



Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to List and Trade Shares of the Teucrium Bitcoin Futures Fund under NYSE Arca Rule 8.200-E, Commentary .02 (Trust Issued Receipts)

November 8, 2021.

On July 23, 2021, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares (“Shares”) of the Teucrium Bitcoin Futures Fund (“Fund”) under NYSE Arca Rule 8.200-E, Commentary .02 (Trust Issued Receipts). The proposed rule change was published for comment in the Federal Register on August 11, 2021.<sup>3</sup>

On September 15, 2021, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>5</sup> This order institutes proceedings under Section 19(b)(2)(B) of the Act<sup>6</sup> to determine whether to approve or disapprove the proposed rule change.

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

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

<sup>3</sup> See Securities Exchange Act Release No. 92573 (Aug. 5, 2021), 86 FR 44062 (Aug. 11, 2021) (“Notice”). Comments on the proposed rule change can be found at: <https://www.sec.gov/comments/sr-nysearca-2021-53/srnysearca202153.htm>.

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 92999, 86 FR 52539 (Sept. 21, 2021). The Commission designated November 9, 2021, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

<sup>6</sup> 15 U.S.C. 78s(b)(2)(B).

## I. Summary of the Proposal

As described in more detail in the Notice,<sup>7</sup> the Exchange proposes to list and trade the Shares of the Fund under NYSE Arca Rule 8.200-E, Commentary .02, which governs the listing and trading of Trust Issued Receipts on the Exchange.

According to the Exchange, the Chicago Mercantile Exchange, Inc. (“CME”) currently offers two bitcoin futures contracts, one contract representing five (5) bitcoin (“BTC Contracts”) and another contract representing one-tenth of one (0.10) bitcoin (“MBT Contracts”).<sup>8</sup> Each BTC Contract and MBT Contract settles daily to the BTC Contract volume-weighted average price (“VWAP”) of all trades that occur between 2:59 p.m. and 3:00 p.m., Central Time, the settlement period, rounded to the nearest tradable tick.<sup>9</sup> BTC Contracts and MBT Contracts each expire on the last Friday of the contract month and the final settlement value for each contract is based on the CME CF Bitcoin Reference Rate (“CME CF BRR”).<sup>10</sup>

The investment objective of the Fund is to have the daily changes in the net asset value (“NAV”) of the Shares reflect the daily changes in the price of a specified benchmark (“Benchmark”).<sup>11</sup> The Benchmark is the average of the closing settlement prices for the first to expire and second to expire BTC Contracts listed on the CME. In seeking to achieve the Fund’s investment objective, the Sponsor will employ a “neutral” investment strategy that is intended to track the changes in the Benchmark. Under normal market conditions, the Fund will invest in the first to expire and second to expire BTC Contracts and MBT Contracts (“Bitcoin Futures

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<sup>7</sup> See Notice, supra note 3.

<sup>8</sup> BTC Contracts began trading on the CME Globex trading platform on December 15, 2017 and are cash-settled in U.S. dollars. MBT Contracts began trading on the CME Globex trading platform on May 3, 2021 under the ticker symbol “MBT” and are also cash-settled in U.S. dollars. See id. at 44062.

<sup>9</sup> See id. at 44073.

<sup>10</sup> See id. The CME CF BRR aggregates the trade flow of major bitcoin spot exchanges during a specific calculation window into a once-a-day reference rate of the U.S. dollar price of bitcoin. See id. at 44067 n.59.

<sup>11</sup> The Fund is a series of Teucrium Commodity Trust (“Trust”). The Fund is managed and controlled by Teucrium Trading, LLC (“Sponsor”). See id. at 44062.

Contracts”) and in cash and cash equivalents. The Fund will roll its futures positions on a regular basis in order to track the changing nature of the Benchmark by closing out first to expire contracts prior to settlement that are no longer part of the Benchmark and then entering into second to expire contracts. Accordingly, the Fund will never carry futures positions all the way to cash settlement. The Fund will endeavor to trade in Bitcoin Futures Contracts so that the Fund’s average daily tracking error against the Benchmark will be less than 10 percent over any period of 30 trading days.<sup>12</sup>

The net asset value (“NAV”) per Share of the Fund will be calculated by taking the current market value of its total assets, subtracting any liabilities, and dividing that total by the number of Shares. The administrator of the Fund will calculate the NAV once each trading day, as of the earlier of the close of the New York Stock Exchange or 4:00 p.m., Eastern Standard Time. To determine the value of Bitcoin Futures Contracts, the Fund’s administrator will use the Bitcoin Futures Contract settlement price on the exchange on which the contract is traded, except that the “fair value” of Bitcoin Futures Contracts may be used when Bitcoin Futures Contracts close at their price fluctuation limit for the day. The Fund’s NAV will include any unrealized profit or loss on open Bitcoin Futures Contracts and any other credit or debit accruing to the Fund but unpaid or not received by the Fund.<sup>13</sup>

The daily holdings of the Fund will be available on the Fund’s website. ICE Data Indices, LLC will calculate an updated Indicative Fund Value (“IFV”) for the Fund, which will be disseminated on a per Share basis every 15 seconds during the Exchange’s Core Trading Session. The IFV will be calculated by using the prior day’s closing NAV per Share of the Fund as a base and will be updated throughout the Exchange’s Core Trading Session to reflect changes in the value of the Fund’s holdings during the trading day. The intraday, closing prices, and settlement prices of the Bitcoin Futures Contracts, as well as their specific contract

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<sup>12</sup> See id. at 44062-63.

<sup>13</sup> See id. at 44073-74.

specifications, will be readily available from the applicable futures exchange websites, automated quotation systems, published or other public sources, or major market data vendors. Intra-day price and closing price level information for the Benchmark will be available from major market data vendors. The Benchmark value will be disseminated once every 15 seconds.<sup>14</sup>

The Fund would create and redeem Shares from time to time, but only in one or more blocks of 12,500 Shares (“Creation Baskets”). The purchase and redemption price for Creation Baskets would be the NAV calculated at the end of the business day when a request for a purchase or redemption is received by the Fund. By placing a purchase order, an authorized purchaser would agree to deposit cash with the custodian.<sup>15</sup> The redemption distribution from the Fund would consist of an amount of cash, cash equivalents and/or exchange listed bitcoin futures that is in the same proportion to the total assets of the Fund on the date that the order to redeem is properly received as the number of Shares to be redeemed under the redemption order is in proportion to the total number of Shares outstanding on the date the order is received.<sup>16</sup>

## II. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEArca-2021-53 and Grounds for Disapproval under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>17</sup> to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of proceedings does not indicate that the

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<sup>14</sup> See id. at 44074-75.

<sup>15</sup> An authorized purchaser who places a purchase order would transfer to the custodian the required amount of cash, cash equivalents and/or bitcoin futures by the end of the next business day following the purchase order date or by the end of such later business day, not to exceed three business days after the purchase order date, as agreed to between the authorized purchaser and the custodian when the purchase order is placed (“Purchase Settlement Date”). Upon receipt of the deposit amount, the custodian would direct DTC to credit the number of Creation Baskets ordered to the authorized purchaser’s DTC account on the Purchase Settlement Date. See id.

<sup>16</sup> See id.

<sup>17</sup> 15 U.S.C. 78s(b)(2)(B).

Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>18</sup> the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be "designed to prevent fraudulent and manipulative acts and practices" and "to protect investors and the public interest."<sup>19</sup>

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice,<sup>20</sup> in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following questions and asks commenters to submit data where appropriate to support their views:

1. What are commenters' views on whether the proposed Fund and Shares would be susceptible to manipulation? What are commenters' views generally on whether the Exchange's proposal is designed to prevent fraudulent and manipulative acts and practices?
2. What are commenters' views of the Exchange's assertions that the regulatory and financial landscape relating to bitcoin and other digital assets have changed significantly since 2016?<sup>21</sup> Are the changes that the Exchange identifies sufficient to support the determination that the proposal to list and trade the Shares is designed to protect investors and the public interest and is consistent with the other applicable requirements of Section 6(b)(5) of the Act?

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<sup>18</sup> Id.

<sup>19</sup> 15 U.S.C. 78f(b)(5).

<sup>20</sup> See Notice, supra note 3.

<sup>21</sup> See id. at 44063-66.

3. The Exchange states that the Fund would provide “an opportunity for U.S. investors to gain price exposure to Bitcoin futures contracts in a regulated and transparent exchange-traded vehicle that limits risks” and asserts that concerns regarding potential manipulation of a bitcoin exchange-traded product “have been sufficiently mitigated by the use of futures contracts in the proposed ETP.”<sup>22</sup> What are commenters’ views regarding such assertions?

4. According to the Exchange, “trading in CME Bitcoin futures contracts has increased significantly, in particular with respect to BTC Contracts,” and “[n]early every measurable metric related to BTC Contracts has trended consistently up since launch and/or accelerated upward in the past year.”<sup>23</sup> The Exchange also states that it believes the data provided regarding the recent growth in the bitcoin futures market “clearly establishes that the CME Bitcoin futures markets generally are a market of significant size” and “the current size and volume of the CME Bitcoin futures market is already more than adequate—and still growing in size—to make its own trading activity the primary, if not the lone determinant, of its valuation.”<sup>24</sup> Based on information provided by the Exchange, do commenters agree with the Exchange that the CME’s bitcoin futures market now represents a regulated market of significant size?<sup>25</sup>

5. The Exchange states it believes that “the surveillance agreement already in place between the Exchange and the CME is ‘adequate to monitor’ for abuses in the trading of the Fund’s shares, given the significant likelihood that a person attempting to manipulate the price of the shares of the Fund would have to manipulate the prices of the Bitcoin Futures Contracts.”<sup>26</sup> The Exchange also states that “any would-be manipulator of Bitcoin prices would be reasonably

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<sup>22</sup> See id. at 44066.

<sup>23</sup> See id. at 44067.

<sup>24</sup> See id. at 44072.

<sup>25</sup> See id. at 44071.

<sup>26</sup> See id. at 44072.

likely to have to do so through the CME Bitcoin futures market. . . .”<sup>27</sup> Do commenters agree with the Exchange’s assertions? Why or why not?

6. The Exchange states it believes that “trading in the Shares would not be the predominant force on prices in the Bitcoin Futures market” because of “the significant volume in and size of the CME Bitcoin futures market and the significant liquidity available in the spot market.”<sup>28</sup>

What are commenters views on the Exchange’s assertion and the data provided by the Exchange to support such assertion?

7. The Exchange states “due to the unique structure of the Fund, it is unlikely that price manipulation or fraud on the trading platforms for Bitcoin will have a measurable impact on the NAV of the Fund.”<sup>29</sup> The Exchange further states “[b]ecause the Fund calculates daily NAV based on Bitcoin Futures Contracts’ settlement prices and does not calculate NAV based directly on the underlying spot Bitcoin market, the Sponsor believes that the only practicable way for a bad actor to manipulate the NAV of the Fund is through manipulating the first and second to expire Bitcoin Futures Contracts.”<sup>30</sup> In addition, the Exchange states “BTC Contracts and MBT Contracts are now of such size and scale that Bitcoin futures prices are not specifically materially influenced by other Bitcoin markets.”<sup>31</sup> What are commenters’ views on these assertions?

8. The Sponsor believes that similarities between the operational characteristics and regulatory requirements applicable to exchange-traded funds (“ETFs”) that both register the sale of their shares under the Securities Act of 1933 (“1933 Act”) and are regulated under the Investment Company Act of 1940 (“1940 Act”) and bitcoin futures-based ETPs that register the

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<sup>27</sup> See id.

<sup>28</sup> See id. at 44073. For example, the Exchange states that one Creation Unit (12,500 Shares) at \$50 per share and CME contract value of \$200,000 only prompts buying of a little over 3 contracts; 10 Creation Units = 31 contracts; 100 Creation Units = 310 contracts, compared to YTD average daily trade volume of 8800 first to expire and 2450 second to expire contracts. See id. at 44073 n. 87

<sup>29</sup> See id. at 44071.

<sup>30</sup> See id.

<sup>31</sup> See id.

sale of their shares under the 1933 Act but are not regulated under the 1940 Act like the Fund “provide sufficient investor protections” and that “there are no investor protections afforded by the 1940 Act that justify unequal review and approval processes for [the Fund] as opposed to bitcoin ETFs.”<sup>32</sup> The Sponsor further states that “in addition to ETFs being required to have a board where ETPs are not, ETFs are also subject to a number of substantive limitations under the 1940 Act to which ETPs are not—e.g., limitations on transactions with affiliates and on leverage” but that it “does not believe [the Fund’s] proposed structure or operations differ substantively from bitcoin ETFs in any manner that should lead the Commission to require 1940 Act registration.”<sup>33</sup> What are commenters’ views of such assertions?

9. The Exchange states that “the Commission should also consider the direct, quantifiable investor protection issue in determining whether to approve this proposal.”<sup>34</sup> In addition, the Exchange states that exposure to bitcoin through a bitcoin futures-based ETP like the Fund presents advantages to retail investors compared to buying spot bitcoin, investing in OTC bitcoin funds, or investing in operating companies with bitcoin exposure.<sup>35</sup> What are commenters’ views regarding the Exchange’s assertions?

### III. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, and the rules and regulations thereunder. Although there do not

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<sup>32</sup> See Letter from W. Thomas Conner, Vedder Price, on behalf of the Sponsor, dated September 1, 2021, at 6, available at <https://www.sec.gov/comments/sr-nysearca-2021-53/srnysearca202153-9197848-249688.pdf>.

<sup>33</sup> See *id.* at 9.

<sup>34</sup> See Notice, *supra* note 3, at 44067.

<sup>35</sup> See *id.* at 44066-67.

appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>36</sup>

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2021-53 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-NYSEArca-2021-53. This file number should be included on the subject line if e-mail 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 (<http://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

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<sup>36</sup> Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2021-53 and should be submitted by [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>37</sup>

J. Matthew DeLesDernier,  
Assistant Secretary.

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<sup>37</sup> 17 CFR 200.30-3(a)(57).