, to enter into a Surveillance-Sharing Agreement, and the associated term sheet became effective as of June 16, 2023. Based on this agreement on terms, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares. Trading of ETH on Coinbase represents a significant portion of US-based ETH trading. The Sponsor has stated to the Exchange that, based on publicly available data reported by spot ether platforms active in the U.S. market, trading on Coinbase has represented approximately 66% of US-dollar to ether trading on such U.S.-based platforms out of total YTD volume across these platforms of approximately U.S. \$93 billion, as of October 16, 2023.⁵²

The Surveillance Sharing Agreement is expected to be a bilateral surveillance-sharing agreement between Nasdaq and Coinbase that is intended to supplement the Exchange's market surveillance program. The Surveillance Sharing Agreement is expected to have the hallmarks of a surveillance-sharing agreement between two members of the ISG, which would give the Exchange supplemental access to data regarding spot ether trades on Coinbase where the Exchange determines it is necessary as part of its surveillance program for the Commodity-Based Trust Shares. This means that the Exchange expects to receive market data for orders and trades from Coinbase, which it will utilize in surveillance of the trading of Commodity-Based Trust Shares. In addition, the Exchange can request further information from Coinbase related to spot ether trading activity on the Coinbase exchange platform, if the Exchange determines that

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This analysis is based on the following spot ether platforms: Coinbase, Binance US, Kraken, Bitstamp, Gemini, and itBit.

such information would be necessary to detect and investigate potential manipulation in the trading of the Commodity-Based Trust Shares.

Designed to Protect Investors and the Public Interest

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ETH through OTC ETH Funds is greater than \$5 billion. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through premium/discount volatility and management fees for OTC ETH Funds. The Exchange believes that, as described above, the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, such concerns are now at the very least outweighed by investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ETH in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in ETH Futures ETFs and operating companies that are imperfect proxies for ETH exposure; and (iv) providing an alternative to custodial spot ETH.

Commodity-Based Trust Shares – Nasdaq Rule 5711(d)

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed on the Exchange pursuant to the initial and continued listing criteria in Nasdaq Rule 5711(d).

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series. The Exchange may obtain information regarding trading in the Shares and listed ETH derivatives via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

Availability of Information

The Exchange also believes that the proposal promotes market transparency in that a large amount of information is currently available about ETH and will be available regarding the Trust and the Shares. In addition to the price transparency of the CF Benchmarks Index, the Trust will provide information regarding the Trust's ETH holdings as well as additional data regarding the Trust.

The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the prior business day's NAV; (b) the prior business day's Official Closing Price; (c) calculation of the premium or discount of such

Official Closing Price against such NAV; (d) data in chart form displaying the frequency distribution of discounts and premiums of the Official Closing Price against the NAV, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (e) the prospectus; and (f) other applicable quantitative information. The Trust Administrator will also disseminate the Trust's holdings on a daily basis on the Trust's website. The price of ether will be made available by one or more major market data vendors, updated at least every 15 seconds during the Regular Market Session. Information about the CF Benchmarks Index, including key elements of how the CF Benchmarks Index is calculated, will be publicly available at <https://www.cfbenchmarks.com/>. Also, an estimated value that reflects an estimated IIV, will be disseminated.

One or more major market data vendors will provide an IIV per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Market Session (9:30 a.m. to 4:00 p.m. (ET)). The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during the Exchange's Regular Market Session to reflect changes in the value of the Trust's NAV during the trading day.

The IIV disseminated during the Exchange's Regular Market Session should not be viewed as an actual real time update of the NAV, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Market Session by one or more major market data vendors. In addition, the IIV will be available through online information services.

The NAV for the Trust will be calculated by the Trust Administrator once a day and will be disseminated daily to all market participants at the same time. Quotation and last sale information regarding the Shares will be disseminated through the facilities of the CTA.

Quotation and last sale information for ether is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters, as well as CF Benchmarks. Information relating to trading, including price and volume information, in ETH is available from major market data vendors and from the exchanges on which ETH is traded. Depth of book information is also available from ETH exchanges. The normal trading hours for ETH exchanges are 24 hours per day, 365 days per year.

In sum, the Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act, that this filing sufficiently demonstrates that the e CME ETH Futures market represents a regulated market of significant size, and that on the whole the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by investor protection issues that would be resolved by approving this proposal.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

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 rather will facilitate the listing and trading of additional exchange-traded product that will enhance competition among both market participants and listing venues, 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. Please include file number SR-NASDAQ-2023-045 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-2023-045. 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-2023-045 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.⁵³

⁵³ 17 CFR 200.30-3(a)(12).

Sherry R. Haywood,

Assistant Secretary.