



## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98846; File No. SR-CboeBZX-2023-087]

### **Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change to List and Trade Shares of the Invesco Galaxy Ethereum ETF under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares**

November 2, 2023.

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

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

Cboe BZX Exchange, Inc. (“BZX” or the “Exchange”) is filing with the Securities and Exchange Commission (“Commission” or “SEC”) a proposed rule change to list and trade shares of the Invesco Galaxy Ethereum ETF (the “Trust”),<sup>3</sup> under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares.

The text of the proposed rule change is also available on the Exchange’s website ([http://markets.cboe.com/us/equities/regulation/rule\\_filings/bzx/](http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/)), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

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

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

<sup>3</sup> The Trust was formed as a Delaware statutory trust on September 27, 2023, and is operated as a grantor trust for U.S. federal tax purposes. The Trust has no fixed termination date.

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

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

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

#### 1. Purpose

The Exchange proposes to list and trade the Shares of the Invesco Galaxy Ethereum ETF<sup>4</sup> under BZX Rule 14.11(e)(4),<sup>5</sup> which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.<sup>6</sup>

According to the Registration Statement, the Trust is neither an investment company registered under the Investment Company Act of 1940, as amended,<sup>7</sup> nor a commodity pool for purposes of the Commodity Exchange Act (“CEA”), and neither the Trust nor the Sponsor is subject to regulation as a commodity pool operator or a commodity trading adviser in connection with the Shares.

### Invesco Galaxy Ethereum ETF

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<sup>4</sup> On September 29, 2023, the Trust filed with the Commission an initial registration statement (the “Registration Statement”) on Form S-1 under the Securities Act of 1933 (15 U.S.C. 77a). The description of the operation of the Trust herein is based, in part, on the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

<sup>5</sup> The Commission approved BZX Rule 14.11(e)(4) in Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR-BATS-2011-018).

<sup>6</sup> All statements and representations made in this filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange.

<sup>7</sup> 15 U.S.C. 80a-1.

Invesco Capital Management is the sponsor of the Trust (the “Sponsor”). A well-established global fund administrator and transfer agent, Bank of New York Mellon (“BNYM”) will be the administrator (“Administrator”) and transfer agent (“Transfer Agent”). Coinbase Custody Trust Company, LLC (“ETH Custodian”), a third-party regulated custodian, will be responsible for custody of the Trust’s Ether (“ETH”), and Bank of New York Mellon (the “Cash Custodian”) will be responsible for custody of any Trust cash holdings. Delaware Trust Company is the trustee (“Trustee”).

According to the Registration Statement, each Share will represent a fractional undivided beneficial interest in the Trust. The Trust’s assets will consist of ETH held by the Custodian on behalf of the Trust. The Trust generally does not intend to hold cash or cash equivalents. However, there may be situations where the Trust will unexpectedly hold cash on a temporary basis.

When the Trust sells or redeems its Shares, it will do so in “in-kind” transactions in large blocks of Shares (a “Creation Basket”) at the Trust’s NAV. Authorized participants will deliver, or facilitate the delivery of, ETH to the Trust’s account with the Custodian in exchange for Shares when they purchase Shares, and the Trust, through the Custodian, will deliver ETH to such authorized participants when they redeem Shares with the Trust. Authorized participants may then offer Shares to the public at prices that depend on various factors, including the supply and demand for Shares, the value of the Trust’s assets, and market conditions at the time of a transaction. Shareholders who buy or sell Shares during the day from their broker may do so at a premium or discount relative to the NAV of the Shares of the Trust.

### Background

Ethereum is free software that is hosted on computers distributed throughout the globe. It employs an array of logic, called a protocol, to create a unified understanding of ownership, commercial activity, and business logic. This allows users to engage in commerce without the need to trust any of its participants or counterparties. Ethereum code creates verifiable and

unambiguous rules that assign clear, strong property rights to create a platform for unrestrained business formation and free exchange. It is widely understood that no single intermediary or entity operates or controls the Ethereum network (referred to as “decentralization”), the transaction validation and recordkeeping infrastructure of which is collectively maintained by a disparate user base. The Ethereum network allows people to exchange tokens of value, or ETH, which are recorded on a distributed public recordkeeping system or ledger known as a blockchain (the “Ethereum Blockchain”), and which can be used to pay for goods and services, including computational power on the Ethereum network, or converted to fiat currencies, such as the U.S. dollar, at rates determined on digital asset exchanges or in individual peer-to-peer transactions. Furthermore, by combining the recordkeeping system of the Ethereum Blockchain with a flexible scripting language that is programmable and can be used to implement sophisticated logic and execute a wide variety of instructions, the Ethereum network is intended to act as a foundational infrastructure layer on top of which users can build their own custom software programs, as an alternative to centralized web servers. In theory, anyone can build their own custom software programs on the Ethereum network. In this way, the Ethereum network represents a project to expand blockchain deployment beyond a limited-purpose, peer-to-peer private money system into a flexible, distributed alternative computing infrastructure that is available to all. On the Ethereum network, ETH is the unit of account that users pay for the computational resources consumed by running their programs.

Heretofore, U.S. retail investors have lacked a U.S. regulated, U.S. exchange-traded vehicle to gain exposure to ETH. Instead current options include: (i) facing the counter-party risk, legal uncertainty, technical risk, and complexity associated with accessing spot Ether or (ii) over-the-counter Ether funds (“OTC ETH Funds”) with high management fees and potentially volatile premiums and discounts;<sup>8</sup> Meanwhile, investors in other countries, including Germany,

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<sup>8</sup> The premium and discount for OTC ETH Funds is known to move rapidly. For example, over the period of 12/21/20 to 1/21/21, the premium for the largest OTC ETH Fund went from 238.63% to 5.1%. While the price of Ether appreciated significantly during this period and NAV per share increased by 101.40%, the

Switzerland and France, are able to use more traditional exchange listed and traded products (including exchange-traded funds holding physical ETH) to gain exposure to ETH. Investors across Europe have access to products which trade on regulated exchanges and provide exposure to a broad array of spot crypto assets. U.S. investors, by contrast, are left with fewer and more risky means of getting Ether exposure.<sup>9</sup>

To this point, the lack of an ETP that holds spot ETH (a “Spot ETH ETP”) exposes U.S. investor assets to significant risk because investors that would otherwise seek cryptoasset exposure through a Spot ETH ETP are forced to find alternative exposure through generally riskier means. For example, investors in OTC ETH Funds are not afforded the benefits and protections of regulated Spot ETH ETPs, resulting in retail investors suffering losses due to drastic movements in the premium/discount of OTC ETH Funds. An investor who purchased the largest OTC ETH Fund in January 2021 and held the position at the end of 2022 would have suffered a 69% loss due to the premium/discount, even if the price of ETH did not change. Many retail investors likely suffered losses due to this premium/discount in OTC ETH Fund trading; all such losses could have been avoided if a Spot ETH ETP had been available. Additionally, many U.S. investors that held their digital assets in accounts at FTX,<sup>10</sup> Celsius Network LLC,<sup>11</sup>

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price per share decreased by 37.49%. This means that investors are holding shares of a fund with roughly \$4.8 billion in assets under management that experiences significant volatility in its premium and discount outside of the fluctuations in price of the underlying asset. Even operating within the normal premium and discount range, it’s possible for an investor to buy shares of an OTC ETH Fund only to have those shares quickly lose 10% or more in dollar value excluding any movement of the price of ether. That is to say – the price of Ether could have stayed exactly the same from market close on one day to market open the next, yet the value of the shares held by the investor decreased only because of the fluctuation of the premium. As more investment vehicles, including mutual funds and ETFs, seek to gain exposure to ether, the easiest option for a buy and hold strategy for such vehicles is often an OTC ETH Fund, meaning that even investors that do not directly buy OTC ETH Funds can be disadvantaged by extreme premiums (or discounts) and premium volatility.

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

<sup>10</sup> See FTX Trading Ltd., et al., Case No. 22-11068.

<sup>11</sup> See Celsius Network LLC, et al., Case No. 22-10964.

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

#### Applicable Standard

The Commission has historically approved or disapproved exchange filings to list and trade series of Trust Issued Receipts, including spot-based Commodity-Based Trust Shares, on the basis of whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size related to the underlying commodity to be held.<sup>14</sup> With this in mind, the CME Ether Futures (“CME ETH Futures”) market, which launched

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<sup>12</sup> See BlockFi Inc., Case No. 22-19361.

<sup>13</sup> See Voyager Digital Holdings, Inc., et al., Case No. 22-10943.

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

in February 2021, is the proper market to consider in determining whether there is a related regulated market of significant size.

The Commission has approved proposals related to the listing and trading of funds that would primarily hold CME Bitcoin Futures that are registered under the Securities Act of 1933 (“Bitcoin Futures ETPs”),<sup>15</sup> finding that the CME Bitcoin Futures market represents a regulated market of significant size. Meanwhile, the Commission has continued to disapprove proposals to list and trade funds that would hold spot bitcoin on the seemingly conflicting basis that the CME Bitcoin Futures market is not a regulated market of significant size.<sup>16</sup> In the recently decided *Grayscale Investments, LLC v Securities and Exchange Commission*,<sup>17</sup> however, the court resolved this conflict by finding that the SEC had failed to provide a coherent explanation as to why it had approved the Bitcoin Futures ETPs while disapproving the proposal to list and trade shares of the Grayscale Bitcoin Trust and vacating the disapproval order.<sup>18</sup>

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

#### Investment Objective

According to the Registration Statement, the investment objective of the Trust is for the Shares to reflect the spot price of Ether as measured by using the Lukka Prime Reference Rate less the Trust’s expenses and other liabilities. In seeking to achieve its investment objective, the Trust will hold Ether (“ETH”) and will value its Shares daily based on the reported Lukka Prime

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<sup>15</sup> See Exchange Act Release No. 94620 (April 6, 2022), 87 FR 21676 (April 12, 2022) (the “Teucrium Approval”) and 94853 (May 5, 2022) (collectively, with the Teucrium Approval, the “Bitcoin Futures Approvals”).

<sup>16</sup> The proposed spot bitcoin funds are nearly identical to the Trust but proposed to hold bitcoin instead of ETH (“Spot Bitcoin ETPs”).

<sup>17</sup> *Grayscale Investments, LLC v. Securities and Exchange Commission, et al.*, Case No. 22-1142 (the “Grayscale Order”).

<sup>18</sup> *Id.*

Reference Rate (the “Benchmark”), which is calculated based on prices contributed by exchanges that are determined by Lukka, Inc., (the “Benchmark Provider”) an independent third-party digital asset company. The Trust is not actively managed.

### The Benchmark

As described in the Registration Statement, the Fund will use the Benchmark to calculate the Trust’s NAV. The Benchmark is designed to be a robust price for ETH in USD and there is no component other than ETH in the index. The underlying exchanges are sourced from the Benchmark Provider. As of December 2022, the following exchanges are considered to be eligible exchanges the Benchmark Provider: Binance, Bitfinex, Bitflyer, Bittrex, Bitstamp, Coinbase, Crypto.com, Gemini, HitBTC, Huobi, Kraken, KuCoin, OKEx, Poloniex (collectively, “Benchmark Pricing Sources”). The Benchmark Provider reviews eligible exchanges quarterly. In determining which exchanges to include, the Benchmark Provider evaluates each exchange using proprietary ratings criteria. The Benchmark Provider constantly reassesses the exchanges to be eligible for inclusion in the Benchmark, and makes adjustments as needed.

In determining the value of ETH, the Benchmark Provider applies a five-step weighting process for identifying the principal exchange for Ether and the last price on that exchange. A Base Exchange Score (“BES”) that takes into account certain criteria is assigned to each eligible exchange in order to select the most appropriate primary exchange and then an executed exchange price is determined at 4:00 P.M. Eastern time.

Step 1: Assign each exchange for Ether and U.S. Dollars a BES reflecting static exchange characteristics such as oversight, microstructure and technology.

Step 2: Adjust the BES based on the relative monthly volume each exchange services. This new score is the Volume Adjusted Score (“VAS”).

Step 3: Decay the adjusted score based on the time passed since last trade on exchange, assessing the level of activity in the market by considering the frequency (volume) of trades. The

decay factor reflects the time since the last trade on the exchange. This is the final Decayed Volume Adjusted Score (DVAS), which reflects freshness of data by tracking most recent trades.

Step 4: Rank the exchanges by the DVAS score and designate the highest-ranking exchange as the Principal Market for that point in time – the principal market is the exchange with highest DVAS.

Step 5: An executed exchange price is used to represent fair market value at 4:00 P.M. Eastern time.

#### Availability of Information

In addition to the price transparency of the Benchmark, the Trust will provide information regarding the Trust's ETH holdings as well as additional data regarding the Trust. The Trust will provide an Intraday 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 Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.). The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the value of the Trust's ETH holdings during the trading day.

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

The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV and the reported closing price; (b) the BZX Official Closing Price<sup>19</sup> in relation to the NAV as of the time the NAV is calculated and a calculation of the premium or discount of such price

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<sup>19</sup> As defined in Rule 11.23(a)(3), the term "BZX Official Closing Price" shall mean the price disseminated to the consolidated tape as the market center closing trade.

against such NAV; (c) data in chart form displaying the frequency distribution of discounts and premiums of the Official Closing Price against the NAV, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The Trust will also disseminate the Trust's holdings on a daily basis on the Trust's website. The price of ETH will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours. Information about the Benchmark, including key elements of how the Benchmark is calculated, will be publicly available at <https://www.lukka.tech/>.

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

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

#### The ETH Custodian

The Custodian's services (i) allow ETH to be deposited from a public blockchain address to the Trust's ETH account and (ii) allow ETH to be withdrawn from the ETH account to a public blockchain address as instructed by the Trust. The Custody Agreement requires the Custodian to hold the Trust's ETH in cold storage, unless required to facilitate withdrawals as a temporary measure. The Custodian will use segregated cold storage ETH addresses for the Trust which are separate from the ETH addresses that the Custodian uses for its other customers and which are directly verifiable via the ETH blockchain. The Custodian will safeguard the private

keys to the ETH associated with the Trust's ETH account. The Custodian will at all times record and identify in its books and records that such ETH constitutes the property of the Trust. The Custodian will not withdraw the Trust's ETH from the Trust's account with the Custodian, or loan, hypothecate, pledge or otherwise encumber the Trust's ETH, without the Trust's instruction. If the custody agreement terminates, the Sponsor may appoint another custodian and the Trust may enter into a custodian agreement with such custodian.

#### Net Asset Value

NAV means the total assets of the Trust including, but not limited to, all ETH and cash, if any, less total liabilities of the Trust, each determined on the basis of generally accepted accounting principles. The Administrator will determine the NAV of the Trust on each day that the Exchange is open for regular trading, as promptly as practical after 4:00 p.m. EST. The NAV of the Trust is the aggregate value of the Trust's assets less its estimated accrued but unpaid liabilities (which include accrued expenses). In determining the Trust's NAV, the Administrator values the ETH held by the Trust based on the price set by the Benchmark as of 4:00 p.m. EST. The Administrator also determines the NAV per Share.

#### Creation and Redemption of Shares

According to the Registration Statement, on any business day, an authorized participant may place an order to create one or more baskets. Purchase orders must be placed by 4:00 p.m. Eastern Time, or the close of regular trading on the Exchange, whichever is earlier. The day on which an order is received is considered the purchase order date. The total deposit of ETH required is an amount of ETH that is in the same proportion to the total assets of the Trust, net of accrued expenses and other liabilities, on the date the order to purchase is properly received, as the number of Shares to be created under the purchase order is in proportion to the total number of Shares outstanding on the date the order is received. Each night, the Sponsor will publish the amount of ETH that will be required in exchange for each creation order. The Administrator determines the required deposit for a given day by dividing the number of ETH held by the Trust

as of the opening of business on that business day, adjusted for the amount of ETH constituting estimated accrued but unpaid fees and expenses of the Trust as of the opening of business on that business day, by the quotient of the number of Shares outstanding at the opening of business divided by 5,000. The procedures by which an authorized participant can redeem one or more Creation Baskets mirror the procedures for the creation of Creation Baskets.

#### Commodity-Based Trust Shares - Rule 14.11(e)(4)

The Shares will be subject to BZX Rule 14.11(e)(4), which sets forth the initial and continued listing criteria applicable to Commodity-Based Trust Shares. The Exchange will obtain a representation that the Trust's NAV will be calculated daily and that these values and information about the assets of the Trust will be made available to all market participants at the same time. The Exchange notes that, as defined in Rule 14.11(e)(4)(C)(i), the Shares will be: (a) issued by a trust that holds a specified commodity<sup>20</sup> deposited with the trust; (b) issued by such trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity; and (c) when aggregated in the same specified minimum number, may be redeemed at a holder's request by such trust which will deliver to the redeeming holder the quantity of the underlying commodity.

Upon termination of the Trust, the Shares will be removed from listing. The Trustee, Delaware Trust Company, is a trust company having substantial capital and surplus and the experience and facilities for handling corporate trust business, as required under Rule 14.11(e)(4)(E)(iv)(a) and that no change will be made to the trustee without prior notice to and approval of the Exchange. The Exchange also notes that, pursuant to Rule 14.11(e)(4)(F), neither the Exchange nor any agent of the Exchange shall have any liability for damages, claims, losses

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<sup>20</sup> For purposes of Rule 14.11(e)(4), the term commodity takes on the definition of the term as provided in the Commodity Exchange Act. The CFTC has stated that: "Certain digital assets, including BTC, ETH, LTC, and at least two fiat-backed stablecoins, tether ("USDT") and the Binance USD ("BUSD"), as well as other virtual currencies as alleged herein, are "commodities," as defined under Section 1a(9) of the [Commodities Exchange] Act, 7 U.S.C. § 1a(9)." See *Commodity Futures Trading Commission v. Changpeng Zhao, Binance Holdings Limited, Binance Holdings (IE) Limited, Binance (Services) Holdings Limited, and Samuel Lim*, March 27, 2023 at 9.

or expenses caused by any errors, omissions or delays in calculating or disseminating any underlying commodity value, the current value of the underlying commodity required to be deposited to the Trust in connection with issuance of Commodity-Based Trust Shares; resulting from any negligent act or omission by the Exchange, or any agent of the Exchange, or any act, condition or cause beyond the reasonable control of the Exchange, its agent, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission or delay in the reports of transactions in an underlying commodity. Finally, as required in Rule 14.11(e)(4)(G), the Exchange notes that any registered market maker (“Market Maker”) in the Shares must file with the Exchange in a manner prescribed by the Exchange and keep current a list identifying all accounts for trading in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, which the registered Market Maker may have or over which it may exercise investment discretion. No registered Market Maker shall trade in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, in an account in which a registered Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by this Rule. In addition to the existing obligations under Exchange rules regarding the production of books and records (see, e.g., Rule 4.2), the registered Market Maker in Commodity-Based Trust Shares shall make available to the Exchange such books, records or other information pertaining to transactions by such entity or registered or non-registered employee affiliated with such entity for its or their own accounts for trading the underlying physical commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, as may be requested by 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. The Exchange will halt trading in the Shares under the conditions specified in BZX Rule 11.18. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the ETH underlying the Shares; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Rule 14.11(e)(4)(E)(ii), which sets forth circumstances under which trading in the Shares may be halted.

#### 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. BZX will allow trading in the Shares during all trading sessions on the Exchange. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in BZX Rule 11.11(a) the minimum price variation for quoting and entry of orders in securities traded on the Exchange is \$0.01 where the price is greater than \$1.00 per share or \$0.0001 where the price is less than \$1.00 per share.

#### Surveillance

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements.

If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. The Exchange may obtain information regarding trading in the Shares and ETH Futures via the Intermarket Surveillance Group (“ISG”), from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.<sup>21</sup>

#### Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (i) the procedures for the creation and redemption of Baskets (and that the Shares are not individually redeemable); (ii) BZX Rule 3.7, which imposes suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers; (iii) how information regarding the IIV and the Trust’s NAV are disseminated; (iv) the risks involved in trading the Shares outside of Regular Trading Hours<sup>22</sup> when an updated IIV will not be calculated or publicly disseminated; (v) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (vi) trading information.

In addition, the Information Circular will advise members, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Shares. Members purchasing the Shares for resale to investors will deliver a prospectus to such investors. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

#### CME ETH Futures<sup>23</sup>

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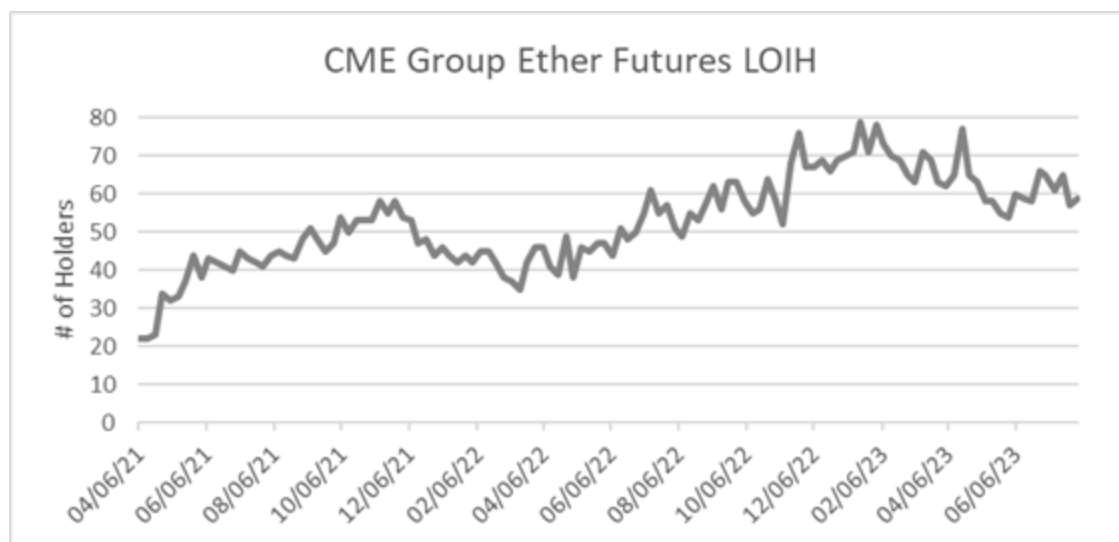
<sup>21</sup> For a list of the current members and affiliate members of ISG, see [www.isgportal.com](http://www.isgportal.com).

<sup>22</sup> Regular Trading Hours is the time between 9:30 a.m. and 4:00 p.m. Eastern Time.

<sup>23</sup> Unless otherwise noted, all data and analysis presented in this section and referenced elsewhere in the filing has been provided by the Sponsor.

CME began offering trading in Ether Futures in February 2021. Each contract represents 50 ETH and is based on the CME CF Ether-Dollar Reference Rate.<sup>24</sup> The contracts trade and settle like other cash-settled commodity futures contracts. Most measurable metrics related to CME ETH Futures have generally trended up since launch, although some metrics have slowed recently. For example, there were 76,293 CME ETH Futures contracts traded in July 2023 (approximately \$7.3 billion) compared to 70,305 (\$11.1 billion) and 158,409 (\$7.5 billion) contracts traded in July 2021, and July 2022 respectively.<sup>25</sup> The Sponsor's research indicates daily correlation between the spot ETH and the CME ETH Futures is 0.998 from the period of 9/1/22 through 9/1/23.

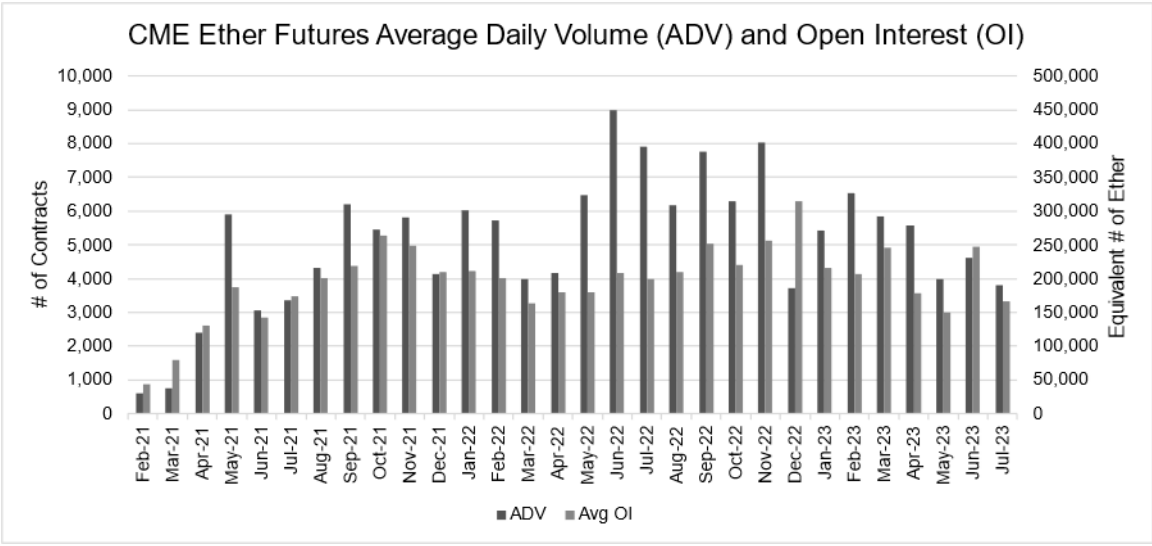
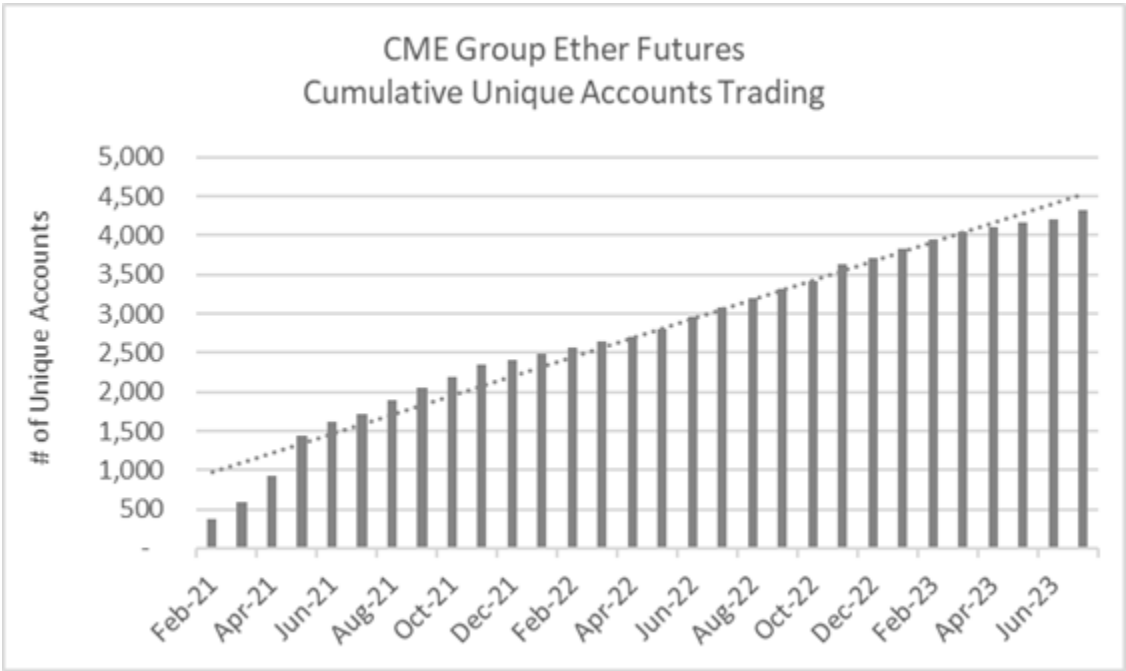
The number of large open interest holders<sup>26</sup> and unique accounts trading CME ETH Futures have both increased, even in the face of heightened Ether price volatility.

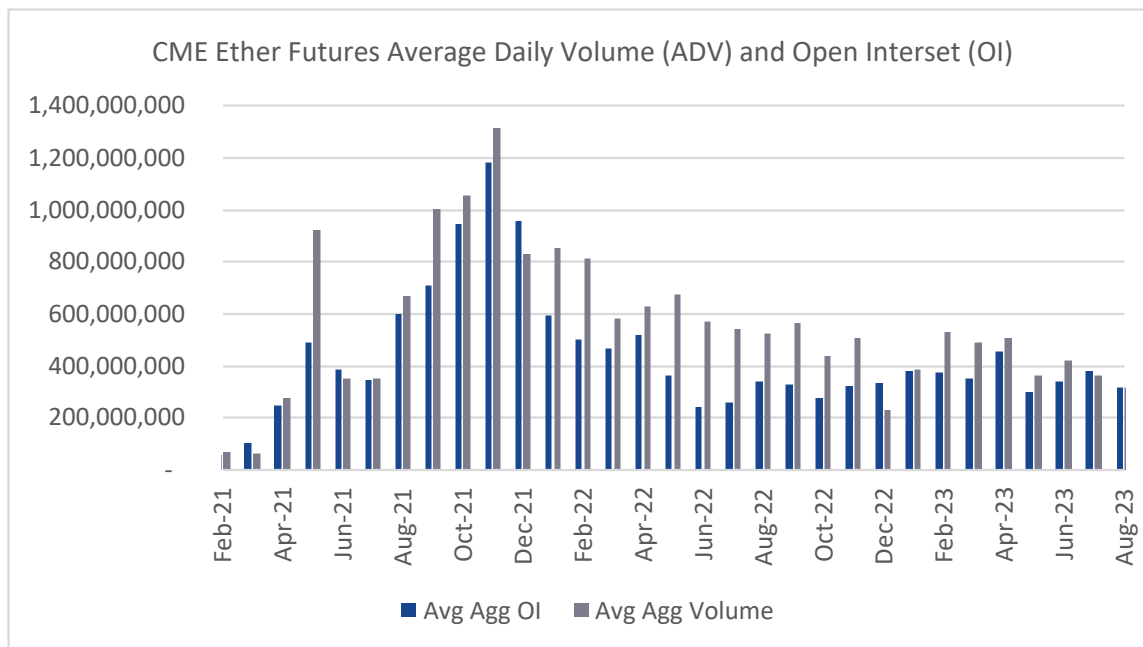


<sup>24</sup> The CME CF Ether-Dollar Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto exchanges and trading platforms, including Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.

<sup>25</sup> Source: CME, 7/31/23.

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





### Section 6(b)(5) and the Applicable Standards

The Commission has approved numerous series of Trust Issued Receipts,<sup>27</sup> including Commodity-Based Trust Shares,<sup>28</sup> to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange’s rules are designed to prevent fraudulent and manipulative acts and practices;<sup>29</sup> and (ii) the requirement that an exchange

<sup>27</sup> See Exchange Rule 14.11(f).

<sup>28</sup> Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

<sup>29</sup> The Exchange believes that ETH is resistant to price manipulation and that “other means to prevent fraudulent and manipulative acts and practices” exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ETH trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ETH platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ETH prices through continuous trading activity challenging. To the extent that there are ETH exchanges engaged in or allowing wash trading or other activity intended to manipulate the price of ETH on other markets, such pricing does not normally impact prices on other exchange because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ETH markets and the presence of arbitrageurs in those markets means that the manipulation of the price of ETH price on any single venue would require manipulation of the global ETH price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ETH exchange or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

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

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

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place<sup>30</sup> with a regulated market of significant size. Both the Exchange and CME are members of ISG. The only remaining issue to be addressed is whether the ETH Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.<sup>31</sup>

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<sup>30</sup> As previously articulated by the Commission, “The standard requires such surveillance-sharing agreements since “they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.” The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.” The Commission has historically held that joint membership in the ISG constitutes such a surveillance sharing agreement. See Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR-NYSEArca-2019-39) (the “Wilshire Phoenix Disapproval”).

<sup>31</sup> See Wilshire Phoenix Disapproval.

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.<sup>32,33</sup>

*(a) Manipulation of the ETP*

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

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

The CME “comprehensively surveils futures market conditions and price movements on a real-time and ongoing basis in order to detect and prevent price distortions, including price distortions caused by manipulative efforts.” Thus, the CME’s surveillance can reasonably be relied upon to capture the effects on the CME futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME futures contracts, whether that attempt is made by directly trading on the CME futures market or indirectly by trading outside of the CME futures market. As such, when the CME shares its surveillance

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<sup>32</sup> See Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a ‘cannot be manipulated’ standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.” *Id.* at 37582.

<sup>33</sup> According to reports, the Commission is poised to allow the launch of ETFs registered under the Investment Company Act of 1940, as amended (the “1940 Act”), that provide exposure to ETH primarily through CME ETH Futures (“ETH Futures ETFs”) as early as October 2023. Allowing such products to list and trade is a productive first step in providing U.S. investors and traders with transparent, exchange-listed tools for expressing a view on ETH. <https://www.bloomberg.com/news/articles/2023-08-17/sec-said-to-be-poised-to-allow-us-debut-of-ether-futures-etfs-eth#xj4y7vzkg>.

information with Arca, the information would assist in detecting and deterring fraudulent or manipulative misconduct related to the non-cash assets held by the proposed ETP.<sup>34</sup>

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

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

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

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME ETH Futures market for a number of reasons. First,

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<sup>34</sup> See Teucrium Approval at 21679.

because the Trust would not hold CME ETH Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME ETH Futures contracts use for pricing.<sup>35</sup> The Sponsor notes that ETH total 24-hour spot trading volume has averaged \$9.4B over the year ending September 1, 2023,<sup>36</sup> with approximately \$950M occurring on venues whose trades are included in the sponsor’s benchmark.<sup>37</sup> The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ETH market even in its most aggressive projections for the Trust’s assets and, thus, the Trust would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME ETH Futures market. Second, much like the CME Bitcoin Futures market, the CME ETH Futures market has progressed and matured significantly. As the court found in the Grayscale Order “Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less.” The Exchange and sponsor agree with this sentiment and believe it applies equally to the spot ETH and CME ETH Futures markets.

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

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

The Exchange is proposing to take additional steps to those described above to supplement its ability to obtain information that would be helpful in detecting, investigating, and deterring fraud and market manipulation in the Commodity-Based Trust Shares. On June 21, 2023, the Exchange reached an agreement on terms with Coinbase, Inc. (“Coinbase”), an operator of a United States-

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

<sup>36</sup> Source: TokenTerminal.

<sup>37</sup> Source: VanEck research, CryptoCompare.

based spot trading platform for ETH that represents a substantial portion of US-based and USD denominated ETH trading,<sup>38</sup> to enter into a surveillance-sharing agreement (“Spot Crypto SSA”) and executed an associated term sheet. Based on this agreement on terms, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares.

The Spot Crypto SSA is expected to be a bilateral surveillance-sharing agreement between the Exchange and Coinbase that is intended to supplement the Exchange’s market surveillance program. The Spot Crypto SSA is expected to have the hallmarks of a surveillance-sharing agreement between two members of the ISG, which would give the Exchange supplemental access to data regarding spot ETH trades on Coinbase where the Exchange determines it is necessary as part of its surveillance program for the Commodity-Based Trust Shares.<sup>39</sup> This means that the Exchange expects to receive market data for orders and trades from Coinbase, which it will utilize in surveillance of the trading of Commodity-Based Trust Shares. In addition, the Exchange can request further information from Coinbase related to spot ETH trading activity on the Coinbase exchange platform, if the Exchange determines that such information would be necessary to detect and investigate potential manipulation in the trading of the Commodity-Based Trust Shares.<sup>40</sup>

*(ii) Designed to Protect Investors and the Public Interest*

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ETH through OTC ETH Funds is greater than \$5 billion. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through premium/discount volatility and management fees for OTC ETH

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<sup>38</sup> According to a report from The Block, Coinbase represented 45%% of USD denominated exchange trading volume in August 2023. <https://www.theblock.co/data/crypto-markets/spot/usd-support-exchange-volume-market-share>.

<sup>39</sup> For additional information regarding ISG and the hallmarks of surveillance-sharing between ISG members, see <https://isgportal.org/overview>.

<sup>40</sup> The Exchange also notes that it already has in place ISG-like surveillance sharing agreement with Cboe Digital Exchange, LLC and Cboe Clear Digital, LLC.

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

## 2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act<sup>41</sup> in general and Section 6(b)(5) of the Act<sup>42</sup> in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Commission has approved numerous series of Trust Issued Receipts, including Commodity-Based Trust Shares, to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices;<sup>43</sup> and (ii) the requirement that an exchange

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<sup>41</sup> 15 U.S.C. 78f.

<sup>42</sup> 15 U.S.C. 78f(b)(5).

<sup>43</sup> The Exchange believes that ETH is resistant to price manipulation and that "other means to prevent fraudulent and manipulative acts and practices" exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ETH trading render it difficult and

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

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

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

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

<sup>44</sup> See Wilshire Phoenix Disapproval.

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.<sup>45,46</sup>

*(a) Manipulation of the ETP*

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

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

The CME “comprehensively surveils futures market conditions and price movements on a real-time and ongoing basis in order to detect and prevent price distortions, including price distortions caused by manipulative efforts.” Thus, the CME’s surveillance can reasonably be relied upon to capture the effects on the CME futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME futures contracts, whether that attempt is made by directly trading on the CME futures market or indirectly by trading outside of the CME futures market. As such, when the CME shares its surveillance

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<sup>45</sup> See Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a ‘cannot be manipulated’ standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.” *Id.* at 37582.

<sup>46</sup> According to reports, the Commission is poised to allow the launch of ETFs registered under the Investment Company Act of 1940, as amended (the “1940 Act”), that provide exposure to ETH primarily through CME ETH Futures (“ETH Futures ETFs”) as early as October 2023. Allowing such products to list and trade is a productive first step in providing U.S. investors and traders with transparent, exchange-listed tools for expressing a view on ETH. <https://www.bloomberg.com/news/articles/2023-08-17/sec-said-to-be-poised-to-allow-us-debut-of-ether-futures-etfs-eth#xj4y7vzkg>.

information with Arca, the information would assist in detecting and deterring fraudulent or manipulative misconduct related to the non-cash assets held by the proposed ETP.<sup>47</sup>

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

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

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

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME ETH Futures market for a number of reasons. First,

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<sup>47</sup> See Teucrium Approval at 21679.

because the Trust would not hold CME ETH Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME ETH Futures contracts use for pricing.<sup>48</sup> The Sponsor notes that ETH total 24-hour spot trading volume has averaged \$9.4B over the year ending September 1, 2023,<sup>49</sup> with approximately \$950M occurring on venues whose trades are included in the sponsor’s benchmark.<sup>50</sup> The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ETH market even in its most aggressive projections for the Trust’s assets and, thus, the Trust would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME ETH Futures market. Second, much like the CME Bitcoin Futures market, the CME ETH Futures market has progressed and matured significantly. As the court found in the Grayscale Order, “Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less.” The Exchange and Sponsor agree with this sentiment and believe it applies equally to the spot ETH and CME ETH Futures markets.

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

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

The Exchange is proposing to take additional steps to those described above to supplement its ability to obtain information that would be helpful in detecting, investigating, and deterring fraud and market manipulation in the Commodity-Based Trust Shares. On June 21, 2023, the Exchange reached an agreement on terms with Coinbase, Inc. (“Coinbase”), an operator of a United States-

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<sup>48</sup> This logic is reflected by the court in the Grayscale Order at 17-18. Specifically, the court found that “Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market...But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin.”

<sup>49</sup> Source: TokenTerminal.

<sup>50</sup> Source: VanEck research, CryptoCompare.

based spot trading platform for ETH that represents a substantial portion of US-based and USD denominated ETH trading, to enter into a Spot Crypto SSA and executed an associated term sheet. Based on this agreement on terms, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares.

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

*(ii) Designed to Protect Investors and the Public Interest*

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ETH through OTC ETH Funds is greater than \$5 billion. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through premium/discount volatility and management fees for OTC ETH Funds. The Exchange believes that, as described above, the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, such concerns are now at the very least outweighed by investor protection concerns. As such, the Exchange believes

that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ETH in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in ETH Futures ETFs and operating companies that are imperfect proxies for ETH exposure; and (iv) providing an alternative to custodial spot ETH.

#### Commodity-Based Trust Shares – Rule 14.11(e)(4)

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed on the Exchange pursuant to the initial and continued listing criteria in Exchange Rule 14.11(e)(4). The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. The Exchange may obtain information regarding trading in the Shares and listed ETH derivatives via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

#### Availability of Information

The Exchange also believes that the proposal promotes market transparency in that a large amount of information is currently available about ETH and will be available regarding the Trust and the Shares. In addition to the price transparency of the Index, the Trust will provide information

regarding the Trust's ETH holdings as well as additional data regarding the Trust. The Trust will provide an IIV per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.). The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the value of the Trust's ETH holdings during the trading day.

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

The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV and the reported closing price; (b) the BZX Official Closing Price in relation to the NAV as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV; (c) data in chart form displaying the frequency distribution of discounts and premiums of the Official Closing Price against the NAV, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The Trust will also disseminate the Trust's holdings on a daily basis on the Trust's website. The price of ETH will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours. Information about the Index, including key elements of how the Index is calculated, will be publicly available at

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

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

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

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change, rather will facilitate the listing and trading of an additional exchange-traded product that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

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

The Exchange has neither solicited nor received written comments on 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 Exchange consents, the Commission will:

- A. by order approve or disapprove such proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

#### IV. Solicitation of Comments

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

##### Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-CboeBZX-2023-087 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-CboeBZX-2023-087. 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-CboeBZX-2023-087 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>51</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>51</sup> 17 CFR 200.30-3(a)(12).