



## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98780; File No. SR-NYSEARCA-2023-70]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule

### Change to List and Trade Shares of the Grayscale Ethereum Trust under NYSE Arca Rule

### 8.201-E (Commodity-Based Trust Shares)

October 23, 2023.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on October 10, 2023, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to list and trade shares of the following under NYSE Arca Rule 8.201-E: Grayscale Ethereum Trust (ETH) (the “Trust”).<sup>4</sup> The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

#### 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 self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> The Trust was previously named Ethereum Investment Trust, whose name was changed pursuant to a Certificate of Amendment to the Certificate of Trust of Ethereum Investment Trust filed with the Delaware Secretary of State on January 11, 2019.

it received on the proposed rule change. The text of those 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 parts of such statements.

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

1. Purpose

Under NYSE Arca Rule 8.201-E, the Exchange may propose to list and/or trade pursuant to unlisted trading privileges “Commodity-Based Trust Shares.”<sup>5</sup> The Exchange proposes to list and trade shares (“Shares”)<sup>6</sup> of the Trust pursuant to NYSE Arca Rule 8.201-E.<sup>7</sup>

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<sup>5</sup> Commodity-Based Trust Shares are securities issued by a trust that represent investors’ discrete identifiable and undivided beneficial ownership interest in the commodities deposited into the Trust.

<sup>6</sup> The Shares are expected to be listed under the ticker symbol “ETH.”

<sup>7</sup> On April 17, 2020, the Trust confidentially filed its draft registration statement on Form 10 under the ‘34 Act) (File No. 377-03131) (the “Draft Registration Statement on Form 10”). On June 16, 2020, the Trust confidentially filed Amendment No. 1 to the Draft Registration Statement on Form 10. The Jumpstart Our Business Startups Act (the “JOBS Act”), enacted on April 5, 2012, added Section 6(e) to the Securities Act of 1933 (the “Securities Act” or “’33 Act”). Section 6(e) of the Securities Act provides that an “emerging growth company” may confidentially submit to the Commission a draft registration statement for confidential, non-public review by the Commission staff prior to public filing, provided that the initial confidential submission and all amendments thereto shall be publicly filed not later than 21 days before the date on which the issuer conducts a road show, as such term is defined in Securities Act Rule 433(h)(4). An emerging growth company is defined in Section 2(a)(19) of the Securities Act as an issuer with less than \$1,000,000,000 total annual gross revenues during its most recently completed fiscal year. The Trust meets the definition of an emerging growth company and consequently submitted its Draft Registration Statement on Form 10 to the Commission on a confidential basis. On August 6, 2020, the Trust filed its registration statement on Form 10 under the Securities Act (File No. 000-56193) (the “Registration Statement on Form 10”). On October 2, 2020, the Trust filed Amendment No. 1 to the Registration Statement on Form 10. On October 5, 2020, the Registration Statement on Form 10 was automatically deemed effective. On March 5, 2021, February 25, 2022, and March 1, 2023, the Trust filed its annual report on Form 10-K under the Securities Act (File No. 000-56193) (the “Annual Reports”). On November 6, 2020, May 7, 2021, August 6, 2021, November 5, 2021, May 6, 2022, August 5, 2022, November 4, 2022, May 5, 2023 and August 4, 2023, the Trust filed its quarterly reports on Form 10-Q under the Securities Act (File No. 000-56193) (the “Quarterly Reports”). The descriptions of the Trust, the Shares, and ETH contained herein are based, in part, on the Annual Reports and Quarterly Reports. On January 17, 2019, the Trust submitted to the Commission an amended Form D as a business trust. Shares of the Trust have been quoted on OTC Market’s OTCQX Best Marketplace under the symbol “ETHE” since June 20, 2019. On May 23, 2019 and March 20, 2020, the Trust published annual reports for ETHE for the periods ended December 31, 2018 and December 31, 2019, respectively. On May 23, 2019, August 8, 2019, November 11, 2019, May 8, 2020, and August 6, 2020, the Trust published quarterly reports for ETHE for the periods ended March 31, 2019, June 30, 2019, September 30, 2019, March 31, 2020, and June 30, 2020, respectively. Reports published before October 5, 2020, the date on which the Trust’s Shares became registered pursuant to Section 12(g) of the Act, can be found on OTC Market’s website (<https://www.otcmarkets.com/stock/ETHE/disclosure>), and reports published on or after October 5, 2020 can be found on OTC Market’s website and the Commission’s website (<https://www.sec.gov/edgar/browse/?CIK=1725210&owner=exclude>). The Shares will be of the same class and will have the same rights as shares of ETHE. According to the Sponsor, freely tradeable shares of ETHE will remain freely tradeable Shares on the date of the listing of the Shares that are unregistered under the Securities Act. Restricted shares of ETHE will remain subject to private placement restrictions on such

The Trust is the world’s largest Ethereum (“ETH”) investment fund by assets under management as of the date of this filing. The Trust has approximately \$4.8 billion in assets under management<sup>8</sup> (representing 2.5% of all ETH in circulation), its Shares trade millions of dollars in daily volume and are held by more than a quarter of a million American investor accounts seeking exposure to ETH without the cost and complexity of purchasing the asset directly. However, because the Trust is not currently listed as an exchange-traded product (“ETP”), the value of the Shares has not been able to closely track the value of the Trust’s underlying ETH. The Sponsor thus believes that allowing Shares of the Trust to list and trade on the Exchange as an ETP (*i.e.*, converting the Trust to a spot Ethereum ETP) would unlock over \$1.6 billion of value<sup>9</sup> for the Trust’s shareholders and provide other investors with a safe and secure way to invest in ETH on a regulated national securities exchange.

The sponsor of the Trust is Grayscale Investments, LLC (“Sponsor”), a Delaware limited liability company. The Sponsor is a wholly owned subsidiary of Digital Currency Group, Inc. (“Digital Currency Group”). The trustee for the Trust is Delaware Trust Company (“Trustee”). The custodian for the Trust is Coinbase Custody Trust Company, LLC (“Custodian”).<sup>10</sup> The distribution and marketing agent for the Trust is Grayscale Securities, LLC (the “Marketing Agent”). The index provider for the Trust is CoinDesk Indices, Inc. (the “Index Provider”).

The Trust is a Delaware statutory trust, formed on December 13, 2017, that operates pursuant to a trust agreement between the Sponsor and the Trustee (“Trust Agreement”). The Trust has no fixed termination date.

### Operation of the Trust

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date, and the holders of such restricted shares will continue to hold those Shares subject to those restrictions until they become freely tradable Shares.

<sup>8</sup> As of September 28, 2023.

<sup>9</sup> As of September 28, 2023.

<sup>10</sup> According to the Annual Report, Digital Currency Group owns a minority interest in Coinbase, Inc., which is the parent company of the Custodian, representing less than 1.0% of its equity.

According to the Annual Report, the Trust’s assets consist solely of ETH, Incidental Rights,<sup>11</sup> IR Virtual Currency,<sup>12</sup> proceeds from the sale of ETH, Incidental Rights, and IR Virtual Currency pending use of such cash for payment of Additional Trust Expenses<sup>13</sup> or distribution to shareholders, and any rights of the Trust pursuant to any agreements, other than the Trust Agreement, to which the Trust is a party. Each Share represents a proportional interest, based on the total number of Shares outstanding, in each of the Trust’s assets as determined by reference to the Index Price,<sup>14</sup> less the Trust’s expenses and other liabilities (which include accrued but unpaid fees and expenses). The Sponsor expects that the market price of the Shares will fluctuate over time in response to the market prices of ETH. In addition, because the Shares reflect the estimated accrued but unpaid expenses of the Trust, the number of ETH represented by a Share will gradually decrease over time as the Trust’s ETH are used to pay the Trust’s expenses. The Trust does not expect to take any Incidental Rights or IR Virtual Currency it may hold into account for purposes of determining the Trust’s “Digital Asset Holdings” (as described below) or the Digital Asset Holdings per Share.

The activities of the Trust are limited to (i) issuing “Baskets” (as defined below) in exchange for ETH transferred to the Trust as consideration in connection with creations, (ii) transferring or selling ETH, Incidental Rights, IR Virtual Currency, or any other staking

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<sup>11</sup> “Incidental Rights” are rights to acquire, or otherwise establish dominion and control over, any virtual currency or other asset or right, which rights are incident to the Trust’s ownership of ETH and arise without any action of the Trust, or of the Sponsor or Trustee on behalf of the Trust.

<sup>12</sup> “IR Virtual Currency” is any virtual currency tokens, or other asset or right, acquired by the Trust through the exercise (subject to the applicable provisions of the Trust Agreement) of any Incidental Right.

<sup>13</sup> “Additional Trust Expenses” are any expenses incurred by the Trust in addition to the Sponsor’s Fee that are not Sponsor-paid Expenses, including, but not limited to, (i) taxes and governmental charges, (ii) expenses and costs of any extraordinary services performed by the Sponsor (or any other service provider) on behalf of the Trust to protect the Trust or the interests of shareholders (including in connection with any Incidental Rights, any IR Virtual Currency, or any other staking consideration), (iii) any indemnification of the Custodian or other agents, service providers or counterparties of the Trust, (iv) the fees and expenses related to the listing, quotation or trading of the Shares on any Secondary Market (including legal, marketing and audit fees and expenses) to the extent exceeding \$600,000 in any given fiscal year and (v) extraordinary legal fees and expenses, including any legal fees and expenses incurred in connection with litigation, regulatory enforcement or investigation matters.

<sup>14</sup> The “Index Price” means the U.S. dollar value of an ETH derived from the Digital Asset Exchanges that are reflected in the Index, calculated at 4:00 p.m., New York time, on each business day. For purposes of the Trust Agreement, the term ETH Index Price has the same meaning as the Index Price as defined herein.

consideration as necessary to cover the “Sponsor’s Fee” and/or certain Trust expenses, (iii) transferring ETH in exchange for Baskets surrendered for redemption (subject to obtaining regulatory approval from the SEC and approval of the Sponsor), (iv) causing the Sponsor to sell ETH, Incidental Rights, IR Virtual Currency, or any other staking consideration on the termination of the Trust, (v) making distributions of Incidental Rights, IR Virtual Currency, and/or any other staking consideration, or cash from the sale thereof, and (vi) engaging in all administrative and security procedures necessary to accomplish such activities in accordance with the provisions of the Trust Agreement, the Custodian Agreement, the Index License Agreement, and the Participant Agreements.

In addition, the Trust may engage in any lawful activity necessary or desirable in order to facilitate shareholders’ access to Incidental Rights or IR Virtual Currency, provided that such activities do not conflict with the terms of the Trust Agreement. The Trust will not be actively managed. It will not engage in any activities designed to obtain a profit from, or to ameliorate losses caused by, changes in the market prices of ETH.

#### Investment Objective

According to the Annual Report, and as further described below, the Trust’s investment objective is for the value of the Shares (based on ETH per Share) to reflect the value of the ETH held by the Trust, determined by reference to the Index Price, less the Trust’s expenses and other liabilities. While an investment in the Shares is not a direct investment in ETH, the Shares are designed to provide investors with a cost-effective and convenient way to gain investment exposure to ETH. A substantial direct investment in ETH may require expensive and sometimes complicated arrangements in connection with the acquisition, security and safekeeping of the ETH and may involve the payment of substantial fees to acquire such ETH from third-party facilitators through cash payments of U.S. dollars. Because the value of the Shares is correlated

with the value of ETH held by the Trust, it is important to understand the investment attributes of, and the market for, ETH.

#### ETH and the Ethereum Network<sup>15</sup>

According to the Annual Report, Ethereum, or ETH, is a digital asset that is created and transmitted through the operations of the peer-to-peer “Ethereum Network,” a decentralized network of computers that operates on cryptographic protocols. No single entity owns or operates the Ethereum Network, the infrastructure of which is collectively maintained by a decentralized user base. The Ethereum Network allows people to exchange tokens of value, called Ether, which are recorded on a public transaction ledger known as a blockchain. ETH can be used to pay for goods and services, including computational power on the Ethereum network, or it can be converted to fiat currencies, such as the U.S. dollar, at rates determined on “Digital Asset Exchanges”<sup>16</sup> that trade ETH or in individual end-user-to-end-user transactions under a barter system.

Furthermore, the Ethereum Network also allows users to write and implement smart contracts—that is, general-purpose code that executes on every computer in the network and can instruct the transmission of information and value based on a sophisticated set of logical conditions. Using smart contracts, users can create markets, store registries of debts or promises, represent the ownership of property, move funds in accordance with conditional instructions and create digital assets other than ETH on the Ethereum Network. Smart contract operations are executed on the Ethereum Blockchain in exchange for payment of ETH. The Ethereum Network

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<sup>15</sup> The description of ETH and the Ethereum Network in this section was provided by the Sponsor and is based on the Annual Report.

<sup>16</sup> A “Digital Asset Market” is a “Brokered Market,” “Dealer Market,” “Principal-to-Principal Market” or “Exchange Market,” as each such term is defined in the Financial Accounting Standards Board Accounting Standards Codification Master Glossary. The “Digital Asset Exchange Market” is the global exchange market for the trading of ETH, which consists of transactions on electronic Digital Asset Exchanges. A “Digital Asset Exchange” is an electronic marketplace where exchange participants may trade, buy and sell ETH based on bid-ask trading. The largest Digital Asset Exchanges are online and typically trade on a 24-hour basis, publishing transaction price and volume data.

is one of a number of projects intended to expand blockchain use beyond just a peer-to-peer money system.

The Ethereum Network went live on July 30, 2015. Unlike other digital assets, such as Bitcoin, which are solely created through a progressive mining process, 72.0 million ETH were created in connection with the launch of the Ethereum Network. At the time of the network launch, a non-profit called the Ethereum Foundation was the sole organization dedicated to protocol development.

The Ethereum Network is decentralized in that it does not require governmental authorities or financial institution intermediaries to create, transmit, or determine the value of ETH. Rather, following the initial distribution of ETH, ETH is created, burned, and allocated by the Ethereum Network protocol through a process that is currently subject to an issuance and burn rate. The value of ETH is determined by the supply of and demand for ETH on the Digital Asset Exchanges or in private end-user-to-end-user transactions.

New ETH are created and rewarded to the validators of a block in the Ethereum Blockchain for verifying transactions. The Ethereum Blockchain is effectively a decentralized database that includes all blocks that have been validated, and it is updated to include new blocks as they are validated. Each ETH transaction is broadcast to the Ethereum Network and, when included in a block, recorded in the Ethereum Blockchain. As each new block records outstanding ETH transactions, and outstanding transactions are settled and validated through such recording, the Ethereum Blockchain represents a complete, transparent and unbroken history of all transactions of the Ethereum Network.

Among other things, ETH is used to pay for transaction fees and computational services (i.e., smart contracts) on the Ethereum Network; users of the Ethereum Network pay for the computational power of the machines executing the requested operations with ETH. Requiring payment in ETH on the Ethereum Network incentivizes developers to write quality applications and increases the efficiency of the Ethereum Network because wasteful code costs more, while

also ensuring that the Ethereum Network remains economically viable by compensating for contributed computational resources.

### ***Smart Contracts and Development on the Ethereum Network***

Smart contracts are programs that run on a blockchain that can execute automatically when certain conditions are met. Smart contracts facilitate the exchange of anything representative of value, such as money, information, property, or voting rights. Using smart contracts, users can send or receive digital assets, create markets, store registries of debts or promises, represent ownership of property or a company, move funds in accordance with conditional instructions and create new digital assets.

Development on the Ethereum Network involves building more complex tools on top of smart contracts, such as decentralized apps (“DApps”); organizations that are autonomous, known as decentralized autonomous organizations (“DAOs”); and entirely new decentralized networks. For example, a company that distributes charitable donations on behalf of users could hold donated funds in smart contracts that are paid to charities only if the charity satisfies certain pre-defined conditions.

Moreover, the Ethereum Network has also been used as a platform for creating new digital assets and conducting their associated initial coin offerings. As of June 30, 2023, a majority of digital assets were built on the Ethereum Network, with such assets representing a significant amount of the total market value of all digital assets.

More recently, the Ethereum Network has been used for decentralized finance (“DeFi”) or open finance platforms, which seek to democratize access to financial services, such as borrowing, lending, custody, trading, derivatives and insurance, by removing third-party intermediaries. DeFi can allow users to lend and earn interest on their digital assets, exchange one digital asset for another and create derivative digital assets such as stablecoins, which are digital assets pegged to a reserve asset such as fiat currency. Over the course of 2022, between

\$20 billion and \$98 billion worth of digital assets were locked up as collateral on DeFi platforms on the Ethereum Network.<sup>17</sup>

In addition, the Ethereum Network and other smart contract platforms have been used for creating non-fungible tokens, or “NFTs.” Unlike digital assets native to smart contract platforms that are fungible and enable the payment of fees for smart contract execution, NFTs allow for digital ownership of assets that convey certain rights to other digital or real-world assets. This new paradigm allows users to own rights to other assets through NFTs, which enable users to trade them with others on the Ethereum Network. For example, an NFT may convey rights to a digital asset that exists in an online game or a Dapp, and users can trade their NFT in the Dapp or game, and carry them to other digital experiences, creating an entirely new free-market, internet-native economy that can be monetized in the physical world.

#### *Overview of the Ethereum Network’s Operations*

In order to own, transfer, or use ETH directly on the Ethereum Network (as opposed to through an intermediary, such as a custodian), a person generally must have internet access to connect to the Ethereum Network. ETH transactions may be made directly between end-users without the need for a third-party intermediary. To prevent the possibility of double-spending ETH, a user must notify the Ethereum Network of the transaction by broadcasting the transaction data to its network peers. The Ethereum Network provides confirmation against double-spending by memorializing every transaction in the Ethereum Blockchain, which is publicly accessible and transparent. This memorialization and verification against double-spending is accomplished through the Ethereum Network validation process, which adds “blocks” of data, including recent transaction information, to the Ethereum Blockchain.

#### *Summary of an ETH Transaction*

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<sup>17</sup> DeFiLlama, “Ethereum Total Value Locked,” <https://defillama.com/chain/Ethereum>.

Prior to engaging in ETH transactions directly on the Ethereum Network, a user generally must first install on its computer or mobile device an Ethereum Network software program that will allow the user to generate a private and public key pair associated with an ETH address, commonly referred to as a “wallet.” The Ethereum Network software program and the ETH address also enable the user to connect to the Ethereum Network and transfer ETH to, and receive ETH from, other users.

Each Ethereum Network address, or wallet, is associated with a unique “public key” and “private key” pair. To receive ETH, the ETH recipient must provide its public key to the party initiating the transfer. This activity is analogous to a recipient for a transaction in U.S. dollars providing a routing address in wire instructions to the payor so that cash may be wired to the recipient’s account. The payor approves the transfer to the address provided by the recipient by “signing” a transaction that consists of the recipient’s public key with the private key of the address from where the payor is transferring the ETH. The recipient, however, does not make public or provide to the sender its related private key.

Neither the recipient nor the sender reveals their private keys in a transaction, because the private key authorizes transfer of the funds in that address to other users. Therefore, if a user loses his private key, the user may permanently lose access to the ETH contained in the associated address. Likewise, ETH is irretrievably lost if the private key associated with them is deleted and no backup has been made. When sending ETH, a user’s Ethereum Network software program must validate the transaction with the associated private key. In addition, since every computation on the Ethereum Network requires processing power, there is a transaction fee involved with the transfer that is paid by the payor. The resulting digitally validated transaction is sent by the user’s Ethereum Network software program to the Ethereum Network validators to allow transaction confirmation.

Ethereum Network validators record and confirm transactions when they validate and add blocks of information to the Ethereum Blockchain. In proof-of-stake, validators compete to be

randomly selected to validate transactions. When a validator is selected to validate a block, it creates that block, which includes data relating to (i) the verification of newly submitted and accepted transactions and (ii) a reference to the prior block in the Ethereum Blockchain to which the new block is being added. The validator becomes aware of outstanding, unrecorded transactions through the data packet transmission and distribution discussed above.

Upon the addition of a block included in the Ethereum Blockchain, the Ethereum Network software program of both the spending party and the receiving party will show confirmation of the transaction on the Ethereum Blockchain and reflect an adjustment to the ETH balance in each party's Ethereum Network public key, completing the ETH transaction. Once a transaction is confirmed on the Ethereum Blockchain, it is irreversible.

Some ETH transactions are conducted "off-blockchain" and are therefore not recorded in the Ethereum Blockchain. Some "off-blockchain transactions" involve the transfer of control over, or ownership of, a specific digital wallet holding ETH or the reallocation of ownership of certain ETH in a pooled-ownership digital wallet, such as a digital wallet owned by a Digital Asset Exchange. In contrast to on-blockchain transactions, which are publicly recorded on the Ethereum Blockchain, information and data regarding off-blockchain transactions are generally not publicly available. Therefore, off-blockchain transactions are not truly ETH transactions in that they do not involve the transfer of transaction data on the Ethereum Network and do not reflect a movement of ETH between addresses recorded in the Ethereum Blockchain. For these reasons, off-blockchain transactions are subject to risks, as any such transfer of ETH ownership is not protected by the protocol behind the Ethereum Network or recorded in, and validated through, the blockchain mechanism.

## ***Creation of New ETH***

### ***Initial Creation of ETH***

Unlike other digital assets such as Bitcoin, which are solely created through a progressive mining process, 72.0 million ETH were created in connection with the launch of the Ethereum Network. The initial 72.0 million ETH were distributed as follows:

Initial Distribution: 60.0 million ETH, or 83.33% of the supply, were sold to the public in a crowd sale conducted between July and August 2014 that raised approximately \$18 million.

Ethereum Foundation: 6.0 million ETH, or 8.33% of the supply, were distributed to the Ethereum Foundation for operational costs.

Ethereum Developers: 3.0 million ETH, or 4.17% of the supply, were distributed to developers who contributed to the Ethereum Network.

Developer Purchase Program: 3.0 million ETH, or 4.17% of the supply, were distributed to members of the Ethereum Foundation to purchase at the initial crowd sale price.

Following the launch of the Ethereum Network, ETH supply initially increased through a progressive mining process. Following the introduction of EIP-1559, described below, ETH supply and issuance rate varies based on factors such as recent use of the network.

### ***Proof-of-Work Mining Process***

Prior to September 2022, Ethereum operated using a proof-of-work consensus mechanism. Under proof-of-work, in order to incentivize those who incurred the computational costs of securing the network by validating transactions, there was a reward given to the computer that was able to create the latest block on the chain. Every 12 seconds, on average, a new block was added to the Ethereum Blockchain with the latest transactions processed by the network, and the computer that generated this block was awarded a variable amount of ETH, depending on use of the network at the time. In certain mining scenarios, referred to as an uncle/aunt reward, ETH was sometimes sent to another miner if they were also able to find a solution, but their block was not included. Due to the nature of the algorithm for block

generation, this process (generating a “proof-of-work”) was guaranteed to be random. The process by which a digital asset was “mined” resulted in new blocks being added to such digital asset’s blockchain and new digital assets being issued to the miners. Prior to the Merge upgrade, described below, computers on the Ethereum Network engaged in a set of prescribed complex mathematical calculations in order to add a block to the Ethereum Blockchain and thereby confirm ETH transactions included in that block’s data.

### *Proof-of-Stake Process*

In the second half of 2020, the Ethereum Network began the first of several stages of an upgrade that was initially known as “Ethereum 2.0” and eventually became known as the “Merge” to transition the Ethereum Network from a proof-of-work consensus mechanism to a proof-of-stake consensus mechanism. The Merge was completed on September 15, 2022, and the Ethereum Network has operated on a proof-of-stake model since such time.

Unlike proof-of-work, in which miners expend computational resources to compete to validate transactions and are rewarded coins in proportion to the amount of computational resources expended, in proof-of-stake, miners (sometimes called validators) risk or “stake” coins to compete to be randomly selected to validate transactions and are rewarded coins in proportion to the amount of coins staked. Any malicious activity, such as validating multiple blocks, disagreeing with the eventual consensus, or otherwise violating protocol rules, results in the forfeiture or “slashing” of a portion of the staked coins. Proof-of-stake is viewed as more energy efficient and scalable than proof-of-work and is sometimes referred to as “virtual mining.” Every 12 seconds, approximately, a new block is added to the Ethereum Blockchain with the latest transactions processed by the network, and the validator that generated this block is awarded ETH.

### *Limits on ETH Supply*

The rate at which new ETH are issued and put into circulation is expected to vary. Following the Merge, approximately 1,700 ETH are issued per day, though the issuance rate

varies based on the number of validators on the network. In addition, the issuance of new ETH could be partially or completely offset by the burn mechanism introduced by the EIP-1559 modification, under which ETH are removed from supply at a rate that varies with network usage. On occasion, the ETH supply has been deflationary over a 24-hour period as a result of the burn mechanism. The attributes of the new consensus algorithm are subject to change, but in sum, the new consensus algorithm and related modifications reduced total new ETH issuances and could turn the ETH supply deflationary over the long term.

As of June 30, 2023, approximately 120 million ETH were outstanding.<sup>18</sup>

#### *Modifications to the ETH Protocol*

The Ethereum Network is an open source project with no official developer or group of developers that controls it. However, historically the Ethereum Network's development has been overseen by the Ethereum Foundation and other core developers. The Ethereum Foundation and core developers are able to access and alter the Ethereum Network source code and, as a result, they are responsible for quasi-official releases of updates and other changes to the Ethereum Network's source code.

For example, in 2019, the Ethereum Network completed a network upgrade called Metropolis that was designed to enhance the usability of the Ethereum Network and was introduced in two stages. The first stage, called Byzantium, was implemented in October 2017. The purpose of Byzantium was to increase the network's privacy, security, and scalability and reduce the block reward from 5.0 ETH to 3.0 ETH. The second stage, called Constantinople, was implemented in February 2019, along with another upgrade, called St. Petersburg. Another network upgrade, called Istanbul, was implemented in December 2019. The purpose of Istanbul was to make the network more resistant to denial of service attacks, enable greater ETH and Zcash interoperability as well as other Equihash-based proof-of-work digital assets, and to

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<sup>18</sup> CoinMarketCap, "Ethereum," <https://coinmarketcap.com/currencies/ethereum/>.

increase the scalability and performance for solutions on zero-knowledge privacy technology like SNARKs and STARKs. The purpose of these upgrades was to prepare the Ethereum Network for the introduction of a proof-of-stake algorithm and reduce the block reward from 3.0 ETH to 2.0 ETH. In the second half of 2020, the Ethereum Network began the first of several stages of an upgrade culminating in the Merge. The Merge amended the Ethereum Network's consensus mechanism to include proof-of-stake. Forthcoming upgrades will include sharding. The purpose of sharding is to increase scalability of a database, such as a blockchain, by splitting the data processing responsibility among many nodes, allowing for parallel processing and validation of transactions. This contrasts with the existing Ethereum Blockchain, which requires each node to process and validate every transaction.

In 2021, the Ethereum network implemented the EIP-1559 upgrade. EIP-1559 changed the methodology used to calculate the fees paid to miners (now validators). This new methodology splits fees into two components: a base cost and priority fee. The base cost is now removed from circulation, or "burnt", and the priority fee is paid to validators. EIP-1559 has reduced the total net issuance of ETH fees to validators. The release of updates to the Ethereum Network's source code does not guarantee that the updates will be automatically adopted. Users and validators must accept any changes made to the Ethereum source code by downloading the proposed modification of the Ethereum Network's source code. A modification of the Ethereum Network's source code is only effective with respect to the Ethereum users and validators that download it. If a modification is accepted only by a percentage of users and validators, a division in the Ethereum Network will occur such that one network will run the pre-modification source code and the other network will run the modified source code. Such a division is known as a "fork." Consequently, as a practical matter, a modification to the source code becomes part of the Ethereum Network only if accepted by participants collectively having a majority of the validation power on the Ethereum Network.

Core development of the Ethereum source code has increasingly focused on modifications of the Ethereum protocol to increase speed and scalability and also allow for financial and non-financial next generation uses. The Trust's activities will not directly relate to such projects, though such projects may utilize ETH as tokens for the facilitation of their non-financial uses, thereby potentially increasing demand for ETH and the utility of the Ethereum Network as a whole. Conversely, projects that operate and are built within the Ethereum Blockchain may increase the data flow on the Ethereum Network and could either "bloat" the size of the Ethereum Blockchain or slow confirmation times.

### Custody of the Trust's ETH

Digital assets and digital asset transactions are recorded and validated on blockchains, the public transaction ledgers of a digital asset network. Each digital asset blockchain serves as a record of ownership for all of the units of such digital asset, even in the case of certain privacy-focused digital assets, where the transactions themselves are not publicly viewable. All digital assets recorded on a blockchain are associated with a public blockchain address, also referred to as a digital wallet. Digital assets held at a particular public blockchain address may be accessed and transferred using a corresponding private key.

### *Key Generation*

Public addresses and their corresponding private keys are generated by the Custodian in secret key generation ceremonies at secure locations inside faraday cages, which are enclosures used to block electromagnetic fields and mitigate attacks. The Custodian uses quantum random number generators to generate the public and private key pairs.

Once generated, private keys are encrypted, separated into "shards," and then further encrypted. After the key generation ceremony, all materials used to generate private keys, including computers, are destroyed. All key generation ceremonies are performed offline. No party other than the Custodian has access to the private key shards of the Trust.

### *Key Storage*

Private key shards are distributed geographically in secure vaults around the world, including in the United States. The locations of the secure vaults may change regularly and are kept confidential by the Custodian for security purposes.

The Digital Asset Account<sup>19</sup> uses offline storage, or “cold storage,” mechanisms to secure the Trust’s private keys. The term cold storage refers to a safeguarding method by which the private keys corresponding to digital assets are disconnected and/or deleted entirely from the internet. Cold storage of private keys may involve keeping such keys on a non-networked (or “airgapped”) computer or electronic device or storing the private keys on a storage device (for example, a USB thumb drive) or printed medium (for example, papyrus, paper, or a metallic object). A digital wallet may receive deposits of digital assets but may not send digital assets without use of the digital assets’ corresponding private keys. In order to send digital assets from a digital wallet in which the private keys are kept in cold storage, either the private keys must be retrieved from cold storage and entered into an online, or “hot,” digital asset software program to sign the transaction, or the unsigned transaction must be transferred to the cold server in which the private keys are held for signature by the private keys and then transferred back to the online digital asset software program. At that point, the user of the digital wallet can transfer its digital assets.

### *Security Procedures*

The Custodian is the custodian of the Trust’s private keys in accordance with the terms and provisions of the Custodian Agreement. Transfers from the Digital Asset Account require certain security procedures, including, but not limited to, multiple encrypted private key shards, usernames, passwords and 2-step verification. Multiple private key shards held by the Custodian must be combined to reconstitute the private key to sign any transaction in order to transfer the

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<sup>19</sup> The Digital Asset Account is a segregated custody account controlled and secured by the Custodian to store private keys, which allows for the transfer of ownership or control of the Trust’s ETH on the Trust’s behalf.

Trust's assets. Private key shards are distributed geographically in secure vaults around the world, including in the United States.

As a result, if any one secure vault is ever compromised, this event will have no impact on the ability of the Trust to access its assets, other than a possible delay in operations, while one or more of the other secure vaults is used instead. These security procedures are intended to remove single points of failure in the protection of the Trust's assets.

Transfers of ETH to the Digital Asset Account will be available to the Trust once processed on the Blockchain.

Subject to obtaining regulatory approval to operate a redemption program and authorization of the Sponsor, the process of accessing and withdrawing ETH from the Trust to redeem a Unit by an Authorized Participant will follow the same general procedure as transferring ETH to the Trust to create a Unit by an Authorized Participant, only in reverse.

#### Digital Asset Holdings

According to the Annual Report, the Trust's assets consist solely of ETH, Incidental Rights, IR Virtual Currency, proceeds from the sale of ETH, Incidental Rights, and IR Virtual Currency pending use of such cash for payment of Additional Trust Expenses or distribution to the shareholders, and any rights of the Trust pursuant to any agreements, other than the Trust Agreement, to which the Trust is a party. Each Share represents a proportional interest, based on the total number of Shares outstanding, in each of the Trust's assets as determined in the case of ETH by reference to the Index Price, less the Trust's expenses and other liabilities (which include accrued but unpaid fees and expenses). The Sponsor expects that the market price of the Shares will fluctuate over time in response to the market prices of ETH. In addition, because the Shares reflect the estimated accrued but unpaid expenses of the Trust, the number of ETH represented by a Share will gradually decrease over time as the Trust's ETH is used to pay the Trust's expenses. The Trust does not expect to take any Incidental Rights or IR Virtual Currency

it may hold into account for purposes of determining the Trust's Digital Asset Holdings or the Digital Asset Holdings per Share.

The Sponsor will evaluate the ETH held by the Trust and determine the Digital Asset Holdings of the Trust in accordance with the relevant provisions of the Trust Documents. The following is a description of the material terms of the Trust Documents as they relate to valuation of the Trust's ETH and the Digital Asset Holdings calculations.

On each business day at 4:00 p.m., New York time, or as soon thereafter as practicable (the "Evaluation Time"), the Sponsor will evaluate the ETH held by the Trust and calculate and publish the Digital Asset Holdings of the Trust. To calculate the Digital Asset Holdings, the Sponsor will:

1. Determine the Index Price as of such business day.
2. Multiply the Index Price by the Trust's aggregate number of ETH owned by the Trust as of 4:00 p.m., New York time, on the immediately preceding day, less the aggregate number of ETH payable as the accrued and unpaid Sponsor's Fee as of 4:00 p.m., New York time, on the immediately preceding day.
3. Add the U.S. dollar value of ETH, calculated using the Index Price, receivable under pending creation orders, if any, determined by multiplying the number of the Baskets represented by such creation orders by the Basket Amount and then multiplying such product by the Index Price.
4. Subtract the U.S. dollar amount of accrued and unpaid Additional Trust Expenses, if any.
5. Subtract the U.S. dollar value of the ETH, calculated using the Index Price, to be distributed under pending redemption orders, if any, determined by multiplying the number of Baskets to be redeemed represented by such redemption orders by the Basket Amount and then multiplying such product by the Index Price (the

amount derived from steps 1 through 5 above, the “Digital Asset Holdings Fee Basis Amount”).

6. Subtract the U.S. dollar amount of the Sponsor’s Fee that accrues for such business day, as calculated based on the Digital Asset Holdings Fee Basis Amount for such business day.

In the event that the Sponsor determines that the primary methodology used to determine the Index Price is not an appropriate basis for valuation of the Trust’s ETH, the Sponsor will utilize the cascading set of rules as described in “Trust Valuation of ETH” below. In addition, in the event that the Trust holds any Incidental Rights and/or IR Virtual Currency, the Sponsor may, at its discretion, include the value of such Incidental Rights and/or IR Virtual Currency in the determination of the Digital Asset Holdings, provided that the Sponsor has determined in good faith a method for assigning an objective value to such Incidental Rights and/or IR Virtual Currency. At this time, the Trust does not expect to take any Incidental Rights or IR Virtual Currency it may hold into account for the purposes of determining the Digital Asset Holdings or the Digital Asset Holdings per Share.

#### ETH Value

##### *Digital Asset Exchange Valuation*

According to the Annual Report, the value of ETH is determined by the value that various market participants place on ETH through their transactions. The most common means of determining the value of an ETH is by surveying one or more Digital Asset Exchanges where ETH is traded publicly (e.g., Coinbase Pro, Kraken, and LMAX Digital). Additionally, there are over-the-counter dealers or market makers that transact in ETH.

### *Digital Asset Exchange Public Market Data*

On each online Digital Asset Exchange, ETH is traded with publicly disclosed valuations for each executed trade, measured by one or more fiat currencies such as the U.S. dollar or euro. Over-the-counter dealers or market makers do not typically disclose their trade data.

As of June 30, 2023, the Digital Asset Exchanges included in the Index are Coinbase Pro, Kraken, and LMAX Digital. As further described below, the Sponsor and the Trust reasonably believe each of these Digital Asset Exchanges are in material compliance with applicable U.S. federal and state licensing requirements and maintain practices and policies designed to comply with know-your-customer (“KYC”), anti-money-laundering (“AML”) regulations.

*Coinbase Pro:* A U.S.-based exchange registered as a money services business (“MSB”) with the U.S. Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”) and licensed as a virtual currency business under the New York State Department of Financial Services (“NYDFS”) BitLicense program, as well as money transmitter in various U.S. states.

*Kraken:* A U.S.-based exchange registered as an MSB with FinCEN and licensed as money transmitter in various U.S. states. Kraken does not hold a BitLicense.

*LMAX Digital:* A U.K.-based exchange registered as a broker with the Financial Conduct Authority. LMAX Digital does not hold a BitLicense.

Currently, there are several Digital Asset Exchanges operating worldwide, and online Digital Asset Exchanges represent a substantial percentage of ETH buying and selling activity and provide the most data with respect to prevailing valuations of ETH. These exchanges include established exchanges such as exchanges included in the Index, which provide a number of options for buying and selling ETH. The below table reflects the trading volume in ETH and market share<sup>20</sup> of the ETH-U.S. dollar trading pair of each of the Digital Asset Exchanges

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<sup>20</sup> Market share is calculated using trading volume data (in ETH) provided by the Index Provider for certain Digital Asset Exchanges, including Coinbase Pro, Kraken, and LMAX Digital, as well as certain other large U.S.-dollar denominated Digital Asset Exchanges that are not included in the Index as of June 30, 2023, including Bitstamp, Binance.US (data included from April 1, 2020), Bitfinex, Bittrex (data included from July 31, 2018), Cboe Digital (data included from October 1, 2020), FTX.US (data included from July 1, 2021 through November 10, 2022), Gemini, HitBTC (data included from June 13, 2019 through March

included in the Index as of June 30, 2023,<sup>21</sup> using data reported by the Index Provider from December 14, 2017 to June 30, 2023:

<b>Digital Asset Exchanges included in the Index as of June 30, 2023</b>	<b>Volume (ETH)</b>	<b>Market Share</b>
Coinbase Pro .....	399,687,249	34.61%
Kraken.....	132,211,166	11.45%
LMAX Digital.....	65,848,432	5.70%
<b>Total ETH-U.S. dollar trading pair .....</b>	<b>597,746,846</b>	<b>51.76%</b>

The domicile, regulation, and legal compliance of the Digital Asset Exchanges included in the Index varies. Information regarding each Digital Asset Exchange may be found, where available, on the websites for such Digital Asset Exchanges, among other places.

*The Index and the Index Price*

The Index is a U.S. dollar-denominated composite reference rate for the price of ETH. The Index is designed to (i) mitigate the effects of fraud, manipulation and other anomalous

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31, 2020), OKCoin (data included from December 25, 2018 through December 31, 2022), and itBit (data included from December 27, 2018).

<sup>21</sup> On January 19, 2020, the Index Provider removed itBit due to a lack of trading volume and added LMAX Digital to the Index based on the exchange meeting the liquidity thresholds as part of its scheduled quarterly review. Effective July 23, 2022, the Index Provider removed Bitstamp from the Index due to the exchange’s failure to meet the minimum liquidity requirement, and added FTX.US as a Constituent Exchange based on its satisfaction of the minimum liquidity requirement as part of its scheduled quarterly review. Effective November 10, 2022, the Index Provider removed FTX.US from the Index due to FTX.US’s announcement that trading on the exchange may be halted, which would impact FTX.US’s ability to reliably publish trade prices and volumes on a real-time basis through APIs, and did not add any Constituent Exchanges as part of its review. Effective January 28, 2023, the Index Provider added Binance.US to the Index based on the exchange meeting the minimum liquidity requirement, and did not remove any Constituent Exchanges as part of its quarterly review. On June 17, 2023, the Index Provider removed Binance.US from the Index, due to Binance.US’s announcement that the exchange was suspending U.S. dollar deposits and withdrawals and planned to delist its U.S. dollar trading pairs, and did not add any Constituent Exchanges as part of its review.

trading activity from impacting the ETH reference rate, (ii) provide a real-time, volume-weighted fair value of ETH and (iii) appropriately handle and adjust for non-market related events.

The Index Price is determined by the Index Provider through a process in which trade data is cleansed and compiled in such a manner as to algorithmically reduce the impact of anomalous or manipulative trading. This is accomplished by adjusting the weight of each data input based on price deviation relative to the observable set, as well as recent and long-term trading volume at each venue relative to the observable set.

#### *Constituent Exchange Selection*

According to the Annual Report, the Digital Asset Exchanges that are included in the Index are selected by the Index Provider utilizing a methodology that is guided by the International Organization of Securities Commissions (“IOSCO”) principles for financial benchmarks. For an exchange to become a Digital Asset Exchange included in the Index (a “Constituent Exchange”), it must satisfy the criteria listed below (the “Inclusion Criteria”):

- Sufficient USD liquidity relative to the size of the listed assets;
- No evidence in the past 12 months of trading restrictions on individuals or entities that would otherwise meet the exchange’s eligibility requirements to trade;
- No evidence in the past 12 months of undisclosed restrictions on deposits or withdrawals from user accounts;
- Real-time price discovery;
- Limited or no capital controls;
- Transparent ownership including a publicly-owned ownership entity;
- Publicly available language and policies addressing legal and regulatory compliance in the US, including KYC (Know Your Customer), AML (Anti-Money Laundering) and other policies designed to comply with relevant regulations that might apply to it;

- Be a U.S.-domiciled exchange or a non-U.S. domiciled exchange that is able to service U.S. investors;
- Offer programmatic spot trading of the trading<sup>22</sup> pair; and
- Reliably publish trade prices and volumes on a real-time basis through Rest and Websocket APIs.

A Digital Asset Exchange is removed as a Constituent Exchanges when it no longer satisfies the Inclusion Criteria. The Index Provider does not currently include data from over-the-counter markets or derivatives platforms among the Constituent Exchanges. According to the Annual Report, over-the-counter data is not currently included because of the potential for trades to include a significant premium or discount paid for larger liquidity, which creates an uneven comparison relative to more active markets. There is also a higher potential for over-the-counter transactions to not be arms-length, and thus not be representative of a true market price. ETH derivative markets are also not currently included as the markets remain relatively thin. The Index Provider will consider IOSCO principles for financial benchmarks and the management of trading venues of ETH derivatives and the aforementioned Inclusion Criteria when considering inclusion of over-the-counter or derivative platform data in the future.

The Index Provider and the Sponsor have entered into an index license agreement, dated as of February 1, 2022 (as amended, the “Index License Agreement”), governing the Sponsor’s use of the Index Price.<sup>23</sup> Pursuant to the terms of the Index License Agreement, the Index Provider may adjust the calculation methodology for the Index Price without notice to, or consent of, the Trust or its shareholders. The Index Provider may decide to change the calculation methodology to maintain the integrity of the Index Price calculation should it identify or become aware of previously unknown variables or issues with the existing methodology that it

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<sup>22</sup> Exchanges with programmatic trading offer traders an application programming interface that permits trading by sending programmed commands to the exchange.

<sup>23</sup> Upon entering into the Index License Agreement, the Sponsor and the Index Provider terminated the license agreement between the parties dated as of February 28, 2019.

believes could materially impact its performance and/or reliability. The Index Provider has sole discretion over the determination of Index Price and may change the methodologies for determining the Index Price from time to time. Shareholders will be notified of any material changes to the calculation methodology or the Index Price in the Trust's current reports and will be notified of all other changes that the Sponsor considers significant in the Trust's periodic or current reports. The Trust will determine the materiality of any changes to the Index Price on a case-by-case basis, in consultation with external counsel.

The Index Provider may change the trading venues that are used to calculate the Index or otherwise change the way in which the Index is calculated at any time. For example, the Index Provider has scheduled quarterly reviews in which it may add or remove Constituent Exchanges that satisfy or fail the Inclusion Criteria. The Index Provider does not have any obligation to consider the interests of the Sponsor, the Trust, the shareholders, or anyone else in connection with such changes. While the Index Provider is not required to publicize or explain the changes or to alert the Sponsor to such changes, it has historically notified the Trust of any material changes to the Constituent Exchanges, including any additions or removals of the Constituent Exchanges, in addition to issuing press releases in connection with the same. The Sponsor will notify investors of any such material event by filing a current report on Form 8-K. Although the Index methodology is designed to operate without any manual intervention, rare events would justify manual intervention. Intervention of this kind would be in response to non-market-related events, such as the halting of deposits or withdrawals of funds on a Digital Asset Exchange, the unannounced closure of operations on a Digital Asset Exchange, insolvency or the compromise of user funds. In the event that such an intervention is necessary, the Index Provider would issue a public announcement through its website, API and other established communication channels with its clients.

#### *Determination of the Index Price*

The Index applies an algorithm to the price of ETH on the Constituent Exchanges calculated on a per second basis over a 24-hour period. The Index's algorithm is expected to reflect a four-pronged methodology to calculate the Index Price from the Constituent Exchanges:

- Volume Weighting: Constituent Exchanges with greater liquidity receive a higher weighting in the Index, increasing the ability to execute against (i.e., replicate) the Index in the underlying spot markets.
- Price-Variance Weighting: The Index Price reflects data points that are discretely weighted in proportion to their variance from the rest of the Constituent Exchanges. As the price at a particular exchange diverges from the prices at the rest of the Constituent Exchanges, its weight in the Index Price consequently decreases.
- Inactivity Adjustment: The Index Price algorithm penalizes stale activity from any given Constituent Exchange. When a Constituent Exchange does not have recent trading data, its weighting in the Index Price is gradually reduced until it is de-weighted entirely. Similarly, once trading activity at a Constituent Exchange resumes, the corresponding weighting for that Constituent Exchange is gradually increased until it reaches the appropriate level.
- Manipulation Resistance: In order to mitigate the effects of wash trading and order book spoofing, the Index only includes executed trades in its calculation. Additionally, the Index only includes Constituent Exchanges that charge trading fees to its users in order to attach a real, quantifiable cost to any manipulation attempts.

The Index Provider re-evaluates the weighting algorithm on a periodic basis, but maintains discretion to change the way in which an Index Price is calculated based on its periodic review or in extreme circumstances. The exact methodology to calculate the Index Price is not publicly available. Still, the Index is designed to limit exposure to trading or price

distortion of any individual Digital Asset Exchange that experiences periods of unusual activity or limited liquidity by discounting, in real-time, anomalous price movements at individual Digital Asset Exchanges.

The Sponsor believes the Index Provider's selection process for Constituent Exchanges as well as the methodology of the Index Price's algorithm provides a more accurate picture of ETH price movements than a simple average of Digital Asset Exchange spot prices, and that the weighting of ETH prices on the Constituent Exchanges limits the inclusion of data that is influenced by temporary price dislocations that may result from technical problems, limited liquidity or fraudulent activity elsewhere in the ETH spot market. By referencing multiple trading venues and weighting them based on trade activity, the Sponsor believes that the impact of any potential fraud, manipulation or anomalous trading activity occurring on any single venue is reduced.

If the Index Price becomes unavailable, or if the Sponsor determines in good faith that such Index Price does not reflect an accurate price for ETH, then the Sponsor will, on a best efforts basis, contact the Index Provider to obtain the Index Price directly from the Index Provider. If after such contact such Index Price remains unavailable or the Sponsor continues to believe in good faith that such Index Price does not reflect an accurate price for the relevant digital asset, then the Sponsor will employ a cascading set of rules to determine the Index Price, as described below in "Determination of the Index Price When Index Prices are Unavailable."

The Trust values its ETH for operational purposes by reference to the Index Price. The Index Price is the value of an ETH as represented by the Index, calculated at 4:00 p.m., New York time, on each business day.

#### Illustrative Example

For the purposes of illustration, outlined below are examples of how the attributes that impact weighting and adjustments in the aforementioned methodology may be utilized to

generate the Index Price for a digital asset. In this example, the Constituent Exchanges for the Index Price for a digital asset are Coinbase Pro, Kraken, LMAX Digital, and Bitstamp.

The Index Price algorithm, as described above, accounts for manipulation at the outset by only including data from executed trades on Constituent Exchanges that charge trading fees.

Then, the below-listed elements may impact the weighting of the Constituent Exchanges on the Index price as follows:

- Volume Weighting: Each Constituent Exchange will be weighted to appropriately reflect the trading volume share of the Constituent Exchange relative to all the Constituent Exchanges during this same period. For example, an average hourly weighting of 67.06%, 14.57%, 11.88%, and 6.49% for Coinbase Pro, LMAX Digital, Kraken, and Bitstamp, respectively, would represent each Constituent Exchange's share of trading volume during the same period.
- Inactivity Adjustment: Assume that a Constituent Exchange represented a 14% weighting on the Index Price of a digital asset, which is based on the per-second calculations of its trading volume and price-variance relative to the cohort of Constituent Exchanges included in such Index, and then went offline for approximately two hours. The index algorithm would automatically recognize inactivity and start de-weighting the Constituent Exchange at the 3-minute mark and continue to do so over a 7-minute period until its influence was effectively zero, 10-minutes after becoming inactive. As soon as trading activity resumed at the Constituent Exchange, the index algorithm would re-weight it to the appropriate weighting based on trading volume and price-variance relative to the cohort of Constituent Exchanges included in the Index. Due to the period of inactivity, it would re-weight the Constituent Exchange activity to a weight lower than its original weighting—for example, to 12%.

- Price-Variance Weighting: Assume that for a one-hour period, the digital asset's execution prices on one Constituent Exchange were trading more than 7% higher than the average execution prices on another Constituent Exchange. The algorithm will automatically detect the anomaly and reduce that specific Constituent Exchange's weighting to 0% for that one-hour period, ensuring a reliable spot reference unaffected by the localized event.

*Determination of the Index Price When Index Prices are Unavailable*

The Sponsor uses the following cascading set of rules to calculate the Index Price.<sup>24</sup> For the avoidance of doubt, the Sponsor will employ the below rules sequentially and in the order as presented below, should one or more specific rule(s) fail.

1. Index Price = The price set by the Index as of 4:00 p.m., New York time, on the valuation date. If the Index becomes unavailable, or if the Sponsor determines in good faith that the Index does not reflect an accurate price, then the Sponsor will, on a best efforts basis, contact the Index Provider to obtain the Index Price directly from the Index Provider. If after such contact the Index remains unavailable or the Sponsor continues to believe in good faith that the Index does not reflect an accurate price, then the Sponsor will employ the next rule to determine the Index Price. There are no predefined criteria to make a good faith assessment and it will be made by the Sponsor in its sole discretion.
2. Index Price = The price set by Coin Metrics Real-Time Rate (the "Secondary Index") as of 4:00 p.m., New York time, on the valuation date (the "Secondary Index Price"). The Secondary Index Price is a real-time reference rate price, calculated using trade data from constituent markets selected by Coin Metrics (the "Secondary Index Provider"). The Secondary Index Price is calculated by

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<sup>24</sup> The Sponsor updated these rules on January 11, 2022.

applying weighted-median techniques to such trade data where half the weight is derived from the trading volume on each constituent market and half is derived from inverse price variance, where a constituent market with high price variance as a result of outliers or market anomalies compared to other constituent markets is assigned a smaller weight. If the Secondary Index becomes unavailable, or if the Sponsor determines in good faith that the Secondary Index does not reflect an accurate price, then the Sponsor will, on a best efforts basis, contact the Secondary Index Provider to obtain the Secondary Index Price directly from the Secondary Index Provider. If after such contact the Secondary Index remains unavailable or the Sponsor continues to believe in good faith that the Secondary Index does not reflect an accurate price, then the Sponsor will employ the next rule to determine the Index Price. There are no predefined criteria to make a good faith assessment and it will be made by the Sponsor in its sole discretion.

3. Index Price = The price set by the Trust's principal market (the "Tertiary Pricing Option") as of 4:00 p.m., New York time, on the valuation date. The Tertiary Pricing Option is a spot price derived from the principal market's public data feed that is believed to be consistently publishing pricing information as of 4:00 p.m., New York time, and is provided to the Sponsor via an application programming interface. If the Tertiary Pricing Option becomes unavailable, or if the Sponsor determines in good faith that the Tertiary Pricing Option does not reflect an accurate price, then the Sponsor will, on a best efforts basis, contact the Tertiary Pricing Provider to obtain the Tertiary Pricing Option directly from the Tertiary Pricing Provider. If after such contact the Tertiary Pricing Option remains unavailable after such contact or the Sponsor continues to believe in good faith that the Tertiary Pricing Option does not reflect an accurate price, then the Sponsor will employ the next rule to determine the Index Price. There are no

predefined criteria to make a good faith assessment and it will be made by the Sponsor in its sole discretion.

4. Index Price = The Sponsor will use its best judgment to determine a good faith estimate of the Index Price. There are no predefined criteria to make a good faith assessment and it will be made by the Sponsor in its sole discretion.

In the event of a fork, the Index Provider may calculate the Index Price based on a digital asset that the Sponsor does not believe to be the appropriate asset that is held by the Trust.<sup>25</sup> In this event, the Sponsor has full discretion to use a different index provider or calculate the Index Price itself using its best judgment.

The Sponsor may, in its sole discretion, select a different index provider, select a different index price provided by the Index Provider, calculate the Index Price by using the cascading set of rules set forth above, or change the cascading set of rules set forth above at any time.<sup>26</sup>

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<sup>25</sup> According to the Annual Report, when a modification is introduced and a substantial majority of users and miners consent to the modification, the change is implemented and the network remains uninterrupted. However, if less than a substantial majority of users and miners consent to the proposed modification, and the modification is not compatible with the software prior to its modification, the consequence would be what is known as a “hard fork” of the Ethereum Network, with one group running the pre-modified software and the other running the modified software. The effect of such a fork would be the existence of two versions of ETH running in parallel, yet lacking interchangeability. For example, in July 2016, Ethereum “forked” into Ethereum and a new digital asset, Ethereum Classic, as a result of the Ethereum network community’s response to a significant security breach in which an anonymous hacker exploited a smart contract running on the Ethereum network to syphon approximately \$60 million of ETH held by the DAO, a distributed autonomous organization, into a segregated account. In response to the hack, most participants in the Ethereum community elected to adopt a “fork” that effectively reversed the hack. However, a minority of users continued to develop the original blockchain, with the digital asset on that blockchain now referred to as Ethereum Classic, or ETC. ETC now trades on several Digital Asset Exchanges. In the event of a hard fork of the Ethereum Network, the Sponsor will, if permitted by the terms of the Trust Agreement, use its discretion to determine, in good faith, which peer-to-peer network, among a group of incompatible forks of the Ethereum Network, is generally accepted as the Ethereum Network and should therefore be considered the appropriate network for the Trust’s purposes. The Sponsor will base its determination on a variety of then relevant factors, including, but not limited to, the Sponsor’s beliefs regarding expectations of the core developers of ETH, users, services, businesses, miners, and other constituencies, as well as the actual continued acceptance of, mining power on, and community engagement with, the Ethereum Network. There is no guarantee that the Sponsor will choose the digital asset that is ultimately the most valuable fork, and the Sponsor’s decision may adversely affect the value of the Shares as a result. The Sponsor may also disagree with shareholders, security vendors, and the Index Provider on what is generally accepted as ETH and should therefore be considered “ETH” for the Trust’s purposes, which may also adversely affect the value of the Shares as a result.

<sup>26</sup> The Sponsor will provide notice of any such changes in the Trust’s periodic or current reports and, where applicable, will file a proposed rule change with the Commission.

## The Impact of the Approval of ETH Futures ETFs on Spot ETH ETPs Like the Trust

On October 2, 2023, the date of this filing, the first ETH-based exchange-traded funds (“ETFs”) were approved by the Commission for trading.<sup>27</sup> 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 Commission 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 (the Investment Company Act of 1940 (the “’40 Act”) for digital-asset futures ETFs and ’33 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.<sup>28</sup> The Sponsor believes that this reasoning is unsupported for the following reasons.

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<sup>27</sup> 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.

<sup>28</sup> 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 ’40 Act, “particularly if those are limited to [the] CME-traded Bitcoin futures,” noting the “significant investor protection” offered by the ’40 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 ’33 Act following the first approval of a bitcoin futures ETF registered under the ’40 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

*The '40 Act offers no more investor protections than the '33 Act in the context of ETH-based ETF and ETP proposals*

While the '40 Act has certain added investor protections that the '33 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 '40 Act supports the purported justifications the Commission has made in denying other spot digital asset ETPs. Instead, the '40 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 '40 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 '40 Act and the registration of spot ETH ETPs under the '33 Act is one without a difference in the context of ETH-based ETP proposals.

*Surveillance-sharing with the CME ETH futures market is sufficient to protect against fraud and manipulation in the underlying spot ETH market*

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

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Issued Receipts)) (“Teucrium Order”) (approving the first bitcoin futures ETP registered under the '33 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.”).

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.

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In summary, the Sponsor believes that the distinctions between the '40 Act and the '33 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.

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

Even if the Commission had not approved ETH futures ETFs, the Sponsor still believes the Commission should approve the listing and trading of Shares of the Trust. In the context of prior spot digital asset ETP proposal disapproval orders for Bitcoin, the Commission expressed concerns about the underlying Digital Asset Market due to the potential for fraud and manipulation and has outlined the reasons why such ETP proposals have been unable to satisfy these concerns.<sup>29</sup> For purposes of the Trust's ETH-based ETP proposal, the Sponsor anticipates that the Commission may have the same concerns and addresses each of these in turn below.

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<sup>29</sup> See Securities Exchange Act Release Nos. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (SR-BatsBZX-2016-30) (Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To List and Trade Shares of the Winklevoss Bitcoin Trust) (the "Winklevoss Order"); 87267 (October 9, 2019), 84 FR 55382 (October 16, 2019) (SR-NYSEArca-2019-01) (Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the Bitwise Bitcoin ETF Trust Under NYSE Arca Rule 8.201-E) (the "Bitwise Order"); 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR-NYSEArca-2019-39) (Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to

In the Prior Spot Digital Asset ETP Disapproval Orders, the Commission outlined that a proposal relating to a digital asset-based ETP could satisfy its concerns regarding potential for fraud and manipulation by demonstrating:

- 1) Inherent Resistance to Fraud and Manipulation: that the underlying commodity market is inherently resistant to fraud and manipulation;
- 2) Other Means to Prevent Fraud and Manipulation: that there are other means to prevent fraudulent and manipulative acts and practices that are sufficient; or
- 3) Surveillance Sharing: that the listing exchange has entered into a surveillance sharing agreement with a regulated market of significant size relating to the underlying or reference assets.

As described below, the Sponsor believes the structure and operation of the Trust are designed to prevent fraudulent and manipulative acts and practices, to protect investors and the public interest, and to respond to the specific concerns that the Commission may have with respect to potential fraud and manipulation in the context of an ETH-based ETP.

#### How the Trust Meets Standards in the Prior Spot Digital Asset ETP Disapproval Orders

##### *1. Resistance to or Prevention of Fraud and Manipulation*

In the Prior Spot Digital Asset ETP Disapproval Orders, the Commission disagreed with the proposition that a digital asset's fungibility, transportability and exchange tradability combine to provide unique protections against, and allow such digital asset to be uniquely resistant to, attempts at price manipulation. The Commission reached its conclusion based on

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Amend NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares) and to List and Trade Shares of the United States Bitcoin and Treasury Investment Trust Under NYSE Arca Rule 8.201-E) (the "Wilshire Phoenix Order"); 83904 (August 22, 2018), 83 FR 43934 (August 28, 2018) (SR-NYSEArca-2017-139) (Order Disapproving a Proposed Rule Change to List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF) (the "ProShares Order"); 83912 (August 22, 2018), 83 FR 43912 (August 28, 2018) (SR-NYSEArca-2018-02) (Order Disapproving a Proposed Rule Change Relating to Listing and Trading of the Direxion Daily Bitcoin Bear 1X Shares, Direxion Daily Bitcoin 1.25X Bull Shares, Direxion Daily Bitcoin 1.5X Bull Shares, Direxion Daily Bitcoin 2X Bull Shares, and Direxion Daily Bitcoin 2X Bear Shares Under NYSE Arca Rule 8.200-E) (the "Direxion Order"); 83913 (August 22, 2018), 83 FR 43923 (August 28, 2018) (SR-CboeBZX-2018-01) (Order Disapproving a Proposed Rule Change to List and Trade the Shares of the GraniteShares Bitcoin ETF and the GraniteShares Short Bitcoin ETF) (the "GraniteShares Order") (together, the "Prior Spot Digital Asset ETP Disapproval Orders").

concessions by one issuer that 95% of the reported trading in the digital asset, Bitcoin, is “fake” or non-economic, effectively admitting that the properties of Bitcoin do not make it inherently resistant to manipulation. Such issuer’s concessions were further compounded by evidence of potential and actual fraud and manipulation in the historical trading of Bitcoin on certain marketplaces such as (1) “wash” trading, (2) trading based on material, non-public information, including the dissemination of false and misleading information, (3) manipulative activity involving Tether, and (4) fraud and manipulation.<sup>30</sup>

The Sponsor acknowledges the possibility that fraud and manipulation may exist in commodity markets and that digital asset trading, such as ETH, *on any given exchange* may be no more uniquely resistant to fraud and manipulation than other commodity markets.<sup>31</sup> However, the Sponsor believes that the fundamental features of digital assets, including fungibility, transportability and exchange tradability offer novel protections beyond those that exist in traditional commodity markets or equity markets when combined with other means, as discussed further below.

## *2. Other Means to Prevent Fraud and Manipulation*

The Commission has recognized 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.<sup>32</sup> In evaluating the effectiveness of this type of resistance, the Commission does not apply a “cannot be manipulated” standard. Instead, the Commission requires that such resistance to fraud and manipulation be novel and

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<sup>30</sup> See Bitwise Order, 84 FR at 55383 (discussing analysis of the Bitcoin spot market that asserts that 95% of the spot market is dominated by fake and non-economic activity, such as wash trades), 55391 (discussing possible sources of fraud and manipulation in the bitcoin spot market). See also Winklevoss Order, 83 FR at 37585–86 (discussing pending litigation against a Bitcoin trading platform for fraudulent conduct relating to Tether); Bitwise Order, 84 FR at 55391 n.140, 55402 & n.331 (same); Winklevoss Order, 83 FR at 37584–86 (discussing potential types of manipulation in the Bitcoin spot market). The Commission has also noted that fraud and manipulation in the Bitcoin spot market could persist for a significant duration. See, e.g., Bitwise Order, 84 FR at 55405 & n.379.

<sup>31</sup> See generally Bitwise Order.

<sup>32</sup> See Winklevoss Order, 84 FR at 37580, 37582-91; Bitwise Order, 84 FR at 55383, 55385-406; Wilshire Phoenix Order, 85 FR at 12597.

beyond those protections that exist in traditional commodity markets or equity markets for which the Commission has long required surveillance-sharing agreements in the context of listing derivative securities products.<sup>33</sup>

The Sponsor believes the Index represents a novel means to prevent fraud and manipulation from impacting a reference price for ETH and that it offers protections beyond those that exist in traditional commodity markets or equity markets. The Index operates materially similarly to CoinDesk Bitcoin Price Index (XBX). Specifically, digital assets, such as ETH, are novel and exist outside traditional commodity markets. It therefore stands to reason that the methods by which they trade will be novel and that the market for digital assets like ETH will have different attributes than traditional commodity markets. Digital assets like ETH were only introduced within the past decade, twenty years after the first U.S. ETFs were offered<sup>34</sup> and 150 years after the first futures were offered.<sup>35</sup> In contrast to older commodities such as gold, silver, platinum, palladium or copper, which the Commission has noted all had at least one significant, regulated market for trading futures on the underlying commodity at the time commodity trust ETPs were approved for listing and trading, the first trading in digital assets like ETH took place entirely in an open, transparent and online setting where other commodities cannot trade.

The Trust has priced its Shares consistently for more than six years based on the Index. The Sponsor believes the Trust's use of the Index specifically addresses the Commission's concerns in that the Index serves as an alternative means to prevent fraud and manipulation. Specifically, the Index can (i) mitigate the effects of fraud, manipulation and other anomalous

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<sup>33</sup> See Winklevoss Order, 84 FR at 37582; Wilshire Phoenix Order, 85 FR at 12597.

<sup>34</sup> SEC, "Investor Bulletin: Exchange-Traded Funds (ETFs)," August 2012, <https://www.sec.gov/investor/alerts/etfs.pdf>.

<sup>35</sup> Commodity Futures Trading Commission ("CFTC"), "History of the CFTC," [https://www.cftc.gov/About/HistoryoftheCFTC/history\\_precftc.html](https://www.cftc.gov/About/HistoryoftheCFTC/history_precftc.html)

trading activity on the ETH reference rate, (ii) provide a real-time, volume-weighted fair value of ETH and (iii) appropriately handle and adjust for non-market related events.

As described in more detail below, the Sponsor believes that the Index accomplishes those objectives in the following ways:

1. The Index tracks the Digital Asset Exchange Market price through trading activity at “U.S.-Compliant Exchanges”;<sup>36</sup>
2. The Index mitigates the impact of instances of fraud, manipulation and other anomalous trading activity in real-time through systematic adjustments;
3. The Index is constructed and maintained by an expert third-party index provider, allowing for prudent handling of non-market-related events; and
4. The Index mitigates the impact of instances of fraud, manipulation and other anomalous trading activity concentrated on any one specific exchange through a cross-exchange composite index rate.

**1. The Index tracks the Digital Asset Exchange Market price through trading activity at “U.S.-Compliant Exchanges.”**

To reduce the risk of fraud, manipulation, and other anomalous trading activity from impacting the Index, only U.S.-Compliant Exchanges are eligible to be included in the Index.

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<sup>36</sup> “U.S.-Compliant Exchanges” are exchanges in the Digital Asset Exchange Market that are compliant with applicable U.S. federal and state licensing requirements and practices regarding AML and KYC regulations. All Constituent Exchanges are U.S.-Compliant Exchanges. “Non-U.S.-Compliant Exchanges” are all other exchanges in the Digital Asset Exchange Market. As of June 30, 2023, the U.S.-Compliant Exchanges that the Index Provider considered for inclusion in the Index were Coinbase Pro, Kraken and LMAX Digital. From these U.S.-Compliant Exchanges, the Index Provider then applies additional Inclusion Criteria to determine the Constituent Exchange. Effective July 23, 2022, the Index Provider removed Bitstamp from the Index due to the exchange’s failure to meet the minimum liquidity requirement and added FTX.US as a Constituent Exchange based on its satisfaction of the minimum liquidity requirement as part of its scheduled quarterly review. Effective November 10, 2022, the Index Provider removed FTX.US from the Index due to FTX.US’s announcement that trading on the exchange may be halted, which would impact FTX.US’s ability to reliably publish trade prices and volumes on a real-time basis through APIs, and did not add any Constituent Exchanges as part of its review. Effective January 28, 2023, the Index Provider added Binance.US to the Index based on the exchange meeting the minimum liquidity requirement, and did not remove any Constituent Exchanges as part of its quarterly review. On June 17, 2023, the Index Provider removed Binance.US from the Index, due to Binance.US’s announcement that the exchange was suspending U.S. dollar deposits and withdrawals and planned to delist its U.S. dollar trading pairs, and did not add any Constituent Exchanges as part of its review.

The Index maintains a minimum number of three exchanges and a maximum number of five exchanges to track the Digital Asset Exchange Market while offering replicability for traders and market makers.<sup>37</sup>

U.S.-Compliant Exchanges possess safeguards that protect against fraud and manipulation. For example, U.S.-Compliant Exchanges regulated by the NYDFS under the BitLicense program have regulatory requirements to implement measures designed to effectively detect, prevent, and respond to fraud, attempted fraud, market manipulation, and similar wrongdoing, and to monitor, control, investigate and report back to the NYDFS regarding any wrongdoing.<sup>38</sup> These exchanges also have the following obligations:<sup>39</sup>

- Submission of audited financial statements including income statements, statements of assets/liabilities, insurance, and banking;
- Compliance with capitalization requirements set at NYDFS's discretion;
- Prohibitions against the sale or encumbrance to protect full reserves of custodian assets;
- Fingerprints and photographs of employees with access to customer funds;
- Retention of a qualified Chief Information Security Officer and annual penetration testing/audits;
- Documented business continuity and disaster recovery plan, independently tested annually; and
- Participation in an independent exam by NYDFS.

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<sup>37</sup> According to the Sponsor, the more exchanges included in the Index, the more ability there is for traders and market makers to trade against the Index by arbitraging price differences. For example, in the event of variances between ETH prices on Constituent Exchanges and non-Constituent Exchanges, arbitrage trading opportunities would exist. These discrepancies generally consolidate over time, as price differences across exchanges are realized and capitalized upon by traders and market makers.

<sup>38</sup> See, e.g., "DFS Takes Action to Deter Fraud and Manipulation in Virtual Currency Markets," available at: <https://www.dfs.ny.gov/about/press/pr1802071.htm>.

<sup>39</sup> See "New York's Final "BitLicense" Rule: Overview and Changes from July 2014 Proposal," June 5, 2015, Davis Polk, available at: [https://www.davispolk.com/files/new\\_yorks\\_final\\_bitlicense\\_rule\\_overview\\_changes\\_july\\_2014\\_proposal.pdf](https://www.davispolk.com/files/new_yorks_final_bitlicense_rule_overview_changes_july_2014_proposal.pdf).

Other U.S.-Compliant Exchanges have voluntarily implemented measures to protect against common forms of market manipulation.<sup>40</sup>

Furthermore, all U.S.-Compliant Exchanges are considered MSBs that are subject to FinCEN's federal and state reporting requirements that provide additional safeguards. For example, unscrupulous traders may be less likely to engage in fraudulent or manipulative acts and practices on exchanges that (1) report suspicious activity to FinCEN as money services businesses, (2) report to state regulators as money transmitters, and/or (3) require customer identification through KYC procedures. U.S.-Compliant Exchanges are required to:<sup>41</sup>

- Identify people with ownership stakes or controlling roles in the MSB;
- Establish a formal Anti-Money Laundering (AML) policy in place with documentation, training, independent review, and a named compliance officer;
- Implement strict customer identification and verification policies and procedures;
- File Suspicious Activity Reports (SARs) for suspicious customer transactions;
- File Currency Transaction Reports (CTRs) for cash-in or cash-out transactions greater than \$10,000; and
- Maintain a five-year record of currency exchanges greater than \$1,000 and money transfers greater than \$3,000.

Lastly, because of ETH's classification as a commodity, the CFTC has authority to police fraud and manipulation on U.S.-Compliant Exchanges.<sup>42</sup>

The Sponsor acknowledges that there are substantial differences between FinCEN and New York state regulations and the Commission's regulation of the national securities

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<sup>40</sup> As of the date of filing, one of the three Constituent Exchanges, Coinbase Pro, is regulated by NYDFS.

<sup>41</sup> See BSA Requirements for MSBs, FinCEN website: <https://www.fincen.gov/bsarequirements-msbs>.

<sup>42</sup> "U.S. CFTC Chief Behnam Reinforces View of Ether as Commodity," Coindesk (Mar. 28, 2023), <https://www.coindesk.com/policy/2023/03/28/us-cftc-chief-behnam-reinforces-view-of-ether-as-commodity/>; CME Group, [https://www.cmegroup.com/markets/cryptocurrencies/ether/ether.html?gad=1&gclid=EAIaIQobChMI44KBmu7ygAMVavvjBx2P4g5yEAAYASAAEgJSZfD\\_BwE&gclid=aw.ds](https://www.cmegroup.com/markets/cryptocurrencies/ether/ether.html?gad=1&gclid=EAIaIQobChMI44KBmu7ygAMVavvjBx2P4g5yEAAYASAAEgJSZfD_BwE&gclid=aw.ds).

exchanges.<sup>43</sup> The Sponsor does not believe the inclusion of U.S.-Compliant Exchanges is in and of itself sufficient to prove that the Index is an alternative means to prevent fraud and manipulation such that surveillance sharing agreements are not required, but does believe that the inclusion of only U.S.-Compliant Exchanges in the Index is one significant way in which the Index is protected from the potential impacts of fraud and manipulation.

**2. The Index mitigates the impact of instances of fraud, manipulation, and other anomalous trading activity in real-time through systematic adjustments.**

The Index is calculated once every second according to a systematic methodology that relies on observed trading activity on the Constituent Exchanges. While the precise methodology underlying the Index is currently proprietary, the key elements of the Index are outlined below:

- **Volume Weighting:** Constituent Exchanges with greater liquidity receive a higher weighting in the Index, increasing the ability to execute against (i.e., replicate) the Index in the underlying spot markets.
- **Price-Variance Weighting:** The Index reflects data points that are discretely weighted in proportion to their variance from the rest of the Constituent Exchanges. As the price at a Constituent Exchange diverges from the prices at the rest of the Constituent Exchanges, its weight in the Index consequently decreases.
- **Inactivity Adjustment:** The Index algorithm penalizes stale activity from any given Constituent Exchange. When a Constituent Exchange does not have recent trading data, its weighting in the Index is gradually reduced, until it is de-weighted entirely. Similarly, once trading activity at the Constituent Exchange resumes, the corresponding weighting for that Constituent Exchange is gradually increased until it reaches the appropriate level.

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<sup>43</sup> See Bitwise Order, 84 FR at 55392; Wilshire Phoenix Order, 85 FR at 12603.

- **Manipulation Resistance:** In order to mitigate the effects of wash trading and order book spoofing, the Index only includes executed trades in its calculation. Additionally, the Index only includes Constituent Exchanges that charge trading fees to its users in order to attach a real, quantifiable cost to any manipulation attempts.

**3. The Index is constructed and maintained by an expert third-party index provider, allowing for prudent handling of non-market-related events.**

The Index Provider reviews and periodically updates which exchanges are included in the Index by utilizing a methodology that is guided by the IOSCO principles for financial benchmarks.

According to the Index methodology, for an exchange to become a Constituent Exchange, it must satisfy the following Inclusion Criteria:

- Sufficient USD liquidity relative to the size of the listed assets;
- No evidence in the past 12 months of trading restrictions on individuals or entities that would otherwise meet the exchange's eligibility requirements to trade;
- No evidence in the past 12 months of undisclosed restrictions on deposits or withdrawals from user accounts;
- Real-time price discovery;
- Limited or no capital controls;
- Transparent ownership including a publicly-owned ownership entity;
- Publicly available language and policies addressing legal and regulatory compliance in the US, including KYC (Know Your Customer), AML (Anti-Money Laundering) and other policies designed to comply with relevant regulations that might apply to it;
- Be a U.S.-domiciled exchange or a non-U.S. domiciled exchange that is able to service U.S. investors;

- Offer programmatic spot trading of the trading pair; and
- Reliably publish trade prices and volumes on a real-time basis through Rest and Websocket APIs.

Although the Index methodology is designed to operate without any human interference, rare events would justify manual intervention. Manual intervention would only be in response to “non-market-related events” (e.g., halting of deposits or withdrawals of funds, unannounced closure of exchange operations, insolvency, compromise of user funds, etc.). In the event that such an intervention is necessary, the Index Provider would issue a public announcement through its website, API and other established communication channels with its clients.<sup>44</sup>

**4. The Index mitigates the impact of instances of fraud, manipulation and other anomalous trading activity concentrated on any one specific exchange through a cross-exchange composite index rate.**

The Index is based on the price and volume data of multiple U.S.-Compliant Exchanges that satisfy the Index Provider’s Inclusion Criteria. By referencing multiple trading venues and weighting them based on trade activity, the impact of any potential fraud, manipulation, or anomalous trading activity occurring on any single venue is reduced. Specifically, the effects of fraud, manipulation, or anomalous trading activity occurring on any single venue are de-weighted and consequently diluted by non-anomalous trading activity from other Constituent Exchanges.

Although the Index is designed to accurately capture the market price of ETH, third parties may be able to purchase and sell ETH on public or private markets included or not included among the Constituent Exchanges, and such transactions may take place at prices materially higher or lower than the Index Price. For example, based on data provided by the Index Provider, on any given day during the twelve months ended June 30, 2023, the maximum

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<sup>44</sup> To the extent any such intervention has a material impact on the Trust, the Sponsor will also issue a public announcement.

differential between the 4:00 p.m., New York time spot price of any single Digital Asset Exchange included in the Index and the Index Price was 2.76% and the average of the maximum differentials of the 4:00 p.m., New York time spot price of each Digital Asset Exchange included in the Index and the Index Price was 0.82%. During this same period, the average differential between the 4:00 p.m., New York time spot prices of all the Digital Asset Exchanges included in the Index and the Index Price was 0.01%.<sup>45</sup>

Since inception of the Trust, the Trust has consistently priced its Shares at 4:00 p.m., New York time based on the Index Price.<sup>46</sup> While that pricing would be known to the market, the Sponsor believes that, even if efforts to manipulate the price of ETH at 4:00 p.m., E.T. were successful on any exchange, such activity would have had a negligible effect on the pricing of the Trust, due to the controls embedded in the structure of the Index.

Accordingly, the Sponsor believes that the Index has proven its ability to (i) mitigate the effects of fraud, manipulation and other anomalous trading activity on the ETH reference rate, (ii) provide a real-time, volume-weighted fair value of ETH and (iii) appropriately handle and adjust for non-market related events. For these reasons, the Sponsor believes that the Index represents an effective alternative means to prevent fraud and manipulation and the Trust's reliance on the Index addresses the Commission's concerns with respect to potential fraud and manipulation.

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<sup>45</sup> All Digital Asset Exchanges that were included in the Index throughout the period were considered in this analysis.

<sup>46</sup> Prior to February 1, 2022, the Trust valued its ETH for operational purposes by reference to the volume-weighted average Index Price (the "Old Index Price"). The Old Index Price was calculated by applying a weighting algorithm to the price and trading volume data for the immediately preceding 24-hour period as of 4:00 p.m., New York time, derived from the Constituent Exchanges reflected in the Index on such trade date, and overlaying an averaging mechanism to the price produced. Thus, whereas the Old Index Price reflected the price of an ETH at 4:00 p.m., New York time, calculated by taking the average of each price of an ETH produced by the Index over the preceding 24-hour period, the Index Price now is the price of an ETH at 4:00 p.m., New York time, calculated based on the price and trading volume data of the Digital Asset Exchanges included in the Index over the preceding 24-hour period. The Index Price differs from the Old Index Price only in that it does not use an additional averaging mechanism; the Index Price otherwise uses the same methodology as the Old Index Price, and there has been no change to the Index used to determine the Index Price or the criteria used to select the Constituent Exchanges.

3. *A Significant, Regulated and Surveilled Market Exists and Is Closely Connected with Spot Market for ETH*

In the Prior Spot Digital Asset ETP Disapproval Orders, the Commission described both the need for and the definition of a surveilled market of significant size for commodity-trust ETPs like the Trust to date.<sup>47</sup> Specifically, the Commission explained that:

for the commodity-trust ETPs approved to date for listing and trading, there has been in every case at least one significant, regulated market for trading futures on the underlying commodity—whether gold, silver, platinum, palladium, or copper—and the ETP listing exchange has entered into surveillance-sharing agreements with, or held Intermarket Surveillance Group membership in common with, that market.<sup>48</sup>

Further, the Commission stated that its interpretation of the term “market of significant size” depends on the interrelationship between the market with which the listing exchange has a surveillance-sharing agreement and the proposed ETP.<sup>49</sup> Accordingly, the terms “significant market” and “market of significant size” could mean:

a market (or group of markets) as to which (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, so that a surveillance-sharing agreement would assist in detecting and deterring misconduct, and (b) it is

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<sup>47</sup> See Winklevoss Order, 83 FR at 37593-94; Bitwise Order, 84 FR at 55383, 55410; Wilshire Phoenix Order, 85 FR at 12609.

<sup>48</sup> See Winklevoss Order, 83 FR at 37594.

<sup>49</sup> See Winklevoss Order, 83 FR at 37594; Bitwise Order, 84 FR at 55410; ProShares Order, 83 FR at 43936; GraniteShares Order, 83 FR at 43925; Direxion Order, 83 FR at 43914; Wilshire Phoenix Order, 85 FR at 12609.

unlikely that trading in the ETP would be the predominant influence on prices in that market.<sup>50</sup>

In the context of the Prior Spot Digital Asset ETP Disapproval Orders specifically, the Commission has stated that establishing a lead-lag relationship between the futures market and the spot market is central to understanding whether it is reasonably likely that a would-be manipulator of the ETP would need to trade on the futures market to successfully manipulate prices on those spot platforms that feed into the proposed ETP's pricing mechanism such that a surveillance-sharing agreement would assist the ETP listing market in detecting and deterring misconduct.<sup>51</sup> In particular, if the spot market leads the futures market, this would indicate that it would not be necessary to trade on the futures market to manipulate the proposed ETP, even if arbitrage worked efficiently, because the futures price would move to meet the spot price.

While studies have found that the CME futures market does lead the spot market in the context of Bitcoin,<sup>52</sup> as explained in the Sponsor's briefs and argument in its prevailing case before the D.C. Circuit Court of Appeals regarding its Bitcoin-based ETP proposal, the lead/lag question is irrelevant. If a would-be manipulator were to attempt to manipulate either a spot ETP or futures ETP by trading futures on the CME, then a surveillance-sharing agreement with the CME would provide access to information concerning that activity.<sup>53</sup> If, on the other hand, a would-be manipulator were to attempt to manipulate either a spot ETP or a futures ETP by

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<sup>50</sup> See Winklevoss Order, 83 FR at 37594. This definition is illustrative and not exclusive. There could be other types of "significant markets" and "markets of significant size," but this definition is an example that will provide guidance to market participants.

<sup>51</sup> See Bitwise Order, 84 FR at 55411; Wilshire Phoenix Order, 85 FR at 12612.

<sup>52</sup> See Memorandum to File from Neel Maitra, Senior Special Counsel (Fintech & Crypto Specialist), Division of Trading and Markets, U.S. Securities and Exchange Commission re: Meeting with Representatives from Fidelity Digital Assets, et al. and attachment (SR-CboeBZX-2021-039) (September 8, 2021), available at: <https://www.sec.gov/comments/sr-cboebzx-2021-039/srcboebzx2021039-250110.pdf>; Letter from Bitwise Asset Management, Inc. re: File Number SR-NYSEArca-2021-89 (February 25, 2022), available at: <https://www.sec.gov/comments/sr-nysearca-2021-89/srnysearca202189-20117902-270822.pdf>; Letter from Wilson Sonsini Goodrich and Rosati, P.C. and Chapman and Cutler LLP, on behalf of Bitwise Asset Management, Inc. re: File No. SR-NYSEArca-2021-89 (March 7, 2022), available at: <https://www.sec.gov/comments/sr-nysearca-2021-89/srnysearca202189-20118794-271630.pdf>.

<sup>53</sup> Grayscale Investments, LLC v. Securities and Exchange Commission, No. 22-1142, Commission Reply Br. 27.

trading on the spot market, then a surveillance-sharing agreement with the CME would also be able to provide access to information concerning that activity. If that were not true, the Commission could not have approved the Bitcoin futures ETPs. Given that the Commission has approved Bitcoin futures ETPs, the Commission must have concluded that the CME is capable of detecting manipulation attempts in the spot bitcoin market. And given that the Commission has now approved ETH futures ETFs, it must have concluded that the CME is capable of detecting manipulation attempts in the spot ETH market as well. Accordingly, the Sponsor believes that disapproval of the instant proposal on such grounds would be arbitrary given that Shares of the Trust would be just as protected from fraud as shares of previously approved ETH futures ETPs.

Regardless of the irrelevance of the lead/lag relationship and the mixed findings regarding the lead/lag relationship between the CME futures and spot markets in the context of Bitcoin, the Sponsor believes that the CME futures market represents a large, surveilled and regulated market and meets the Commission's definition of a "significant market." For example, from November 1, 2019 to August 31, 2023, the CME futures market trading volume was over \$373 billion, compared to \$701 billion in trading volume across the Constituent Exchanges included in the Index. With over 50% of the Index trading volume, the CME futures market represents significant coverage of U.S.-Compliant Exchanges in the Ether market. In addition, the CME futures market trading volume from November 1, 2019 to August 31, 2023 was approximately 43% of the trading volume of the U.S. dollar-denominated spot markets referenced in the Bitwise Order.<sup>54</sup>

Given the size of the CME futures markets, the Sponsor believes such markets meet the Commission's definition of "significant market" because there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully

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<sup>54</sup> These spot markets include Binance.US, Coinbase Pro, Bitfinex, Kraken, Bitstamp, BitFlyer, Poloniex, Bittrex, and itBit.

manipulate the ETP, since arbitrage between the derivative and spot markets would tend to counter an attempt to manipulate the spot market alone. As a result, the Exchange's ability to obtain information regarding trading in the Shares and futures from markets and other entities that are members of the Intermarket Trading Group ("ISG"), including the CME, would assist the Exchange in detecting and deterring misconduct.

The Sponsor also believes it is unlikely that the ETP would become the predominant influence on prices in the market. While future inflows to the proposed Trust cannot be predicted, to provide comparable data, the Sponsor examined the change in market capitalization of ETH with net inflows into the Trust, which currently trades on OTC Markets and is largest and most liquid ETH investment product in the world.<sup>55</sup> From November 1, 2019 to August 31, 2023, the market capitalization of ETH grew from \$20 billion to \$198 billion, a \$178 billion increase. Over the same period, the Trust experienced \$1.2 billion of inflows. The cumulative inflow into the Trust over the stated time period was only 0.6% of the aggregate growth of ETH's market capitalization.

Additionally, the Trust experienced approximately \$70.2 billion of trading volume from November 1, 2019 to August 31, 2023, only 19% of the CME futures market and 10% of the Index over the same period.

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In summary, the Sponsor believes that the foregoing addresses concerns the Commission may have with respect to ETH-based ETPs, based on the Commission's articulated concerns with respect to potential fraud and manipulation in Bitcoin-based ETPs. Specifically, the Sponsor believes that, although ETH is not itself inherently resistant to fraud and manipulation, the Index represents an effective means to prevent fraudulent and manipulative acts and practices. As discussed above, the Trust has used the Index to price the Shares for more than six years, and the

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<sup>55</sup> To further illustrate the size and liquidity of the Trust, as of September 6, 2023, compared with global commodity ETPs, the Trust would rank 24th in assets under management and 83rd in notional trading volume for the preceding 30 days.

Index has proven its ability to (i) mitigate the effects of fraud, manipulation and other anomalous trading activity on the ETH reference rate, (ii) provide a real-time, volume-weighted fair value of ETH and (iii) appropriately handle and adjust for non-market related events. The Sponsor also believes that the CME futures market is a significant, surveilled and regulated market that is closely connected with the spot market for ETH and fulfills the requirements for surveillance sharing given the Exchange's ability to obtain information from markets and other entities that are members of the ISG to assist in detecting and deterring misconduct.

### Creation of Shares

According to the Annual Report, the Trust will issue Shares to Authorized Participants from time to time, but only in one or more Baskets (with a Basket being a block of 100 Shares). The Trust will not issue fractions of a Basket. The creation of Baskets will be made only in exchange for the delivery to the Trust, or the distribution by the Trust, of the number of whole and fractional ETH represented by each Basket being created, which is determined by dividing (x) the number of ETH owned by the Trust at 4:00 p.m., E.T., on the trade date of a creation order, after deducting the number of ETH representing the U.S. dollar value of accrued but unpaid fees and expenses of the Trust (converted using the Index Price at such time, and carried to the eighth decimal place), by (y) the number of Shares outstanding at such time (with the quotient so obtained calculated to one one-hundred-millionth of one ETH (i.e., carried to the eighth decimal place)), and multiplying such quotient by 100 (the "Basket Amount"). All questions as to the calculation of the Basket Amount will be conclusively determined by the Sponsor and will be final and binding on all persons interested in the Trust. The Basket Amount multiplied by the number of Baskets being created is the "Total Basket Amount." The number of ETH represented by a Share will gradually decrease over time as the Trust's ETH are used to pay the Trust's expenses. As of June 30, 2023, each Share represented approximately 0.0097 of one ETH.

Authorized Participants are the only persons that may place orders to create Baskets. Each Authorized Participant must (i) be a registered broker-dealer, (ii) enter into an agreement with the Sponsor and the Liquidity Provider (as defined below), if applicable, that provides the procedures for the creation and redemption of Baskets and for the delivery of ETH required for Creation Baskets and Redemption Baskets (each, a “Participant Agreement”) and (iii) in the case of creation or redemption in-kind, own an ETH wallet address that is known to the Custodian as belonging to the Authorized Participant. An Authorized Participant may act for its own account or as agent for broker-dealers, custodians and other securities market participants that wish to create or redeem Baskets. Shareholders who are not Authorized Participants will only be able to redeem their Shares through an Authorized Participant.

Although the creation of Baskets requires the delivery to the Trust of the Total Basket Amount, an Authorized Participant may deposit cash, which will facilitate the purchase or sale of ETH on behalf of the Authorized Participant through one or more eligible companies (each, a “Liquidity Provider”) that have entered into a Participant Agreement with the Sponsor, the Administrator, the Marketing Agent, and the relevant Authorized Participant.

The Participant Agreement provides the procedures for the creation of Baskets and for the delivery of the whole and fractional ETH required for such creations. The Participant Agreement and the related procedures attached thereto may be amended by the Sponsor and the relevant Authorized Participant. Under the Participant Agreement, the Sponsor has agreed to indemnify each Authorized Participant against certain liabilities, including liabilities under the Securities Act.

Authorized Participants do not pay a transaction fee to the Trust in connection with the creation of Baskets, but there may be transaction fees associated with the validation of the transfer of ETH by the Ethereum Network. Authorized Participants who deposit ETH with the Trust in exchange for Baskets will receive no fees, commissions or other form of compensation

or inducement of any kind from either the Sponsor or the Trust, and no such person has any obligation or responsibility to the Sponsor or the Trust to effect any sale or resale of Shares.

Creation Procedures

On any business day, an Authorized Participant may place an order with the Administrator to create one or more Baskets. Orders for creations may be placed either “in-kind” or “in-cash.” Orders for creation in-kind must be placed with the Administrator no later than 3:59:59 p.m., New York time, and no later than 4:59:59 p.m., New York time, for creations in-cash (in each case, the “Order Cutoff Time”).

In-kind creations will take place as follows, where “T” is the trade date and each day in the sequence must be a business day:

T	T+1
<ul style="list-style-type: none"> <li>• The Authorized Participant places a creation order with the Administrator.</li> <li>• The Marketing Agent accepts (or rejects) the creation order, which is communicated to the Authorized Participant by the Administrator.</li> <li>• The Total Basket Amount is determined as soon as practicable after 4:00 p.m., New York time.</li> </ul>	<ul style="list-style-type: none"> <li>• The Authorized Participant transfers the Total Basket Amount to the Custodian no later than 4:00 p.m., New York time.</li> <li>• Once the Total Basket Amount is received by the Custodian, the Administrator directs the Transfer Agent to credit the number of Baskets created to the Authorized Participant’s DTC account.</li> </ul>

In-cash creations will take place as follows, where “T” is the trade date and each day in the sequence must be a business day:

T-1	T	T+1

<ul style="list-style-type: none"> <li>• The Authorized Participant places a creation order with the Administrator.</li> <li>• The Marketing Agent accepts (or rejects) the creation order, which is communicated to the Authorized Participant by the Administrator.</li> <li>• The Authorized Participant sends 110% of the U.S. dollar value of the number of baskets ordered pursuant to such creation order, as calculated using the Index Price as of the order date (the “Cash Collateral Amount”) to the Administrator.</li> </ul>	<ul style="list-style-type: none"> <li>• The Sponsor notifies the Liquidity Provider of the creation order and the Liquidity Provider may begin purchasing ETH to deliver the Total Basket Amount.</li> <li>• The Total Basket Amount is determined as soon as practicable after 4:00 p.m., New York time.</li> </ul>	<ul style="list-style-type: none"> <li>• The Liquidity Provider delivers the Total Basket Amount to the Custodian no later than 4:00 p.m., New York time.</li> <li>• Once the Total Basket Amount is received by the Custodian, the Administrator directs the Transfer Agent to credit the number of Baskets created to the Authorized Participant’s DTC account.</li> <li>• The Administrator sends the Liquidity Provider cash equal to the U.S. dollar value of the Total Basket Amount, as determined on the trade date, plus the Variable Fee, and returns the remaining amount of the Cash Collateral Amount</li> </ul>
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		(if any) to the Authorized Participant.
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### Redemption of Shares

The Trust may redeem Shares from time to time but only in Baskets. A Basket equals a block of 100 Shares. The number of outstanding Shares is expected to decrease from time to time as a result of the redemption of Baskets. The redemption of Baskets requires the distribution by the Trust of the number of ETH represented by the Baskets being redeemed. The redemption of a Basket will be made only in exchange for the distribution by the Trust of the number of whole and fractional ETH represented by each Basket being redeemed, the number of which is determined by dividing (x) the number of ETH owned by the Trust at 4:00 p.m., New York time, on the relevant trade date of a redemption order, after deducting the number of ETH representing the U.S. dollar value of accrued but unpaid fees and expenses of the Trust (converted using the Index Price at such time, and carried to the eighth decimal place) by (y) the number of Shares outstanding at such time (with the quotient so obtained calculated to one one-hundred-millionth of one ETH (i.e., carried to the eighth decimal place)), and multiplying such quotient by 100.

Authorized Participants are the only persons that may place orders to redeem Baskets. Shareholders who are not Authorized Participants will be able to redeem their Shares only through an Authorized Participant.

Each Participant Agreement provides the procedures for the redemption of Baskets and for the delivery of the whole and fractional ETH required for such redemption. The Participant Agreement and the related procedures attached thereto may be amended by the Sponsor and the relevant Authorized Participant.

Authorized Participants do not pay a transaction fee to the Trust in connection with the redemption of Baskets, but there may be transaction fees associated with the validation of the transfer of ETH by the Ethereum Network.

### Redemption Procedures

The Trust will also redeem Shares on a continuous basis but only in Baskets of 100 Shares. The procedures by which an Authorized Participant can redeem one or more Baskets mirror the procedures for the creation of Baskets. On any business day, an Authorized Participant may place an order with the Administrator to redeem one or more Baskets. Redemption orders must be placed with the Administrator no later than the Order Cutoff Time.

In-kind redemptions will take place as follows, where “T” is the trade date and each day in the sequence must be a business day:

T	T+2
<ul style="list-style-type: none"> <li>• The Authorized Participant places a redemption order with the Administrator.</li> <li>• The Marketing Agent accepts (or rejects) the redemption order, which is communicated to the Authorized Participant by the Administrator.</li> <li>• The Total Basket Amount is determined as soon as practicable after 4:00 p.m., New York time.</li> </ul>	<ul style="list-style-type: none"> <li>• The Authorized Participant delivers Baskets from its DTC account to the Transfer Agent no later than 4:00 p.m., New York time.</li> <li>• Once the Baskets are received by the Transfer Agent, the Custodian transfers the Total Basket Amount to the Authorized Participant and the Transfer Agent cancels the Shares.</li> </ul>

In-cash redemptions will take place as follows, where “T” is the trade date and each day in the sequence must be a business day:

T-1	T	T+2
<ul style="list-style-type: none"> <li>• The Authorized Participant places a redemption order with the Administrator.</li> </ul>	<ul style="list-style-type: none"> <li>• The Sponsor notifies the Liquidity Provider of the redemption order and the Liquidity Provider may begin selling ETH to</li> </ul>	<ul style="list-style-type: none"> <li>• The Authorized Participant delivers Baskets to be redeemed to the Transfer Agent no</li> </ul>

<ul style="list-style-type: none"> <li>The Marketing Agent accepts (or rejects) the redemption order, which is communicated to the Authorized Participant by the Administrator.</li> </ul>	<p>deliver the Total Basket Amount.</p> <ul style="list-style-type: none"> <li>The Total Basket Amount is determined as soon as practicable after 4:00 p.m., New York time.</li> </ul>	<p>later than 4:00 p.m., New York time.</p> <ul style="list-style-type: none"> <li>The Liquidity Provider deposits with the Administrator cash equal to the U.S. dollar value of the Total Basket Amount, as determined on the trade date.</li> <li>Once the Baskets are received by the Transfer Agent and the Administrator sends the above-mentioned cash equal to the U.S. dollar value of the Total Basket Amount less the Transaction Fee, the Variable Fee and all other charges and fees payable in connection with the redemption order to the Authorized Participant, the Transfer Agent cancels the Shares.</li> </ul>
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|  |  | <ul style="list-style-type: none"><li>• The Custodian sends the Liquidity Provider the number of ETH equal to the Total Basket Amount and the Administrator sends the Variable Fee to the Liquidity Provider.</li></ul> |
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### Suspension of Orders

The creation or redemption of Shares may be suspended generally, or refused with respect to particular requested creations or redemptions, during any period when the transfer books of the Transfer Agent are closed or if circumstances outside the control of the Sponsor or its delegates make it for all practical purposes not feasible to process creation orders or redemption orders. The Administrator may reject an order or, after accepting an order, may cancel such order by rejecting the Total Basket Amount if: (i) such order is not presented in proper form as described in the Participant Agreement, (ii) the transfer of the Total Basket Amount comes from an account other than an ETH wallet address that is known to the Custodian as belonging to the Authorized Participant or (iii) the fulfillment of the order, in the opinion of counsel, might be unlawful, among other reasons. None of the Sponsor or its delegates will be liable for the suspension, rejection or acceptance of any creation order or redemption order.

In particular, upon the Trust's receipt of any Incidental Rights and/or IR Virtual Currency in connection with a fork, airdrop or similar event, the Sponsor may suspend redemptions until it is able to cause the Trust to sell or distribute such Incidental Rights and/or IR Virtual Currency.

### Availability of Information

The Trust's website (<https://grayscale.com/products/grayscale-ethereum-trust/>) will include quantitative information on a per Share basis updated on a daily basis, including, (i) the current Digital Asset Holdings per Share daily and the prior business day's Digital Asset

Holdings per Share and the reported closing price of the Shares; (ii) the mid-point of the bid-ask price<sup>56</sup> as of the time the Digital Asset Holdings per Share is calculated (“Bid-Ask Price”) and a calculation of the premium or discount of such price against such Digital Asset Holdings per Share; and (iii) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid-Ask Price against the Digital Asset Holdings per Share, within appropriate ranges, for each of the four previous calendar quarters (or for as long as the Trust has been trading as an ETP if shorter). In addition, on each business day the Trust’s website will provide pricing information for the Shares.

One or more major market data vendors, will provide an intra-day indicative value (“IIV”) per Share updated every 15 seconds, as calculated by the Exchange or a third party financial data provider during the Exchange’s Core Trading Session (9:30 a.m. to 4:00 p.m., E.T.).<sup>57</sup> The IIV will be calculated using the same methodology as the Digital Asset Holdings per Share of the Trust (as described above), specifically by using the prior day’s closing Digital Asset Holdings per Share as a base and updating that value during the NYSE Arca Core Trading Session to reflect changes in the value of the Trust’s Digital Asset Holdings during the trading day.

The IIV disseminated during the NYSE Arca Core Trading Session should not be viewed as an actual real-time update of the Digital Asset Holdings per Share, 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 NYSE Arca Core Trading Session by one or more major market data vendors. In addition, the IIV will be available through on-line information services.

The Digital Asset Holdings for the Trust will be calculated by the Sponsor once a day and will be disseminated daily to all market participants at the same time. To the extent that the

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<sup>56</sup> The bid-ask price of the Trust is determined using the highest bid and lowest offer on the Consolidated Tape as of the time of calculation of the closing day Digital Asset Holdings.

<sup>57</sup> The IIV on a per Share basis disseminated during the Core Trading Session should not be viewed as a real-time update of the Digital Asset Holdings, which is calculated once a day.

Sponsor has utilized the cascading set of rules described in “Index Price” above, the Trust’s website will note the valuation methodology used and the price per ETH resulting from such calculation. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the Consolidated Tape Association (“CTA”).

Quotation and last sale information for ETH will be widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters. In addition, real-time price (and volume) data for ETH is available by subscription from Reuters and Bloomberg. The spot price of ETH is available on a 24-hour basis from major market data vendors, including Bloomberg and Reuters. Information relating to trading, including price and volume information, in ETH will be available from major market data vendors and from the exchanges on which ETH are traded. The normal trading hours for Digital Asset Exchanges are 24-hours per day, 365-days per year.

On each business day, the Sponsor will publish the Index Price, the Trust’s Digital Asset Holdings, and the Digital Asset Holdings per Share on the Trust’s website as soon as practicable after its determination. If the Digital Asset Holdings and Digital Asset Holdings per Share have been calculated using a price per ETH other than the Index Price for such Evaluation Time, the publication on the Trust’s website will note the valuation methodology used and the price per ETH resulting from such calculation.

The Trust will provide website disclosure of its Digital Asset Holdings daily. The website disclosure of the Trust’s Digital Asset Holdings will occur at the same time as the disclosure by the Sponsor of the Digital Asset Holdings to Authorized Participants so that all market participants are provided such portfolio information at the same time. Therefore, the same portfolio information will be provided on the public website as well as in electronic files provided to Authorized Participants. Accordingly, each investor will have access to the current Digital Asset Holdings of the Trust through the Trust’s website, as well as from one or more major market data vendors.

The value of the Index, as well as additional information regarding the Index, will be available on a continuous basis at <https://www.coindesk.com/indices>.

### 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. Shares will trade on the NYSE Arca Marketplace from 4:00 a.m. to 8:00 p.m., E.T. in accordance with NYSE Arca Rule 7.34-E (Early, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Rule 7.6-E, the minimum price variation ("MPV") for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is \$0.01, with the exception of securities that are priced less than \$1.00, for which the MPV for order entry is \$0.0001.

The Shares will conform to the initial and continued listing criteria under NYSE Arca Rule 8.201-E. The trading of the Shares will be subject to NYSE Arca Rule 8.201-E(g), which sets forth certain restrictions on Equity Trading Permit Holders ("ETP Holders") acting as registered Market Makers in Commodity-Based Trust Shares to facilitate surveillance. The Exchange represents that, for initial and continued listing, the Trust will be in compliance with Rule 10A-3<sup>58</sup> under the Act, as provided by NYSE Arca Rule 5.3-E. A minimum of 100,000 Shares of the Trust will be outstanding at the commencement of trading on the Exchange.

### 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 of the Trust.<sup>59</sup> Trading in Shares of the Trust will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12-E have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

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<sup>58</sup> 17 CFR 240.10A-3.

<sup>59</sup> See NYSE Arca Rule 7.12-E.

The Exchange may halt trading during the day in which an interruption to the dissemination of the IIV or the value of the Index occurs. If the interruption to the dissemination of the IIV or the value of the Index 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 Digital Asset Holdings per Share is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the Digital Asset Holdings per Share is available to all market participants.

### Surveillance

The Exchange represents that trading in the Shares of the Trust will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.<sup>60</sup> The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

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

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares from such markets and other entities. In addition, the

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<sup>60</sup> FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

Exchange may obtain information regarding trading in the Shares from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement (“CSSA”).<sup>61</sup> The Exchange is also able to obtain information regarding trading in the Shares in connection with such ETP Holders’ proprietary or customer trades which they effect through ETP Holders on any relevant market.

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

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

The Sponsor has represented 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 Act, the Exchange will monitor 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 NYSE Arca Rule 5.5-E(m).

#### Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an “Information Bulletin” of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (1) the procedures for creations of Shares in Baskets; (2) NYSE Arca Rule 9.2-E(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) information regarding how the value of the Index and the IIV are disseminated; (4) the

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<sup>61</sup> For a list of the current members of ISG, see [www.isgportal.org](http://www.isgportal.org). The Exchange notes that not all components of the Trust may trade on markets that are members of ISG or with which the Exchange has in place a CSSA.

possibility that trading spreads and the resulting premium or discount on the Shares may widen during the Opening and Late Trading Sessions, when an updated IIV will not be calculated or publicly disseminated; and (5) trading information. The Exchange notes that investors purchasing Shares directly from the Trust will receive a prospectus.

In addition, the Information Bulletin will reference that the Trust is subject to various fees and expenses as described in the Annual Report. The Information Bulletin will disclose that information about the Shares of the Trust is publicly available on the Trust's website.

The Information Bulletin will also discuss any relief, if granted, by the Commission or the staff from any rules under the Act.

## 2. Statutory Basis

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

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Rule 8.201-E. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares with other markets that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares from such markets. In addition, the Exchange may obtain

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

information regarding trading in the Shares from markets that are members of ISG or with which the Exchange has in place a CSSA. Also, pursuant to NYSE Arca Rule 8.201-E(g), the Exchange is able to obtain information regarding trading in the Shares and the underlying ETH or any ETH derivative through ETP Holders acting as registered Market Makers, in connection with such ETP Holders' proprietary or customer trades through ETP Holders which they effect on any relevant market.

The proposed rule change is also designed to prevent fraudulent and manipulative acts and practices because, although the Digital Asset Exchange Market is not inherently resistant to fraud and manipulation, the Index serves as a means sufficient to mitigate the impact of instances of fraud and manipulation on a reference price for ETH. Specifically, the Index provides a better benchmark for the price of ETH than the Digital Asset Exchange Market price because it (1) tracks the Digital Asset Exchange Market price through trading activity at U.S.-Compliant Exchanges; (2) mitigates the impact of instances of fraud, manipulation and other anomalous trading activity in real-time through systematic adjustments; (3) is constructed and maintained by an expert third-party index provider, allowing for prudent handling of non-market-related events; and (4) mitigates the impact of instances of fraud, manipulation and other anomalous trading activity concentrated on any one specific exchange through a cross-exchange composite index rate. The Trust has used the Index to price the Shares for more than four years, and the Index has proven its ability to (i) mitigate the effects of fraud, manipulation and other anomalous trading activity from impacting the ETH reference rate, (ii) provide a real-time, volume-weighted fair value of ETH and (iii) appropriately handle and adjust for non-market related events, such that efforts to manipulate the price of ETH would have had a negligible effect on the pricing of the Trust, due to the controls embedded in the structure of the Index. In addition, certain of the Index's Constituent Exchanges also have or have begun to implement market surveillance infrastructure to further detect, prevent, and respond to fraud, attempted fraud, and similar wrongdoing, including market manipulation. The proposed rule change is also designed to

prevent fraudulent and manipulative acts and practices based on the existence of the CME futures market as a large, surveilled and regulated market that is closely connected with the spot market for ETH and through which the Exchange could obtain information to assist in detecting and deterring potential fraud or manipulation.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that there is a considerable amount of ETH price and market information available on public websites and through professional and subscription services. Investors may obtain, on a 24-hour basis, ETH pricing information based on the spot price for ETH from various financial information service providers. The closing price and settlement prices of ETH are readily available from the Digital Asset Exchanges and other publicly available websites. In addition, such prices are published in public sources, or on-line information services such as Bloomberg and Reuters. The Digital Asset Holdings per Share will be calculated daily and made available to all market participants at the same time. The Trust will provide website disclosure of its Digital Asset Holdings daily. One or more major market data vendors will disseminate for the Trust on a daily basis information with respect to the most recent Digital Asset Holdings per Share and Shares outstanding. In addition, if the Exchange becomes aware that the Digital Asset Holdings per Share is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the Digital Asset Holdings is available to all market participants. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. The IIV will be widely disseminated on a per Share basis every 15 seconds during the NYSE Arca Core Trading Session (normally 9:30 a.m., E.T., to 4:00 p.m., E.T.) by one or more major market data vendors. The Exchange represents that the Exchange may halt trading during the day in which an interruption to the dissemination of the IIV or the value of the Index occurs. If the interruption to the dissemination of the IIV or the value of the Index 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.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a CSSA. In addition, as noted above, investors will have ready access to information regarding the Trust's Digital Asset Holdings, IIV, and quotation and last sale information for the Shares.

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 purposes of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of an additional type of exchange-traded product, and the first such product based on ETH, which will enhance competition among market participants, to the benefit of investors and the marketplace.

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

No written comments were solicited or received with respect to the proposed rule change.

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 up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or

- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

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

Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-NYSEARCA-2023-70 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-2023-70. 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-NYSEARCA-2023-70 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

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

**Sherry R. Haywood,**

*Assistant Secretary.*

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