

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-94853; File No. SR-NASDAQ-2021-066)

May 5, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, to List and Trade Shares of the Valkyrie XBTO Bitcoin Futures Fund under Nasdaq Rule 5711(g)

I. INTRODUCTION

On August 23, 2021, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the Valkyrie XBTO Bitcoin Futures Fund (“Trust”) under Nasdaq Rule 5711(g) (Commodity Futures Trust Shares). On August 25, 2021, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register on September 9, 2021.³

On September 29, 2021, pursuant to Section 19(b)(2) of the Exchange Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On December 7, 2021, the Commission instituted proceedings under

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 92865 (Sept. 2, 2021), 86 FR 50570 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 93172, 86 FR 55071 (Oct. 5, 2021).

Section 19(b)(2)(B) of the Exchange Act⁶ to determine whether to approve or disapprove the proposed rule change.⁷ On February 25, 2022, the Commission designated a longer period for Commission action on the proposed rule change.⁸ On April 12, 2022, the Exchange filed partial Amendment No. 2 to the proposed rule change.⁹ The Commission has received no comments on the proposed rule change.

When an exchange files a proposed rule change,¹⁰ the Commission must determine whether the proposed rule change is consistent with the statutory provisions, and the rules and regulations, that apply to national securities exchanges.¹¹ As discussed further below, the Commission is approving the proposed rule change, as modified by Amendment Nos. 1 and 2. In approving this proposed rule change, however, the Commission emphasizes—as it has with previous orders regarding bitcoin-related ETPs¹²—that its action does not rest on an evaluation

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Securities Exchange Act Release No. 93731, 86 FR 70882 (Dec. 13, 2021).

⁸ See Securities Exchange Act Release No. 94316, 87 FR 12211 (Mar. 3, 2022).

⁹ In Amendment No. 2, the Exchange clarified, among other things, that under no circumstances will the Trust hold and/or invest in any assets other than bitcoin futures contracts traded on the Chicago Mercantile Exchange, Inc., cash, and Money Market Instruments (as defined below), and provided additional representations that are commonly made by and/or required for futures-based exchange-traded products listed under Nasdaq Rule 5711(g) (Commodity Futures Trust Shares). Because Amendment No. 2 does not materially alter the substance of the proposed rule change, Amendment No. 2 is not subject to notice and comment. The full text of Amendment No. 2 is available on the Commission’s website at: <https://www.sec.gov/comments/sr-nasdaq-2021-066/srnasdaq2021066-20125377-284868.pdf> (“Amendment No. 2”).

¹⁰ Such filings are made under Section 19(b)(1) of the Exchange Act, 15 U.S.C. 78s(b)(1), and Exchange Act Rule 19b-4, 17 CFR 240.19b-4.

¹¹ See Exchange Act Section 19(b)(2)(C), 15 U.S.C. 78s(b)(2)(C).

¹² See, e.g., Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, To Amend NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares) and To List and Trade Shares of the United States Bitcoin and Treasury Investment Trust Under NYSE Arca Rule 8.201-E, Securities Exchange Act Release No. 88284 (Feb. 26, 2020),

of whether bitcoin, or blockchain technology more generally, has utility or value as an innovation or an investment.

II. DESCRIPTION OF THE PROPOSED RULE CHANGE, AS MODIFIED BY AMENDMENT NOS. 1 AND 2

As described in more detail in the Notice and Amendment No. 2,¹³ the Exchange proposes to list and trade the Shares of the Trust under Nasdaq Rule 5711(g), which governs the listing and trading of Commodity Futures Trust Shares on the Exchange.

The investment objective of the Trust is for the Shares to reflect the performance of bitcoin¹⁴ as represented by the CME CF Bitcoin Reference Rate (“CME CF BRR”), less the Trust’s liabilities and expenses.¹⁵ The CME CF BRR aggregates the trade flow of major bitcoin spot platforms during a specific calculation window into a one-a-day reference rate of the U.S.

85 FR 12595, 12597 (Mar. 3, 2020) (SR-NYSEArca-2019-39) (“USBT Order”); Order Disapproving a Proposed Rule Change To List and Trade Shares of the NYDIG Bitcoin ETF Under NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares), Securities Exchange Act Release No. 94395 (Mar. 10, 2022), 87 FR 14932, 14934 (Mar. 16, 2022) (SR-NYSEArca-2021-57) (“NYDIG Order”).

¹³ See Notice, supra note 3; Amendment No. 2, supra note 9.

¹⁴ Bitcoins are digital assets that are issued and transferred via a decentralized, open-source protocol used by a peer-to-peer computer network through which transactions are recorded on a public transaction ledger known as the “bitcoin blockchain.” The bitcoin protocol governs the creation of new bitcoins and the cryptographic system that secures and verifies bitcoin transactions. See, e.g., Notice, 86 FR at 50571.

¹⁵ See id. at 50574. Valkyrie Funds LLC (“Sponsor”) serves as the Trust’s sponsor and commodity pool operator; Vident Investment Advisory, LLC (“Sub-Advisor”) serves as the Trust’s sub-advisor and commodity trading advisor; and XBTO Trading, LLC is the research provider for the Sponsor and the Sub-Advisor. Delaware Trust Company serves as the trustee for the Trust. The Sponsor is currently considering third-party service providers for the roles of administrator, transfer agent, custodian, and marketing agent. See id. at 50571.

dollar price of bitcoin.¹⁶ The Trust will pursue its investment objective by holding bitcoin futures that are cash-settled and traded on the Chicago Mercantile Exchange, Inc. (the “CME”), which was self-certified with the Commodity Futures Trading Commission (the “CFTC”).¹⁷ The Trust will not invest in or hold spot bitcoin.¹⁸ In addition to the Trust’s investments in CME bitcoin futures, the Trust expects to have significant holdings of cash and high-quality, short-term debt instruments that have remaining terms-to maturity of less than 397 days, and include only U.S. Treasury securities and repurchase agreements (“Money Market Instruments”).¹⁹

The net asset value (“NAV”) of the Trust will be determined in accordance with Generally Accepted Accounting Principles. The NAV per Share will be determined by dividing the NAV of the Trust by the number of Shares outstanding. The NAV of the Trust is typically determined as of 4:00 p.m. E.T. on each day the Shares trade on the Exchange (“Business Day”). The Trust’s daily activities are generally not reflected in the NAV determined for the Business Day on which the transactions are effected (the trade date), but rather on the following Business Day.²⁰

The Trust will issue and redeem Shares on a continuous basis at NAV per Share in large, specified blocks of Shares (“Creation Units”) in transactions with broker-dealers and large institutional investors that have entered into participation agreements (“Authorized

¹⁶ See id. at 50573 n.8. According to the Exchange, calculation rules are geared toward maximum transparency and real-time replicability in underlying spot markets, including Bitstamp, Coinbase, Gemini, itBit, and Kraken. See id.

¹⁷ See id. at 50574.

¹⁸ See Amendment No. 2, supra note 9, at 3.

¹⁹ See id.; Notice, 86 FR at 50574.

²⁰ See Notice, 86 FR at 50574.

Participants”). The Exchange currently anticipates that a Creation Unit will consist of 50,000 Shares, although this number may change from time to time.²¹ In addition, the Shares will generally be created and redeemed in cash.²²

III. DISCUSSION AND COMMISSION FINDINGS

After careful review, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1 and 2, is consistent with the Exchange Act and rules and regulations thereunder applicable to a national securities exchange.²³ In particular, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1 and 2, is consistent with Section 6(b)(5) of the Exchange Act,²⁴ which requires, among other things, that the Exchange’s rules be designed to “prevent fraudulent and manipulative acts and practices,” to “promote just and equitable principles of trade,” to “remove impediments to and perfect the mechanism of a free and open market and a national market system,” and, “in general, to protect investors and the public interest.” The Commission also finds, with respect to the dissemination of quotation and last trade information for the proposed ETP, that the proposed rule change, as modified by Amendment Nos. 1 and 2, is consistent with Section 11A(a)(1)(C)(iii) of the Exchange Act,²⁵ which sets forth Congress’ finding that it is in the public interest and appropriate for the

²¹ See *id.* at 50579–80. Upon the request of an Authorized Participant made at the time of a redemption order, the Sponsor at its sole discretion may determine, in addition to delivering redemption proceeds, to transfer futures contracts to the Authorized Participant pursuant to an exchange of a futures contract for a related position or to a block trade sale of futures contracts to the Authorized Participant. See *id.* at 50580.

²² See Amendment No. 2, *supra* note 9, at 4.

²³ In approving this proposed rule change, as modified by Amendment Nos. 1 and 2, the Commission notes that it has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁴ 15 U.S.C. 78f(b)(5).

²⁵ 15 U.S.C. 78k-1(a)(1)(C)(iii).

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.

When considering whether Nasdaq’s proposal to list and trade the Shares is designed to prevent fraudulent and manipulative acts and practices, the Commission applies the same standard it used in orders considering previous proposals to list bitcoin-based commodity trusts and bitcoin-based trust issued receipts.²⁶ As the Commission has explained, an exchange that

²⁶ 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 (Aug. 1, 2018) (SR-BatsBZX-2016-30) (“Winklevoss Order”); USBT Order, 85 FR 12595; Order Disapproving a Proposed Rule Change To List and Trade Shares of the WisdomTree Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93700 (Dec. 1, 2021), 86 FR 69322 (Dec. 7, 2021) (SR-CboeBZX-2021-024) (“WisdomTree Order”); Order Disapproving a Proposed Rule Change To List and Trade Shares of the Kryptoin Bitcoin ETF Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93860 (Dec. 22, 2021), 86 FR 74166 (Dec. 29, 2021) (SR-CboeBZX-2021-029) (“Kryptoin Order”); Order Disapproving a Proposed Rule Change To List and Trade Shares of the Valkyrie Bitcoin Fund Under NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares), Securities Exchange Act Release No. 93859 (Dec. 22, 2021), 86 FR 74156 (Dec. 29, 2021) (SR-NYSEArca-2021-31) (“Valkyrie Order”); Order Disapproving a Proposed Rule Change To List and Trade Shares of the First Trust SkyBridge Bitcoin ETF Trust Under NYSE Arca Rule 8.201-E, Securities Exchange Act Release No. 94006 (Jan. 20, 2022), 87 FR 3869 (Jan. 25, 2022) (SR-NYSEArca-2021-37) (“Skybridge Order”); Order Disapproving a Proposed Rule Change To List and Trade Shares of the Wise Origin Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 94080 (Jan. 27, 2022), 87 FR 5527 (Feb. 1, 2022) (SR-CboeBZX-2021-029) (“Wise Origin Order”); NYDIG Order, 87 FR 14932; Order Disapproving a Proposed Rule Change To List and Trade Shares of the Global X Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 94396 (Mar. 10, 2022), 87 FR 14912 (Mar. 16, 2022) (SR-CboeBZX-2021-052) (“Global X Order”); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Shares of the ARK 21Shares Bitcoin ETF Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 94571 (Mar. 31, 2022), 87 FR 20014 (Apr. 6, 2022) (SR-CboeBZX-2021-051) (“ARK 21Shares Order”). See also Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and

lists bitcoin-based exchange-traded products (“ETPs”) can meet its obligations under Exchange Act Section 6(b)(5) by demonstrating that the exchange has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to the underlying or reference bitcoin assets.²⁷ The Winklevoss Order applied this standard to a commodity-trust ETP

Trading of Shares of the SolidX Bitcoin Trust Under NYSE Arca Equities Rule 8.201, Securities Exchange Act Release No. 80319 (Mar. 28, 2017), 82 FR 16247 (Apr. 3, 2017) (SR-NYSEArca-2016-101) (“SolidX Order”). The Commission also notes that orders were issued by delegated authority on the following matters: Order Disapproving a Proposed Rule Change To List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF, Securities Exchange Act Release No. 83904 (Aug. 22, 2018), 83 FR 43934 (Aug. 28, 2018) (SR-NYSEArca-2017-139) (“ProShares Order”); Order Disapproving a Proposed Rule Change To List and Trade the Shares of the GraniteShares Bitcoin ETF and the GraniteShares Short Bitcoin ETF, Securities Exchange Act Release No. 83913 (Aug. 22, 2018), 83 FR 43923 (Aug. 28, 2018) (SR-CboeBZX-2018-001) (“GraniteShares Order”); Order Disapproving a Proposed Rule Change To List and Trade Shares of the VanEck Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93559 (Nov. 12, 2021), 86 FR 64539 (Nov. 18, 2021) (SR-CboeBZX-2021-019) (“VanEck Order”); Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 2, To List and Trade Shares of the Teucrium Bitcoin Futures Fund Under NYSE Arca Rule 8.200-E, Commentary .02 (Trust Issued Receipts), Securities Exchange Act Release No. 94620 (Apr. 6, 2022), 87 FR 21676 (Apr. 12, 2022) (SR-NYSEArca-2021-053) (“Teucrium Order”).

²⁷ See USBT Order, 85 FR at 12596. In the context of derivative securities products such as commodity-trust ETPs, the Commission has long recognized the importance of comprehensive surveillance-sharing agreements to detect and deter fraudulent and manipulative activity. See, e.g., streetTRACKS Gold Shares, Securities Exchange Act Release No. 50603 (Oct. 28, 2004), 69 FR 64614, 64618-19 (Nov. 5, 2004) (SR-NYSE-2004-22); iShares Silver Trust, Securities Exchange Act Release No. 53521 (Mar. 20, 2006), 71 FR 14967, 14968, 14973-74 (Jan 26, 2005) (SR-Amex-2004-38); JPM XF Physical Copper Trust, Securities Exchange Act Release No. 68440 (Dec. 14, 2012), 77 FR 75468, 75469-70, 75272, 75485-86 (Dec. 20, 2012) (SR-NYSEArca-2012-28). See also Winklevoss Order, 83 FR at 37592 n.202 and accompanying text (discussing previous Commission approvals of commodity-trust ETPs). And the Commission’s approval orders for commodity-futures ETPs consistently note the ability of an ETP listing exchange to share surveillance information either through surveillance-sharing agreements or through membership by the listing exchange and the relevant futures exchange in the Intermarket Surveillance Group. See, e.g., Securities Exchange Act Release No. 53105 (Jan. 11 2006), 71 FR 3129, 3136 (Jan. 19, 2006) (SR-Amex-2005-059); Securities Exchange Act Release No. 53582 (Mar. 31, 2006), 71 FR 17510, 17518

based on spot bitcoin, and the Commission has found that this standard is also appropriate for, and has applied the standard to, proposed ETPs based on bitcoin futures.²⁸

In the analysis below, the Commission examines whether the proposed rule change, as modified by Amendment Nos. 1 and 2, is consistent with Section 6(b)(5) of the Exchange Act by addressing: in Section III.A whether Nasdaq has entered into a comprehensive surveillance-sharing agreement with a regulated market of significant size related to the underlying bitcoin assets (here, CME bitcoin futures contracts); in Section III.B assertions that allowing investors to obtain exposure to bitcoin futures contracts through a bitcoin futures-based ETP would be beneficial; and in Section III.C whether the proposed ETP is consistent with other standards for commodity-futures ETPs. Based on its analysis, the Commission concludes that the proposed rule change, as modified by Amendment Nos. 1 and 2, is consistent with the statutory requirements of Exchange Act Sections 6(b)(5) and 11A(a)(1)(C)(iii).

As discussed in more detail below, the approval is based on a finding that the CME is a “significant market” related to CME bitcoin futures contracts, which would be the exclusive non-cash holdings of the proposed ETP. The Commission emphasizes that its approval of this proposal is based on the specific facts and circumstances of the proposal.²⁹

(Apr. 6, 2006) (SR-Amex-2005-127); Securities Exchange Act Release No. 54013 (June 16, 2006), 71 FR 36372, 36378-79 (June 26, 2006) (SR-NYSE-2006-17). See also GraniteShares Order, 83 FR at 43925-27 nn.35-39 and accompanying text (discussing previous Commission approvals of commodity-futures ETPs).

²⁸ See ProShares Order, 83 FR at 43936; GraniteShares Order, 83 FR at 43925; Teucrium Order, 87 FR at 21677.

²⁹ The Commission is not suggesting that either the development of the CME bitcoin futures market or the approval of this proposal would require the Commission to approve a proposed rule change seeking to list and trade shares of an ETP holding spot bitcoin as an asset or ETPs related to other digital assets. See, e.g., GraniteShares Order, 83 FR at 43931. Other proposed ETPs will continue to be assessed on their particular facts and

A. Comprehensive Surveillance-Sharing Agreement with a Regulated Market of Significant Size Related to CME Bitcoin Futures Contracts

As stated above, an exchange that lists a bitcoin-based ETP can meet its obligations under Exchange Act Section 6(b)(5) by demonstrating that the exchange has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to the underlying bitcoin assets.³⁰ When disapproving the earliest proposals for bitcoin-based ETPs, the Commission recognized that “regulated bitcoin-related markets are in the early stages of their development,” but that “[o]ver time, regulated bitcoin-related markets may continue to grow and develop” in a way that would make it possible for a bitcoin-based ETP to satisfy the requirements of the Exchange Act.³¹ The Commission previously stated that, for example, “existing or newly created bitcoin futures markets” that are regulated may achieve significant size, and an ETP listing exchange may be able to demonstrate in a proposed rule change that it will be able to address the risk of fraud and manipulation by entering into a surveillance-sharing agreement with a regulated market of significant size.³²

With respect to the proposed ETP, the underlying bitcoin assets are CME bitcoin futures contracts. The relevant analysis, therefore, is whether Nasdaq has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to CME bitcoin futures contracts. As discussed below, taking into consideration the direct relationship between the regulated market with which Nasdaq has a surveillance-sharing agreement and the assets held by the proposed ETP—including the current state of the CME bitcoin futures market and the trading

circumstances and on whether those proposals are consistent with the requirements of the Exchange Act.

³⁰ See supra note 27.

³¹ See Winklevoss Order, 83 FR at 37580.

³² See id.; USBT Order, 85 FR at 12598.

of exchange-traded funds registered under the Investment Company Act of 1940 (“1940 Act”) that hold CME bitcoin futures (“Bitcoin Futures ETFs”)—the Commission concludes that the Exchange has the requisite surveillance-sharing agreement. The Commission notes that in the Teucrium Order it recently approved NYSE Arca, Inc.’s proposal to list and trade shares of an ETP that similarly would hold CME bitcoin futures contracts as its only non-cash holdings.³³

Comprehensive Surveillance-Sharing Agreements with the CME, a Regulated Market

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 the underlying assets 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.³⁴ Comprehensive surveillance-sharing agreements “provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.”³⁵ 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

³³ See Teucrium Order, 87 FR at 21676.

³⁴ See Amendment to Rule Filing Requirements for Self-Regulatory Organizations Regarding New Derivative Securities Products, Securities Exchange Act Release No. 40761 (Dec. 8, 1998), 63 FR 70952, 70959 (Dec. 22, 1998).

³⁵ Id. See also Winklevoss Order, 83 FR at 37594; ProShares Order, 83 FR at 43936; GraniteShares Order, 83 FR at 43924; USBT Order, 85 FR at 12596.

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.³⁶

As the Commission has stated, it considers two markets to have a comprehensive surveillance-sharing agreement with one another if they are both members of the Intermarket Surveillance Group (“ISG”), even if they do not have a separate bilateral surveillance-sharing agreement.³⁷ Accordingly, based on the common membership of Nasdaq and the CME in the ISG,³⁸ Nasdaq has the equivalent of a comprehensive surveillance-sharing agreement with the CME. Moreover, as the Commission has previously recognized, the CFTC regulates the CME futures market, including the CME bitcoin futures market, and thus that market is “regulated.”³⁹

Whether the CME is a Market of Significant Size Related to CME Bitcoin Futures Contracts

In the Winklevoss Order, the Commission stated that the term “significant market” or “market of significant size” includes a market (or group of markets) as to which (1) 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 (2) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.⁴⁰ The Commission explained that this

³⁶ See Winklevoss Order, 83 FR at 37592-93 (discussing Letter from Brandon Becker, Director, Division of Market Regulation, Commission, to Gerard D. O’Connell, Chairman, Intermarket Surveillance Group (June 3, 1994), available at <http://www.sec.gov/divisions/marketreg/mr-noaction/isg060394.htm>).

³⁷ See *id.* at 37580 n.19.

³⁸ See Notice, 86 FR at 50576.

³⁹ See, e.g., WisdomTree Order, 86 FR at 69330; Wise Origin Order, 87 FR at 5534.

⁴⁰ See Winklevoss Order, 83 FR at 37594.

definition is illustrative and not exclusive, and that there could be other types of “significant markets” and “markets of significant size.”⁴¹

(1) Prong 1

The first prong of the analysis addresses whether the surveillance-sharing agreement on which the ETP listing exchange proposes to rely would assist in detecting and deterring fraudulent or manipulative misconduct related to the assets held by the ETP. In the present proposal, the proposed ETP’s only non-cash holdings will be CME bitcoin futures contracts. Moreover, the proposed “significant” regulated market (i.e., the CME) with which the listing exchange has a surveillance-sharing agreement is the same market on which these assets trade. As the Commission previously recognized in the Teucrium Order, the CME’s surveillance can reasonably be relied upon to capture the effects on the CME bitcoin futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME bitcoin futures contracts, whether that attempt is made by directly trading on the CME bitcoin futures market or indirectly by trading outside of the CME bitcoin futures market, such that when the CME shares its surveillance information with Nasdaq, the information would assist in detecting and deterring fraudulent or manipulative misconduct related to the non-cash assets held by the proposed ETP.⁴² Accordingly, for the present proposal, it is unnecessary for Nasdaq to

⁴¹ See id.

⁴² See Teucrium Order, 87 FR at 21679. See also Notice, 86 FR at 50574 (stating that “[l]ike other futures products on the CME, [CME bitcoin futures] are subject to oversight by the CFTC, and the CME itself is empowered to enforce its own rulebook as it relates to the [CME bitcoin futures]” and “has a surveillance team that monitors the trading of [CME bitcoin futures] at all times”); 50579 (stating that as a Designated Contract Market (“DCM”), the CME must “certify that it has the ability to prevent manipulation, price distortion, and disruptions of the cash-settlement process through market surveillance, compliance, and enforcement practices and procedures”). This reasoning, however, does not extend to spot bitcoin ETPs. Spot bitcoin markets are not currently “regulated.” See,

establish a reasonable likelihood that a would-be manipulator would have to trade on the CME itself to manipulate the proposed ETP.⁴³

Nasdaq, however, makes several arguments in support of its assertion that it is reasonably likely that a person attempting to manipulate the proposed ETP would have to trade on the CME bitcoin futures market to successfully manipulate the proposed ETP.⁴⁴ First, Nasdaq states that the CME bitcoin futures market has grown considerably since Commission disapprovals of a bitcoin futures ETP in August 2018 and a spot bitcoin ETP in January 2020, as evidenced by

e.g., USBT Order, 85 FR at 12604; NYDIG Order, 87 FR at 14936 nn.65-67. If an exchange seeking to list a spot bitcoin ETP relies on the CME as the regulated market with which it has a comprehensive surveillance-sharing agreement, because the assets held by a spot bitcoin ETP would not be traded on the CME, that proposal would be significantly different from the current proposal. Because of this important difference, with respect to a spot bitcoin ETP, there would be reason to question whether a surveillance-sharing agreement with the CME would, in fact, assist in detecting and deterring fraudulent and manipulative misconduct affecting the price of the spot bitcoin held by that ETP. If, however, an exchange proposing to list and trade a spot bitcoin ETP identifies the CME as the regulated market with which it has a comprehensive surveillance-sharing agreement, the exchange could overcome the Commission's concern by demonstrating that there is a reasonable likelihood that a person attempting to manipulate the spot bitcoin ETP would have to trade on the CME in order to manipulate the ETP, because such demonstration would help establish that the exchange's surveillance-sharing agreement with the CME would have the intended effect of aiding in the detection and deterrence of fraudulent and manipulative misconduct related to the spot bitcoin held by the ETP. See Teucrium Order, 87 FR at 21679 n.46.

⁴³ In addition, when considering past proposals for spot bitcoin ETPs, the Commission has discussed whether there is a lead-lag relationship between the regulated market (e.g., the CME) and the market on which the assets held by the ETP would have traded (i.e., spot bitcoin platforms), as part of an analysis of whether a would-be manipulator of the spot bitcoin ETP would need to trade on the regulated market to effect such manipulation. See, e.g., USBT Order, 85 FR at 12612. For the present proposal, because of the direct relationship between the regulated market (i.e., the CME) and the only non-cash assets held by the proposed ETP (i.e., CME bitcoin futures contracts) establishing a "lead-lag" relationship between the CME and non-CME markets is also unnecessary. See Teucrium Order, 87 FR at 21679 n.47.

⁴⁴ See Notice, 86 FR at 50575-78.

empirical data on trading volume and open interest.⁴⁵ Nasdaq further states that “because the [CME bitcoin futures] market has grown to resemble other futures markets, a lead-lag relationship that exists in other mature futures markets has also likely developed between the [CME bitcoin futures] market and the bitcoin spot market.”⁴⁶ Second, Nasdaq argues that observations made by the Staff of the Commission’s Division of Investment Management regarding the maturity of the bitcoin futures market “is strong evidence that concerns previously raised regarding price manipulation in that market have been significantly reduced.”⁴⁷ Finally, Nasdaq argues that the majority of academic literature concerning the lead-lag relationship between the bitcoin futures market and the spot bitcoin market, including studies with more recent data, “supports the proposition that price discovery does take place in the [CME bitcoin futures] market and therefore a lead-lag relationship exists between the spot and futures markets.”⁴⁸ Nasdaq discusses two more recent studies,⁴⁹ and concludes that this research “build[s] upon the already emerging academic consensus . . . that the [CME bitcoin futures]

⁴⁵ See id. at 50576.

⁴⁶ Id. at 50577.

⁴⁷ Id. (citing Staff Statement on Funds Registered Under the Investment Company Act Investing in the Bitcoin Futures Market (May 11, 2021), available at: https://www.sec.gov/news/public-statement/staff-statement-investing-bitcoin-futures-market#_ftnref5) (“Staff Statement”).

⁴⁸ Id.

⁴⁹ See id. at 50577–78 (discussing Y. Hu, Y. Hou & L. Oxley, What role do futures markets play in Bitcoin pricing? Causality, cointegration and price discovery from a time-varying perspective, 72 Int’l Rev. of Fin. Analysis 101569 (2020) (“Hu, Hou & Oxley”); and J. Wu, K. Xu, X. Zheng & J. Chen, Fractional cointegration in bitcoin spot and futures markets, 41 J. Futures Mkts. 1478 (2021) (“Wu et al.”)).

market does lead the spot market such that a would-be manipulator would necessarily conclude that it must trade in the futures market to successfully manipulate the spot price of bitcoin.”⁵⁰

The Commission disagrees with much of Nasdaq’s reasoning. Nasdaq’s assertions about the general upward trends in trading volume and open interest of CME bitcoin futures do not establish whether it is reasonably likely that a would-be manipulator would have to trade on the CME to successfully manipulate the proposed ETP.⁵¹ In addition, as Nasdaq recognized, the Staff Statement did not reach a conclusion that the CME bitcoin futures market is a “significant market” or a “market of significant size” related to bitcoin in the context of the requirements of Section 6(b)(5) of the Exchange Act,⁵² nor did it even undertake such an assessment. Moreover, the evidence in the record for this proposal does not support a finding that the CME leads bitcoin price discovery.⁵³ As Nasdaq recognizes, studies indicate that price discovery takes place in the bitcoin spot market.⁵⁴ Moreover, the literature discussed by Nasdaq in its filing has been

⁵⁰ Id. at 50578 (citing B. Kapar & J. Olmo, An analysis of price discovery between Bitcoin futures and spot markets, 174 Econ. Letters 62 (2019) (“Kapar & Olmo”); E. Akyildirim, S. Corbet, P. Katsiampa, N. Kellard & A. Sensoy, The development of Bitcoin futures: Exploring the interactions between cryptocurrency derivatives, 34 Fin. Res. Letters 101234 (2020) (“Akyildirim et al.”); A. Chang, W. Herrmann & W. Cai, Efficient Price Discovery in the Bitcoin Markets, Wilshire Phoenix, Oct. 14, 2020, available at: <https://www.wilshirephoenix.com/efficient-price-discovery-in-the-bitcoin-markets/> (“Wilshire Phoenix”). See also id. at 50577 (citing J. Hung, H. Liu & J. Yang, Trading activity and price discovery in Bitcoin futures markets, 62 J. Empirical Finance 107 (2021) (“Hung, Liu & Yang”).

⁵¹ The Commission has previously considered and rejected similar arguments in the context of spot bitcoin ETPs. See, e.g., USBT Order, 85 FR at 12612; GlobalX Order, 87 FR at 14919; NYDIG Order, 87 FR at 14938.

⁵² See Notice, 86 FR at 50577.

⁵³ See also USBT Order, 85 FR at 12612; WisdomTree Order, 86 FR at 69331; Wise Origin Order, 87 FR at 5535; GlobalX Order, 87 FR at 14920; NYDIG Order, 87 FR at 14938; Teucrium Order, 87 FR at 21679.

⁵⁴ See Notice, 86 FR at 50577 (citing Hung, Liu & Yang). See also C. Alexander & D. Heck, Price discovery in Bitcoin: The impact of unregulated markets, 50 J. Financial

previously considered by the Commission.⁵⁵ As discussed in past Commission orders, the “mixed results” of price discovery analyses, including the studies discussed by Nasdaq in its filing, fail to demonstrate that the CME bitcoin futures market constitutes a market of significant size vis-à-vis the bitcoin spot market.⁵⁶

However, none of these deficiencies in Nasdaq’s arguments concerning whether there is a reasonable likelihood that a would-be manipulator of the proposed ETP would have to trade on the CME conflicts with the Commission’s determination that, because the only non-cash assets held by the proposed ETP (i.e., CME bitcoin futures contracts) are traded on the CME itself, Nasdaq’s surveillance-sharing agreement with the CME can reasonably be relied upon to assist in detecting and deterring fraudulent or manipulative misconduct related to those assets. Thus the first prong of the standard for “market of significant size” has been established.

Stability 100776 (2020) (finding that, in a multi-dimensional setting, including the main price leaders within futures, perpetuals, and spot markets, CME bitcoin futures have a very minor effect on price discovery; and that faster speed of adjustment and information absorption occurs on the unregulated spot and derivatives platforms than on CME bitcoin futures).

⁵⁵ See supra notes 49-50 and accompanying text.

⁵⁶ See, e.g., GlobalX Order, 87 FR at 14920 n.119 (concluding that papers on the lead-lag relationship and price discovery between bitcoin spot and futures markets, including the Wu et al. paper, the Hung, Liu & Yang paper, and the Akyildirim et al. paper, show that the academic literature is unsettled); NYDIG Order, 87 FR at 14938 (stating that Hu, Hou & Oxley’s Granger causality analysis had findings that are “concededly mixed” and that issues the Commission previously raised in the USBT Order about an unpublished version of that paper had not been addressed). See also USBT Order, 85 FR at 12613 n.244 (discussing that the use of daily price data, as opposed to intraday prices, by Kapar & Olmo and Hu, Hou & Oxley (in an unpublished version of the paper) may not be able to distinguish which market incorporates new information faster); WisdomTree Order, 86 FR at 69331 n.143 (concluding that the papers cited by a commenter, including the Wilshire Phoenix working paper, evidence the unsettled nature of the academic literature).

(2) Prong 2

As discussed above, in determining whether the CME bitcoin futures market constitutes a “market of significant size” related to CME bitcoin futures contracts, the Commission has also considered as a second prong of the analysis whether trading in the proposed ETP would be unlikely to be the predominant influence on prices in the CME bitcoin futures market.⁵⁷ Based on the facts and circumstances here, the Commission finds that this second prong has been satisfied.

Nasdaq asserts that trading in the Shares would not be the predominant force on prices in the CME bitcoin futures market (or spot market) because of the significant volume in the CME bitcoin futures market, the size of bitcoin’s market capitalization, which is approximately \$1 trillion, and the significant liquidity available in the spot market.⁵⁸ Nasdaq states that, since the GraniteShares Order and the USBT Order were issued, there has been steady and robust growth observed in the CME bitcoin futures market.⁵⁹ For example, according to Nasdaq, the daily average trading volume for CME bitcoin futures was \$117 million or 3,629 contracts for the week including August 24, 2018, as compared to \$354.75 million or 7,731 contracts for the week including February 26, 2020, and to \$2.412 billion or 12,610 contracts for the week ending May 28, 2021.⁶⁰ Additionally, according to Nasdaq, the daily average open interest in CME bitcoin futures was \$95.4 million or 2,956 contracts for the week including August 24, 2018, as compared to \$250.25 million or 5,407 contracts for the week including February 26, 2020, and to \$1.6626 billion or 8,677 contracts for the week ending May 28, 2021.⁶¹

⁵⁷ See Winklevoss Order, 83 FR at 37594; USBT Order, 85 FR at 12596-97.

⁵⁸ See Notice, 86 FR at 50578.

⁵⁹ See id. at 50576.

⁶⁰ See id.

⁶¹ See id.

Nasdaq also states that the spot market for bitcoin is very liquid.⁶² According to Nasdaq, in February 2021, for example, the cost to buy or sell \$5 million worth of bitcoin averaged roughly 10 basis points, with a market impact of 30 basis points.⁶³ For a \$10 million market order, the cost to buy or sell was roughly 20 basis points, with a market impact of 50 basis points.⁶⁴ Stated another way, Nasdaq provides that a market participant could enter a market buy or sell order for \$10 million and only move the market 0.5%.⁶⁵ Nasdaq further asserts that more strategic purchases or sales (such as using limit orders and executing through OTC bitcoin desks) would likely have a less obvious impact on the market, which Nasdaq states is consistent with the ability of MicroStrategy, Tesla, and Square to collectively purchase billions of dollars in bitcoin without resulting in significant price movements.⁶⁶

Nasdaq also provides the results from a study conducted by CF Benchmarks (“CF Benchmarks Analysis”) to determine the extent of “slippage” (*i.e.*, the difference between the expected price of a trade and the price at which the trade was actually executed), which, according to the Exchange, offers further evidence that trading in the Shares is unlikely to be the predominant influence in either the bitcoin spot or futures market.⁶⁷ According to Nasdaq, the CF

⁶² See id. at 50578.

⁶³ See id. According to Nasdaq, these statistics are based on samples of bitcoin liquidity in U.S. dollars (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase Pro, Gemini, Bitstamp, Kraken, LMAX Exchange, Binance US, and OK Coin during February 2021. See id. at 50578 n.47.

⁶⁴ See id. at 50578.

⁶⁵ See id.

⁶⁶ See id.

⁶⁷ See id. (citing CF Benchmarks, “An Analysis of the Suitability of the CME CF BRR for the Creation of Regulated Financial Products,” December 2020 (available at: <https://docsend.com/view/kizk7rarzaba6jxf>)).

Benchmarks Analysis simulates the purchase of 50 bitcoins a day for 686 days (an amount chosen, according to the Exchange, specifically to replicate hypothetical trades by a bitcoin ETP) and found that the maximum amount of slippage on a particular day was 0.3%, with the remainder of values between 0% and 0.15%.⁶⁸ According to Nasdaq, the CF Benchmarks Analysis demonstrates that, during the observation period, the slippage was largely negligible or, at most, minor.⁶⁹ Nasdaq argues that, while the CF Benchmarks Analysis focuses on the impact of a hypothetical ETP in the bitcoin spot market, arbitrage mechanisms in the spot and futures market dictate that it would be unlikely for a bitcoin futures ETP such as the Trust to overrun the CME bitcoin futures market without also overrunning the bitcoin spot market. Accordingly, the Exchange explains that the CF Benchmarks Analysis further bolsters its contention that the Trust and other similar ETPs would be unlikely to overrun the market.⁷⁰ Nasdaq finally concludes that the combination of CME bitcoin futures leading price discovery, the overall size of the bitcoin market, and the ability for market participants, including authorized participants creating and redeeming in-kind with the Trust, to buy or sell large amounts of bitcoin without significant market impact will help prevent the Shares from becoming the predominant force on pricing in either the bitcoin spot or CME bitcoin futures markets.⁷¹

The Commission has considered and rejected nearly identical arguments as provided above in past disapproval orders of spot bitcoin ETPs.⁷² Moreover, as stated in the Teucrum

⁶⁸ See id.

⁶⁹ See id.

⁷⁰ See id.

⁷¹ See id.

⁷² See, e.g., WisdomTree Order, 86 FR at 69332; Skybridge Order, 87 FR at 3878-80; Wise Origin Order, 87 FR at 5536-37.

Order, the Commission finds arguments centered around the relationship between the bitcoin spot market and the CME bitcoin futures market to be inapposite where, as here, the proposed “significant” market (i.e., the CME bitcoin futures market) is the same as the market on which the proposed ETP’s only non-cash assets (i.e., CME bitcoin futures contracts) trade.⁷³

Nonetheless, the Commission concludes that it is unlikely that trading in the proposed ETP would be the predominant influence on prices in the CME bitcoin futures market. In the Teucrium Order, the Commission stated that the CME bitcoin futures market has sufficiently developed to support ETPs seeking exposure to bitcoin by holding CME bitcoin futures contracts.⁷⁴ As the order explained, the maturation of the CME bitcoin futures market since its inception in 2017—including, but not limited to, its overall size, volume, and liquidity, as well as number of years since its commencement—and evidence from the recent introduction of the 1940 Act-registered Bitcoin Futures ETFs help support the conclusion that trading in an ETP that would hold CME bitcoin futures is not likely to be the predominant influence on prices in the CME bitcoin futures market.⁷⁵ Here, the proposed ETP also holds CME bitcoin futures contracts as its only non-cash holdings. The Commission, therefore, reaches the same conclusion—that trading in the proposed ETP is not likely to be the predominant influence on prices in the CME

⁷³ See Teucrium Order, 87 FR at 21680.

⁷⁴ See id. at 21681.

⁷⁵ See id. Among other things, the Commission considered that the CME bitcoin futures market began offering trading in bitcoin futures contracts in 2017 and, as of March 2022, trading in the standard-sized CME bitcoin futures contract was \$38.9 billion. The Commission also stated that, since the launch of 1940 Act-registered Bitcoin Futures ETFs in October 2021, the Commission has neither observed any disruption to the CME bitcoin futures market, nor any evidence that the Bitcoin Futures ETFs have exerted a dominant influence on CME bitcoin futures prices. See id.

bitcoin futures market. Thus the second prong of the standard for “market of significant size” has been established.

The Commission, accordingly, concludes that the CME is a “significant market” related to CME bitcoin futures contracts, and thus that the Exchange has entered into the requisite surveillance-sharing agreement. Nasdaq may, therefore, rely on this surveillance-sharing agreement to demonstrate that its proposal to list and trade the Shares is designed to prevent fraudulent and manipulative acts and practices, as required by Section 6(b)(5) of the Exchange Act.⁷⁶

B. Exposure to Bitcoin Futures Contracts Through a Bitcoin Futures-Based ETP

Nasdaq states that, despite growing investor interest in bitcoin, the primary means for investors to gain access to bitcoin exposure remains either through CME bitcoin futures or a

⁷⁶ The Commission has recognized that a listing exchange could demonstrate that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with a comprehensive surveillance-sharing agreement with a regulated market of significant size, including by demonstrating that the bitcoin market as a whole or the underlying bitcoin market is uniquely and inherently resistant to fraud and manipulation. See USBT Order, 85 FR at 12587 n.23. Such resistance to fraud and manipulation must be novel and beyond those protections that exist in traditional commodities or securities markets. See id. at 12597. Moreover, in the context of previous spot bitcoin ETP proposals that have attempted to demonstrate that other means besides surveillance-sharing agreements are sufficient to prevent fraudulent and manipulative acts and practices, the Commission has consistently rejected arguments made by the listing exchanges. See supra note 26. In this proposal, Nasdaq likewise asserts that, with respect to the proposed ETP, there are other means to prevent fraudulent and manipulative acts and practices sufficient to justify dispensing with the requisite surveillance-sharing requirement. See Notice, 86 FR at 50578-79. Because Nasdaq has the requisite surveillance sharing agreement, the Commission does not need to reach the separate question of whether Nasdaq has demonstrated that there are other means, besides the surveillance-sharing agreement, that would be sufficient to prevent fraudulent and manipulative acts and practices.

direct investment through bitcoin platforms or over-the-counter trading.⁷⁷ Nasdaq asserts that, for regular investors simply wishing to express an investment view in bitcoin, investment through CME bitcoin futures is complex and requires active management. Moreover, direct investment in bitcoin brings with it significant inconvenience, complexity, expense, and risk.⁷⁸ Directly holding bitcoin requires investors to retain and protect their private keys, which, if lost or compromised, renders their bitcoin unavailable.⁷⁹ According to Nasdaq, investment vehicles that invest directly in bitcoin, or investors that hold bitcoin through digital wallets or other storage mechanisms, must take extraordinary steps in order to protect their bitcoin, such as placing the bitcoin in “cold storage.”⁸⁰

Nasdaq asserts that the Shares, instead, would represent a significant innovation in the bitcoin market by providing an inexpensive and simple vehicle for investors to gain exposure to bitcoin in a secure and easily accessible product that is familiar and transparent.⁸¹ As compared to a direct investment in bitcoin, the proposed ETP would enhance the security afforded to investors.⁸² Further, the Trust would not face risks similar to investment vehicles that hold bitcoin directly because the Trust’s exposure to bitcoin would be through cash-settled CME bitcoin futures.⁸³

⁷⁷ See Notice, 86 FR at 50582.

⁷⁸ See id.

⁷⁹ See id.

⁸⁰ See id.

⁸¹ See id.

⁸² See id.

⁸³ See id.

In essence, Nasdaq asserts that the risky nature of direct investment in spot bitcoin or a spot bitcoin ETP and the complex nature of direct investment in CME bitcoin futures compels approval of the proposed ETP. The Commission disagrees.⁸⁴ Pursuant to Section 19(b)(2) of the Exchange Act, the Commission must approve a proposed rule change filed by a national securities exchange if it finds that the proposed rule change is consistent with the applicable requirements of the Exchange Act, and it must disapprove the filing if it does not make such a finding.⁸⁵ Thus, even if a proposed rule change purports to protect investors from a particular type of investment risk—such as the susceptibility of an asset to loss or theft—the proposed rule change may still fail to meet the requirements under the Exchange Act.⁸⁶

Regardless of Nasdaq’s assertions and for the reasons discussed herein—including that Nasdaq has demonstrated that it has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to CME bitcoin futures contracts that will help prevent fraudulent and manipulative acts and practices,⁸⁷ and that core aspects of the proposed ETP will be consistent with other commodity-futures ETPs that the Commission has approved, including with respect to the availability of pricing information, transparency of portfolio holdings, and types of surveillance procedures⁸⁸—the Commission finds that the proposal is also

⁸⁴ The Commission has disagreed with similar arguments made in the context of a previous bitcoin futures-related ETP. See GraniteShares Order, 83 FR at 43931.

⁸⁵ See Exchange Act Section 19(b)(2)(C), 15 U.S.C. 778s(b)(2)(C).

⁸⁶ See SolidX Order, 82 FR at 16259; WisdomTree Order, 86 FR at 69334; Wise Origin Order, 87 FR at 5538.

⁸⁷ See supra Section III.A.

⁸⁸ See infra Section III.C.

consistent with the requirement under Section 6(b)(5) that the Exchange's rules be designed to protect investors and the public interest.⁸⁹

C. Other Standards for Commodity-Futures ETPs

Nasdaq's proposal sets forth aspects of the proposed ETP, including the availability of pricing information, transparency of portfolio holdings, and types of surveillance procedures, that are consistent with the other commodity-futures ETPs that the Commission has approved.⁹⁰

According to Nasdaq,⁹¹ quotation and last-sale information regarding the Shares will be disseminated through the facilities of the Consolidated Tape Association. Information regarding market price and trading of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Price information for CME bitcoin futures can be found on the CME's website. Intraday price quotations on Money Market Instruments of the type held by the Trust will be available from major broker-dealer firms and from third parties, which may provide prices free with a time delay, or "live" with a paid fee. For CME bitcoin futures, such intraday information will be available directly from the applicable listing venue. Intraday price information will also be available through subscription services, such as Bloomberg and Thomson Reuters, which can be accessed by authorized participants and other investors. Pricing information related to Money Market Instruments will be available through issuer websites and publicly available quotation services,

⁸⁹ The Commission acknowledges that, compared to trading in unregulated spot bitcoin markets, trading a CME bitcoin futures-based ETP on a national securities exchange may provide some additional protection to investors. See GraniteShares Order, 83 FR at 43931; USBT Order, 85 FR at 12615; Teucrium Order, 87 FR at 21682 n.109.

⁹⁰ See, e.g., ProShares UltraPro 3X Natural Gas ETF and ProShares UltraPro 3X Short Natural Gas ETF, Securities Exchange Act Release No. 86532 (July 31, 2019), 84 FR 38312 (Aug. 6, 2019) (SR-NYSEArca-2019-02); Teucrium Order, 87 FR at 21683-84.

⁹¹ See Notice, 86 FR at 50580, 50583; Amendment No. 2, supra note 9, at 4-5.

such as Bloomberg, Markit, and Thomson Reuters. The CME CF BRR will be disseminated once daily at 4:00 p.m. London time and will be available on the CME's website. Information regarding the CME CF BRR, including rules and methodologies can also be found on the CME's website.

The Trust's website will display the prior business day's NAV. On each business day, before commencement of trading in the Shares during Regular Trading Hours, the Trust will disclose on its website the portfolio holdings of the Trust. The Trust's website will also include a form of the prospectus for the Trust. The website will include the Shares' ticker symbol and CUSIP information, along with additional quantitative information updated on a daily basis.⁹² The website will also contain pricing information for the Shares. All information disclosed on the Trust's website will be publicly available at no charge.⁹³

The Trust's NAV will be calculated by the Sponsor once a day and will typically be determined as of 4:00 p.m. (Eastern time) on each day the Shares trade on the Exchange. The Exchange or a third-party financial data provider will calculate an intra-day indicative value ("IIV") by using the prior day's closing NAV per Share as a base and updating that value during the Exchange's Regular Market Session (9:30 a.m. to 4:00 p.m. (Eastern time)) to reflect changes in the value of the Trust's NAV during the trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Market Session by one or more

⁹² The Trust's website will include: (1) the prior business day's NAV and the reported closing price; (2) the mid-point of the bid/ask price in relation to the NAV as of the time the NAV is calculated ("Bid/Ask Price") and a calculation of the premium or discount of such price against such NAV; and (3) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for at least each of the four previous calendar quarters (or for the life of the Trust, if shorter).

⁹³ See Notice, 86 FR at 50580; Amendment No. 2, supra note 9, at 4, 7.

major market data vendors. The NAV for the Trust will be disseminated daily to all market participants at the same time.⁹⁴

The proposal also is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading in the Shares when a reasonable degree of transparency cannot be assured. If the Exchange becomes aware that the NAV with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants. Further, if the IIV or the value of the underlying futures contract is not being disseminated as required, the Exchange may halt trading during the day in which an interruption to the dissemination of the IIV or the value of the underlying futures contract occurs. If the interruption to the dissemination of the IIV or the value of the underlying futures contract 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. Trading in Shares of the Trust will be halted if conditions specified in Nasdaq Rule 4120(a)(9) or the circuit breaker parameters in Nasdaq Rules 4120(a)(11) and (12) have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees.⁹⁵ Moreover, trading of the Shares will be subject to Nasdaq Rule 5711(g), which sets forth certain restrictions on registered Market Makers in the Shares to facilitate surveillance.⁹⁶

⁹⁴ See Notice, 86 FR at 50574, 50580.

⁹⁵ See id. at 50581.

⁹⁶ See id. at 50580-81.

The Commission notes that the Exchange or the Financial Industry Regulatory Authority (“FINRA”), on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and the underlying CME bitcoin futures 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 information regarding trading in the Shares and the underlying CME bitcoin futures from such markets and entities. In addition, the Exchange may obtain information regarding trading in the Shares and the underlying CME bitcoin futures from other exchanges who are members or affiliates of the ISG or with which the Exchange has in place a comprehensive surveillance-sharing agreement (“CSSA”).⁹⁷ The Exchange may also obtain information regarding trading in the spot bitcoin market from the exchanges with which the CME or the Exchange has entered into a CSSA.⁹⁸

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.⁹⁹ In support of this proposal, the Exchange represented that:¹⁰⁰

(1) The Shares of the Trust will conform to the initial and continued listing criteria set forth in Nasdaq Rule 5711(g).

⁹⁷ For a list of the current members and affiliate members of ISG, see www.isgportal.org. According to the Exchange, not all components of the Disclosed Portfolio for the Trust may trade on markets that are members of the ISG or with which the Exchange has in place a CSSA. See Notice, 86 FR at 50581 n.68.

⁹⁸ See Notice, 86 FR at 50581; Amendment No. 2, supra note 9, at 5. For additional discussion of the CME bitcoin futures market and how surveillance-sharing between the Exchange and the CME via common membership in the ISG would assist in detecting and deterring manipulative conduct related to the Shares, see Section III.A above.

⁹⁹ See Notice, 86 FR at 50581.

¹⁰⁰ See id.; Amendment No. 2.

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(3) The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of Shares on the Exchange will be subject to the Exchange's surveillance procedures for derivative products.

(4) 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 in the Shares. Specifically, the Information Circular will discuss the following: (a) the procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (b) Section 10 of Nasdaq General Rule 9, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (c) how information regarding the IIV and the portfolio holdings is disseminated; (d) the risks involved in trading the Shares during the Pre-Market and Post-Market Sessions when an updated IIV will not be calculated or publicly disseminated; (e) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(5) For initial and continued listing, the Trust will be in compliance with Rule 10A-3 under the Exchange Act.¹⁰¹

¹⁰¹ 17 CFR 240.10A-3.

(6) Under no circumstances will the Trust hold and/or invest in any assets other than CME bitcoin futures contracts, cash, and Money Market Instruments. The Trust will not invest in or hold spot bitcoin.

(7) The Trust's investments will be consistent with the Trust's investment objective and will not be used to enhance leverage. That is, 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 benchmark.

(8) A minimum of 100,000 Shares of the Trust will be outstanding at the commencement of trading on the Exchange.

(9) The Exchange represents that all statements and representations made in the filing regarding (a) the description of the reference assets or trust holdings; (b) limitations on reference assets, or trust holdings; (c) dissemination and availability of the reference asset or intraday indicative values; or (d) the applicability of Nasdaq listing rules specified in the filing shall constitute continued listing standards. 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.

IV. CONCLUSION

This approval order is based on all of the Exchange's representations and description of the Trust, including those set forth above and in Amendment No. 2. The Commission notes that the Shares must comply with the requirements of Nasdaq Rule 5711(g) to be listed and traded on the Exchange on an initial and continuing basis.

For the reasons set forth above, the Commission finds, pursuant to Section 19(b)(2) of the Exchange Act,¹⁰² that the proposed rule change, as modified by Amendment Nos. 1 and 2, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with Section 6(b)(5) and Section 11A(a)(1)(C)(iii) of the Exchange Act.¹⁰³

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,¹⁰⁴ that proposed rule change SR-NASDAQ-2021-066, as modified by Amendment Nos. 1 and 2, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰⁵

J. Matthew DeLesDernier
Assistant Secretary

¹⁰² 15 U.S.C. 78f(b)(2).

¹⁰³ 15 U.S.C. 78f(b)(5); 15 U.S.C. 78k-1(a)(1)(C)(iii).

¹⁰⁴ 15 U.S.C. 78f(b)(2).

¹⁰⁵ 17 CFR 200.30-3(a)(12).