



**SECURITIES AND EXCHANGE COMMISSION**  
**[Release No. 34-100434; File No. SR-NASDAQ-2024-028]**

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

June 26, 2024.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup>, and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 17, 2024, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

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

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.

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

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

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

1. Purpose

The Exchange proposes to list and trade Shares of the Trust under Nasdaq Rule 5711(d), which governs the listing and trading of “Commodity-Based Trust Shares.” The Trust is managed and controlled by the Hashdex Asset Management Ltd. (“Sponsor”) and administered by Tidal ETF Services LLC (the “Administrator”). The Shares will be registered with the SEC by means of the Trust's registration statement on Form S-1 (the “Registration Statement”).<sup>3</sup>

Description of the Trust

The Shares will be issued by the Trust, a Delaware statutory trust to be established by the Sponsor. The Trust will operate pursuant to the rules and guidelines set forth in the Trust agreement (“Trust Agreement”). The Trust will issue Shares representing fractional undivided beneficial interests in its net assets. The assets of the Trust will consist of bitcoin and ether. Under limited circumstances, the Trust will hold cash to bear its expenses. The Trust will not be an investment company registered under the Investment Company Act of 1940, as amended (the “1940 Act”), and will not be a commodity pool under the Commodity Exchange Act.

U.S. Bancorp Fund Services, LLC will be the sub-administrator, and transfer agent for the Trust (“Sub-Administrator” or “Transfer Agent”). U.S. Bank, N.A. will hold the Trust’s cash and/or cash equivalents<sup>4</sup> (“Cash Custodian”). The Sponsor intends to enter into an agreement with Coinbase Custody Trust Company, LLC and BitGo Trust Company, Inc. (“Crypto

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<sup>3</sup> 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>4</sup> “Cash equivalents” include short-term treasury bills (90 days or less to maturity), money market funds, and demand deposit accounts. The Trust does not hold, invest in, or trade in crypto assets that are linked to any fiat currency (i.e., stablecoins).

Custodians”, and together with the Cash Custodian, the “Custodians”). The Crypto Custodians will keep custody of all the Trust’s bitcoin and ether.<sup>5</sup>

#### The Trust’s Investment Objective

The investment objective of the Trust is to have the daily changes in the net asset value (“NAV”) of the Shares correspond to the daily changes in the price of the Nasdaq Crypto US Settlement Price Index,<sup>6</sup> NCIUSS (the “NCIUSS” or “Index”), less expenses and liabilities from the Trust’s operations, by investing in bitcoin and ether.

The Shares are designed to provide a straightforward means of obtaining investment exposure to bitcoin and ether through the public securities market, as opposed to direct acquisition, holding, and trading of spot crypto assets on a peer-to-peer or other basis or via a crypto asset platform. The Shares have been designed to remove the obstacles represented by the complexities and operational burdens involved in a direct investment in bitcoin and ether, while at the same time having an intrinsic value that reflects, at any given time, the investment exposure to the assets owned by the Trust at such time, less the Trust’s expenses and liabilities. The Shares provide investors with an alternative method of achieving exposure to the crypto asset markets through the public securities market, which may be more familiar to them.

The Trust will gain exposure to crypto assets by buying spot bitcoin and spot ether. The Trust will maintain cash balances to the extent it is necessary for currently due Trust-payable expenses.

If there are no Share redemption orders or currently due Trust-payable expenses, the Trust’s portfolio is expected to consist of bitcoin and ether. The Trust will not invest in any other spot crypto asset besides bitcoin and ether. The Trust will not invest in crypto securities,

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<sup>5</sup> The Trust may engage additional custodians for its crypto assets, each of whom may be referred to as a Crypto Custodian. The Trust may also remove or change current Crypto Custodians, provided that there is at least one Crypto Custodian at all times.

<sup>6</sup> See [https://indexes.nasdaqomx.com/docs/Methodology\\_NCIUS.pdf](https://indexes.nasdaqomx.com/docs/Methodology_NCIUS.pdf).

tokenized assets or stablecoins. As of May 27, 2024, the crypto asset constituents of the Index (“Index Constituents”) and their weightings<sup>7</sup> were as follows:

| Constituents  | Weight |
|---------------|--------|
| Bitcoin (BTC) | 70.54% |
| Ether (ETH)   | 29.46% |

The Sponsor will employ a passive investment strategy that is intended to track the changes in the Index regardless of whether the Index goes up or goes down, meaning that the Sponsor will not try to “beat” the Index. The Trust’s passive investment strategy is designed to allow investors to purchase and sell the Shares for the purpose of investing in the Index, whether to hedge the risk of losses in their Index-related transactions or gain price exposure to the Index. The Trust’s investments will be consistent with the Trust’s investment objective and will not be used to enhance leverage. That is, given its passive investment strategy, the Trust’s investments will not be used to seek performance that is the multiple or inverse multiple (e.g., 2Xs, 3Xs, -2Xs, and -3Xs) of the Trust’s Index.

None of the Trust, the Sponsor, any Crypto Custodian, or any other person associated with the Trust will, directly or indirectly, engage in action where any portion of the Trust’s ether becomes subject to the Ethereum proof-of-stake validation or is used to earn additional ether or generate income or other earnings.

From time to time, the Trust may be entitled to or come into possession of rights to acquire, or otherwise establish dominion and control over, any crypto asset (for avoidance of doubt, other than bitcoin and ether) or other asset or right, which rights are incident to the Trust’s ownership of bitcoin or ether and arise without any action of the Trust, or of the Sponsor

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<sup>7</sup> The Index Constituents will be weighted according to their relative free float market capitalizations, as described in the next section “The Trust’s Benchmark”.

(“Incidental Rights”) and/or crypto assets, or other assets or rights, acquired by the Trust through the exercise of any Incidental Right (“IR Virtual Currency”) by virtue of its ownership of bitcoin or ether, generally through a fork in the Bitcoin or Ethereum blockchain, an airdrop offered to holders of bitcoin or ether or other similar event.

With respect to a fork, airdrop or similar event, the Sponsor will cause the Trust to permanently and irrevocably abandon any such Incidental Rights and IR Virtual Currency and no such Incidental Right or IR Virtual Currency shall be taken into account for purposes of determining the NAV of the Trust.

In the event that any other crypto asset is included (other than bitcoin or ether), or is eligible for inclusion as an Index Constituent (as defined below), the Sponsor will transition the Trust’s investment strategy from full replication<sup>8</sup> to sample replication<sup>9</sup>, with only bitcoin and ether in the same proportions determined by the Index, and determine whether a filing with the Commission under Rule 19b-4 of the Act will be required.

#### The Trust’s Benchmark

The Trust will use the Index as a reference to track and measure its performance compared to the price performance of the markets for the Index Constituents and for valuation purposes when calculating the Trust’s NAV.

The Index is designed to measure the performance of a portion of the overall crypto asset market. The Index does not track the overall performance of all crypto assets generally, nor the performance of any specific crypto assets. The Index is owned and administered by Nasdaq, Inc. (“Index Provider”) and is calculated by CF Benchmarks Limited (“Calculation Agent”), which is experienced in calculating and administering crypto assets indices. The Calculation Agent publishes daily the Index Constituents, the Index Constituents’ weightings, the intraday value of

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<sup>8</sup> Full replication is an investment strategy where the fund invests in all the components of the index in their exact weights, providing precise tracking of the index performance.

<sup>9</sup> Sample replication is a strategy where the fund invests in a representative sample of the index components, which may not include all index components, to achieve similar performance. This approach is typically used to reduce costs or when full replication is impractical.

the Index (under the ticker NCIUS), and the daily settlement value of the Index (under the ticker NCIUSS), which is effectively the Index's closing value.

The Index is derived from a rules-based methodology ("Index Rules"), which is overseen by the Nasdaq Cryptocurrency Index Oversight Committee ("NCIOC"). The NCIOC governs the Index and is responsible for its implementation, administration, and general oversight, including assessing crypto assets for eligibility, adjustments to account for regulatory changes and periodic methodology reviews. The Index Rules may only be changed by the Index Provider with the approval of the NCIOC. Neither the Trust, nor the Sponsor have control over the Index Rules or the Index administration. Changes to Index Rules may result in adverse effects to the Trust and/or in the ability of the Sponsor to implement the Trust's investment strategy.

Crypto assets are eligible for inclusion in the Index if they satisfy the criteria set forth under the Nasdaq Crypto US Index methodology, which includes being currently listed on a U.S.-regulated digital asset trading platform or serving as the underlying asset for a derivative instrument listed on a U.S.-regulated derivatives platform. The Index adjusts its constituents and weightings on a quarterly basis to reflect changes in the crypto asset markets.

Pursuant to the Index Rules, to be eligible for inclusion in the Index, crypto assets must meet the following criteria on a quarterly basis:

- (1) Have active tradable markets listed on at least two Core Crypto Platforms (as defined below) for the entire period since the previous Index reconstitution;
- (2) Be supported by at least one Core Custodian (as defined below) for the entire period since the previous Index reconstitution.
- (3) To be considered for entry to the Index at any Index reconstitution, an asset must have a median daily trading volume in the USD pair conducted across all Core

Crypto Platforms that is no less than 0.5% of the cryptocurrency asset that has the highest median daily trading volume.

(4) Be currently listed on a U.S.-regulated digital asset trading platform or serve as the underlying asset for a derivative instrument listed on a U.S.-regulated derivatives platform.

(5) Have free-floating pricing (i.e., not be pegged to the value of any asset).

If a crypto asset meets requirements (1) through (5), it will be considered eligible for Index inclusion.

Notwithstanding inclusion in the eligible list, the NCIOC reserves the right to further exclude any additional assets based on one or more factors, including but not limited to its risk of being deemed a security by United States Securities laws along with its review of general reputational, fraud, manipulation, or security concerns connected to the asset. Assets that, in the sole discretion of the Nasdaq Crypto Index Oversight Committee, do not offer utility, do not facilitate novel use cases, or that do not exhibit technical, structural or cryptoeconomic innovation (e.g., assets inspired by memes or internet jokes) may also be excluded.

The Index will assess any crypto assets resulting from a hard fork or an airdrop under the same criteria as established digital assets and will only include a new digital asset if it meets the eligibility criteria set forth above.

Moreover, notwithstanding the above, the Sponsor will not invest the Trust's assets in any other crypto assets (i.e., other than bitcoin and ether), even if such other crypto assets are included in the Index pursuant to the Index Rules and the eligibility criteria above.

The Index Constituents will be weighted according to their relative free float market capitalizations. The free float market capitalization of an Index Constituent on any given day is defined as the product of an Index Constituent Settlement Price (as defined below) and its

Circulating Supply<sup>10</sup> as set in the most recent reconstitution. Weights are calculated by dividing the free float market capitalization of a digital asset by the total free float market capitalization of all Index Constituents at the time of rebalancing.

As set forth in the Index methodology, a “Core Crypto Platform” is a crypto asset platform that, in the opinion of the NCIOC, exhibits at a minimum the following characteristics:

- (1) Have strong forking controls;
- (2) Have effective anti-money laundering controls;
- (3) Have a reliable and transparent application programming interface (API) that provides real-time and historical trading data;
- (4) Charge fees for trading and structure trading incentives that do not interfere with the forces of supply and demand;
- (5) Be licensed by a public independent governing body;
- (6) Include surveillance for manipulative trading practices and erroneous transactions;
- (7) Evidence a robust IT infrastructure;
- (8) Demonstrate active capacity management;<sup>11</sup>

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<sup>10</sup> The Index will utilize "Circulating Supply" of an Index Constituent for all calculations of free float market capitalization and the determination of constituent weights. Circulating Supply is defined as the total supply of all units of a digital asset issued outside of the codebase since the initial block on a digital asset's blockchain or since the point of inception of the digital asset on a cryptographic distributed ledger that can be "spent" or moved from one deposit address to another that is deemed to be likely to be available for trading as defined by the Calculation Agent and described by the methods in the CF Cryptocurrency Index Family Multi Asset Ground Rules (section 4.2.1 to 4.3.1.2.1). Circulating Supply data will be determined at the block height or ledger number which is the last confirmed block or ledger number at 16:00:00 UTC on the day that is eight (8) business days immediately preceding the relevant Reconstitution Date. Where the Calculation Agent cannot reliably determine any of the respective inputs for the calculation of the Circulating Supply for a given crypto asset that is an Index Constituent then its Circulating Supply shall be approximated. This will be done by applying the Median Free Float Factor (Circulating Supply/Total Supply) that has been determined for that reconstitution of all Index Constituents to the Total Supply (Circulating Supply = Total Supply X Median Free Float Factor). During reconstitution, updated Circulating Supply of crypto assets will be set and will remain fixed until the next reconstitution. The Index fixes Circulating Supply of Index Constituents between reconstitutions in order to preserve the investability property of the Index.

<sup>11</sup> According to the Index methodology, to demonstrate active capacity management, Core Crypto Platforms must demonstrate that their platform's technical infrastructure is designed in such a way that it is capable of accommodating a sudden, significant increase in trade volume without impacting system functionality.

(9) Evidence cooperation with regulators and law enforcement; and

(10) Have a minimum market representation for trading volume.<sup>12</sup>

The list of existing Core Crypto Platforms will be recertified by the NCIOC at a minimum on an annual basis.

The Core Crypto Platforms as of May 27, 2024 are BitStamp, Coinbase, Gemini, itBit, and Kraken.

The Index methodology defines a “Core Custodian” to be a crypto assets custodian that, in the opinion of the NCIOC, exhibits the following characteristics:

- (1) Provide custody accounts whose holders are the legal beneficiaries of the assets held in the account. In case of bankruptcy or insolvency of a Custodian, creditors or the estate should have no rights to the client’s assets.
- (2) Offer segregated individual accounts and store crypto assets in segregated individual accounts and not in omnibus accounts. Custodians must not allow securities lending against digital assets.
- (3) Generate account-segregated private keys for digital assets using high entropy random number generation methods and employ advanced security practices.
- (4) Utilize technology for storing private keys in offline digital vaults and apply secure processes, such as private key segmentation, multi-signature authorization, and geographic distribution of stored assets, to limit access to private keys. The Crypto Custodian will use security technology for storing private keys aiming to avoid theft or misappropriation of assets due to online attacks, collusion of agents managing the storage services, or any other threat.

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<sup>12</sup> According to Index methodology, to compute an exchange’s market size, the NCIOC sums the U.S. Dollar (“USD”) volume of all eligible crypto asset - USD pairs for the month of August each year. A Core Crypto Platform must have at least 0.05% of the total volume in eligible exchanges.

- (5) Offers redemption processes for timely and secure transfer of digital assets and allows account holders to set withdrawal authorization restrictions such as whitelisting and multi-user account controls.
- (6) Must support the Index's forking policy and allow the split of assets to be reflected in the Index asset holdings.
- (7) Have a comprehensive risk management policy and formalized framework for managing operational and custody risks, including a disaster recovery program that ensures continuity of operations in the event of a system failure. The Crypto Custodian must have a business continuity plan to help ensure continued customer access to the assets.
- (8) Is licensed as a Custodian by a reputable and independent governing body (e.g., the U.S. Securities and Exchange Commission, the New York State Department of Financial Services, or other state, national or international regulators), as can be ascertained by certain public data sources.
- (9) Provides third-party audit reports at least annually on operational and security processes. This audit may be completed either by having a full SOC2 certification issued or the third-party auditor providing an attest report based off the full SOC2 methodology.
- (10) Have an insurance policy that covers, at least partially, third-party theft of private keys, insider theft from internal employees, and loss of keys.

A Core Custodian might lose eligibility if it does not comply with the above requirements or with any other NCIOC requirements.

The NCIOC will review new Core Custodian candidates throughout the year and announce any new additions when approved. The list of existing Core Custodians will be recertified by the NCIOC at a minimum on an annual basis. Changes to the list of Core Custodians may be made by the approval of the NCIOC and announced accordingly in the case of exceptional events or in order to maintain the integrity of the Index.

The Core Custodians as of May 27, 2024 are BitGo, Coinbase, Fidelity and Gemini. The Trust's crypto assets must at all times be drawn only from the Core Custodians.

The Index will be reconstituted and rebalanced quarterly, on the first Business Day in March, June, September, and December (each a "Reconstitution Date").

The settlement price of each Index Constituent ("Index Constituent Settlement Price") is calculated once every trading day by applying a publicly available rules-based pricing methodology (the "Pricing Methodology") to a diverse collection of pricing sources to provide an institutional-grade reference price for each constituent. The Pricing Methodology is designed to account for variances in price across a wide range of sources, each of which has been vetted according to criteria identified in the methodology. Specifically, the Index Constituent Settlement Price is the Time Weighted Average Price ("TWAP") calculated across the volume weighted average prices ("VWAPs") for each minute in the settlement price window, which is between 3:50:00 and 4:00:00 p.m. New York time, on all Core Crypto Platforms. Where there are no transactions observed in any given minute of the settlement price window, that minute is excluded from the calculation of the TWAP.

The Pricing Methodology also utilizes penalty factors to mitigate the impact of anomalous trading activity such as manipulation, illiquidity, large block trading, or operational issues that could compromise price representation. Three types of penalties are applied when three or more contributing Core Crypto Platforms contribute pricing for a constituent asset: abnormal price penalties, abnormal volatility penalties, and abnormal volume penalties. These penalties are defined as adjustment factors to the weight of information from each platform that contributes pricing information based on the deviation of a platform's price, volatility, or volume from the median across all exchanges. For example, if a Core Crypto Platform's price is 2.5 standard deviations away from the median price, its price penalty factor will be a 1/2.5 multiplier.

The Sponsor believes that the NCIUSS is a suitable Index for the Trust for several reasons. First, it would provide reliable pricing for purposes of tracking the actual performance of the crypto asset markets for the Index Constituents. Second, it is administered by a reputable index administrator that is not affiliated with the Sponsor or Trust,<sup>13</sup> which provides assurances of accountability and independence. Finally, its Pricing Methodology is designed to resist potential price manipulation from unregulated crypto markets by applying the following safeguards:

- (1) Requiring that constituents be listed on a U.S.-regulated crypto asset trading platform or serve as the underlying asset for a derivative instrument listed on a U.S.-regulated derivatives platform
- (2) Strict eligibility criteria for the Core Crypto Platforms from which the Index data is drawn;
- (3) A diverse collection of trustworthy pricing sources to provide an institutional-grade reference price for the Index Constituents; and
- (4) The use of adjustment factors to mitigate against the impact of any anomalous trading activity on the Index Constituent Settlement Prices.

#### Custody of the Trust's Crypto Assets

An investment in the Shares is backed by assets held by the Trust, including the bitcoin and ether held by the Crypto Custodians on behalf of the Trust. The Crypto Custodians must

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<sup>13</sup> Nasdaq, Inc. (“Nasdaq”), the Index Provider, adheres to the International Organization of Securities Commissions principles for benchmarks (the “IOSCO Principles”) for many of its indexes via an internal control and governance framework that is audited by an external, independent auditor on an annual basis. Although NCIUSS is not currently one of the indexes that is required to comply with IOSCO Principles, as a reference rate index, it is administered in a manner that is generally consistent with both the IOSCO Principles and the elements of Nasdaq’s internal control and governance framework pursuant to IOSCO Principles. NCIUSS is administered and governed by the NCIOC in accordance with the publicly available NCIUS methodology. The NCIOC oversees all aspects of the administration of the NCIUSS, including the defined processes and controls for the selection and monitoring of third parties such as the Core Crypto Platforms and Core Custodians, as well as the validation and reconciliation of Index calculations and pricing data. The NCIOC also oversees the identification and mitigation of any potential conflicts of interest, formal complaints, and updates or changes to the Index methodology consistent with the IOSCO Principles.

qualify as Core Custodians by the NCIOC and, thus satisfy at least the requirements set forth by the NCIOC in the NCIUSS methodology.<sup>14</sup> The Trust may engage additional custodians for its crypto assets and may also remove or change current Crypto Custodians, provided that there is at least one Crypto Custodian at all times.

The Trust's Crypto Custodians will hold and be responsible for maintaining custody of the Trust's bitcoin and ether. The Sponsor will cause the Trust to maintain ownership and control of the Trust's bitcoin in a manner consistent with good delivery requirements for spot commodity transactions.

All of the Trust's crypto assets will be held in one or more accounts in the name of the Trust (each a "Custody Account" and together the "Custody Accounts"), other than the Trust's assets which are temporarily maintained in a trading account under limited circumstances ("Trading Account"), i.e., in connection with creation and redemption basket activity or sales of crypto assets deducted from the Trust's holdings in payment of Trust expenses or the Sponsor's fee (or, in extraordinary circumstances, upon liquidation of the Trust). The Custody Accounts include all the Trust's assets held at the Crypto Custodians but do not include the Trust's crypto temporarily maintained in the Trading Account from time to time. The hardware, software, systems, and procedures of the Crypto Custodians may not be available or cost-effective for many investors to access directly.

The Trust's bitcoin, ether and cash holdings from time to time may temporarily be maintained in the Trading Account. The Sponsor intends to execute an agreement so Coinbase Inc. can serve as the Trust's "Prime Execution Agent" ("Prime Execution Agent Agreement"). In this capacity, the Prime Execution Agent will facilitate the buying and selling of crypto assets by the Trust in response to cash creations and redemptions between the Trust and registered broker-dealers that are Depository Trust Company ("DTC") participants that enter into an authorized

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<sup>14</sup> See [https://indexes.nasdaqomx.com/docs/Methodology\\_NCIUS.pdf](https://indexes.nasdaqomx.com/docs/Methodology_NCIUS.pdf).

participant agreement with the Sponsor (“Authorized Participants”), and the sale of crypto assets to pay the Sponsor’s fee, any other Trust expenses not assumed by the Sponsor, to the extent applicable, and in extraordinary circumstances, in connection with the liquidation of the Trust’s assets.

### Creation and Redemption of Shares

The Trust issues and redeems “Baskets”<sup>15</sup> on a continuous basis. Baskets are issued or redeemed only in exchange for an amount of cash determined by the Sponsor or the Administrator on each Business Day. No Shares are issued unless the Cash Custodian has allocated to the Trust’s account the corresponding amount of cash. Baskets may be created or redeemed only by Authorized Participants. Each Authorized Participant must be registered as a broker-dealer under the Exchange Act and regulated by the FINRA, or exempt from being, or otherwise not required to be, so regulated or registered, and must be qualified to act as a broker or dealer in the states or other jurisdictions where the nature of its business so requires.

The Authorized Participants will deliver only cash to create Shares and will receive only cash when redeeming Shares. Further, Authorized Participants will not directly or indirectly purchase, hold, deliver, or receive a crypto asset as part of the creation or redemption process or otherwise direct the Trust or a third party with respect to purchasing, holding, delivering, or receiving crypto assets as part of the creation or redemption process.

The Trust will create Shares by receiving crypto assets from a third party that is not the Authorized Participant, and the Trust – not the Authorized Participant – is responsible for selecting the third party to deliver the assets. Further, the third party will not be acting as an agent of the Authorized Participant with respect to the delivery of the crypto assets to the Trust

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<sup>15</sup> Baskets will be offered continuously at NAV per Share for 10,000 Shares. Therefore, a Basket of Shares would be valued at NAV per Share multiplied by the Basket size and the crypto asset required to be delivered in exchange for a creation of a Basket would equal the dollar value of the NAV per Share multiplied by the Basket size for such creations. The Trust may change the number of Shares in a Basket. Only Authorized Participants may purchase or redeem Baskets. Shares will be offered to the public from time to time at varying prices that will reflect the price of crypto assets and the trading price of the Shares on Nasdaq at the time of the offer.

or acting at the direction of the Authorized Participant with respect to the delivery of the crypto assets to the Trust. The Trust will redeem Shares by delivering crypto assets to a third party that is not the Authorized Participant, and the Trust – not the Authorized Participant – is responsible for selecting the third party to receive the assets. Further, the third party will not be acting as an agent of the Authorized Participant with respect to the receipt of the crypto assets from the Trust or acting at the direction of the Authorized Participant with respect to the receipt of the crypto assets from the Trust. The third-party will be unaffiliated with the Trust and the Sponsor.

In connection with cash creations and cash redemptions, the Authorized Participants will submit orders to create or redeem Baskets<sup>16</sup> of Shares exclusively in exchange for cash. The Trust will engage in crypto transactions to convert cash into crypto assets (in association with creation orders) and crypto assets into cash (in association with redemption orders). The Trust will conduct its crypto asset purchase and sale transactions by, in its sole discretion, choosing to trade directly with designated third parties (each, a “Crypto Trading Counterparty”), who are not registered broker-dealers pursuant to written agreements between each such Crypto Trading Counterparty and the Trust, or choosing to trade through the Prime Execution Agent acting in an agency capacity with third parties pursuant to the Prime Execution Agent Agreement. Crypto Trading Counterparties settle trades with the Trust using their own accounts at the Prime Execution Agent when trading with the Trust.

For a creation of a Basket of Shares, the Authorized Participant will be required to submit the creation order by an early order cutoff (“Creation Early Cutoff Time”). The Creation Early Cutoff Time will initially be 6:00 p.m. ET on the business day prior to trade date.

On the date of the Creation Early Cutoff Time for a creation order, the Trust will choose, in its sole discretion, to enter into a transaction with a Crypto Trading Counterparty (or the Prime Execution Agent) to buy crypto assets in exchange for the cash proceeds from such creation

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<sup>16</sup> The Trust issues and redeems Shares only in blocks or “Baskets” of 10,000 or integral multiples thereof. These transactions take place in exchange for crypto assets.

order. On the settlement date for a creation, the Trust will deliver Shares to the Authorized Participant in exchange for cash received from the Authorized Participant. Also, on or around the settlement date, the Crypto Trading Counterparty or Prime Execution Agent, as applicable, will deposit the required assets pursuant to its trade with the Trust into the Trust's Trading Account in exchange for cash. In the event the Trust has not been able to successfully execute and complete settlement of a crypto transaction by the settlement date of the creation order, the Authorized Participant will be given the option to (1) cancel the creation order, or (2) accept that the Trust will continue to attempt to complete the execution, which will delay the settlement date of the creation order. With respect to a creation order, as between the Trust and the Authorized Participant, the Authorized Participant is responsible for the dollar cost of the difference between the crypto asset price utilized in calculating NAV per Share on trade date and the price at which the Trust acquires the asset to the extent the price realized in buying the crypto asset is higher than the price utilized in the NAV. To the extent the price realized in buying the crypto asset is lower than the price utilized in the NAV, the Authorized Participant shall keep the dollar impact of any such difference.

Because the Trust's Trading Account may not be funded with cash on trade date for the purchase of crypto assets associated with a cash creation order, the Trust may borrow trade credits ("Trade Credits") in the form of cash from the "Trade Credit Lender", under a trade financing agreement ("Trade Financing Agreement") or may require the Authorized Participant to deliver the required cash for the creation order on trade date. The extension of Trade Credits on trade date allows the Trust to purchase crypto assets through the Prime Execution Agent on trade date, with such assets being deposited in the Trust's Trading Account. On settlement date for a creation order, the Trust delivers Shares to the Authorized Participant in exchange for cash received from the Authorized Participant. To the extent Trade Credits were utilized, the Trust uses the cash to repay the Trade Credits borrowed from the Trade Credit Lender. On settlement

date for a creation order, the crypto assets purchased are swept from the Trust's Trading Account to the Custody Account pursuant to a regular end-of-day sweep process.

For a redemption of a Basket of Shares, the Authorized Participant will be required to submit a redemption order by an early order cutoff (the "Redemption Early Cutoff Time"). The Redemption Early Cutoff Time will initially be 6:00 p.m. ET on the business day prior to trade date. On the date of the Redemption Early Cutoff Time for a redemption order, the Trust may choose, in its sole discretion, to enter into a transaction with a Crypto Trading Counterparty or the Prime Execution Agent, to sell crypto assets in exchange for cash. After the Redemption Early Cutoff Time, the Trust will instruct the Crypto Custodian to prepare to move the associated assets from the Trust's Custody Account to the Trading Account. On the settlement date for a redemption order, the Authorized Participant will deliver the necessary Shares to the Trust, and on or around settlement date, a Crypto Trading Counterparty or Prime Execution Agent, as applicable, will deliver the cash associated with the Trust's sale of crypto assets to the Trust in exchange for the Trust's crypto assets, and the Trust will deliver cash to the Authorized Participant. In the event the Trust has not been able to successfully execute and complete settlement of a crypto transaction by the settlement date, the Authorized Participant will be given the option to (1) cancel the redemption order, or (2) accept that the Trust will continue to attempt to complete the execution, which will delay the settlement date. With respect to a redemption order, between the Trust and the Authorized Participant, the Authorized Participant will be responsible for the dollar cost of the difference between the crypto asset price utilized in calculating the NAV per Share on trade date and the price realized in selling the crypto asset to raise the cash needed for the cash redemption order to the extent the price realized in selling the asset is lower than the price utilized in the NAV. To the extent the price realized in selling the crypto asset is higher than the price utilized in the NAV, the Authorized Participant will keep the dollar impact of any such difference.

The Trust may use financing in connection with a redemption order when crypto assets remain in the Custody Account at the point of intended execution of a sale of a crypto asset. In those circumstances, the Trust may borrow Trade Credits in the form of crypto assets from the Trade Credit Lender, which allows the Trust to sell crypto assets through the Prime Execution Agent on trade date, and the cash proceeds are deposited in the Trading Account. On settlement date for a redemption order, the Trust delivers cash to the Authorized Participant in exchange for Shares received from the Authorized Participant. In the event financing was used, the Trust will use the crypto assets moved from the Custody Account to the Trading Account to repay the Trade Credits borrowed from the Trade Credit Lender.

#### Net Asset Value

The Trust's NAV per Share will be calculated by taking the current market value of its total assets, subtracting any liabilities, and dividing that total by the number of Shares. The assets of the Trust will consist of bitcoin, ether, cash and cash equivalents. The Sponsor has the exclusive authority to determine the Trust's NAV, which it has delegated to the Administrator.

The Administrator of the Trust will calculate the NAV once each Business Day, as of the earlier of the close of the Nasdaq or 4:00 p.m. New York time. For purposes of making these calculations, a Business Day means any day other than a day when Nasdaq is closed for regular trading ("Business Day").

In determining the Trust's bitcoin and ether holdings, the Administrator will value the Index Constituents held by the Trust based on the Index Constituent Settlement Price, unless the prices are not available or the Administrator, in its sole discretion, determines that the Index Constituent Settlement Price is unreliable ("Fair Value Event"). In the instance of a Fair Value Event, the Trust's holdings may be fair valued on a temporary basis in accordance with the fair value policies approved by the Administrator.

In the instance of a Fair Value Event and pursuant to the Administrator's fair valuation policies and procedures, VWAP or Volume Weighted Median Prices ("VWMP") from another index administrator ("Secondary Index") will be utilized.

If a Secondary Index is also not available or the Administrator in its sole discretion determines the Secondary Index is unreliable, the price set by the Trust's principal market as of 4:00 p.m. ET, on the valuation date will be utilized. In the event the principal market price is not available or the Administrator in its sole discretion determines the principal market valuation is unreliable, the Administrator will use its best judgment to determine a good faith estimate of fair value. The Administrator identifies and determines the Trust's principal market (or in the absence of a principal market, the most advantageous market) for crypto assets consistent with the application of fair value measurement framework in FASB ASC 820-10.<sup>17</sup> The principal market is the market where the reporting entity would normally enter into a transaction to sell the asset or transfer the liability. The principal market must be available to and be accessible by the reporting entity. The reporting entity is the Trust.

If the Index Constituent Settlement Price is not used to determine the Trust's crypto asset holdings, owners of the beneficial interests of Shares (the "Shareholders") will be notified in a prospectus supplement or on the Trust's website and, if this index change is on a permanent basis, a filing with the Commission under Rule 19b-4 of the Act will be required.

A Fair Value Event value determination will be based upon all available factors that the Sponsor or the Administrator deems relevant at the time of the determination and may be based on analytical values determined by the Sponsor or Administrator using third-party valuation models. Fair value policies approved by the Administrator will seek to determine the fair value price that the Trust might reasonably expect to receive from the current sale of that asset or

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<sup>17</sup> See FASB (Financial Accounting Standards Board) Accounting standards codification (ASC) 820-10. For financial reporting purposes only, the Trustee has adopted a valuation policy that outlines the methodology for valuing the Trust's assets. The policy also outlines the methodology for determining the principal market (or in the absence of a principal market, the most advantageous market) in accordance with FASB ASC 820-10.

liability in an arm’s-length transaction on the date on which the asset or liability is being valued consistent with “Relevant Transactions”.<sup>18</sup>

### Indicative Trust Value

In order to provide updated information relating to the Trust for use by Shareholders and market professionals, the Sponsor will engage an independent calculator to calculate an updated Indicative Trust Value (“ITV”).<sup>19</sup> The ITV will be calculated by using the prior day’s closing NAV per Share of the Trust as a base and will be updated throughout the regular market session of 9:30 a.m. E.T. to 4:00 p.m. E.T. (the “Regular Market Session”) to reflect changes in the value of the Trust’s holdings during the trading day. For purposes of calculating the ITV, the Trust’s spot bitcoin and ether holdings will be priced using a real time version of the Index, the Nasdaq Crypto US Index (“NCIUS”)<sup>20</sup>.

The ITV will be disseminated on a per Share basis every 15 seconds during the Exchange’s Regular Market Session and be widely disseminated by one or more major market data vendors during the Regular Market Session.<sup>21</sup>

### Background – Spot Crypto Asset ETFs

The Commission has recently permitted exchange-traded products (“ETPs”) to directly hold bitcoin and ether. The Exchange and the Sponsor applaud the Commission as these approvals mark a significant step forward in offering U.S. investors and traders transparent, exchange-listed products for expressing views on crypto assets.

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<sup>18</sup> A “Relevant Transaction” is any crypto asset versus U.S. dollar spot trade that occurs during the observation window between 3:00 p.m. and 4:00 p.m. ET on a “Core Crypto Platform” in the BTC/USD pair that is reported and disseminated by a Core Crypto Platform through its publicly available application programming interface and observed by the index administrator.

<sup>19</sup> The ITV is based on the prior day’s closing NAV per Share and updated to reflect changes in the Trust’s holdings value during the trading day.

<sup>20</sup> The Nasdaq Crypto US Index (Index symbol NCIUS) is calculated every second throughout a 24-hour trading day, seven days per week, using published, real-time bid and ask quotes for Index constituents observed on Core Crypto Platforms through the publicly available API. See <https://indexes.nasdaqomx.com/Index/Overview/NCIUS>

<sup>21</sup> Several major market data vendors display and/or make widely available ITVs taken from the Consolidated Tape Association (“CTA”) or other data feeds.

The Exchange and the Sponsor believe that the proposed rule change does not introduce any elements that the Commission has not previously approved, and therefore, it will not impose any inappropriate consequences on the market. Although using previously approved crypto assets, the Trust employs a new strategy of investing in the crypto asset market, as it will hold both spot bitcoin and spot ether in accordance with the Index methodology, and its approval will add value to the U.S. market.

The Trust will hold spot bitcoin and spot ether, commodities for which proposals to list and trade ETPs have recently been approved by the Commission. As the Trust will invest in crypto assets for which proposals to list and trade ETPs have been recently approved by the Commission, and because the Exchange will utilize the same surveillance mechanisms that were deployed pursuant to the proposals to list and trade those approved ETPs, the Sponsor and the Exchange understand that the proposed rule change does not introduce any novel regulatory issues and believe that the Commission should approve this proposal.

#### *Spot Bitcoin ETF*

On January 10, 2024, the Commission issued an order granting approval for proposals to list bitcoin-based commodity trust and bitcoin-based trust units (“Spot Bitcoin ETPs”).<sup>22</sup> In considering the Spot Bitcoin ETPs, the Commission determined in the Spot Bitcoin ETP Approval Order that the Exchanges’ comprehensive surveillance-sharing agreement with the Chicago Mercantile Exchange (“CME”) - a U.S. regulated market whose bitcoin futures market is consistently highly correlated to spot bitcoin - could be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the proposals. The exchanges have comprehensive surveillance-sharing agreements with the CME

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<sup>22</sup> See Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008 (January 17, 2024) (Self-Regulatory Organizations; NYSE Arca, Inc.; The Nasdaq Stock Market LLC; Cboe BZX Exchange, Inc.; Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, To List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units) (the “Spot Bitcoin ETP Approval Order”).

via their common membership in the Intermarket Surveillance Group (“ISG”), which facilitates the sharing of information that is available to the CME through its surveillance of its markets.

After reviewing the proposals for the Spot Bitcoin ETPs, the Commission found that they were consistent with the Act, including with section 6(b)(5), and rules and regulations thereunder applicable to a national securities exchange, including the Exchange. The abovementioned section 6(b)(5) requires, among other things, that the investment product is designed to “prevent fraudulent and manipulative acts and practices” and, “in general, to protect investors and the public interest;” and with section 11A(a)(1)(C)(iii) of the Act, which sets forth Congress’ finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities.

The Commission's analysis<sup>23</sup> in the Spot Bitcoin ETP Approval Order also demonstrated that prices typically move in close, though not perfect, correlation<sup>24</sup> between the spot bitcoin market and the CME bitcoin futures market. Therefore, the Commission concluded that fraud or manipulation affecting spot bitcoin market prices would likely also impact CME bitcoin futures prices. Since the CME’s surveillance can help detect these impacts on CME bitcoin futures prices, such surveillance can be reasonably expected to assist in monitoring for fraudulent and manipulative acts and practices in the specific context of the Spot Bitcoin ETPs proposals.

In the Spot Bitcoin ETP Approval Order, the Commission also stated that the Spot Bitcoin ETP proposals, similar to other spot commodity ETPs it has approved, are reasonably designed to ensure fair disclosure of information necessary for accurate share pricing, to prevent

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<sup>23</sup> The robustness of the Commission’s correlation analysis rests on the pre-requisites of (1) the correlations being calculated with respect to bitcoin futures that trade on the CME, a U.S. market regulated by the CFTC, (2) the lengthy sample period of price returns for both the CME bitcoin futures market and the spot bitcoin market, (3) the frequent intra-day trading data in both the CME bitcoin futures market and the spot bitcoin market over that lengthy sample period, and (4) the consistency of the correlation results throughout the lengthy sample period.

<sup>24</sup> Correlation should not be interpreted as an indicator of a causal relationship or whether one variable leads or lags the other.

trading in the absence of sufficient transparency, to protect material nonpublic information related to the products' portfolios, and to maintain fair and orderly markets for the shares of the Spot Bitcoin ETPs.

### *Spot Ether ETF*

A few months after the issuance of its Spot Bitcoin ETP Approval Order, the Commission issued on May 23, 2024 an approval order for proposals to list ether-based trusts ("Spot Ether ETPs").<sup>25</sup> The Commission also concluded in the Spot Ether ETP Approval Order that the exchanges' comprehensive surveillance-sharing agreement with the CME, which is consistently highly correlated with spot ether, can be reasonably expected to prevent fraudulent and manipulative acts and practices within the context of the mentioned proposals.

As in the case of the Spot Bitcoin ETP Approval Order, in the Spot Ether ETP Approval Order, the Commission determined that the exchanges' comprehensive surveillance-sharing agreement with the CME ether futures market, which exhibits a consistent high correlation with spot ether, is likely to effectively deter fraudulent and manipulative practices within the framework of the Spot Ether ETP proposals. Therefore, based on similar reasons to the Spot Bitcoin ETP Approval, the Commission approved the Spot Ether ETPs, stating that the proposals to list and trade Spot Ether ETPs were also consistent with the requirements of the Act and the regulations applicable to a national securities exchange, in particular with section 6(b)(5) and section 11A(a)(1)(C)(iii) of the Act.

### Availability of Information

The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the prior Business Day's NAV per Share; (b) the prior Business Day's Nasdaq official closing price; (c) calculation of the premium or discount of such Nasdaq official

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<sup>25</sup> See Exchange Act Release No. 100224 (May 23, 2024) (Self-Regulatory Organizations; NYSE Arca, Inc.; The Nasdaq Stock Market LLC; Cboe BZX Exchange, Inc.; Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Shares of Ether-Based Exchange-Traded Products) (the "Spot Ether ETP Approval Order").

closing price against such NAV per Share; (d) data in chart form displaying the frequency distribution of discounts and premiums of the Nasdaq official closing price against the NAV per Share, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (e) the prospectus; and (f) other applicable quantitative information. The Administrator will also disseminate the Trust's holdings on a daily basis on the Trust's website. The NAV per Share 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 relevant securities information processor.

Also, an estimated value that reflects an estimated ITV will be disseminated. For more information on the ITV, including the calculation methodology, see "Indicative Trust Value" above. The ITV disseminated during the Regular Market Session should not be viewed as an actual real time update of the NAV per Share, which will be calculated only once at the end of each trading day. The ITV will be widely disseminated on a per Share basis every 15 seconds during the Regular Market Session by one or more major market data vendors. In addition, the ITV will be available through online information services.

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

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers.

### Initial and Continued Listing

The Shares will be subject to Nasdaq Rule 5711(d)(vi), which sets forth the initial and continued listing criteria applicable to Commodity-Based Trust Shares. The Exchange will obtain a representation that the Trust's NAV per Share will be calculated daily and will be made available to all market participants at the same time. A minimum of 80,000 Shares, or the equivalent of eight Baskets, will be required to be outstanding at the time of commencement of trading on the Exchange. Upon termination of the Trust, the Shares will be removed from listing.

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

The Exchange is able to obtain information regarding trading in the Shares and the underlying bitcoin and ether, or any CME-traded crypto derivatives through members acting as registered Market Makers, in connection with their proprietary or customer trades.

As a general matter, the Exchange has regulatory jurisdiction over its members, and their associated persons. The Exchange also has regulatory jurisdiction over any person or entity controlling a member, as well as a subsidiary or affiliate of a member that is in the securities business. A subsidiary or affiliate of a member organization that does business only in commodities would not be subject to Exchange jurisdiction, but the Exchange could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory or self-regulatory organizations of which such subsidiary or affiliate is a member.

### Trading Rules

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

### Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. The Exchange will halt trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121, including without limitation the conditions specified in Nasdaq Rule 4120(a)(9) and (10) and the trading pauses under Nasdaq Rules 4120(a)(11) and (12).

Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the Index Constituents underlying the Shares; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

If the ITV or the value of the Index is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the ITV or the value of the Index occurs. If the interruption to the dissemination of the ITV 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 NAV per Share with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV per Share is available to all market participants.

### Surveillance

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. The surveillance program includes real-time patterns for price and volume movements and post-trade surveillance patterns (e.g., spoofing, marking the close, pinging, phishing). In addition to the Exchange's existing surveillance, a new pattern will be added to surveil for significant deviation in the Shares' price from the underlying asset's price. The Exchange will use the trade data from an external vendor that consolidates the real-time data from multiple crypto assets platforms.

Trading of Shares on the Exchange will be subject to the Exchange's surveillance program for derivative products, as well as cross-market surveillances administered by FINRA, on behalf of the Exchange pursuant to a regulatory services agreement, which are also designed to detect violations of Exchange rules and applicable federal securities laws. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

The Exchange will require the Trust to represent to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements, and, pursuant to its obligations under section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust is not in compliance with the

applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

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<sup>26</sup>, 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. The Exchange also may obtain information regarding trading in the Shares and listed crypto asset 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.

The Exchange's current trading surveillance focuses on detecting securities trading outside their normal patterns. 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 is able to obtain information regarding trading in the Shares, the physical commodities included in, or options, futures or options on futures on, Shares through Equity Trading Permit Holders ("ETP Holders"), in connection with such ETP Holders' proprietary or customer trades which they effect on any relevant market. The Exchange can obtain market surveillance information, including customer identity information, with respect to transactions occurring on the exchanges that are members of the ISG.

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 applicable federal securities laws.

### Information Circular

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<sup>26</sup> For a list of the current members and affiliate members of ISG, see <https://www.isgportal.com/>.

Prior to the commencement of trading, the Exchange will inform its members in an information circular (“Information Circular”) of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (1) the procedures for creations and redemptions of Shares in Baskets (and that Shares are not individually redeemable); (2) Section 10 of Nasdaq General Rule 9, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (3) how information regarding the ITV is disseminated; (4) the risks involved in trading the Shares during the pre-market and postmarket sessions when an updated ITV will not be calculated or publicly disseminated; (5) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information. The Information Circular will also discuss any exemptive, no action and interpretive relief granted by the Commission from any rules under the Act.

The Information Circular will also reference the fact that there is no regulated source of last sale information regarding crypto assets, that the Commission has no jurisdiction over the trading of the Index Constituents as a commodity.

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

## 2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under section 6(b)(5)<sup>27</sup> that an exchange has 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

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<sup>27</sup> 15 U.S.C. 78f(b)(5).

perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria set forth in Nasdaq Rule 5711(d). 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 and the Trust's holdings with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and the Trust's holdings from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the Trust's holdings from markets and other entities that are members of ISG or with which the Exchange has in place a CSSA. The Exchange is also able to obtain information regarding trading in the Shares and the Trust's holdings through ETP Holders, in connection with such ETP Holders' proprietary or customer trades which they effect through ETP Holders on any relevant market. The Exchange will require the Trust to represent to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements, and, pursuant to its obligations under section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series.

Trading in Shares of the Trust will be halted if the circuit breaker parameters have been reached or because of market conditions or for reasons that, in the view of the Exchange, make

trading in the Shares inadvisable. These may include unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market.

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 Shares that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The Commission has approved numerous spot-based crypto asset products to be listed on U.S. national securities exchanges.<sup>28</sup> In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices; and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of section 6(b)(5) of the Act because this filing sufficiently demonstrates that the applicable standard that has previously been articulated by the Commission with respect to proposals to list and trade units of commodity-based trusts has been met as outlined below.

To list and trade the commodity-trust ETPs, the Commission requires a comprehensive surveillance-sharing agreement with a regulated market of significant size. The Exchange and CME are members of the ISG, meeting this requirement. The remaining issue is whether the CME constitutes a regulated market of significant size in relation to bitcoin futures and ether futures in the context of the proposed ETP, which the Exchange believes it does. The Commission has provided an illustrative definition for "market of significant size" to include a

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<sup>28</sup> See "Background – Spot Crypto Asset ETFs" above.

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 unlikely that trading in the ETP would be the predominant influence on prices in that market.<sup>29</sup> In the Spot Bitcoin ETP Approval Order and the Spot Ether ETP Approval Order, the Commission concluded that CME was indeed a market of significant size with respect to bitcoin futures and ether futures.

In the Spot Bitcoin ETP Approval Order and the Spot Ether Approval Order, the Commission also concluded that the proposing exchanges' comprehensive surveillance-sharing agreement with the CME - a U.S. regulated market - whose bitcoin and ether futures market is consistently highly correlated to spot bitcoin and spot ether, respectively - could be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the proposals.

Consequently, this Trust, which invests solely in bitcoin and ether, is similar to these approved products, since its only holdings are bitcoin, ether, and cash. As such, by analogy, in this specific context, the CME can also be considered the market of significant size in relation to bitcoin futures and ether futures. This market of significant size is highly, though not perfectly correlated with the spot bitcoin market and the spot ether market respectively, so that surveillance of the bitcoin futures market and the ether futures market can be reasonably expected to assist in monitoring for fraudulent and manipulative acts and practices in the spot bitcoin market and the spot ether market, respectively.

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

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<sup>29</sup> See Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To List and Trade Shares of the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579, 37594 (Aug. 1, 2018) (SR-BatsBZX-2016-30).

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

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

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

No written comments were either solicited or received.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period 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 shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

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

Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-NASDAQ-2024-028 on the subject line.

Paper Comments:

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

All submissions should refer to file number SR-NASDAQ-2024-028. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright

protection. All submissions should refer to file number SR-NASDAQ-2024-028 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>30</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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