

Required fields are shown with yellow backgrounds and asterisks.

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SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549  
Form 19b-4

File No. \* SR 2023 - \* 019

Amendment No. (req. for Amendments \*)

Filing by The Nasdaq Stock Market LLC

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input checked="" type="checkbox"/>	Section 19(b)(3)(A) * <input type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
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Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>
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Rule

<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)
<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)
<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010  
Section 806(e)(1) \*

Section 806(e)(2) \*

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934  
Section 3C(b)(2) \*

Exhibit 2 Sent As Paper Document

Exhibit 3 Sent As Paper Document

**Description**

Provide a brief description of the action (limit 250 characters, required when Initial is checked \*).

A proposal to list and trade shares of the Valkyrie Bitcoin Fund under Nasdaq Rule 5711(d).

**Contact Information**

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name \* Jonathan Last Name \* Cayne

Title \* Principal Associate General Counsel

E-mail \* Jonathan.Cayne@nasdaq.com

Telephone \* (301) 978-8493 Fax

**Signature**

Pursuant to the requirements of the Securities Exchange of 1934, The Nasdaq Stock Market LLC has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date 07/03/2023

(Title \*)

By John Zecca

EVP and Chief Legal Officer

(Name \*)

NOTE: Clicking the signature block at right will initiate digitally signing the form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

 Date: 2023.07.03 11:52:40 -04'00'

Required fields are shown with yellow backgrounds and astericks.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EDFS website.

**Form 19b-4 Information \***

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SR-NASDAQ-2023-019 19b-4.doc

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

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SR-NASDAQ-2023-019 Exhibit 1.doc

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A - Notice of Proposed Rule Change, Security-Based Swap Submission, or Advanced Notice by Clearing Agencies \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2- Notices, Written Comments, Transcripts, Other Communications**

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Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit Sent As Paper Document

**Exhibit 3 - Form, Report, or Questionnaire**

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit Sent As Paper Document

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934, as amended (the “Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) is filing with the Securities and Exchange Commission (“Commission”) a proposed rule change to list and trade shares of the Valkyrie Bitcoin Fund (the “Trust”) under Nasdaq Rule 5711(d) (“Commodity-Based Trust Shares”). The shares of the Trust are referred to herein as the “Shares.”

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by senior management of the Exchange pursuant to authority delegated by the Board of Directors (the “Board”). Exchange staff will advise the Board of any action taken pursuant to delegated authority. No other action by Nasdaq is necessary for the filing of the rule change.

Questions and comments on the proposed rule change may be directed to:

Jonathan F. Cayne  
Principal Associate General Counsel  
Nasdaq, Inc.  
(301) 978-8493

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

(a) Purpose

The Exchange proposes to list and trade Shares of the Trust under Nasdaq Rule 5711(d),

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

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

which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.<sup>3</sup>

### Description of the Trust

The Shares will be issued by the Trust, a Delaware statutory trust. The Trust will operate pursuant to a trust agreement (the “Trust Agreement”) between Valkyrie Digital Assets, LLC (the “Sponsor”) and Delaware Trust Company, as the Trust’s trustee (the “Trustee”). The Shares will be registered with the Commission by means of the Trust’s registrations statement on Form S-1 (the “Registration Statement”).<sup>4</sup> Pursuant to the Trust Agreement, the Sponsor will enter into a custodian agreement (the “Custodian Agreement”) with a qualified custodian (the “Custodian”) to act as custodian for the Trust’s bitcoins. Pursuant to the Custodian Agreement, the Custodian will establish accounts that hold the bitcoins deposited with the Custodian on behalf of the Trust. U.S. Bancorp Fund Services, LLC will act as the transfer agent for the Trust (the “Transfer Agent”) and as the administrator of the Trust (the “Administrator”) to perform various administrative, accounting and recordkeeping functions on behalf of the Trust.

The investment objective of the Trust is for the Shares to reflect the performance of the value of a bitcoin as represented by the CME CF Bitcoin Reference Rate - New York Variant (the “Index”), less the Trust’s liabilities and expenses. The purpose of the Trust is to provide investors with a cost-effective and convenient way to invest in bitcoin in a manner that is more efficient and convenient than the purchase of a stand-alone bitcoin, while also mitigating some of

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<sup>3</sup> Nasdaq Rule 5711(d)(iv)(A) defines Commodity-Based Trust Shares as “a security (1) that is issued by a trust (“Trust”) that holds a specified commodity deposited with the Trust; (2) that is issued by such Trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity; and (3) that, when aggregated in the same specified minimum number, may be redeemed at a holder’s request by such Trust which will deliver to the redeeming holder the quantity of the underlying commodity.”

<sup>4</sup> See Amendment No. 2 to Registration Statement on Form S-1, dated May 8, 2023 filed with the Commission by the Sponsor on behalf of the Trust (File No. 333-252344). The descriptions of the Trust contained herein are based, in part, on information in the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

the risk by reducing the volatility typically associated with the purchase of stand-alone bitcoin and without the uncertain and often complex requirements relating to acquiring and/or holding bitcoin.

The Trust will only hold bitcoin, and will, from time to time, issue Baskets<sup>5</sup> in exchange for deposits of bitcoins and to distribute bitcoins in connection with redemptions of Baskets. The Shares of the Trust represent units of fractional undivided beneficial interest in, and ownership of, the Trust. The bitcoins held by the Custodian on behalf of the Trust will be transferred out of the Bitcoin Account only in the following circumstances: transferred to pay the Sponsor's Fee, distributed to Authorized Participants or Liquidity Providers, as applicable, in connection with the redemption of Baskets, transferred to be sold on an as-needed basis to pay Additional Trust Expenses, sold on behalf of the Trust in the event the Trust terminates and liquidates its assets or as otherwise required by law or regulation.

#### Custody of the Trust's Bitcoins

The Trust will engage a Custodian to custody the Trust's bitcoin. The Trust will select a Custodian that is a qualified custodian under the Investment Advisers Act of 1940. Under the Custodian Agreement, the Custodian will be responsible for the safety and security of the Trust's Bitcoins as well as overseeing the process of deposit, withdrawal, sale and purchase of the Trust's bitcoins. The Custodian will custody the bitcoin in accordance with the terms of the Custodian Agreement.

All bitcoins exist and are stored on the Blockchain, the decentralized transaction ledger of the Bitcoin Network. The Blockchain records most transactions (including mining of new bitcoins) for all bitcoins in existence, and in doing so verifies the location of each bitcoin (or

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<sup>5</sup> A Basket equals a block of 50,000 Shares.

fraction thereof) in a particular digital wallet. The Bitcoin Account will be maintained by the Custodian and cold storage<sup>6</sup> mechanisms will be used for the Vault Account by the Custodian. Each digital wallet of the Trust may be accessed using its corresponding private key. The Custodian's custodial operations will maintain custody of the private keys that have been deposited in cold storage at its various vaulting premises which are located in geographically dispersed locations across the world, including but not limited to the United States, Europe, including Switzerland, and South America. The locations of the vaulting premises may change regularly and are kept confidential by the Custodian for security purposes.

The Custodian is the custodian of the Trust's private keys in accordance with the terms and provisions of the Custodian Agreement and will utilize the certain security procedures such as algorithms, codes, passwords, encryption or telephone call-backs (together, the "Security Procedures") in the administration and operation of the Trust and the safekeeping of its bitcoins and private keys. The Custodian will create a Vault Account for the Trust assets in which private keys are placed in cold storage. The Custodian will segregate the private keys stored with it from any other assets it holds or holds for others. Further, multiple distinct private keys must sign any transaction in order to transfer the Trust's bitcoins from a multi-signature address to any other address on the Bitcoin blockchain. Distinct private keys required for multi-signature address transfers reside in geographically dispersed vault locations, known as "signing vaults." In addition to multiple signing vaults, the Custodian maintains multiple "back-up vaults" in which backup private keys are stored. In the event that one or more of the "signing vaults" is

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<sup>6</sup> The term "cold storage" refers to a safeguarding method by which the private keys corresponding to bitcoins stored on a digital wallet are removed from any computers actively connected to the internet. Cold storage of private keys may involve keeping such wallet on a non-networked computer or electronic device or storing the public key and private keys relating to the digital wallet on a storage device (for example, a USB thumb drive) or printed medium (for example, papyrus or paper) and deleting the digital wallet from all computers.

compromised, the back-up vaults would be activated and used as signing vaults to complete a transaction within 72 hours. As such, if any one signing vault is compromised, it would have no impact on the ability of the Trust to access its bitcoins, other than a possible delay in operations of 72 hours, while one or more of the “backup vaults” is transitioned to a signing vault. These Security Procedures ensure that there is no single point of failure in the protection of the Trust’s assets.

#### Calculation of Net Asset Value

The Trust’s net asset value (“NAV”) is calculated by taking the current market value of its total assets, less any liabilities of the Trust, and dividing that total by the total number of outstanding Shares. The bitcoin held by the Trust will be valued based on the price set by the Index. The Administrator will calculate the NAV of the Trust once each Exchange trading day. The Exchange’s Regular Market Session closes at 4:00 p.m. EST. The NAV for a normal trading day will be released after the end of the Regular Market Session. However, NAVs are not officially struck until later in the day (often by 5:30 p.m. EST and almost always by 8:00 p.m. EST). The pause between 4:00 p.m. EST and 5:30 p.m. EST provides an opportunity to algorithmically detect, flag, investigate, and correct unusual pricing should it occur. The NAV for the Trust’s Shares will be disseminated daily to all market participants at the same time. The Sponsor anticipates that the Index will be reflective of a reasonable valuation of the average spot price of bitcoin. However, in the event the Index is not available or determined by the Sponsor to not be reliable, the Sponsor would “fair value” the Trust’s bitcoin holdings. The Sponsor does not anticipate that the need to “fair value” bitcoin will be a common occurrence. The Sponsor will publish the NAV and NAV per Share at <https://valkyrieinvest.com/> as soon as practicable after their determination and availability.

### Intraday Indicative Value

In order to provide updated information relating to the Trust for use by Shareholders and market professionals, the Trust will disseminate an updated intraday indicative value (“IIV”) per Share updated every 15 seconds by one or more major market data vendors during the Exchange’s Regular Market Session.<sup>7</sup> The IIV will be calculated by a third-party financial data provider during the Exchange’s Regular Market Session. The IIV will be calculated by using the prior day’s closing NAV per Share of the Trust as a base and updating that value throughout the trading day to reflect changes in the most recently reported price level of the CME CF Bitcoin Real-Time Index (“BRTI”), as reported by CME Group, Inc., Bloomberg, L.P. or another reporting service. The BRTI is calculated in real time based on the Relevant Order Books of all Constituent Bitcoin Exchanges. A “Relevant Order Book” is the universe of the currently unmatched limit orders to buy or sell in the BTC/USD pair that is reported and disseminated by CF Benchmarks Ltd., as the BRTI calculation agent.

### Creation and Redemption of Shares

The Trust will issue Shares on an ongoing basis, but only in one or more Baskets. The creation and redemption of a Basket requires the delivery to the Trust, or the distribution by the Trust, of the number of whole and fractional bitcoins represented by each Basket being created or redeemed, the number of which is determined by dividing the number of bitcoins owned by the Trust at 4:00 p.m., New York time, on the trade date of a creation or redemption order, as adjusted for the number of whole and fractional bitcoins constituting accrued but unpaid fees and expenses of the Trust, by the number of Shares outstanding at such time (the quotient so obtained

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<sup>7</sup> Several major market data vendors display and/or make widely available IIVs taken from the Consolidated Tape Association (“CTA”) or other data feeds. In addition, the indicative fund value will be available through on-line information services such as Bloomberg and Reuters.



calculated to one-hundred-millionth of one bitcoin), and multiplying such quotient by 50,000 (the “Basket Bitcoin Amount”). The Basket Bitcoin Amount multiplied by the number of Baskets being created or redeemed is the “Total Basket Bitcoin Amount.”

Authorized Participants are the only persons that may place orders to create or redeem Baskets. Each Authorized Participant must (i) be a registered broker-dealer, (ii) enter into a Participant Agreement with the Sponsor, the Administrator, the Marketing Agent and the Liquidity Providers and (iii) in the case of the creation or redemption of Baskets that do not use the Conversion Procedures, own a bitcoin wallet address that is recognized by the Custodian as belonging to the Authorized Participant (an “Authorized Participant Self-Administered Account”). Authorized Participants may act for their own accounts or as agents for broker-dealers, custodians and other securities market participants that wish to create or redeem Baskets. Shareholders who are not Authorized Participants will only be able to redeem their Shares through an Authorized Participant.

Although the Trust will create Baskets only upon the receipt of bitcoins, and will redeem Baskets only by distributing bitcoins, an Authorized Participant may deposit cash with the Administrator, which will facilitate the purchase or sale of bitcoins through a Liquidity Provider on behalf of an Authorized Participant (the “Conversion Procedures”). Liquidity Providers must (i) enter into a Participant Agreement with the Sponsor, the Administrator, the Marketing Agent and each Authorized Participant and (ii) own a Liquidity Provider Account.

The Conversion Procedures will be facilitated by a single Liquidity Provider. On an order-by-order basis, the Sponsor will select the Liquidity Provider that it believes will provide the best execution of the Conversion Procedures, and will base its decision on factors such as the Liquidity Provider’s creditworthiness, financial stability, the timing and speed of execution,

liquidity and the likelihood of, and capabilities in, execution, clearance and settlement. In the event that an order cannot be filled in its entirety by a single Liquidity Provider, additional Liquidity Provider(s) will be selected by the Sponsor to fill the remaining amount based on the criteria above.

### Creation Procedures

On any Business Day, an Authorized Participant may order one or more Creation Baskets from the Trust by placing a creation order with the Administrator. Creation orders may be placed either “in-kind” or “in-cash.” Creation orders must be placed no later than 3:59:59 p.m., New York time, for in-kind creations, and 4:59:59 p.m., New York time, for in-cash creations, on each Business Day. Authorized Participants may only create Baskets and cannot create any Shares in an amount less than a Basket.

### *In-Kind Creations*

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

#### **T**

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- The Authorized Participant places a creation order with the Administrator.
- The Marketing Agent accepts (or rejects) the creation order, which is communicated to the Authorized Participant by the Administrator.
- The Total Basket Bitcoin Amount is determined as soon as practicable after 4:00 p.m., New York time.

#### **T+1**

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- The Authorized Participant transfers the Total Basket Bitcoin Amount from its Authorized Participant Self-Administered Account to the Custodian.
- Once the Total Basket Bitcoin Amount is received by the Custodian, the Administrator directs the Transfer Agent to credit the Creation Baskets to the Authorized Participant’s DTC account.

*In-Cash Creations*

Upon receiving instruction from the Administrator that a creation order has been accepted by the Marketing Agent, the Authorized Participant will send 110% of the U.S. Dollar value of the Total Basket Bitcoin Amount, as calculated using the most recently published Bitcoin Index Price (the “Cash Collateral Amount”). Once the Cash Collateral Amount is received by the Administrator, the Sponsor will notify the Liquidity Provider of the creation order. The Liquidity Provider will then (i) determine the Cash Exchange Rate, which, in the case of a creation order, is the Index spot price at the time at which the Cash Collateral Amount is received by the Administrator, plus the 1% Liquidity Provider Fee, and (ii) provide a firm quote to the Authorized Participant for the Total Basket Bitcoin Amount, determined by using the Cash Exchange Rate. If the Liquidity Provider’s quote is greater than the Cash Collateral Amount received, the Authorized Participant will be required to pay the difference on the same day. Under the Conversion Procedures, the Authorized Participant does not pay more than the firm quote provided by the Liquidity Provider. The Liquidity Provider bears the risk of any change in the Total Basket Bitcoin Amount and of any change in the price of bitcoin once the Cash Exchange Rate has been determined. Provided that payment for the Total Basket Bitcoin Amount is received by the Administrator, the Liquidity Provider will deliver the bitcoins to the Custodian on the settlement date on behalf of the Authorized Participant. After the Custodian receives the Total Basket Bitcoin Amount, the Administrator will instruct the Transfer Agent to deliver the Creation Baskets to the Authorized Participant. The Administrator will then send the Liquidity Provider the cash equal to the Cash Exchange Rate times the Total Basket Bitcoin Amount, plus the 1% Liquidity Provider Fee. The Administrator will return any remaining amount of the Cash Collateral Amount to the Authorized Participant.

### Redemption Procedures

The procedures by which an Authorized Participant can redeem one or more Baskets mirror the procedures for the creation of Baskets. On any Business Day, an Authorized Participant may place a redemption order specifying the number of Redemption Baskets to be redeemed. Redemption orders may be placed either “in-kind” or “in-cash.” Redemption orders must be placed no later than 3:59:59 p.m., New York time, for in-kind redemptions, and 4:59:59 p.m., New York time, for in-cash redemption, on each Business Day. Authorized Participants may only redeem Baskets and cannot redeem any Shares in an amount less than a Basket.

#### *In-Kind Redemptions*

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

#### **T**

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- The Authorized Participant places a redemption order with the Administrator.
- The Marketing Agent accepts (or rejects) the redemption order.
- The Total Basket Bitcoin Amount is determined as soon as practicable after 4:00 p.m., New York time.

#### **T+1**

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- The Authorized Participant delivers to the Transfer Agent Redemption Baskets from its DTC account.
- Once the Redemption Baskets are received by the Transfer Agent, the Custodian transfers the Total Basket Bitcoin Amount to the Authorized Participant and the Transfer Agent cancels the Shares.

#### *In-Cash Redemptions*

To redeem Baskets using the Conversion Procedures, Authorized Participants will send

the Administrator a redemption order. The Marketing Agent will accept or reject the redemption order on that same date. A Liquidity Provider will then (i) determine the Cash Exchange Rate, which, in the case of a redemption order, is the Index spot price minus the 1% Liquidity Provider Fee at the time at which the Administrator notifies the Authorized Participant that an order has been accepted and (ii) provide a firm quote to an Authorized Participant for the Total Basket Bitcoin Amount, determined by using the Cash Exchange Rate. Under the Conversion Procedures, the Authorized Participant does not receive less than the firm quote provided by the Liquidity Provider. The Liquidity Provider bears the risk of any change in the Total Basket Bitcoin Amount and of any change in the price of bitcoin once the Cash Exchange Rate has been determined. The Liquidity Provider will send the Administrator the cash proceeds equal to the Cash Exchange Rate times the Total Basket Bitcoin Amount, minus the 1% Liquidity Provider Fee. Once the Authorized Participant delivers the Redemption Baskets to the Transfer Agent, the Administrator will send the cash proceeds to the Authorized Participant and the Transfer Agent will cancel the Shares. At the instruction of the Administrator, the Custodian will then send the Liquidity Provider the Total Basket Bitcoin Amount.

#### Overview of the Bitcoin Industry and Market<sup>8</sup>

##### *Bitcoin*

Bitcoin is the digital asset that is native to, and created and transmitted through the operations of, the peer-to-peer Bitcoin network, a decentralized network of computers that operates on cryptographic protocols. No single entity owns or operates the Bitcoin network, the infrastructure of which is collectively maintained by a decentralized user base. The Bitcoin

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<sup>8</sup> For the purpose of this section, Bitcoin with an upper case “B” is used to describe the system as a whole that is involved in maintaining the ledger of bitcoin ownership and facilitating the transfer of bitcoin among parties. When referring to the digital asset within the bitcoin network, bitcoin is written with a lower case “b” (except, at the beginning of sentences or paragraph sections).

network allows people to exchange tokens of value, called bitcoin, which are recorded on a public transaction ledger known as the Blockchain. Bitcoin can be used to pay for goods and services, or it can be converted to fiat currencies, such as the U.S. dollar, at rates determined on bitcoin trading platforms or in individual end-user-to-end-user transactions under a barter system.

The value of bitcoin is determined by the supply of and demand for bitcoin. New bitcoins are created and rewarded to the parties providing the Bitcoin network's infrastructure ("miners") in exchange for their expending computational power to verifying transactions and add them to the Blockchain. The Blockchain is effectively a decentralized database that includes all blocks that have been solved by miners and it is updated to include new blocks as they are solved. Each bitcoin transaction is broadcast to the Bitcoin network and, when included in a block, recorded in the Blockchain. As each new block records outstanding bitcoin transactions, and outstanding transactions are settled and validated through such recording, the Blockchain represents a complete, transparent and unbroken history of all transactions of the Bitcoin network.

#### *Bitcoin Network*

Bitcoin was first described in a white paper released in 2008 and published under the pseudonym "Satoshi Nakamoto." The protocol underlying Bitcoin was subsequently released in 2009 as open source software and currently operates on a worldwide network of computers.

The first step in directly using the Bitcoin network for transactions is to download specialized software referred to as a "bitcoin wallet." A user's bitcoin wallet can run on a computer or smartphone, and can be used both to send and to receive bitcoin. Within a bitcoin wallet, a user can generate one or more unique "bitcoin addresses," which are conceptually

similar to bank account numbers. After establishing a bitcoin address, a user can send or receive bitcoin from his or her bitcoin address to another user's address. Sending bitcoin from one bitcoin address to another is similar in concept to sending a bank wire from one person's bank account to another person's bank account; provided, however, that such transactions are not managed by an intermediary and erroneous transactions generally may not be reversed or remedied once sent.

The amount of bitcoin associated with each bitcoin address, as well as each bitcoin transaction to or from such address, is transparently reflected in the Blockchain and can be viewed by websites that operate as "blockchain explorers." Copies of the Blockchain exist on thousands of computers on the Bitcoin network. A user's bitcoin wallet will either contain a copy of the blockchain or be able to connect with another computer that holds a copy of the blockchain. The innovative design of the Bitcoin network protocol allows each Bitcoin user to trust that their copy of the Blockchain will generally be updated consistent with each other user's copy.

#### *Bitcoin Protocol*

The Bitcoin protocol is open source software, meaning any developer can review the underlying code and suggest changes. There is no official company or group that is responsible for making modifications to Bitcoin. There are, however, a number of individual developers that regularly contribute to a specific distribution of Bitcoin software known as the "Bitcoin Core," which is maintained in an open-source repository on the website Github. There are many other compatible versions of Bitcoin software, but Bitcoin Core provides the de-facto standard for the Bitcoin protocol, also known as the "reference software." The core developers for Bitcoin Core operate under a volunteer basis and without strict hierarchical administration.

Significant changes to the Bitcoin protocol are typically accomplished through a so-called “Bitcoin Improvement Proposal” or BIP. Such proposals are generally posted on websites, and the proposals explain technical requirements for the protocol change as well as reasons why the change should be accepted. Upon its inclusion in the most recent version of Bitcoin Core, a new BIP becomes part of the reference software’s Bitcoin protocol. Several BIPs have been implemented since 2011 and have provided various new features and scaling improvements.

Because Bitcoin has no central authority, updating the reference software’s Bitcoin protocol will not immediately change the Bitcoin network’s operations. Instead, the implementation of a change is achieved by users and miners downloading and running updated versions of Bitcoin Core or other Bitcoin software that abides by the new Bitcoin protocol. Users and miners must accept any changes made to the Bitcoin source code by downloading a version of their Bitcoin software that incorporates the proposed modification of the Bitcoin network’s source code. A modification of the Bitcoin network’s source code is only effective with respect to the Bitcoin users and miners that download it. If an incompatible modification is accepted only by a percentage of users and miners, a division in the Bitcoin network will occur such that one network will run the pre-modification source code and the other network will run the modified source code. Such a division is known as a “fork” in the Bitcoin network.

Such a fork in the Bitcoin network occurred on August 1, 2017, when a group of developers and miners accepted certain changes to the Bitcoin network software intended to increase transaction capacity. Blocks mined on this network now diverge from blocks mined on the Bitcoin network, which has resulted in the creation of a new blockchain whose digital asset is referred to as “bitcoin cash.” Bitcoin and bitcoin cash now operate as separate, independent



networks, and have distinct related assets (bitcoin and bitcoin cash). Additional forks have followed the Bitcoin Cash fork, including those for Bitcoin Gold and Bitcoin SegWit2X, in the months after the creation of Bitcoin Cash.

#### *Bitcoin Transactions*

A bitcoin transaction contains the sender's bitcoin address, the recipient's bitcoin address, the amount of bitcoin to be sent, a transaction fee and the sender's digital signature. Bitcoin transactions are secured by cryptography known as public-private key cryptography, represented by the bitcoin addresses and digital signature in a transaction's data file. Each Bitcoin network address, or wallet, is associated with a unique "public key" and "private key" pair, both of which are lengthy alphanumeric codes, derived together and possessing a unique relationship. The public key is visible to the public and analogous to the Bitcoin network address. The private key is a secret and may be used to digitally sign a transaction in a way that proves the transaction has been signed by the holder of the public-private key pair, without having to reveal the private key.

The Bitcoin network incorporates a system to prevent double-spending of a single bitcoin. To prevent the possibility of double-spending a single bitcoin, each validated transaction is recorded, time stamped and publicly displayed in a "block" in the Blockchain, which is publicly available. Any user may validate, through their Bitcoin wallet or a blockchain explorer, that each transaction in the Bitcoin network was authorized by the holder of the applicable private key, and Bitcoin network mining software consistent with reference software requirements typically validates each such transaction before including it in the Blockchain.

#### *Bitcoin Mining – Creation of New Bitcoins*

The process by which bitcoins are created and bitcoin transactions are verified is called

mining. To begin mining, a user, or “miner,” can download and run a mining client, which, like regular Bitcoin network software, turns the user’s computer into a “node” on the Bitcoin network that validates blocks. Each time transactions are validated and bundled into new blocks added to the Blockchain, the Bitcoin network awards the miner solving such blocks with newly issued bitcoin and any transaction fees paid by bitcoin transaction senders. This reward system is the method by which new bitcoins enter into circulation to the public.

#### *Mathematically Controlled Supply*

The method for creating new bitcoin is mathematically controlled in a manner so that the supply of bitcoin grows at a limited rate pursuant to a pre-set schedule. The number of bitcoin awarded for solving a new block is automatically halved every 210,000 blocks. Thus, the current fixed reward for solving a new block is 6.25 bitcoin per block; the reward decreased from twenty-five (25) bitcoin in July 2016 and 12.5 in May 2020. It is estimated to halve again at the start of 2024. This deliberately controlled rate of bitcoin creation means that the number of bitcoin in existence will never exceed twenty-one (21) million and that bitcoin cannot be devalued through excessive production unless the Bitcoin network’s source code (and the underlying protocol for bitcoin issuance) is altered. As of January 1, 2023, approximately 19,250,000 bitcoin have been mined.

#### *Bitcoin Value*

The value of Bitcoin is determined by the value that various market participants place on Bitcoin through their transactions. The most common means of determining the value of a Bitcoin is by surveying one or more Bitcoin Exchanges where Bitcoin is traded publicly and transparently (e.g., Bitstamp, Coinbase, Kraken, itBit, Gemini and LMAX Digital). Additionally, in parallel to the open bitcoin exchanges, informal “over-the-counter” or “OTC

markets” for bitcoin trading also exist as a result of the peer-to-peer nature of the Bitcoin Network, which allows direct transactions between any seller and buyer.

On each exchange, bitcoin is traded with publicly disclosed valuations for each executed trade, measured by one or more fiat currencies such as the U.S. dollar or Euro. OTC markets do not typically disclose their trade data. Currently, there are many exchanges operating worldwide, and each such exchange represents a substantial percentage of bitcoin buying and selling activity.

### The Index

As described in the Registration Statement, the Fund will use the Index to calculate the Trust’s NAV. The Index is not affiliated with the Sponsor and was created and is administered by CF Benchmarks Ltd. (the “Benchmark Administrator”), an independent entity, to facilitate financial products based on bitcoin. The Index is designed based on the IOSCO Principals for Financial Benchmarks and serves as a once-a-day benchmark rate of the U.S. dollar price of bitcoin (USD/BTC), calculated as of 4 p.m. Eastern time. The Index is based on materially the same methodology (except calculation time)<sup>9</sup> as the Benchmark Administrator’s CME CF Bitcoin Reference Rate (the “BRR”), which was first introduced on November 14, 2016 and is the rate on which bitcoin futures contracts (“Bitcoin Futures”) are cash-settled in U.S. dollars at the CME. The Index aggregates the trade flow of several bitcoin exchanges, during an observation window between 3:00 p.m. and 4:00 p.m. Eastern time into the U.S. dollar price of one bitcoin at 4:00 p.m. Eastern time. The current constituent bitcoin exchanges of the Index are Bitstamp, Coinbase, Gemini, itBit, Kraken and LMAX Digital (the “Constituent Bitcoin Exchanges”).

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<sup>9</sup> The Index is calculated as of 4 p.m. Eastern Time, whereas the BRR is calculated as of 4 p.m. London Time.

The Index is calculated based on the “Relevant Transactions”<sup>10</sup> of all of its Constituent Bitcoin Exchanges, as follows:

- All Relevant Transactions are added to a joint list, recording the time of execution, trade price and size for each transaction.
- The list is partitioned by timestamp into 12 equally-sized time intervals of 5 (five) minute length.
- For each partition separately, the volume-weighted median trade price is calculated from the trade prices and sizes of all Relevant Transactions, i.e., across all Constituent Bitcoin Exchanges. A volume-weighted median differs from a standard median in that a weighting factor, in this case trade size, is factored into the calculation.
- The Index is then determined by the arithmetic mean of the volume-weighted medians of all partitions.

By employing the foregoing steps, the Index thereby seeks to ensure that transactions in bitcoin conducted at outlying prices do not have an undue effect on the value of a specific partition, large trades or clusters of trades transacted over a short period of time will not have an undue influence on the index level, and the effect of large trades at prices that deviate from the prevailing price are mitigated from having an undue influence on the benchmark level. In addition, the Sponsor notes that an oversight function is implemented by the Benchmark Administrator in seeking to ensure that the Index is administered through codified policies for Index integrity.

The Index provides an accurate reference to the average spot price of Bitcoin and the methodology employed in constructing the Index, specifically its use of medians in filtering out small trades, makes the Index more resistant to manipulation than other measurements that employ different methodologies. In addition, the Index included over \$375 billion in bitcoin trades (approximately 12,500 bitcoins) during the one-year period ended December 31, 2022.

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<sup>10</sup> A “Relevant Transaction” is any cryptocurrency versus U.S. dollar spot trade that occurs during the observation window between 3:00 p.m. and 4:00 p.m. Eastern time on a Constituent Bitcoin Exchange in the BTC/USD pair that is reported and disseminated by a Constituent Bitcoin Exchange through its publicly available API and observed by the Benchmark Administrator, CF Benchmarks Ltd.

Finally, an oversight committee is responsible for regularly reviewing and overseeing the methodology, practice, standards and scope of the Index to ensure that it continues to accurately track the spot prices of Bitcoin.

### Background

The Commission has historically approved or disapproved exchange filings to list and trade series of Trust Issued Receipts, including spot-based Commodity- Based Trust Shares, on the basis of whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size related to the underlying commodity to be held.<sup>11</sup> Prior orders from the Commission have pointed out that in every prior approval order for Commodity-Based Trust Shares, there has been a derivatives market that represents the regulated market of significant size, generally a Commodity Futures Trading Commission regulated futures market.<sup>12</sup> Further to this point, the Commission’s prior orders have noted that the spot

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<sup>11</sup> See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018). This proposal was subsequently disapproved by the Commission. See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the “Winklevoss Order”).

<sup>12</sup> See streetTRACKS Gold Shares, Exchange Act Release No. 50603 (Oct. 28, 2004), 69 FR 64614, 64618–19 (Nov. 5, 2004) (SR-NYSE-2004-22) (the “First Gold Approval Order”); iShares COMEX Gold Trust, Exchange Act Release No. 51058 (Jan. 19, 2005), 70 FR 3749, 3751, 3754–55 (Jan. 26, 2005) (SR-Amex-2004-38); iShares Silver Trust, Exchange Act Release No. 53521 (Mar. 20, 2006), 71 FR 14967, 14968, 14973–74 (Mar. 24, 2006) (SR-Amex-2005-072); ETFS Gold Trust, Exchange Act Release No. 59895 (May 8, 2009), 74 FR 22993, 22994–95, 22998, 23000 (May 15, 2009) (SR-NYSEArca-2009-40); ETFS Silver Trust, Exchange Act Release No. 59781 (Apr. 17, 2009), 74 FR 18771, 18772, 18775–77 (Apr. 24, 2009) (SR-NYSEArca-2009-28); ETFS Palladium Trust, Exchange Act Release No. 61220 (Dec. 22, 2009), 74 FR 68895, 68896 (Dec. 29, 2009) (SR-NYSEArca-2009-94) (notice of proposed rule change included NYSE Arca’s representation that “[t]he most significant palladium futures exchanges are the NYMEX and the Tokyo Commodity Exchange,” that “NYMEX is the largest exchange in the world for trading precious metals futures and options,” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which NYMEX is a member, Exchange Act Release No. 60971 (Nov. 9, 2009), 74 FR 59283, 59285–86, 59291 (Nov. 17, 2009)); ETFS Platinum Trust, Exchange Act Release No. 61219 (Dec. 22, 2009), 74 FR 68886, 68887–88 (Dec. 29, 2009) (SR-NYSEArca-2009-95) (notice of proposed rule change included NYSE Arca’s representation that “[t]he most significant platinum futures exchanges are the NYMEX and the Tokyo Commodity Exchange,” that “NYMEX is the largest exchange in the world for trading precious metals futures and options,” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which NYMEX is a member, Exchange Act Release No. 60970 (Nov. 9, 2009), 74 FR 59319, 59321, 59327 (Nov. 17, 2009)); Sprott Physical Gold Trust, Exchange Act Release No. 61496 (Feb. 4, 2010), 75 FR 6758, 6760 (Feb. 10, 2010)

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(SR-NYSEArca-2009-113) (notice of proposed rule change included NYSE Arca’s representation that the COMEX is one of the “major world gold markets,” that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” and that NYMEX, of which COMEX is a division, is a member of the Intermarket Surveillance Group, Exchange Act Release No. 61236 (Dec. 23, 2009), 75 FR 170, 171, 174 (Jan. 4, 2010)); Sprott Physical Silver Trust, Exchange Act Release No. 63043 (Oct. 5, 2010), 75 FR 62615, 62616, 62619, 62621 (Oct. 12, 2010) (SR-NYSEArca-2010-84); ETFs Precious Metals Basket Trust, Exchange Act Release No. 62692 (Aug. 11, 2010), 75 FR 50789, 50790 (Aug. 17, 2010) (SR-NYSEArca-2010-56) (notice of proposed rule change included NYSE Arca’s representation that “the most significant gold, silver, platinum and palladium futures exchanges are the COMEX and the TOCOM” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 62402 (Jun. 29, 2010), 75 FR 39292, 39295, 39298 (July 8, 2010)); ETFs White Metals Basket Trust, Exchange Act Release No. 62875 (Sept. 9, 2010), 75 FR 56156, 56158 (Sept. 15, 2010) (SR-NYSEArca-2010-71) (notice of proposed rule change included NYSE Arca’s representation that “the most significant silver, platinum and palladium futures exchanges are the COMEX and the TOCOM” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 62620 (July 30, 2010), 75 FR 47655, 47657, 47660 (Aug. 6, 2010)); ETFs Asian Gold Trust, Exchange Act Release No. 63464 (Dec. 8, 2010), 75 FR 77926, 77928 (Dec. 14, 2010) (SR-NYSEArca-2010-95) (notice of proposed rule change included NYSE Arca’s representation that “the most significant gold futures exchanges are the COMEX and the Tokyo Commodity Exchange,” that “COMEX is the largest exchange in the world for trading precious metals futures and options,” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 63267 (Nov. 8, 2010), 75 FR 69494, 69496, 69500–01 (Nov. 12, 2010)); Sprott Physical Platinum and Palladium Trust, Exchange Act Release No. 68430 (Dec. 13, 2012), 77 FR 75239, 75240–41 (Dec. 19, 2012) (SR-NYSEArca-2012-111) (notice of proposed rule change included NYSE Arca’s representation that “[f]utures on platinum and palladium are traded on two major exchanges: The New York Mercantile Exchange ... and Tokyo Commodities Exchange” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 68101 (Oct. 24, 2012), 77 FR 65732, 65733, 65739 (Oct. 30, 2012)); APMEX Physical—1 oz. Gold Redeemable Trust, Exchange Act Release No. 66930 (May 7, 2012), 77 FR 27817, 27818 (May 11, 2012) (SR-NYSEArca-2012-18) (notice of proposed rule change included NYSE Arca’s representation that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, and that gold futures are traded on COMEX and the Tokyo Commodity Exchange, with a cross-reference to the proposed rule change to list and trade shares of the ETFs Gold Trust, in which NYSE Arca represented that COMEX is one of the “major world gold markets,” Exchange Act Release No. 66627 (Mar. 20, 2012), 77 FR 17539, 17542–43, 17547 (Mar. 26, 2012)); JPM XF Physical Copper Trust, Exchange Act Release No. 68440 (Dec. 14, 2012), 77 FR 75468, 75469–70, 75472, 75485–86 (Dec. 20, 2012) (SR-NYSEArca-2012-28); iShares Copper Trust, Exchange Act Release No. 68973 (Feb. 22, 2013), 78 FR 13726, 13727, 13729–30, 13739–40 (Feb. 28, 2013) (SR-NYSEArca-2012-66); First Trust Gold Trust, Exchange Act Release No. 70195 (Aug. 14, 2013), 78 FR 51239, 51240 (Aug. 20, 2013) (SR-NYSEArca-2013-61) (notice of proposed rule change included NYSE Arca’s representation that FINRA, on behalf of the exchange, may obtain trading information regarding gold futures and options on gold futures from members of the Intermarket Surveillance Group, including COMEX, or from markets “with which [NYSE Arca] has in place a comprehensive surveillance sharing agreement,” and that gold futures are traded on COMEX and the Tokyo Commodity Exchange, with a cross-reference to the proposed rule change to list and trade shares of the ETFs Gold Trust, in which NYSE Arca represented that COMEX is one of the “major world gold markets,” Exchange Act Release No. 69847 (June 25, 2013), 78 FR 39399, 39400, 39405 (July 1, 2013)); Merk Gold Trust, Exchange Act Release No. 71378 (Jan. 23, 2014), 79 FR 4786, 4786–87 (Jan. 29, 2014) (SR-NYSEArca-2013-137) (notice of proposed rule change included NYSE Arca’s representation that “COMEX is the largest gold futures and options exchange” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” including with respect to transactions occurring on COMEX pursuant to CME and NYMEX’s membership, or from exchanges “with

commodities and currency markets for which it has previously approved spot ETPs are generally unregulated and that the Commission relied on the underlying futures market as the regulated market of significant size that formed the basis for approving the series of Currency and Commodity-Based Trust Shares, including gold, silver, platinum, palladium, copper, and other commodities and currencies. The Commission specifically noted in the Winklevoss Order that the First Gold Approval Order “was based on an assumption that the currency market and the spot gold market were largely unregulated.”<sup>13</sup>

As such, the regulated market of significant size test does not require that the spot bitcoin market be regulated in order for the Commission to approve this proposal, and precedent makes clear that an underlying market for a spot commodity or currency being a regulated market would actually be an exception to the norm. These largely unregulated currency and commodity markets do not provide the same protections as the markets that are subject to the Commission’s oversight, but the Commission has consistently looked to surveillance sharing agreements with the underlying futures market in order to determine whether such products were consistent with the Act. With this in mind, the Bitcoin Futures market, as defined below, is the proper market to consider in determining whether there is a related regulated market of significant size.

Further to this point, the Exchange notes that the Commission has recently approved proposals related to the listing and trading of funds that would primarily hold Bitcoin Futures that are registered under the Securities Act of 1933 instead of the Investment Company Act of

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which [NYSE Arca] has in place a comprehensive surveillance sharing agreement,” Exchange Act Release No. 71038 (Dec. 11, 2013), 78 FR 76367, 76369, 76374 (Dec. 17, 2013)); Long Dollar Gold Trust, Exchange Act Release No. 79518 (Dec. 9, 2016), 81 FR 90876, 90881, 90886, 90888 (Dec. 15, 2016) (SR-NYSEArca-2016-84).

<sup>13</sup> See Winklevoss Order at 37592.

1940, as amended (the “1940 Act”).<sup>14</sup> In the Teucrium Approval, the Commission found the Bitcoin Futures market to be a regulated market of significant size as it relates to Bitcoin Futures, an odd tautological truth that is also inconsistent with prior disapproval orders for exchange traded products (“ETPs”) that would hold actual bitcoin instead of derivatives contracts (“Spot Bitcoin ETPs”) that use the exact same pricing methodology as the Bitcoin Futures. As further discussed below, both the Exchange and the Sponsor believe that this proposal and the included analysis are sufficient to establish that the Bitcoin Futures market represents a regulated market of significant size as it relates both to the Bitcoin Futures market and to the spot bitcoin market and that this proposal should be approved.

#### Bitcoin Futures ETFs

The Exchange and Sponsor applaud the Commission for allowing the launch of ETFs registered under the 1940 Act and the recent Bitcoin Futures Approvals that provide exposure to bitcoin primarily through Bitcoin Futures (“Bitcoin Futures ETFs”). Allowing such products to list and trade is a productive first step in providing U.S. investors and traders with transparent, exchange-listed tools for expressing a view on bitcoin. The Bitcoin Futures Approvals, however, have created a logical inconsistency in the application of the standard the Commission applies when considering bitcoin ETP proposals.

As discussed further below, the standard applicable to bitcoin ETPs is whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size in the underlying asset. Previous disapproval orders have made clear that a market that constitutes a regulated market of significant size is generally a futures and/or options

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<sup>14</sup> See Exchange Act Release No. 94620 (April 6, 2022), 87 FR 21676 (April 12, 2022) (the “Teucrium Approval”) and 94853 (May 5, 2022) (collectively, with the Teucrium Approval, the “Bitcoin Futures Approvals”).



market based on the underlying reference asset rather than the spot commodity markets, which are often unregulated.<sup>15</sup> Leaving aside the analysis of that standard until later in this proposal,<sup>16</sup> the Exchange believes that the following rationale that the Commission applied to a Bitcoin Futures ETF should result in the Commission approving this and other Spot Bitcoin ETP proposals:

The CME “comprehensively surveils futures market conditions and price movements on a real-time and ongoing basis in order to detect and prevent price distortions, including price distortions caused by manipulative efforts.” Thus, the CME’s surveillance can reasonably be relied upon to capture the effects on the CME 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. As such, when the CME shares its surveillance information with Arca, the information would assist in detecting and deterring fraudulent or manipulative misconduct related to the non-cash assets held by the proposed ETP.<sup>17</sup>

Bitcoin Futures pricing is based on pricing from spot bitcoin markets. The statement from the Teucrium Approval that “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...indirectly by trading outside of the CME bitcoin futures market,” makes clear that the Commission believes

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<sup>15</sup> See Winklevoss Order at 37593, specifically footnote 202, which includes the language from numerous approval orders for which the underlying futures markets formed the basis for approving series of ETPs that hold physical metals, including gold, silver, palladium, platinum, and precious metals more broadly; and 37600, specifically where the Commission provides that “when the spot market is unregulated – the requirement of preventing fraudulent and manipulative acts may possibly be satisfied by showing that the ETP listing market has entered into a surveillance-sharing agreement with a regulated market of significant size in derivatives related to the underlying asset.” As noted above, the Exchange believes that these citations are particularly helpful in making clear that the spot market for a spot commodity ETP need not be “regulated” in order for a spot commodity ETP to be approved by the Commission, and in fact that it’s been the common historical practice of the Commission to rely on such derivatives markets as the regulated market of significant size because such spot commodities markets are largely unregulated.

<sup>16</sup> As further outlined below, both the Exchange and the Sponsor believe that the Bitcoin Futures market represents a regulated market of significant size and that this proposal and others like it should be approved on this basis.

<sup>17</sup> See Teucrium Approval at 21679.

that CME's surveillance can capture the effects of trading on the relevant spot markets on the pricing of Bitcoin Futures. If CME is able to detect such attempts at manipulation in the complex and interconnected spot bitcoin market, how would such an ability to detect attempted manipulation and the utility in sharing that information with the listing exchange apply only to Bitcoin Futures ETFs and not Spot Bitcoin ETPs? Stated a different way, given that there is significant trading volume on numerous bitcoin exchanges that are not part of the CME CF Bitcoin Reference Rate and that arbitrage opportunities across bitcoin exchanges means that such trading volume will influence spot bitcoin prices across the market and, despite this, the Commission still believes that CME can detect attempted manipulation of the Bitcoin Futures through "trading outside of the CME bitcoin futures market," it is clear that such ability would apply equally to both Bitcoin Futures ETFs and Spot Bitcoin ETPs. To take it a step further, such an ability would also seem to be a strong indication that the CME Bitcoin Futures market represents a regulated market of significant size. To be clear, the Exchange agrees with the Commission on this point (and the implications of their conclusions) and notes that the pricing mechanism applicable to the Shares is similar to the CME CF Bitcoin Reference Rate, as further discussed below.

The Exchange also notes that a Bitcoin Futures ETF may also be more susceptible to potential manipulation than a Spot Bitcoin ETP that offers only in-kind creation and redemption because Bitcoin Futures pricing (and thus the value of the underlying holdings of a Bitcoin Futures ETF) is based on a single price derived from spot bitcoin pricing, while shares of a Spot Bitcoin ETP would represent interest in bitcoin directly and authorized participants for a Spot Bitcoin ETP (as proposed herein) would be able to source bitcoin from any exchange and create or redeem with the applicable trust regardless of the price of the underlying index. As such, the Exchange believes that, in addition to the CME Bitcoin Futures market representing a regulated

market of significant size as it relates to the spot bitcoin market, in-kind Spot Bitcoin ETPs are likely less susceptible to manipulation than Bitcoin Futures ETFs because of the underlying creation and redemption arbitrage mechanism that will operate in the same manner as it does for all other ETFs.

In addition to potentially being more susceptible to manipulation than a Spot Bitcoin ETP, the structure of Bitcoin Futures ETFs provides negative outcomes for buy and hold investors as compared to a Spot Bitcoin ETP.<sup>18</sup> Specifically, the cost of rolling Bitcoin Futures contracts will cause the Bitcoin Futures ETFs to lag the performance of bitcoin itself and, at over a billion dollars in assets under management, would cost U.S. investors significant amounts of money on an annual basis compared to Spot Bitcoin ETPs. Such rolling costs would not be required for Spot Bitcoin ETPs that hold bitcoin. Further, Bitcoin Futures ETFs could potentially hit CME position limits, which would force a Bitcoin Futures ETF to invest in non-futures assets for bitcoin exposure and cause potential investor confusion and lack of certainty about what such Bitcoin Futures ETFs are actually holding to try to get exposure to bitcoin, not to mention completely changing the risk profile associated with such an ETF. While Bitcoin Futures ETFs represent a useful trading tool, they are clearly a sub-optimal structure for U.S. investors that are looking for long-term exposure to bitcoin that will, based on the calculations above, unnecessarily cost U.S. investors significant amounts of money every year compared to Spot Bitcoin ETPs and the Exchange believes that any proposal to list and trade a Spot Bitcoin ETP should be reviewed by the Commission with this important investor protection context in mind.

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<sup>18</sup> See e.g., “Bitcoin ETF’s Success Could Come at Fundholders’ Expense,” Wall Street Journal (October 24, 2021), available at: <https://www.wsj.com/articles/bitcoin-etfs-success-could-come-at-fundholders-expense-11635080580>; “Physical Bitcoin ETF Prospects Accelerate,” ETF.com (October 25, 2021), available at: [https://www.etf.com/sections/blog/physical-bitcoin-etf-prospects-shine?nopaging=1&\\_cf\\_chl\\_jschl\\_tk=\\_pmd JsK.fjXz9eAQW9zol0qpzhXDrrl pIVdoCloLXbLj144-1635476946-0-gqNtZGzNApCjcnBszQql](https://www.etf.com/sections/blog/physical-bitcoin-etf-prospects-shine?nopaging=1&_cf_chl_jschl_tk=_pmd JsK.fjXz9eAQW9zol0qpzhXDrrl pIVdoCloLXbLj144-1635476946-0-gqNtZGzNApCjcnBszQql).

Based on the foregoing, the Exchange and Sponsor believe that any objective review of the proposals to list Spot Bitcoin ETPs compared to the Bitcoin Futures ETFs and the Bitcoin Futures Approvals would lead to the conclusion that Spot Bitcoin ETPs should be available to U.S. investors and, as such, this proposal and other comparable proposals to list and trade Spot Bitcoin ETPs should be approved by the Commission. Stated simply, U.S. investors will continue to lose significant amounts of money from holding Bitcoin Futures ETFs as compared to Spot Bitcoin ETPs, losses which could be prevented by the Commission approving Spot Bitcoin ETPs. Additionally, any concerns related to preventing fraudulent and manipulative acts and practices related to Spot Bitcoin ETPs would apply equally to the spot markets underlying the futures contracts held by a Bitcoin Futures ETF. While the 1940 Act does offer certain investor protections, those protections do not relate to mitigating potential manipulation of the holdings of an ETF in a way that warrants distinction between Bitcoin Futures ETFs and Spot Bitcoin ETPs. To be clear, both the Exchange and Sponsor believe that the Bitcoin Futures market is a regulated market of significant size and that such manipulation concerns are mitigated as described throughout this proposal. After issuing the Bitcoin Futures Approvals which conclude the CME Bitcoin Futures market is a regulated market of significant size as it relates to Bitcoin Futures, the only consistent outcome would be approving Spot Bitcoin ETPs on the basis that the Bitcoin Futures market is also a regulated market of significant size as it relates to the bitcoin spot market. Including in the analysis the significant and preventable losses to U.S. investors that comes with Bitcoin Futures ETFs, disapproving Spot Bitcoin ETPs seems even more arbitrary and capricious. Given the current landscape, approving this proposal (and others like it) and allowing Spot Bitcoin ETPs to be listed and traded alongside Bitcoin Futures ETFs would establish a consistent regulatory approach, provide U.S. investors with choice in product structures for bitcoin exposure, and offer flexibility in the means of gaining exposure to

bitcoin through transparent, regulated, U.S. exchange-listed vehicles.

#### Spot and Proxy Exposure to Bitcoin

Exposure to bitcoin through an ETP also presents certain advantages for retail investors compared to buying spot bitcoin directly. The most notable advantage from the Sponsor's perspective is the elimination of the need for an individual retail investor to either manage their own private keys or to hold bitcoin through a cryptocurrency exchange that lacks sufficient protections. Typically, retail exchanges hold most, if not all, retail investors' bitcoin in "hot" (Internet-connected) storage and do not make any commitments to indemnify retail investors or to observe any particular cybersecurity standard. Meanwhile, a retail investor holding spot bitcoin directly in a self-hosted wallet may suffer from inexperience in private key management (e.g., insufficient password protection, lost key, etc.), which could cause them to lose some or all of their bitcoin holdings. Thus, with respect to custody of the Trust's bitcoin assets, the Trust presents advantages from an investment protection standpoint for retail investors compared to owning spot bitcoin directly.

Finally, a number of operating companies largely engaged in unrelated businesses – such as Tesla (a car manufacturer) and MicroStrategy (an enterprise software company) – have announced significant investments in bitcoin. Without access to bitcoin exchange-traded products, retail investors seeking investment exposure to bitcoin may end up purchasing shares in these companies in order to gain the exposure to bitcoin that they seek.<sup>19</sup> In fact, mainstream financial news networks have written a number of articles providing investors with guidance for obtaining bitcoin exposure through publicly traded companies (such as MicroStrategy, Tesla, and bitcoin mining companies, among others) instead of dealing with the complications associated

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<sup>19</sup> In August 2017, the Commission's Office of Investor Education and Advocacy warned investors about situations where companies were publicly announcing events relating to digital coins or tokens in an effort to affect the price of the company's publicly traded common stock. See [https://www.sec.gov/oiea/investor-alerts-and-bulletins/ia\\_icorelatedclaims](https://www.sec.gov/oiea/investor-alerts-and-bulletins/ia_icorelatedclaims).

with buying spot bitcoin in the absence of a bitcoin ETP.<sup>20</sup> Such operating companies, however, are imperfect bitcoin proxies and provide investors with partial bitcoin exposure paired with a host of additional risks associated with whichever operating company they decide to purchase. Additionally, the disclosures provided by the aforementioned operating companies with respect to risks relating to their bitcoin holdings are generally substantially smaller than the registration statement of a bitcoin ETP, including the Registration Statement, typically amounting to a few sentences of narrative description and a handful of risk factors.<sup>21</sup> In other words, investors seeking bitcoin exposure through publicly traded companies are gaining only partial exposure to bitcoin and are not fully benefitting from the risk disclosures and associated investor protections that come from the securities registration process.

### Bitcoin Futures

CME began offering trading in Bitcoin Futures in 2017. Each contract represents five bitcoin and is based on the CME CF Bitcoin Reference Rate.<sup>22</sup> The contracts trade and settle like other cash-settled commodity futures contracts. Nearly every measurable metric related to Bitcoin Futures has generally trended up since launch, although certain notional volume calculations have decreased roughly in line with the decrease in the price of bitcoin. For example, there were 276,542 Bitcoin Futures contracts traded in March 2023 compared to

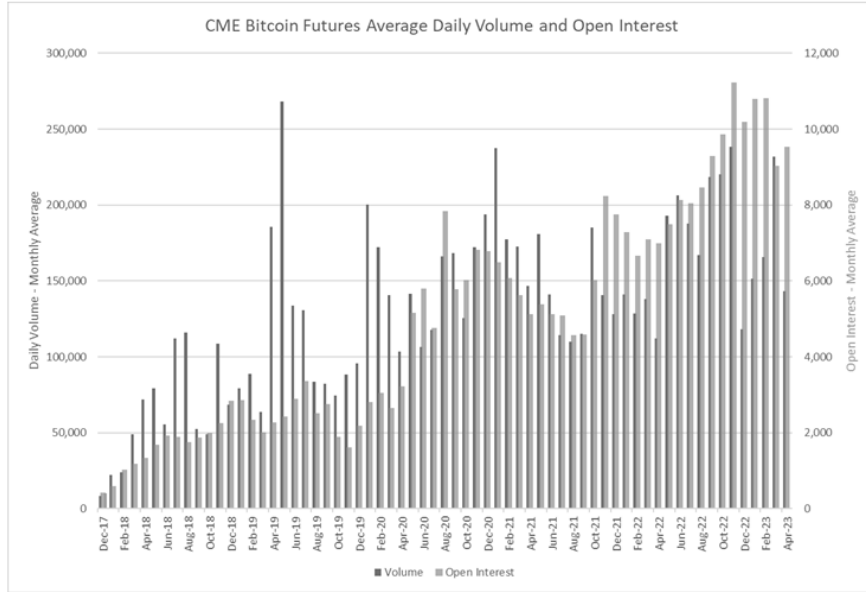
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<sup>20</sup> See e.g., “7 public companies with exposure to bitcoin” (February 8, 2021) available at: <https://finance.yahoo.com/news/7-public-companies-with-exposure-to-bitcoin-154201525.html>; and “Want to get in the crypto trade without holding bitcoin yourself? Here are some investing ideas” (February 19, 2021) available at: <https://www.cnbc.com/2021/02/19/ways-to-invest-in-bitcoin-without-holding-the-cryptocurrency-yourself.html>.

<sup>21</sup> See, e.g., Tesla 10-K for the year ended December 31, 2020, which mentions bitcoin just nine times: [https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000156459021004599/tsla-10k\\_20201231.htm](https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000156459021004599/tsla-10k_20201231.htm).

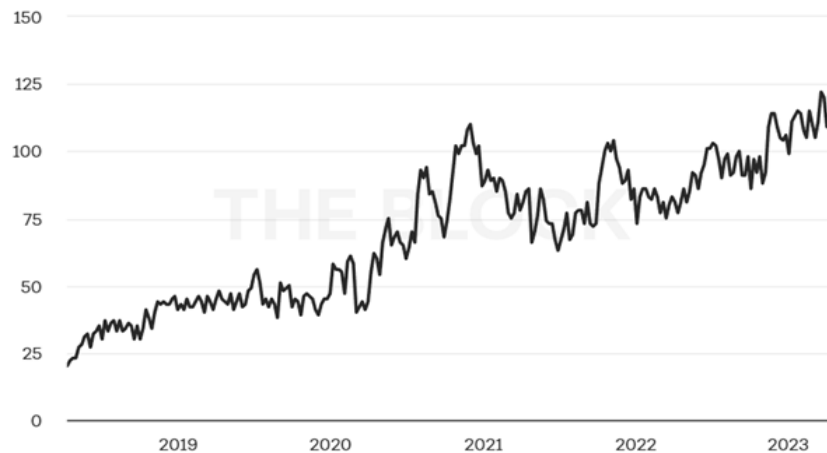
<sup>22</sup> The CME CF Bitcoin Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto exchanges and trading platforms, including Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.

165,567, 233,345, and 183,131 contracts traded in March 2020, March 2021, and March 2023, respectively.



Source: CME 4/20/23.

### Large Open Interest Holders of CME Bitcoin Futures



SOURCE: CFTC COT  
 UPDATED: MAY 2, 2023

ZOOM **ALL** YTD 12M 3M 1M

The number of large open interest holders and *unique accounts trading Bitcoin Futures* have both increased, even in the face of heightened Bitcoin price volatility.

A large open interest holder in Bitcoin Futures is an entity that holds at least 25 contracts, which is the equivalent of 125 bitcoin.

The Sponsor further believes that publicly available research, including research done as part of rule filings proposing to list and trade shares of Spot Bitcoin ETPs, corroborates the overall trend outlined above and supports the thesis that the Bitcoin Futures pricing leads the spot market and, thus, a person attempting to manipulate the Shares would also have to trade on that market to manipulate the ETP. Specifically, the Sponsor believes that such research indicates that bitcoin futures lead the bitcoin spot market in price formation.<sup>23</sup>

### Preventing Fraudulent and Manipulative Practices

In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices;<sup>24</sup> and

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<sup>23</sup> See Exchange Act Releases No. 94080 (January 27, 2022), 87 FR 5527 (April 12, 2022) (specifically "Amendment No. 1 to the Proposed Rule Change To List and Trade Shares of the Wise Origin Bitcoin Trust Under BZX Rule 14.11(3)(4), Commodity-Based Trust Shares"); 94982 (May 25, 2022), 87 FR 33250 (June 1, 2022); 94844 (May 4, 2022), 87 FR 28043 (May 10, 2022); and 93445 (October 28, 2021), 86 FR 60695 (November 3, 2021). See also Hu, Y., Hou, Y. and Oxley, L. (2019). "What role do futures markets play in Bitcoin pricing? Causality, cointegration and price discovery from a time-varying perspective" (available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7481826/>). This academic research paper concludes that "There exist no episodes where the Bitcoin spot markets dominates the price discovery processes with regard to Bitcoin futures. This points to a conclusion that the price formation originates solely in the Bitcoin futures market. We can, therefore, conclude that the Bitcoin futures markets dominate the dynamic price discovery process based upon time-varying information share measures. Overall, price discovery seems to occur in the Bitcoin futures markets rather than the underlying spot market based upon a time-varying perspective."

<sup>24</sup> The Exchange believes that bitcoin is resistant to price manipulation and that "other means to prevent fraudulent and manipulative acts and practices" exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of bitcoin trading render it difficult and prohibitively costly to manipulate the price of bitcoin. The fragmentation across bitcoin platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of bitcoin prices through continuous trading activity challenging. To the extent that there are bitcoin exchanges engaged in or allowing wash trading or other activity intended to manipulate the price of bitcoin on other markets, such pricing does not normally impact prices on other exchange because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the bitcoin markets and the presence of arbitrageurs in those markets means that the manipulation of the price of bitcoin price on any single venue would require manipulation of the global bitcoin price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular bitcoin exchange or OTC platform. As a



(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 and that this filing sufficiently demonstrates that the Bitcoin Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

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

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place<sup>25</sup> with a regulated market of significant size. Both the Exchange and CME are members of ISG.<sup>26</sup> The only remaining issue to be addressed is whether the Bitcoin Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a

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result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

<sup>25</sup> As previously articulated by the Commission, “The standard requires such surveillance-sharing agreements since “they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.” The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.” The Commission has historically held that joint membership in the Intermarket Surveillance Group (“ISG”) constitutes such a surveillance sharing agreement. See Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR-NYSEArca-2019-39) (the “Wilshire Phoenix Disapproval”).

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

reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.<sup>27</sup>

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.<sup>28</sup>

*(A) Reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP*

Bitcoin Futures represent a growing influence on pricing in the spot bitcoin market as has been laid out above and in other proposals to list and trade Spot Bitcoin ETPs. Pricing in Bitcoin Futures is based on pricing from spot bitcoin markets. As noted above, the statement from the Teucrium Approval that “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...indirectly by trading outside of the CME bitcoin futures market,” makes clear that the Commission believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of Bitcoin Futures. While the Commission makes clear in the Teucrium Approval that the analysis only applies to the Bitcoin Futures market as it relates to an ETP that invests in

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<sup>27</sup> See Wilshire Phoenix Disapproval.

<sup>28</sup> See Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a ‘cannot be manipulated’ standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.” Id. at 37582.

Bitcoin Futures as its only non-cash or cash equivalent holding, if CME's surveillance is sufficient to mitigate concerns related to trading in Bitcoin Futures for which the pricing is based directly on pricing from spot bitcoin markets, it's not clear how such a conclusion could apply only to ETPs based on Bitcoin Futures and not extend to Spot Bitcoin ETPs.

Additionally, a Bitcoin Futures ETF is actually potentially more susceptible to manipulation than a Spot Bitcoin ETP where the underlying trust offers only in-kind creation and redemption. Specifically, the pricing of Bitcoin Futures is based on prices from spot bitcoin markets, while shares of a Spot Bitcoin ETP would represent an interest in bitcoin directly and authorized participants for a Spot Bitcoin ETP would be able to source bitcoin from any exchange and create or redeem with the applicable trust regardless of the price of the underlying index. Potential manipulation of a Bitcoin Futures ETF would require manipulation on the spot markets on which the pricing for Bitcoin Futures are based while the in-kind creation and redemption process and fungibility of bitcoin means that a would be manipulator of a Spot Bitcoin ETP would need to manipulate the price across all bitcoin markets or risk simply providing arbitrage opportunities for authorized participants. Further to this point, this arbitrage opportunity also acts to reduce any incentives to manipulate the price of a Spot Bitcoin ETP because the underlying trust will create and redeem shares at set rates of bitcoin per share without regard to the price that the ETP is trading at in the secondary market or the price of the underlying index. As such, the Exchange believes that part (a) of the significant market test outlined above is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the Shares.

*(B) Predominant Influence on Prices in Spot and Bitcoin Futures*

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the Bitcoin Futures market or spot market for a number of

reasons, including the in-kind creation and redemption process, the spot market arbitrage opportunities that such in-kind creation and redemption process creates, the significant volume in the Bitcoin Futures market, the size of bitcoin's market cap, and the significant liquidity available in the spot market. In addition to the Bitcoin Futures market data points cited above, the spot market for bitcoin is also very liquid. According to data from Skew, the cost to buy or sell \$5 million worth of bitcoin averages roughly 48 basis points with a market impact of \$139.08.<sup>29</sup> Stated another way, a market participant could enter a market buy or sell order for \$5 million of bitcoin and only move the market 0.48%. More strategic purchases or sales (such as using limit orders and executing through OTC bitcoin trade desks) would likely have less obvious impact on the market – which is consistent with MicroStrategy, Tesla, and Square being able to collectively purchase billions of dollars in bitcoin.

As such, the combination of the in-kind creation and redemption process, the 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 Bitcoin Futures markets, satisfying part (b) of the test outlined above.

*(c) Other Means to Prevent Fraudulent and Manipulative Acts and Practices*  
SSA with Bitcoin Spot Market

The Exchange is also proposing to take additional steps to those described above to supplement its ability to obtain information that would be helpful in detecting, investigating, and deterring fraud and market manipulation in the Commodity-Based Trust Shares.

On June 30, 2023, the Exchange executed a term sheet with Coinbase, Inc. (“Coinbase”)

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<sup>29</sup> These statistics are based on samples of bitcoin liquidity in USD (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase, FTX and Kraken during the one year period ending May 2022.

to enter into a surveillance-sharing agreement (“Spot BTC SSA”). Based on this agreement, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares. Trading of Bitcoin on Coinbase represents a significant portion of US-based Bitcoin trading. According to the Sponsor, the Exchange aims to enter into a surveillance-sharing agreement with Coinbase, the operator of the largest United States-based spot trading platform for Bitcoin representing a majority of global spot BTC trading paired with USD. The surveillance-sharing agreement would give the Exchange supplemental access to data regarding spot Bitcoin trades occurring on Coinbase if it is determined to be a necessary as part of its surveillance program for the Commodity-Based Trust Shares. Trading on Coinbase consistently accounts for over 50% of market share of BTC-USD spot trading volume.

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

As noted above, the Commission also permits a listing exchange to demonstrate that

“other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present. Consistent with prior points above, offering only in-kind creation and redemption will provide unique protections against potential attempts to manipulate the Shares. While the Sponsor believes that the Benchmark which it uses to value the Trust’s bitcoin is itself resistant to manipulation based on the methodology further described below, the fact that creations and redemptions are only available in-kind makes the manipulability of the Benchmark significantly less important. Specifically, because the Trust will not accept cash to buy bitcoin in order to create new shares or, barring a forced redemption of the Trust or under other extraordinary circumstances, be forced to sell bitcoin to pay cash for redeemed shares, the price that the Sponsor uses to value the Trust’s bitcoin is not particularly important.<sup>30</sup> When authorized participants are creating with the Trust, they need to deliver a certain number of bitcoin per share (regardless of the valuation used) and when they’re redeeming, they can similarly expect to receive a certain number of bitcoin per share. As such, even if the price used to value the Trust’s bitcoin is manipulated (which the Sponsor believes that its methodology is resistant to), the ratio of bitcoin per Share does not change and the Trust will either accept (for creations) or distribute (for redemptions) the same number of bitcoin regardless of the value. This not only mitigates the risk associated with potential manipulation, but also discourages and disincentivizes manipulation of the Benchmark because there is little financial incentive to do so.

#### Availability of Information

The Trust’s website (<https://valkyrieinvest.com/>) will include quantitative information on a per Share basis updated on a daily basis, including (i) the current NAV per Share daily and the

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<sup>30</sup> While the Benchmark will not be particularly important for the creation and redemption process, it will be used for calculating fees.

prior business day's NAV and the reported closing price; (ii) the mid-point of the bid-ask price<sup>31</sup> 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 (iii) 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 each of the four previous calendar quarters (or for the life of the Trust, if shorter). In addition, on each business day the Trust's website will provide pricing information for the Shares. Also, an estimated value that reflects an estimated intraday value of the Trust's portfolio (the "Intraday Indicative Value"), will be disseminated.

The Trust's website will provide an IIV per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Market Session (9:30 a.m. to 4:00 p.m. (Eastern time)).<sup>32</sup> The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during the Exchange's Regular Market Session to reflect changes in the value of the Trust's NAV during the trading day.

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

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

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<sup>31</sup> The bid-ask price of the Trust is determined using the highest bid and lowest offer on the Consolidated Tape as of the time of calculation of the closing day NAV.

<sup>32</sup> The IIV on a per Share basis disseminated during the Regular Market Session should not be viewed as a real-time update of the NAV, which is calculated once a day.

Tape Association (“CTA”).

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 will be calculated daily and will be made available to all market participants at the same time. Upon termination of the Trust, the Shares will be removed from listing. The Trustee, Delaware Trust Company, is a trust company having substantial capital and surplus and the experience and facilities for handling corporate trust business, as required under Nasdaq Rule 5711(d)(vi)(D) and no change will be made to the trustee without prior notice to and approval of the Exchange.

As required in Nasdaq Rule 5711(d)(vii), 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.

#### 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. (Eastern time). 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 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 bitcoin 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 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 the 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 bitcoin 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 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.

### Surveillance

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

On June 30, 2023, the Exchange executed a term sheet with Coinbase to enter into a Spot BTC SSA. Based on this agreement, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares. Trading of Bitcoin on Coinbase represents a significant portion of US-based Bitcoin trading. According to the Sponsor, the Exchange aims to enter into a surveillance-sharing agreement with Coinbase, the operator of the largest United States-based spot trading platform for Bitcoin representing a majority of global spot BTC trading paired with USD. The surveillance-sharing agreement would give the Exchange supplemental access to data regarding spot Bitcoin trades occurring on Coinbase if it is determined to be a necessary as part

of its surveillance program for the Commodity-Based Trust Shares. Trading on Coinbase consistently accounts for over 50% of market share of BTC-USD spot trading volume.

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

#### Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (1) the procedures for purchases and redemptions of Shares in Creation Units (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 IIV is disseminated; (4) 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; (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.

Additionally, the Information Circular will reference that the Trust is subject to various fees and expenses described in the Draft 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.

(b) Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act<sup>33</sup> in general and Section 6(b)(5) of the Act<sup>34</sup> in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Commission has approved numerous series of Trust Issued Receipts,<sup>35</sup> including Commodity-Based Trust Shares,<sup>36</sup> to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices; and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The

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<sup>33</sup> 15 U.S.C. 78f.

<sup>34</sup> 15 U.S.C. 78f(b)(5).

<sup>35</sup> See Exchange Rule 5720.

<sup>36</sup> Commodity-Based Trust Shares, as described in Exchange Rule 5711(d), are a type of Trust Issued Receipt.

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 standard that has previously been articulated by the Commission applicable to Commodity-Based Trust Shares has been met as outlined below.

*Designed to Prevent Fraudulent and Manipulative Acts and Practices*

In order for a proposal to list and trade a series of Commodity-Based Trust Shares to be deemed consistent with the Act, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place with a regulated market of significant size. Both the Exchange and CME are members of ISG.<sup>37</sup> As such, the only remaining issue to be addressed is whether the Bitcoin Futures market constitutes a market of significant size, which the Exchange believes that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.<sup>38</sup>

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.<sup>39</sup>

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<sup>37</sup> For a list of the current members and affiliate members of ISG, [see https://www.isgportal.com/](https://www.isgportal.com/).

<sup>38</sup> [See](#) Wilshire Phoenix Disapproval.

<sup>39</sup> [See](#) Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a “cannot be manipulated” standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing

- (a) *Reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP*

Bitcoin Futures represent a growing influence on pricing in the spot bitcoin market as has been laid out above and in other proposals to list and trade Spot Bitcoin ETPs. Pricing in Bitcoin Futures is based on pricing from spot bitcoin markets. As noted above, the statement from the Teucrium Approval that “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...indirectly by trading outside of the CME bitcoin futures market,” makes clear that the Commission believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of Bitcoin Futures. While the Commission makes clear in the Teucrium Approval that the analysis only applies to the Bitcoin Futures market as it relates to an ETP that invests in Bitcoin Futures as its only non-cash or cash equivalent holding, if CME’s surveillance is sufficient to mitigate concerns related to trading in Bitcoin Futures for which the pricing is based directly on pricing from spot bitcoin markets, it’s not clear how such a conclusion could apply only to ETPs based on Bitcoin Futures and not extend to Spot Bitcoin ETPs.

Additionally, a Bitcoin Futures ETF is actually potentially more susceptible to manipulation than a Spot Bitcoin ETP where the underlying trust offers only in-kind creation and redemption. Specifically, the pricing of Bitcoin Futures is based on prices from spot bitcoin markets, while shares of a Spot Bitcoin ETP would represent an interest in bitcoin directly and authorized participants for a Spot Bitcoin ETP would be able to source bitcoin from any exchange and create or redeem with the applicable trust regardless of the price of the underlying

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exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met. *Id.* at 37582.

index. Potential manipulation of a Bitcoin Futures ETF would require manipulation on the spot markets on which the pricing for Bitcoin Futures are based while the in-kind creation and redemption process and fungibility of bitcoin means that a would be manipulator of a Spot Bitcoin ETP would need to manipulate the price across all bitcoin markets or risk simply providing arbitrage opportunities for authorized participants. Further to this point, this arbitrage opportunity also acts to reduce any incentives to manipulate the price of a Spot Bitcoin ETP because the underlying trust will create and redeem shares at set rates of bitcoin per share without regard to the price that the ETP is trading at in the secondary market or the price of the underlying index. As such, the Exchange believes that part (a) of the significant market test outlined above is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the Shares.

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

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the Bitcoin Futures market or spot market for a number of reasons, including the in-kind creation and redemption process, the spot market arbitrage opportunities that such in-kind creation and redemption process creates, the significant volume in the Bitcoin Futures market, the size of bitcoin's market cap, and the significant liquidity available in the spot market. In addition to the Bitcoin Futures market data points cited above, the spot market for bitcoin is also very liquid. According to data from Skew, the cost to buy or sell \$5 million worth of bitcoin averages roughly 48 basis points with a market impact of \$139.08.<sup>40</sup> Stated another way, a market participant could enter a market buy or sell order for \$5 million of bitcoin and only move the market 0.48%. More strategic purchases or sales (such

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<sup>40</sup> These statistics are based on samples of bitcoin liquidity in USD (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase, FTX and Kraken during the one year period ending May 2022.

as using limit orders and executing through OTC bitcoin trade desks) would likely have less obvious impact on the market – which is consistent with MicroStrategy, Tesla, and Square being able to collectively purchase billions of dollars in bitcoin.

As such, the combination of the in-kind creation and redemption process, the 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 Bitcoin Futures markets, satisfying part (b) of the test outlined above.

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

SSA with Bitcoin Spot Market

The Exchange is also proposing to take additional steps to those described above to supplement its ability to obtain information that would be helpful in detecting, investigating, and deterring fraud and market manipulation in the Commodity-Based Trust Shares.

On June 30, 2023, the Exchange executed a term sheet with Coinbase to enter into a Spot BTC SSA. Based on this agreement, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares. Trading of Bitcoin on Coinbase represents a significant portion of US-based Bitcoin trading. According to the Sponsor, the Exchange aims to enter into a surveillance-sharing agreement with Coinbase, the operator of the largest United States-based spot trading platform for Bitcoin representing a majority of global spot BTC trading paired with USD. The surveillance-sharing agreement would give the Exchange supplemental access to data regarding spot Bitcoin trades occurring on Coinbase if it is determined to be a necessary as part



of its surveillance program for the Commodity-Based Trust Shares. Trading on Coinbase consistently accounts for over 50% of market share of BTC-USD spot trading volume.

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

As noted above, the Commission also permits a listing exchange to demonstrate that "other means to prevent fraudulent and manipulative acts and practices" are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present. Consistent with prior points above, offering only in-kind creation and redemption will provide unique protections against potential attempts to manipulate the Shares. While the Sponsor believes that the Benchmark which it uses to value the Trust's bitcoin is itself resistant to manipulation based on the methodology further described below, the fact that creations and redemptions are only available in-kind makes the manipulability of the Benchmark significantly less important. Specifically, because the Trust

will not accept cash to buy bitcoin in order to create new shares or, barring a forced redemption of the Trust or under other extraordinary circumstances, be forced to sell bitcoin to pay cash for redeemed shares, the price that the Sponsor uses to value the Trust's bitcoin is not particularly important.<sup>41</sup> When authorized participants are creating with the Trust, they need to deliver a certain number of bitcoin per share (regardless of the valuation used) and when they're redeeming, they can similarly expect to receive a certain number of bitcoin per share. As such, even if the price used to value the Trust's bitcoin is manipulated (which the Sponsor believes that its methodology is resistant to), the ratio of bitcoin per Share does not change and the Trust will either accept (for creations) or distribute (for redemptions) the same number of bitcoin regardless of the value. This not only mitigates the risk associated with potential manipulation, but also discourages and disincentivizes manipulation of the Benchmark because there is little financial incentive to do so.

The Exchange also believes that reviewing this proposal through the lens of the Bitcoin Futures Approvals would also lead the Commission to approving this proposal. Previous disapproval orders have made clear that a market that constitutes a regulated market of significant size is generally a futures and/or options market based on the underlying reference asset rather than the spot commodity markets, which are often unregulated.<sup>42</sup> The Exchange

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<sup>41</sup> While the Benchmark will not be particularly important for the creation and redemption process, it will be used for calculating fees.

<sup>42</sup> See Winklevoss Order at 37593, specifically footnote 202, which includes the language from numerous approval orders for which the underlying futures markets formed the basis for approving series of ETPs that hold physical metals, including gold, silver, palladium, platinum, and precious metals more broadly; and 37600, specifically where the Commission provides that "when the spot market is unregulated – the requirement of preventing fraudulent and manipulative acts may possibly be satisfied by showing that the ETP listing market has entered into a surveillance-sharing agreement with a regulated market of significant size in derivatives related to the underlying asset." As noted above, the Exchange believes that these citations are particularly helpful in making clear that the spot market for a spot commodity ETP need not be "regulated" in order for a spot commodity ETP to be approved by the Commission, and in fact that it's been the common historical practice of the Commission to rely on such derivatives markets as the regulated market of significant size because such spot commodities markets are largely unregulated.

believes that the following excerpt from the Teucrium Approval is particularly informative:

The CME “comprehensively surveils futures market conditions and price movements on a real-time and ongoing basis in order to detect and prevent price distortions, including price distortions caused by manipulative efforts.” Thus, the CME’s surveillance can reasonably be relied upon to capture the effects on the CME 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. As such, when the CME shares its surveillance information with Arca, the information would assist in detecting and deterring fraudulent or manipulative misconduct related to the non-cash assets held by the proposed ETP.<sup>43</sup>

Bitcoin Futures pricing is based on pricing from spot bitcoin markets. The statement from the Teucrium Approval that “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...indirectly by trading outside of the CME bitcoin futures market,” makes clear that the Commission believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of Bitcoin Futures. If CME is able to detect such attempts at manipulation in the complex and interconnected spot bitcoin market, how would such an ability to detect attempted manipulation and the utility in sharing that information with the listing exchange apply only to Bitcoin Futures ETFs and not Spot Bitcoin ETPs? Stated a different way, given that there is significant trading volume on numerous bitcoin exchanges that are not part of the CME CF Bitcoin Reference Rate and that arbitrage opportunities across bitcoin exchanges means that such trading volume will influence spot bitcoin prices across the market and, despite this, the Commission still believes that CME can detect attempted manipulation of the Bitcoin Futures through “trading outside of the CME bitcoin futures market,” it is clear that such ability would apply equally to both Bitcoin Futures ETFs and Spot Bitcoin ETPs To take it a step further, such an ability would also seem to be a strong indication that the CME Bitcoin Futures market

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<sup>43</sup> See Teucrium Approval at 21679.

represents a regulated market of significant size. To be clear, the Exchange agrees with the Commission on this point (and the implications of their conclusions) and notes that the pricing mechanism applicable to the Shares is similar to the CME CF Bitcoin Reference Rate, as further discussed below.

The Exchange also notes that a Bitcoin Futures ETF may also be more susceptible to potential manipulation than a Spot Bitcoin ETP that offers only in-kind creation and redemption because Bitcoin Futures pricing (and thus the value of the underlying holdings of a Bitcoin Futures ETF) is based on a single price derived from spot bitcoin pricing, while shares of a Spot Bitcoin ETP would represent interest in bitcoin directly and authorized participants for a Spot Bitcoin ETP (as proposed herein) would be able to source bitcoin from any exchange and create or redeem with the applicable trust regardless of the price of the underlying index. As such, the Exchange believes that, in addition to the CME Bitcoin Futures market representing a regulated market of significant size as it relates to the spot bitcoin market, in-kind Spot Bitcoin ETPs are likely less susceptible to manipulation than Bitcoin Futures ETFs because of the underlying creation and redemption arbitrage mechanism that will operate in the same manner as it does for all other ETFs.

In addition to potentially being more susceptible to manipulation than a Spot Bitcoin ETP, the structure of Bitcoin Futures ETFs provides negative outcomes for buy and hold investors as compared to a Spot Bitcoin ETP.<sup>44</sup> Specifically, the cost of rolling Bitcoin Futures contracts will cause the Bitcoin Futures ETFs to lag the performance of bitcoin itself and, at over a billion dollars in assets under management, would cost U.S. investors significant amounts of

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<sup>44</sup> See e.g., “Bitcoin ETF’s Success Could Come at Fundholders’ Expense,” Wall Street Journal (October 24, 2021), available at: <https://www.wsj.com/articles/bitcoin-etfs-success-could-come-at-fundholders-expense-11635080580>; “Physical Bitcoin ETF Prospects Accelerate,” ETF.com (October 25, 2021), available at: [https://www.etf.com/sections/blog/physical-bitcoin-etf-prospects-shine?nopaging=1&cf\\_chl\\_jschl\\_tk=\\_pmd JsK.fjXz9eAQW9zol0qpzhXDrrl pIVdoCloLXbLj144-1635476946-0-gqNtZGzNApCjcnBszQql](https://www.etf.com/sections/blog/physical-bitcoin-etf-prospects-shine?nopaging=1&cf_chl_jschl_tk=_pmd JsK.fjXz9eAQW9zol0qpzhXDrrl pIVdoCloLXbLj144-1635476946-0-gqNtZGzNApCjcnBszQql).

money on an annual basis compared to Spot Bitcoin ETPs. Such rolling costs would not be required for Spot Bitcoin ETPs that hold bitcoin. Further, Bitcoin Futures ETFs could potentially hit CME position limits, which would force a Bitcoin Futures ETF to invest in non-futures assets for bitcoin exposure and cause potential investor confusion and lack of certainty about what such Bitcoin Futures ETFs are actually holding to try to get exposure to bitcoin, not to mention completely changing the risk profile associated with such an ETF. While Bitcoin Futures ETFs represent a useful trading tool, they are clearly a sub-optimal structure for U.S. investors that are looking for long-term exposure to bitcoin that will, based on the calculations above, unnecessarily cost U.S. investors significant amounts of money every year compared to Spot Bitcoin ETPs and the Exchange believes that any proposal to list and trade a Spot Bitcoin ETP should be reviewed by the Commission with this important investor protection context in mind.

Based on the foregoing, the Exchange and Sponsor believe that any objective review of the proposals to list Spot Bitcoin ETPs compared to the Bitcoin Futures ETFs and the Bitcoin Futures Approvals would lead to the conclusion that Spot Bitcoin ETPs should be available to U.S. investors and, as such, this proposal and other comparable proposals to list and trade Spot Bitcoin ETPs should be approved by the Commission. Stated simply, U.S. investors will continue to lose significant amounts of money from holding Bitcoin Futures ETFs as compared to Spot Bitcoin ETPs, losses which could be prevented by the Commission approving Spot Bitcoin ETPs. Additionally, any concerns related to preventing fraudulent and manipulative acts and practices related to Spot Bitcoin ETPs would apply equally to the spot markets underlying the futures contracts held by a Bitcoin Futures ETF. While the 1940 Act does offer certain investor protections, those protections do not relate to mitigating potential manipulation of the holdings of an ETF in a way that warrants distinction between Bitcoin Futures ETFs and Spot

Bitcoin ETPs. To be clear, both the Exchange and Sponsor believe that the Bitcoin Futures market is a regulated market of significant size and that such manipulation concerns are mitigated as described throughout this proposal. After issuing the Bitcoin Futures Approvals which conclude the CME Bitcoin Futures market is a regulated market of significant size as it relates to Bitcoin Futures, the only consistent outcome would be approving Spot Bitcoin ETPs on the basis that the Bitcoin Futures market is also a regulated market of significant size as it relates to the bitcoin spot market. Including in the analysis the significant and preventable losses to U.S. investors that comes with Bitcoin Futures ETFs, disapproving Spot Bitcoin ETPs seems even more arbitrary and capricious. Given the current landscape, approving this proposal (and others like it) and allowing Spot Bitcoin ETPs to be listed and traded alongside Bitcoin Futures ETFs would establish a consistent regulatory approach, provide U.S. investors with choice in product structures for bitcoin exposure, and offer flexibility in the means of gaining exposure to bitcoin through transparent, regulated, U.S. exchange-listed vehicles.

#### Spot and Proxy Exposure to Bitcoin

Exposure to bitcoin through an ETP also presents certain advantages for retail investors compared to buying spot bitcoin directly. The most notable advantage from the Sponsor's perspective is the elimination of the need for an individual retail investor to either manage their own private keys or to hold bitcoin through a cryptocurrency exchange that lacks sufficient protections. Typically, retail exchanges hold most, if not all, retail investors' bitcoin in "hot" (Internet-connected) storage and do not make any commitments to indemnify retail investors or to observe any particular cybersecurity standard. Meanwhile, a retail investor holding spot bitcoin directly in a self-hosted wallet may suffer from inexperience in private key management (e.g., insufficient password protection, lost key, etc.), which could cause them to lose some or all of their bitcoin holdings. Thus, with respect to custody of the Trust's bitcoin assets, the Trust

presents advantages from an investment protection standpoint for retail investors compared to owning spot bitcoin directly.

Finally, a number of operating companies largely engaged in unrelated businesses – such as Tesla (a car manufacturer) and MicroStrategy (an enterprise software company) – have announced significant investments in bitcoin. Without access to bitcoin exchange-traded products, retail investors seeking investment exposure to bitcoin may end up purchasing shares in these companies in order to gain the exposure to bitcoin that they seek.<sup>45</sup> In fact, mainstream financial news networks have written a number of articles providing investors with guidance for obtaining bitcoin exposure through publicly traded companies (such as MicroStrategy, Tesla, and bitcoin mining companies, among others) instead of dealing with the complications associated with buying spot bitcoin in the absence of a bitcoin ETP.<sup>46</sup> Such operating companies, however, are imperfect bitcoin proxies and provide investors with partial bitcoin exposure paired with a host of additional risks associated with whichever operating company they decide to purchase. Additionally, the disclosures provided by the aforementioned operating companies with respect to risks relating to their bitcoin holdings are generally substantially smaller than the registration statement of a bitcoin ETP, including the Registration Statement, typically amounting to a few sentences of narrative description and a handful of risk factors.<sup>47</sup> In other words, investors

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<sup>45</sup> In August 2017, the Commission’s Office of Investor Education and Advocacy warned investors about situations where companies were publicly announcing events relating to digital coins or tokens in an effort to affect the price of the company’s publicly traded common stock. See [https://www.sec.gov/oiea/investor-alerts-and-bulletins/ia\\_icorelatedclaims](https://www.sec.gov/oiea/investor-alerts-and-bulletins/ia_icorelatedclaims).

<sup>46</sup> See e.g., “7 public companies with exposure to bitcoin” (February 8, 2021) available at: <https://finance.yahoo.com/news/7-public-companies-with-exposure-to-bitcoin-154201525.html>; and “Want to get in the crypto trade without holding bitcoin yourself? Here are some investing ideas” (February 19, 2021) available at: <https://www.cnbc.com/2021/02/19/ways-to-invest-in-bitcoin-without-holding-the-cryptocurrency-yourself.html>.

<sup>47</sup> See, e.g., Tesla 10-K for the year ended December 31, 2020, which mentions bitcoin just nine times: [https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000156459021004599/tsla-10k\\_20201231.htm](https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000156459021004599/tsla-10k_20201231.htm).

seeking bitcoin exposure through publicly traded companies are gaining only partial exposure to bitcoin and are not fully benefitting from the risk disclosures and associated investor protections that come from the securities registration process.

#### Commodity-Based Trust Shares

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed on the Exchange pursuant to the initial and continued listing criteria in Exchange Rule 5711(d). The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 5800 and following. The Exchange may obtain information regarding trading in the Shares and listed bitcoin 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.

#### 4. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change, rather will facilitate the listing and trading of



additional actively-managed exchange-traded products that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

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

The Exchange has neither solicited nor received written comments on the proposed rule change.

6. Extension of Time Period for Commission Action

Not applicable.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rule of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

1. Notice of proposed rule change for publication in the Federal Register.

**EXHIBIT 1**

SECURITIES AND EXCHANGE COMMISSION  
(Release No. \_\_\_\_\_ ; File No. SR-NASDAQ-2023-019)

July \_\_, 2023

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to List and Trade Shares of Valkyrie Bitcoin Fund

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 July 3, 2023, 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 Valkyrie Bitcoin Fund (the “Trust”) under Nasdaq Rule 5711(d) (“Commodity-Based Trust Shares”). The shares 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

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

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

the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The Exchange proposes to list and trade Shares of the Trust under Nasdaq Rule 5711(d), which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.<sup>3</sup>

Description of the Trust

The Shares will be issued by the Trust, a Delaware statutory trust. The Trust will operate pursuant to a trust agreement (the “Trust Agreement”) between Valkyrie Digital Assets, LLC (the “Sponsor”) and Delaware Trust Company, as the Trust’s trustee (the “Trustee”). The Shares will be registered with the Commission by means of the Trust’s registrations statement on Form S-1 (the “Registration Statement”).<sup>4</sup> Pursuant to the Trust Agreement, the Sponsor will enter into a custodian agreement (the “Custodian Agreement”) with a qualified custodian (the “Custodian”) to act as custodian for the Trust’s bitcoins. Pursuant to the Custodian Agreement, the Custodian will establish accounts that hold the bitcoins deposited with the Custodian on behalf of the Trust. U.S. Bancorp Fund Services, LLC will act as the transfer agent for the Trust (the “Transfer

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<sup>3</sup> Nasdaq Rule 5711(d)(iv)(A) defines Commodity-Based Trust Shares as “a security (1) that is issued by a trust (“Trust”) that holds a specified commodity deposited with the Trust; (2) that is issued by such Trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity; and (3) that, when aggregated in the same specified minimum number, may be redeemed at a holder’s request by such Trust which will deliver to the redeeming holder the quantity of the underlying commodity.”

<sup>4</sup> See Amendment No. 2 to Registration Statement on Form S-1, dated May 8, 2023 filed with the Commission by the Sponsor on behalf of the Trust (File No. 333-252344). The descriptions of the Trust contained herein are based, in part, on information in the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

Agent”) and as the administrator of the Trust (the “Administrator”) to perform various administrative, accounting and recordkeeping functions on behalf of the Trust.

The investment objective of the Trust is for the Shares to reflect the performance of the value of a bitcoin as represented by the CME CF Bitcoin Reference Rate - New York Variant (the “Index”), less the Trust’s liabilities and expenses. The purpose of the Trust is to provide investors with a cost-effective and convenient way to invest in bitcoin in a manner that is more efficient and convenient than the purchase of a stand-alone bitcoin, while also mitigating some of the risk by reducing the volatility typically associated with the purchase of stand-alone bitcoin and without the uncertain and often complex requirements relating to acquiring and/or holding bitcoin.

The Trust will only hold bitcoin, and will, from time to time, issue Baskets<sup>5</sup> in exchange for deposits of bitcoins and to distribute bitcoins in connection with redemptions of Baskets. The Shares of the Trust represent units of fractional undivided beneficial interest in, and ownership of, the Trust. The bitcoins held by the Custodian on behalf of the Trust will be transferred out of the Bitcoin Account only in the following circumstances: transferred to pay the Sponsor’s Fee, distributed to Authorized Participants or Liquidity Providers, as applicable, in connection with the redemption of Baskets, transferred to be sold on an as-needed basis to pay Additional Trust Expenses, sold on behalf of the Trust in the event the Trust terminates and liquidates its assets or as otherwise required by law or regulation.

#### Custody of the Trust’s Bitcoins

The Trust will engage a Custodian to custody the Trust’s bitcoin. The Trust will

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<sup>5</sup> A Basket equals a block of 50,000 Shares.

select a Custodian that is a qualified custodian under the Investment Advisers Act of 1940. Under the Custodian Agreement, the Custodian will be responsible for the safety and security of the Trust's Bitcoins as well as overseeing the process of deposit, withdrawal, sale and purchase of the Trust's bitcoins. The Custodian will custody the bitcoin in accordance with the terms of the Custodian Agreement.

All bitcoins exist and are stored on the Blockchain, the decentralized transaction ledger of the Bitcoin Network. The Blockchain records most transactions (including mining of new bitcoins) for all bitcoins in existence, and in doing so verifies the location of each bitcoin (or fraction thereof) in a particular digital wallet. The Bitcoin Account will be maintained by the Custodian and cold storage<sup>6</sup> mechanisms will be used for the Vault Account by the Custodian. Each digital wallet of the Trust may be accessed using its corresponding private key. The Custodian's custodial operations will maintain custody of the private keys that have been deposited in cold storage at its various vaulting premises which are located in geographically dispersed locations across the world, including but not limited to the United States, Europe, including Switzerland, and South America. The locations of the vaulting premises may change regularly and are kept confidential by the Custodian for security purposes.

The Custodian is the custodian of the Trust's private keys in accordance with the terms and provisions of the Custodian Agreement and will utilize the certain security procedures such as algorithms, codes, passwords, encryption or telephone call-backs

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<sup>6</sup> The term "cold storage" refers to a safeguarding method by which the private keys corresponding to bitcoins stored on a digital wallet are removed from any computers actively connected to the internet. Cold storage of private keys may involve keeping such wallet on a non-networked computer or electronic device or storing the public key and private keys relating to the digital wallet on a storage device (for example, a USB thumb drive) or printed medium (for example, papyrus or paper) and deleting the digital wallet from all computers.

(together, the “Security Procedures”) in the administration and operation of the Trust and the safekeeping of its bitcoins and private keys. The Custodian will create a Vault Account for the Trust assets in which private keys are placed in cold storage. The Custodian will segregate the private keys stored with it from any other assets it holds or holds for others. Further, multiple distinct private keys must sign any transaction in order to transfer the Trust’s bitcoins from a multi-signature address to any other address on the Bitcoin blockchain. Distinct private keys required for multi-signature address transfers reside in geographically dispersed vault locations, known as “signing vaults.” In addition to multiple signing vaults, the Custodian maintains multiple “back-up vaults” in which backup private keys are stored. In the event that one or more of the “signing vaults” is compromised, the back-up vaults would be activated and used as signing vaults to complete a transaction within 72 hours. As such, if any one signing vault is compromised, it would have no impact on the ability of the Trust to access its bitcoins, other than a possible delay in operations of 72 hours, while one or more of the “backup vaults” is transitioned to a signing vault. These Security Procedures ensure that there is no single point of failure in the protection of the Trust’s assets.

#### Calculation of Net Asset Value

The Trust’s net asset value (“NAV”) is calculated by taking the current market value of its total assets, less any liabilities of the Trust, and dividing that total by the total number of outstanding Shares. The bitcoin held by the Trust will be valued based on the price set by the Index. The Administrator will calculate the NAV of the Trust once each Exchange trading day. The Exchange’s Regular Market Session closes at 4:00 p.m. EST. The NAV for a normal trading day will be released after the end of the Regular

Market Session . However, NAVs are not officially struck until later in the day (often by 5:30 p.m. EST and almost always by 8:00 p.m. EST). The pause between 4:00 p.m. EST and 5:30 p.m. EST provides an opportunity to algorithmically detect, flag, investigate, and correct unusual pricing should it occur. The NAV for the Trust’s Shares will be disseminated daily to all market participants at the same time. The Sponsor anticipates that the Index will be reflective of a reasonable valuation of the average spot price of bitcoin. However, in the event the Index is not available or determined by the Sponsor to not be reliable, the Sponsor would “fair value” the Trust’s bitcoin holdings. The Sponsor does not anticipate that the need to “fair value” bitcoin will be a common occurrence. The Sponsor will publish the NAV and NAV per Share at <https://valkyrieinvest.com/> as soon as practicable after their determination and availability.

#### Intraday Indicative Value

In order to provide updated information relating to the Trust for use by Shareholders and market professionals, the Trust will disseminate an updated intraday indicative value (“IIV”) per Share updated every 15 seconds by one of more major market data vendors during the Exchange’s Regular Market Session .<sup>7</sup> The IIV will be calculated by a third-party financial data provider during the Exchange’s Regular Market Session. The IIV will be calculated by using the prior day’s closing NAV per Share of the Trust as a base and updating that value throughout the trading day to reflect changes in the most recently reported price level of the CME CF Bitcoin Real-Time Index (“BRTI”), as reported by CME Group, Inc., Bloomberg, L.P. or another reporting service. The BRTI is calculated in real time based on the Relevant Order Books of all Constituent

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<sup>7</sup> Several major market data vendors display and/or make widely available IIVs taken from the Consolidated Tape Association (“CTA”) or other data feeds. In addition, the indicative fund value will be available through on-line information services such as Bloomberg and Reuters.

Bitcoin Exchanges. A “Relevant Order Book” is the universe of the currently unmatched limit orders to buy or sell in the BTC/USD pair that is reported and disseminated by CF Benchmarks Ltd., as the BRTI calculation agent.

#### Creation and Redemption of Shares

The Trust will issue Shares on an ongoing basis, but only in one or more Baskets. The creation and redemption of a Basket requires the delivery to the Trust, or the distribution by the Trust, of the number of whole and fractional bitcoins represented by each Basket being created or redeemed, the number of which is determined by dividing the number of bitcoins owned by the Trust at 4:00 p.m., New York time, on the trade date of a creation or redemption order, as adjusted for the number of whole and fractional bitcoins constituting accrued but unpaid fees and expenses of the Trust, by the number of Shares outstanding at such time (the quotient so obtained calculated to one-hundred-millionth of one bitcoin), and multiplying such quotient by 50,000 (the “Basket Bitcoin Amount”). The Basket Bitcoin Amount multiplied by the number of Baskets being created or redeemed is the “Total Basket Bitcoin Amount.”

Authorized Participants are the only persons that may place orders to create or redeem Baskets. Each Authorized Participant must (i) be a registered broker-dealer, (ii) enter into a Participant Agreement with the Sponsor, the Administrator, the Marketing Agent and the Liquidity Providers and (iii) in the case of the creation or redemption of Baskets that do not use the Conversion Procedures, own a bitcoin wallet address that is recognized by the Custodian as belonging to the Authorized Participant (an “Authorized Participant Self-Administered Account”). Authorized Participants may act for their own accounts or as agents for broker-dealers, custodians and other securities market



participants that wish to create or redeem Baskets. Shareholders who are not Authorized Participants will only be able to redeem their Shares through an Authorized Participant.

Although the Trust will create Baskets only upon the receipt of bitcoins, and will redeem Baskets only by distributing bitcoins, an Authorized Participant may deposit cash with the Administrator, which will facilitate the purchase or sale of bitcoins through a Liquidity Provider on behalf of an Authorized Participant (the “Conversion Procedures”). Liquidity Providers must (i) enter into a Participant Agreement with the Sponsor, the Administrator, the Marketing Agent and each Authorized Participant and (ii) own a Liquidity Provider Account.

The Conversion Procedures will be facilitated by a single Liquidity Provider. On an order-by-order basis, the Sponsor will select the Liquidity Provider that it believes will provide the best execution of the Conversion Procedures, and will base its decision on factors such as the Liquidity Provider’s creditworthiness, financial stability, the timing and speed of execution, liquidity and the likelihood of, and capabilities in, execution, clearance and settlement. In the event that an order cannot be filled in its entirety by a single Liquidity Provider, additional Liquidity Provider(s) will be selected by the Sponsor to fill the remaining amount based on the criteria above.

#### Creation Procedures

On any Business Day, an Authorized Participant may order one or more Creation Baskets from the Trust by placing a creation order with the Administrator. Creation orders may be placed either “in-kind” or “in-cash.” Creation orders must be placed no later than 3:59:59 p.m., New York time, for in-kind creations, and 4:59:59 p.m., New York time, for in-cash creations, on each Business Day. Authorized Participants may

only create Baskets and cannot create any Shares in an amount less than a Basket.

*In-Kind Creations*

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

**T**

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- The Authorized Participant places a creation order with the Administrator.
- The Marketing Agent accepts (or rejects) the creation order, which is communicated to the Authorized Participant by the Administrator.
- The Total Basket Bitcoin Amount is determined as soon as practicable after 4:00 p.m., New York time.

**T+1**

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- The Authorized Participant transfers the Total Basket Bitcoin Amount from its Authorized Participant Self-Administered Account to the Custodian.
- Once the Total Basket Bitcoin Amount is received by the Custodian, the Administrator directs the Transfer Agent to credit the Creation Baskets to the Authorized Participant’s DTC account.

*In-Cash Creations*

Upon receiving instruction from the Administrator that a creation order has been accepted by the Marketing Agent, the Authorized Participant will send 110% of the U.S. Dollar value of the Total Basket Bitcoin Amount, as calculated using the most recently published Bitcoin Index Price (the “Cash Collateral Amount”). Once the Cash Collateral Amount is received by the Administrator, the Sponsor will notify the Liquidity Provider of the creation order. The Liquidity Provider will then (i) determine the Cash Exchange Rate, which, in the case of a creation order, is the Index spot price at the time at which the Cash Collateral Amount is received by the Administrator, plus the 1% Liquidity Provider Fee, and (ii) provide a firm quote to the Authorized Participant for the Total

Basket Bitcoin Amount, determined by using the Cash Exchange Rate. If the Liquidity Provider's quote is greater than the Cash Collateral Amount received, the Authorized Participant will be required to pay the difference on the same day. Under the Conversion Procedures, the Authorized Participant does not pay more than the firm quote provided by the Liquidity Provider. The Liquidity Provider bears the risk of any change in the Total Basket Bitcoin Amount and of any change in the price of bitcoin once the Cash Exchange Rate has been determined. Provided that payment for the Total Basket Bitcoin Amount is received by the Administrator, the Liquidity Provider will deliver the bitcoins to the Custodian on the settlement date on behalf of the Authorized Participant. After the Custodian receives the Total Basket Bitcoin Amount, the Administrator will instruct the Transfer Agent to deliver the Creation Baskets to the Authorized Participant. The Administrator will then send the Liquidity Provider the cash equal to the Cash Exchange Rate times the Total Basket Bitcoin Amount, plus the 1% Liquidity Provider Fee. The Administrator will return any remaining amount of the Cash Collateral Amount to the Authorized Participant.

#### Redemption Procedures

The procedures by which an Authorized Participant can redeem one or more Baskets mirror the procedures for the creation of Baskets. On any Business Day, an Authorized Participant may place a redemption order specifying the number of Redemption Baskets to be redeemed. Redemption orders may be placed either "in-kind" or "in-cash." Redemption orders must be placed no later than 3:59:59 p.m., New York time, for in-kind redemptions, and 4:59:59 p.m., New York time, for in-cash redemption, on each Business Day. Authorized Participants may only redeem Baskets and cannot

redeem any Shares in an amount less than a Basket.

*In-Kind Redemptions*

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

**T**

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- The Authorized Participant places a redemption order with the Administrator.
- The Marketing Agent accepts (or rejects) the redemption order.
- The Total Basket Bitcoin Amount is determined as soon as practicable after 4:00 p.m., New York time.

**T+1**

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- The Authorized Participant delivers to the Transfer Agent Redemption Baskets from its DTC account.
- Once the Redemption Baskets are received by the Transfer Agent, the Custodian transfers the Total Basket Bitcoin Amount to the Authorized Participant and the Transfer Agent cancels the Shares.

*In-Cash Redemptions*

To redeem Baskets using the Conversion Procedures, Authorized Participants will send the Administrator a redemption order. The Marketing Agent will accept or reject the redemption order on that same date. A Liquidity Provider will then (i) determine the Cash Exchange Rate, which, in the case of a redemption order, is the Index spot price minus the 1% Liquidity Provider Fee at the time at which the Administrator notifies the Authorized Participant that an order has been accepted and (ii) provide a firm quote to an Authorized Participant for the Total Basket Bitcoin Amount, determined by using the Cash Exchange Rate. Under the Conversion Procedures, the Authorized Participant does

not receive less than the firm quote provided by the Liquidity Provider. The Liquidity Provider bears the risk of any change in the Total Basket Bitcoin Amount and of any change in the price of bitcoin once the Cash Exchange Rate has been determined. The Liquidity Provider will send the Administrator the cash proceeds equal to the Cash Exchange Rate times the Total Basket Bitcoin Amount, minus the 1% Liquidity Provider Fee. Once the Authorized Participant delivers the Redemption Baskets to the Transfer Agent, the Administrator will send the cash proceeds to the Authorized Participant and the Transfer Agent will cancel the Shares. At the instruction of the Administrator, the Custodian will then send the Liquidity Provider the Total Basket Bitcoin Amount.

#### Overview of the Bitcoin Industry and Market<sup>8</sup>

##### *Bitcoin*

Bitcoin is the digital asset that is native to, and created and transmitted through the operations of, the peer-to-peer Bitcoin network, a decentralized network of computers that operates on cryptographic protocols. No single entity owns or operates the Bitcoin network, the infrastructure of which is collectively maintained by a decentralized user base. The Bitcoin network allows people to exchange tokens of value, called bitcoin, which are recorded on a public transaction ledger known as the Blockchain. Bitcoin can be used to pay for goods and services, or it can be converted to fiat currencies, such as the U.S. dollar, at rates determined on bitcoin trading platforms or in individual end-user-to-end-user transactions under a barter system.

The value of bitcoin is determined by the supply of and demand for bitcoin. New

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<sup>8</sup> For the purpose of this section, Bitcoin with an upper case “B” is used to describe the system as a whole that is involved in maintaining the ledger of bitcoin ownership and facilitating the transfer of bitcoin among parties. When referring to the digital asset within the bitcoin network, bitcoin is written with a lower case “b” (except, at the beginning of sentences or paragraph sections).

bitcoins are created and rewarded to the parties providing the Bitcoin network's infrastructure ("miners") in exchange for their expending computational power to verifying transactions and add them to the Blockchain. The Blockchain is effectively a decentralized database that includes all blocks that have been solved by miners and it is updated to include new blocks as they are solved. Each bitcoin transaction is broadcast to the Bitcoin network and, when included in a block, recorded in the Blockchain. As each new block records outstanding bitcoin transactions, and outstanding transactions are settled and validated through such recording, the Blockchain represents a complete, transparent and unbroken history of all transactions of the Bitcoin network.

#### *Bitcoin Network*

Bitcoin was first described in a white paper released in 2008 and published under the pseudonym "Satoshi Nakamoto." The protocol underlying Bitcoin was subsequently released in 2009 as open source software and currently operates on a worldwide network of computers.

The first step in directly using the Bitcoin network for transactions is to download specialized software referred to as a "bitcoin wallet." A user's bitcoin wallet can run on a computer or smartphone, and can be used both to send and to receive bitcoin. Within a bitcoin wallet, a user can generate one or more unique "bitcoin addresses," which are conceptually similar to bank account numbers. After establishing a bitcoin address, a user can send or receive bitcoin from his or her bitcoin address to another user's address. Sending bitcoin from one bitcoin address to another is similar in concept to sending a bank wire from one person's bank account to another person's bank account; provided, however, that such transactions are not managed by an intermediary and erroneous

transactions generally may not be reversed or remedied once sent.

The amount of bitcoin associated with each bitcoin address, as well as each bitcoin transaction to or from such address, is transparently reflected in the Blockchain and can be viewed by websites that operate as “blockchain explorers.” Copies of the Blockchain exist on thousands of computers on the Bitcoin network. A user’s bitcoin wallet will either contain a copy of the blockchain or be able to connect with another computer that holds a copy of the blockchain. The innovative design of the Bitcoin network protocol allows each Bitcoin user to trust that their copy of the Blockchain will generally be updated consistent with each other user’s copy.

#### *Bitcoin Protocol*

The Bitcoin protocol is open source software, meaning any developer can review the underlying code and suggest changes. There is no official company or group that is responsible for making modifications to Bitcoin. There are, however, a number of individual developers that regularly contribute to a specific distribution of Bitcoin software known as the “Bitcoin Core,” which is maintained in an open-source repository on the website Github. There are many other compatible versions of Bitcoin software, but Bitcoin Core provides the de-facto standard for the Bitcoin protocol, also known as the “reference software.” The core developers for Bitcoin Core operate under a volunteer basis and without strict hierarchical administration.

Significant changes to the Bitcoin protocol are typically accomplished through a so-called “Bitcoin Improvement Proposal” or BIP. Such proposals are generally posted on websites, and the proposals explain technical requirements for the protocol change as well as reasons why the change should be accepted. Upon its inclusion in the most recent

version of Bitcoin Core, a new BIP becomes part of the reference software's Bitcoin protocol. Several BIPs have been implemented since 2011 and have provided various new features and scaling improvements.

Because Bitcoin has no central authority, updating the reference software's Bitcoin protocol will not immediately change the Bitcoin network's operations. Instead, the implementation of a change is achieved by users and miners downloading and running updated versions of Bitcoin Core or other Bitcoin software that abides by the new Bitcoin protocol. Users and miners must accept any changes made to the Bitcoin source code by downloading a version of their Bitcoin software that incorporates the proposed modification of the Bitcoin network's source code. A modification of the Bitcoin network's source code is only effective with respect to the Bitcoin users and miners that download it. If an incompatible modification is accepted only by a percentage of users and miners, a division in the Bitcoin network will occur such that one network will run the pre-modification source code and the other network will run the modified source code. Such a division is known as a "fork" in the Bitcoin network.

Such a fork in the Bitcoin network occurred on August 1, 2017, when a group of developers and miners accepted certain changes to the Bitcoin network software intended to increase transaction capacity. Blocks mined on this network now diverge from blocks mined on the Bitcoin network, which has resulted in the creation of a new blockchain whose digital asset is referred to as "bitcoin cash." Bitcoin and bitcoin cash now operate as separate, independent networks, and have distinct related assets (bitcoin and bitcoin cash). Additional forks have followed the Bitcoin Cash fork, including those for Bitcoin Gold and Bitcoin SegWit2X, in the months after the creation of Bitcoin Cash.



### *Bitcoin Transactions*

A bitcoin transaction contains the sender's bitcoin address, the recipient's bitcoin address, the amount of bitcoin to be sent, a transaction fee and the sender's digital signature. Bitcoin transactions are secured by cryptography known as public-private key cryptography, represented by the bitcoin addresses and digital signature in a transaction's data file. Each Bitcoin network address, or wallet, is associated with a unique "public key" and "private key" pair, both of which are lengthy alphanumeric codes, derived together and possessing a unique relationship. The public key is visible to the public and analogous to the Bitcoin network address. The private key is a secret and may be used to digitally sign a transaction in a way that proves the transaction has been signed by the holder of the public-private key pair, without having to reveal the private key.

The Bitcoin network incorporates a system to prevent double-spending of a single bitcoin. To prevent the possibility of double-spending a single bitcoin, each validated transaction is recorded, time stamped and publicly displayed in a "block" in the Blockchain, which is publicly available. Any user may validate, through their Bitcoin wallet or a blockchain explorer, that each transaction in the Bitcoin network was authorized by the holder of the applicable private key, and Bitcoin network mining software consistent with reference software requirements typically validates each such transaction before including it in the Blockchain.

### *Bitcoin Mining – Creation of New Bitcoins*

The process by which bitcoins are created and bitcoin transactions are verified is called mining. To begin mining, a user, or "miner," can download and run a mining client, which, like regular Bitcoin network software, turns the user's computer into a

“node” on the Bitcoin network that validates blocks. Each time transactions are validated and bundled into new blocks added to the Blockchain, the Bitcoin network awards the miner solving such blocks with newly issued bitcoin and any transaction fees paid by bitcoin transaction senders. This reward system is the method by which new bitcoins enter into circulation to the public.

#### *Mathematically Controlled Supply*

The method for creating new bitcoin is mathematically controlled in a manner so that the supply of bitcoin grows at a limited rate pursuant to a pre-set schedule. The number of bitcoin awarded for solving a new block is automatically halved every 210,000 blocks. Thus, the current fixed reward for solving a new block is 6.25 bitcoin per block; the reward decreased from twenty-five (25) bitcoin in July 2016 and 12.5 in May 2020. It is estimated to halve again at the start of 2024. This deliberately controlled rate of bitcoin creation means that the number of bitcoin in existence will never exceed twenty-one (21) million and that bitcoin cannot be devalued through excessive production unless the Bitcoin network’s source code (and the underlying protocol for bitcoin issuance) is altered. As of January 1, 2023, approximately 19,250,000 bitcoin have been mined.

#### *Bitcoin Value*

The value of Bitcoin is determined by the value that various market participants place on Bitcoin through their transactions. The most common means of determining the value of a Bitcoin is by surveying one or more Bitcoin Exchanges where Bitcoin is traded publicly and transparently (e.g., Bitstamp, Coinbase, Kraken, itBit, Gemini and LMAX Digital). Additionally, in parallel to the open bitcoin exchanges, informal “over-the-counter” or “OTC markets” for bitcoin trading also exist as a result of the peer-to-peer

nature of the Bitcoin Network, which allows direct transactions between any seller and buyer.

On each exchange, bitcoin is traded with publicly disclosed valuations for each executed trade, measured by one or more fiat currencies such as the U.S. dollar or Euro. OTC markets do not typically disclose their trade data. Currently, there are many exchanges operating worldwide, and each such exchange represents a substantial percentage of bitcoin buying and selling activity.

### The Index

As described in the Registration Statement, the Fund will use the Index to calculate the Trust's NAV. The Index is not affiliated with the Sponsor and was created and is administered by CF Benchmarks Ltd. (the "Benchmark Administrator"), an independent entity, to facilitate financial products based on bitcoin. The Index is designed based on the IOSCO Principals for Financial Benchmarks and serves as a once-a-day benchmark rate of the U.S. dollar price of bitcoin (USD/BTC), calculated as of 4 p.m. Eastern time. The Index is based on materially the same methodology (except calculation time)<sup>9</sup> as the Benchmark Administrator's CME CF Bitcoin Reference Rate (the "BRR"), which was first introduced on November 14, 2016 and is the rate on which bitcoin futures contracts ("Bitcoin Futures") are cash-settled in U.S. dollars at the CME. The Index aggregates the trade flow of several bitcoin exchanges, during an observation window between 3:00 p.m. and 4:00 p.m. Eastern time into the U.S. dollar price of one bitcoin at 4:00 p.m. Eastern time. The current constituent bitcoin exchanges of the Index are Bitstamp, Coinbase, Gemini, itBit, Kraken and LMAX Digital (the "Constituent

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<sup>9</sup> The Index is calculated as of 4 p.m. Eastern Time, whereas the BRR is calculated as of 4 p.m. London Time.

Bitcoin Exchanges”).

The Index is calculated based on the “Relevant Transactions”<sup>10</sup> of all of its Constituent Bitcoin Exchanges, as follows:

- All Relevant Transactions are added to a joint list, recording the time of execution, trade price and size for each transaction.
- The list is partitioned by timestamp into 12 equally-sized time intervals of 5 (five) minute length.
- For each partition separately, the volume-weighted median trade price is calculated from the trade prices and sizes of all Relevant Transactions, i.e., across all Constituent Bitcoin Exchanges. A volume-weighted median differs from a standard median in that a weighting factor, in this case trade size, is factored into the calculation.
- The Index is then determined by the arithmetic mean of the volume-weighted medians of all partitions.

By employing the foregoing steps, the Index thereby seeks to ensure that transactions in bitcoin conducted at outlying prices do not have an undue effect on the value of a specific partition, large trades or clusters of trades transacted over a short period of time will not have an undue influence on the index level, and the effect of large trades at prices that deviate from the prevailing price are mitigated from having an undue influence on the benchmark level. In addition, the Sponsor notes that an oversight function is implemented by the Benchmark Administrator in seeking to ensure that the Index is administered through codified policies for Index integrity.

The Index provides an accurate reference to the average spot price of Bitcoin and the methodology employed in constructing the Index, specifically its use of medians in filtering out small trades, makes the Index more resistant to manipulation than other measurements that employ different methodologies. In addition, the Index included over

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<sup>10</sup> A “Relevant Transaction” is any cryptocurrency versus U.S. dollar spot trade that occurs during the observation window between 3:00 p.m. and 4:00 p.m. Eastern time on a Constituent Bitcoin Exchange in the BTC/USD pair that is reported and disseminated by a Constituent Bitcoin Exchange through its publicly available API and observed by the Benchmark Administrator, CF Benchmarks Ltd.

\$375 billion in bitcoin trades (approximately 12,500 bitcoins) during the one-year period ended December 31, 2022. Finally, an oversight committee is responsible for regularly reviewing and overseeing the methodology, practice, standards and scope of the Index to ensure that it continues to accurately track the spot prices of Bitcoin.

### Background

The Commission has historically approved or disapproved exchange filings to list and trade series of Trust Issued Receipts, including spot-based Commodity- Based Trust Shares, on the basis of whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size related to the underlying commodity to be held.<sup>11</sup> Prior orders from the Commission have pointed out that in every prior approval order for Commodity-Based Trust Shares, there has been a derivatives market that represents the regulated market of significant size, generally a Commodity Futures Trading Commission regulated futures market.<sup>12</sup> Further to this

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<sup>11</sup> See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018). This proposal was subsequently disapproved by the Commission. See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the “Winklevoss Order”).

<sup>12</sup> See streetTRACKS Gold Shares, Exchange Act Release No. 50603 (Oct. 28, 2004), 69 FR 64614, 64618–19 (Nov. 5, 2004) (SR-NYSE-2004-22) (the “First Gold Approval Order”); iShares COMEX Gold Trust, Exchange Act Release No. 51058 (Jan. 19, 2005), 70 FR 3749, 3751, 3754–55 (Jan. 26, 2005) (SR-Amex-2004-38); iShares Silver Trust, Exchange Act Release No. 53521 (Mar. 20, 2006), 71 FR 14967, 14968, 14973–74 (Mar. 24, 2006) (SR-Amex-2005-072); ETFs Gold Trust, Exchange Act Release No. 59895 (May 8, 2009), 74 FR 22993, 22994–95, 22998, 23000 (May 15, 2009) (SR-NYSEArca-2009-40); ETFs Silver Trust, Exchange Act Release No. 59781 (Apr. 17, 2009), 74 FR 18771, 18772, 18775–77 (Apr. 24, 2009) (SR-NYSEArca-2009-28); ETFs Palladium Trust, Exchange Act Release No. 61220 (Dec. 22, 2009), 74 FR 68895, 68896 (Dec. 29, 2009) (SR-NYSEArca-2009-94) (notice of proposed rule change included NYSE Arca’s representation that “[t]he most significant palladium futures exchanges are the NYMEX and the Tokyo Commodity Exchange,” that “NYMEX is the largest exchange in the world for trading precious metals futures and options,” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which NYMEX is a member, Exchange Act Release No. 60971 (Nov. 9, 2009), 74 FR 59283, 59285–86, 59291 (Nov. 17, 2009)); ETFs Platinum Trust, Exchange Act Release No. 61219 (Dec. 22, 2009), 74 FR 68886, 68887–88 (Dec. 29, 2009) (SR-NYSEArca-2009-95) (notice of proposed rule change included NYSE Arca’s representation that “[t]he most significant platinum futures exchanges are the NYMEX and the Tokyo Commodity Exchange,” that “NYMEX is the largest exchange in the world for trading precious metals futures and options,” and that NYSE Arca “may obtain trading

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information via the Intermarket Surveillance Group,” of which NYMEX is a member, Exchange Act Release No. 60970 (Nov. 9, 2009), 74 FR 59319, 59321, 59327 (Nov. 17, 2009)); Sprott Physical Gold Trust, Exchange Act Release No. 61496 (Feb. 4, 2010), 75 FR 6758, 6760 (Feb. 10, 2010) (SR-NYSEArca-2009-113) (notice of proposed rule change included NYSE Arca’s representation that the COMEX is one of the “major world gold markets,” that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” and that NYMEX, of which COMEX is a division, is a member of the Intermarket Surveillance Group, Exchange Act Release No. 61236 (Dec. 23, 2009), 75 FR 170, 171, 174 (Jan. 4, 2010)); Sprott Physical Silver Trust, Exchange Act Release No. 63043 (Oct. 5, 2010), 75 FR 62615, 62616, 62619, 62621 (Oct. 12, 2010) (SR-NYSEArca-2010-84); ETFs Precious Metals Basket Trust, Exchange Act Release No. 62692 (Aug. 11, 2010), 75 FR 50789, 50790 (Aug. 17, 2010) (SR-NYSEArca-2010-56) (notice of proposed rule change included NYSE Arca’s representation that “the most significant gold, silver, platinum and palladium futures exchanges are the COMEX and the TOCOM” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 62402 (Jun. 29, 2010), 75 FR 39292, 39295, 39298 (July 8, 2010)); ETFs White Metals Basket Trust, Exchange Act Release No. 62875 (Sept. 9, 2010), 75 FR 56156, 56158 (Sept. 15, 2010) (SR-NYSEArca-2010-71) (notice of proposed rule change included NYSE Arca’s representation that “the most significant silver, platinum and palladium futures exchanges are the COMEX and the TOCOM” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 62620 (July 30, 2010), 75 FR 47655, 47657, 47660 (Aug. 6, 2010)); ETFs Asian Gold Trust, Exchange Act Release No. 63464 (Dec. 8, 2010), 75 FR 77926, 77928 (Dec. 14, 2010) (SR-NYSEArca-2010-95) (notice of proposed rule change included NYSE Arca’s representation that “the most significant gold futures exchanges are the COMEX and the Tokyo Commodity Exchange,” that “COMEX is the largest exchange in the world for trading precious metals futures and options,” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 63267 (Nov. 8, 2010), 75 FR 69494, 69496, 69500–01 (Nov. 12, 2010)); Sprott Physical Platinum and Palladium Trust, Exchange Act Release No. 68430 (Dec. 13, 2012), 77 FR 75239, 75240–41 (Dec. 19, 2012) (SR-NYSEArca-2012-111) (notice of proposed rule change included NYSE Arca’s representation that “[f]utures on platinum and palladium are traded on two major exchanges: The New York Mercantile Exchange ... and Tokyo Commodities Exchange” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 68101 (Oct. 24, 2012), 77 FR 65732, 65733, 65739 (Oct. 30, 2012)); APMEX Physical—1 oz. Gold Redeemable Trust, Exchange Act Release No. 66930 (May 7, 2012), 77 FR 27817, 27818 (May 11, 2012) (SR-NYSEArca-2012-18) (notice of proposed rule change included NYSE Arca’s representation that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, and that gold futures are traded on COMEX and the Tokyo Commodity Exchange, with a cross-reference to the proposed rule change to list and trade shares of the ETFs Gold Trust, in which NYSE Arca represented that COMEX is one of the “major world gold markets,” Exchange Act Release No. 66627 (Mar. 20, 2012), 77 FR 17539, 17542–43, 17547 (Mar. 26, 2012)); JPM XF Physical Copper Trust, Exchange Act Release No. 68440 (Dec. 14, 2012), 77 FR 75468, 75469–70, 75472, 75485–86 (Dec. 20, 2012) (SR-NYSEArca-2012-28); iShares Copper Trust, Exchange Act Release No. 68973 (Feb. 22, 2013), 78 FR 13726, 13727, 13729–30, 13739–40 (Feb. 28, 2013) (SR-NYSEArca-2012-66); First Trust Gold Trust, Exchange Act Release No. 70195 (Aug. 14, 2013), 78 FR 51239, 51240 (Aug. 20, 2013) (SR-NYSEArca-2013-61) (notice of proposed rule change included NYSE Arca’s representation that FINRA, on behalf of the exchange, may obtain trading information regarding gold futures and options on gold futures from members of the Intermarket Surveillance Group, including COMEX, or from markets “with which [NYSE Arca] has in place a comprehensive surveillance sharing agreement,” and that gold futures are traded on COMEX and the Tokyo Commodity Exchange, with a cross-reference to the proposed rule change to list and trade shares of the ETFs Gold Trust, in which NYSE Arca represented that COMEX is one of the “major world gold markets,” Exchange Act Release No. 69847 (June 25, 2013), 78 FR 39399, 39400, 39405 (July 1, 2013)); Merk Gold Trust,

point, the Commission’s prior orders have noted that the spot commodities and currency markets for which it has previously approved spot ETPs are generally unregulated and that the Commission relied on the underlying futures market as the regulated market of significant size that formed the basis for approving the series of Currency and Commodity-Based Trust Shares, including gold, silver, platinum, palladium, copper, and other commodities and currencies. The Commission specifically noted in the Winklevoss Order that the First Gold Approval Order “was based on an assumption that the currency market and the spot gold market were largely unregulated.”<sup>13</sup>

As such, the regulated market of significant size test does not require that the spot bitcoin market be regulated in order for the Commission to approve this proposal, and precedent makes clear that an underlying market for a spot commodity or currency being a regulated market would actually be an exception to the norm. These largely unregulated currency and commodity markets do not provide the same protections as the markets that are subject to the Commission’s oversight, but the Commission has consistently looked to surveillance sharing agreements with the underlying futures market in order to determine whether such products were consistent with the Act. With this in mind, the Bitcoin Futures market, as defined below, is the proper market to consider in determining whether there is a related regulated market of significant size.

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Exchange Act Release No. 71378 (Jan. 23, 2014), 79 FR 4786, 4786–87 (Jan. 29, 2014) (SR-NYSEArca-2013-137) (notice of proposed rule change included NYSE Arca’s representation that “COMEX is the largest gold futures and options exchange” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” including with respect to transactions occurring on COMEX pursuant to CME and NYMEX’s membership, or from exchanges “with which [NYSE Arca] has in place a comprehensive surveillance sharing agreement,” Exchange Act Release No. 71038 (Dec. 11, 2013), 78 FR 76367, 76369, 76374 (Dec. 17, 2013)); Long Dollar Gold Trust, Exchange Act Release No. 79518 (Dec. 9, 2016), 81 FR 90876, 90881, 90886, 90888 (Dec. 15, 2016) (SR-NYSEArca-2016-84).

<sup>13</sup> See Winklevoss Order at 37592.

Further to this point, the Exchange notes that the Commission has recently approved proposals related to the listing and trading of funds that would primarily hold Bitcoin Futures that are registered under the Securities Act of 1933 instead of the Investment Company Act of 1940, as amended (the “1940 Act”).<sup>14</sup> In the Teucrium Approval, the Commission found the Bitcoin Futures market to be a regulated market of significant size as it relates to Bitcoin Futures, an odd tautological truth that is also inconsistent with prior disapproval orders for exchange traded products (“ETPs”) that would hold actual bitcoin instead of derivatives contracts (“Spot Bitcoin ETPs”) that use the exact same pricing methodology as the Bitcoin Futures. As further discussed below, both the Exchange and the Sponsor believe that this proposal and the included analysis are sufficient to establish that the Bitcoin Futures market represents a regulated market of significant size as it relates both to the Bitcoin Futures market and to the spot bitcoin market and that this proposal should be approved.

#### Bitcoin Futures ETFs

The Exchange and Sponsor applaud the Commission for allowing the launch of ETFs registered under the 1940 Act and the recent Bitcoin Futures Approvals that provide exposure to bitcoin primarily through Bitcoin Futures (“Bitcoin Futures ETFs”). Allowing such products to list and trade is a productive first step in providing U.S. investors and traders with transparent, exchange-listed tools for expressing a view on bitcoin. The Bitcoin Futures Approvals, however, have created a logical inconsistency in the application of the standard the Commission applies when considering bitcoin ETP proposals.

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<sup>14</sup> See Exchange Act Release No. 94620 (April 6, 2022), 87 FR 21676 (April 12, 2022) (the “Teucrium Approval”) and 94853 (May 5, 2022) (collectively, with the Teucrium Approval, the “Bitcoin Futures Approvals”).



As discussed further below, the standard applicable to bitcoin ETPs is whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size in the underlying asset. Previous disapproval orders have made clear that a market that constitutes a regulated market of significant size is generally a futures and/or options market based on the underlying reference asset rather than the spot commodity markets, which are often unregulated.<sup>15</sup> Leaving aside the analysis of that standard until later in this proposal,<sup>16</sup> the Exchange believes that the following rationale that the Commission applied to a Bitcoin Futures ETF should result in the Commission approving this and other Spot Bitcoin ETP proposals:

The CME “comprehensively surveils futures market conditions and price movements on a real-time and ongoing basis in order to detect and prevent price distortions, including price distortions caused by manipulative efforts.” Thus, the CME’s surveillance can reasonably be relied upon to capture the effects on the CME 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. As such, when the CME shares its surveillance information with Arca, the information would assist in detecting and deterring fraudulent or manipulative misconduct related to the non-cash assets held by the proposed ETP.<sup>17</sup>

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<sup>15</sup> See Winklevoss Order at 37593, specifically footnote 202, which includes the language from numerous approval orders for which the underlying futures markets formed the basis for approving series of ETPs that hold physical metals, including gold, silver, palladium, platinum, and precious metals more broadly; and 37600, specifically where the Commission provides that “when the spot market is unregulated – the requirement of preventing fraudulent and manipulative acts may possibly be satisfied by showing that the ETP listing market has entered into a surveillance-sharing agreement with a regulated market of significant size in derivatives related to the underlying asset.” As noted above, the Exchange believes that these citations are particularly helpful in making clear that the spot market for a spot commodity ETP need not be “regulated” in order for a spot commodity ETP to be approved by the Commission, and in fact that it’s been the common historical practice of the Commission to rely on such derivatives markets as the regulated market of significant size because such spot commodities markets are largely unregulated.

<sup>16</sup> As further outlined below, both the Exchange and the Sponsor believe that the Bitcoin Futures market represents a regulated market of significant size and that this proposal and others like it should be approved on this basis.

<sup>17</sup> See Teucrium Approval at 21679.

Bitcoin Futures pricing is based on pricing from spot bitcoin markets. The statement from the Teucrium Approval that “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...indirectly by trading outside of the CME bitcoin futures market,” makes clear that the Commission believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of Bitcoin Futures. If CME is able to detect such attempts at manipulation in the complex and interconnected spot bitcoin market, how would such an ability to detect attempted manipulation and the utility in sharing that information with the listing exchange apply only to Bitcoin Futures ETFs and not Spot Bitcoin ETPs? Stated a different way, given that there is significant trading volume on numerous bitcoin exchanges that are not part of the CME CF Bitcoin Reference Rate and that arbitrage opportunities across bitcoin exchanges means that such trading volume will influence spot bitcoin prices across the market and, despite this, the Commission still believes that CME can detect attempted manipulation of the Bitcoin Futures through “trading outside of the CME bitcoin futures market,” it is clear that such ability would apply equally to both Bitcoin Futures ETFs and Spot Bitcoin ETPs. To take it a step further, such an ability would also seem to be a strong indication that the CME Bitcoin Futures market represents a regulated market of significant size. To be clear, the Exchange agrees with the Commission on this point (and the implications of their conclusions) and notes that the pricing mechanism applicable to the Shares is similar to the CME CF Bitcoin Reference Rate, as further discussed below.

The Exchange also notes that a Bitcoin Futures ETF may also be more susceptible to potential manipulation than a Spot Bitcoin ETP that offers only in-kind creation and

redemption because Bitcoin Futures pricing (and thus the value of the underlying holdings of a Bitcoin Futures ETF) is based on a single price derived from spot bitcoin pricing, while shares of a Spot Bitcoin ETP would represent interest in bitcoin directly and authorized participants for a Spot Bitcoin ETP (as proposed herein) would be able to source bitcoin from any exchange and create or redeem with the applicable trust regardless of the price of the underlying index. As such, the Exchange believes that, in addition to the CME Bitcoin Futures market representing a regulated market of significant size as it relates to the spot bitcoin market, in-kind Spot Bitcoin ETPs are likely less susceptible to manipulation than Bitcoin Futures ETFs because of the underlying creation and redemption arbitrage mechanism that will operate in the same manner as it does for all other ETFs.

In addition to potentially being more susceptible to manipulation than a Spot Bitcoin ETP, the structure of Bitcoin Futures ETFs provides negative outcomes for buy and hold investors as compared to a Spot Bitcoin ETP.<sup>18</sup> Specifically, the cost of rolling Bitcoin Futures contracts will cause the Bitcoin Futures ETFs to lag the performance of bitcoin itself and, at over a billion dollars in assets under management, would cost U.S. investors significant amounts of money on an annual basis compared to Spot Bitcoin ETPs. Such rolling costs would not be required for Spot Bitcoin ETPs that hold bitcoin. Further, Bitcoin Futures ETFs could potentially hit CME position limits, which would force a Bitcoin Futures ETF to invest in non-futures assets for bitcoin exposure and cause potential investor confusion and lack of certainty about what such Bitcoin Futures ETFs

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<sup>18</sup> See e.g., “Bitcoin ETF’s Success Could Come at Fundholders’ Expense,” Wall Street Journal (October 24, 2021), available at: <https://www.wsj.com/articles/bitcoin-etfs-success-could-come-at-fundholders-expense-11635080580>; “Physical Bitcoin ETF Prospects Accelerate,” ETF.com (October 25, 2021), available at: [https://www.etf.com/sections/blog/physical-bitcoin-etf-prospects-shine?nopaging=1&cf\\_chl\\_jschl\\_tk=\\_pmd\\_JsK.fjXz9eAQW9zol0qpzhXDr\\_rI\\_pIVdoClolXbLjl44-1635476946-0-gqNtZGzNAPCjenBsZQql](https://www.etf.com/sections/blog/physical-bitcoin-etf-prospects-shine?nopaging=1&cf_chl_jschl_tk=_pmd_JsK.fjXz9eAQW9zol0qpzhXDr_rI_pIVdoClolXbLjl44-1635476946-0-gqNtZGzNAPCjenBsZQql).

are actually holding to try to get exposure to bitcoin, not to mention completely changing the risk profile associated with such an ETF. While Bitcoin Futures ETFs represent a useful trading tool, they are clearly a sub-optimal structure for U.S. investors that are looking for long-term exposure to bitcoin that will, based on the calculations above, unnecessarily cost U.S. investors significant amounts of money every year compared to Spot Bitcoin ETPs and the Exchange believes that any proposal to list and trade a Spot Bitcoin ETP should be reviewed by the Commission with this important investor protection context in mind.

Based on the foregoing, the Exchange and Sponsor believe that any objective review of the proposals to list Spot Bitcoin ETPs compared to the Bitcoin Futures ETFs and the Bitcoin Futures Approvals would lead to the conclusion that Spot Bitcoin ETPs should be available to U.S. investors and, as such, this proposal and other comparable proposals to list and trade Spot Bitcoin ETPs should be approved by the Commission. Stated simply, U.S. investors will continue to lose significant amounts of money from holding Bitcoin Futures ETFs as compared to Spot Bitcoin ETPs, losses which could be prevented by the Commission approving Spot Bitcoin ETPs. Additionally, any concerns related to preventing fraudulent and manipulative acts and practices related to Spot Bitcoin ETPs would apply equally to the spot markets underlying the futures contracts held by a Bitcoin Futures ETF. While the 1940 Act does offer certain investor protections, those protections do not relate to mitigating potential manipulation of the holdings of an ETF in a way that warrants distinction between Bitcoin Futures ETFs and Spot Bitcoin ETPs. To be clear, both the Exchange and Sponsor believe that the Bitcoin Futures market is a regulated market of significant size and that such manipulation concerns are mitigated as described throughout this proposal. After issuing the Bitcoin

Futures Approvals which conclude the CME Bitcoin Futures market is a regulated market of significant size as it relates to Bitcoin Futures, the only consistent outcome would be approving Spot Bitcoin ETPs on the basis that the Bitcoin Futures market is also a regulated market of significant size as it relates to the bitcoin spot market. Including in the analysis the significant and preventable losses to U.S. investors that comes with Bitcoin Futures ETFs, disapproving Spot Bitcoin ETPs seems even more arbitrary and capricious. Given the current landscape, approving this proposal (and others like it) and allowing Spot Bitcoin ETPs to be listed and traded alongside Bitcoin Futures ETFs would establish a consistent regulatory approach, provide U.S. investors with choice in product structures for bitcoin exposure, and offer flexibility in the means of gaining exposure to bitcoin through transparent, regulated, U.S. exchange-listed vehicles.

#### Spot and Proxy Exposure to Bitcoin

Exposure to bitcoin through an ETP also presents certain advantages for retail investors compared to buying spot bitcoin directly. The most notable advantage from the Sponsor's perspective is the elimination of the need for an individual retail investor to either manage their own private keys or to hold bitcoin through a cryptocurrency exchange that lacks sufficient protections. Typically, retail exchanges hold most, if not all, retail investors' bitcoin in "hot" (Internet-connected) storage and do not make any commitments to indemnify retail investors or to observe any particular cybersecurity standard. Meanwhile, a retail investor holding spot bitcoin directly in a self-hosted wallet may suffer from inexperience in private key management (e.g., insufficient password protection, lost key, etc.), which could cause them to lose some or all of their bitcoin holdings. Thus, with respect to custody of the Trust's bitcoin assets, the Trust presents advantages from an investment protection standpoint for retail investors compared to

owning spot bitcoin directly.

Finally, a number of operating companies largely engaged in unrelated businesses – such as Tesla (a car manufacturer) and MicroStrategy (an enterprise software company) – have announced significant investments in bitcoin. Without access to bitcoin exchange-traded products, retail investors seeking investment exposure to bitcoin may end up purchasing shares in these companies in order to gain the exposure to bitcoin that they seek.<sup>19</sup> In fact, mainstream financial news networks have written a number of articles providing investors with guidance for obtaining bitcoin exposure through publicly traded companies (such as MicroStrategy, Tesla, and bitcoin mining companies, among others) instead of dealing with the complications associated with buying spot bitcoin in the absence of a bitcoin ETP.<sup>20</sup> Such operating companies, however, are imperfect bitcoin proxies and provide investors with partial bitcoin exposure paired with a host of additional risks associated with whichever operating company they decide to purchase. Additionally, the disclosures provided by the aforementioned operating companies with respect to risks relating to their bitcoin holdings are generally substantially smaller than the registration statement of a bitcoin ETP, including the Registration Statement, typically amounting to a few sentences of narrative description and a handful of risk factors.<sup>21</sup> In other words, investors seeking bitcoin exposure through publicly traded

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<sup>19</sup> In August 2017, the Commission’s Office of Investor Education and Advocacy warned investors about situations where companies were publicly announcing events relating to digital coins or tokens in an effort to affect the price of the company’s publicly traded common stock. See [https://www.sec.gov/oiea/investor-alerts-and-bulletins/ia\\_icorelatedclaims](https://www.sec.gov/oiea/investor-alerts-and-bulletins/ia_icorelatedclaims).

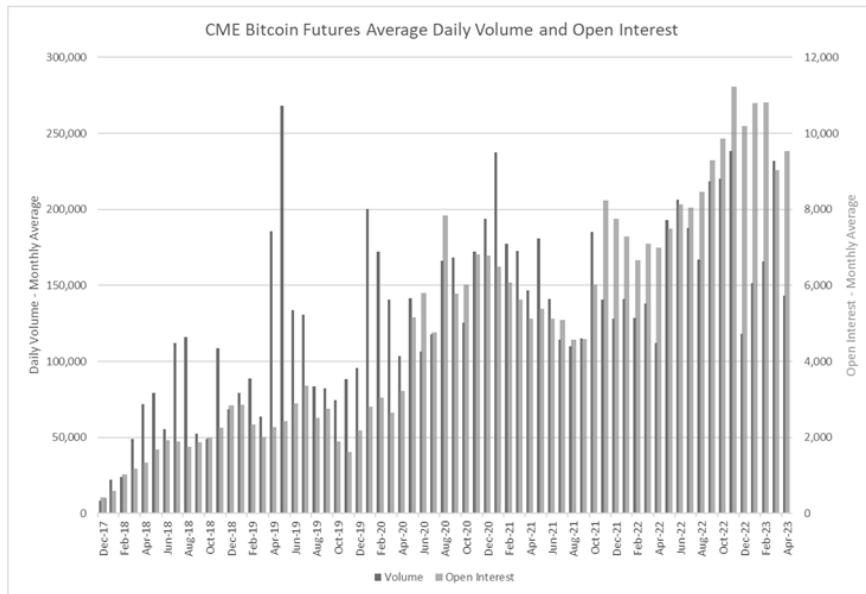
<sup>20</sup> See e.g., “7 public companies with exposure to bitcoin” (February 8, 2021) available at: <https://finance.yahoo.com/news/7-public-companies-with-exposure-to-bitcoin-154201525.html>; and “Want to get in the crypto trade without holding bitcoin yourself? Here are some investing ideas” (February 19, 2021) available at: <https://www.cnbc.com/2021/02/19/ways-to-invest-in-bitcoin-without-holding-the-cryptocurrency-yourself-.html>.

<sup>21</sup> See, e.g., Tesla 10-K for the year ended December 31, 2020, which mentions bitcoin just nine times: [https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000156459021004599/tsla-10k\\_20201231.htm](https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000156459021004599/tsla-10k_20201231.htm).

companies are gaining only partial exposure to bitcoin and are not fully benefitting from the risk disclosures and associated investor protections that come from the securities registration process.

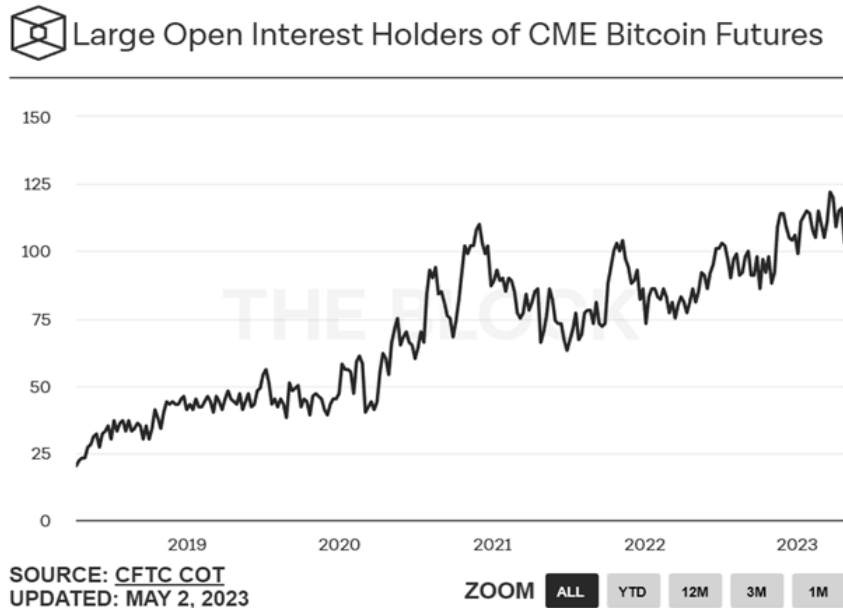
Bitcoin Futures

CME began offering trading in Bitcoin Futures in 2017. Each contract represents five bitcoin and is based on the CME CF Bitcoin Reference Rate.<sup>22</sup> The contracts trade and settle like other cash-settled commodity futures contracts. Nearly every measurable metric related to Bitcoin Futures has generally trended up since launch, although certain notional volume calculations have decreased roughly in line with the decrease in the price of bitcoin. For example, there were 276,542 Bitcoin Futures contracts traded in March 2023 compared to 165,567, 233,345, and 183,131 contracts traded in March 2020, March 2021, and March 2023, respectively.



Source: CME 4/20/23.

22 The CME CF Bitcoin Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto exchanges and trading platforms, including Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.



The number of large open interest holders and *unique accounts trading Bitcoin Futures* have both increased, even in the face of heightened Bitcoin price volatility.

A large open interest holder in Bitcoin Futures is an entity that holds at least 25 contracts, which is the equivalent of 125 bitcoin.

The Sponsor further believes that publicly available research, including research done as part of rule filings proposing to list and trade shares of Spot Bitcoin ETPs, corroborates the overall trend outlined above and supports the thesis that the Bitcoin Futures pricing leads the spot market and, thus, a person attempting to manipulate the Shares would also have to trade on that market to manipulate the ETP. Specifically, the Sponsor believes that such research indicates that bitcoin futures lead the bitcoin spot market in price formation.<sup>23</sup>

<sup>23</sup> See Exchange Act Releases No. 94080 (January 27, 2022), 87 FR 5527 (April 12, 2022) (specifically “Amendment No. 1 to the Proposed Rule Change To List and Trade Shares of the Wise Origin Bitcoin Trust Under BZX Rule 14.11(3)(4), Commodity-Based Trust Shares”); 94982 (May 25, 2022), 87 FR 33250 (June 1, 2022); 94844 (May 4, 2022), 87 FR 28043 (May 10, 2022); and 93445 (October 28, 2021), 86 FR 60695 (November 3, 2021). See also Hu, Y., Hou, Y. and Oxley, L. (2019). “What role do futures markets play in Bitcoin pricing? Causality, cointegration and price discovery from a time-varying perspective” (available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7481826/>). This academic research paper concludes that “There exist no episodes where the Bitcoin spot markets dominates the price discovery processes with regard to Bitcoin futures. This points to a conclusion that the price formation originates solely in the Bitcoin futures market. We can, therefore, conclude that the



### Preventing Fraudulent and Manipulative Practices

In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices;<sup>24</sup> 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 and that this filing sufficiently demonstrates that the Bitcoin Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

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Bitcoin futures markets dominate the dynamic price discovery process based upon time-varying information share measures. Overall, price discovery seems to occur in the Bitcoin futures markets rather than the underlying spot market based upon a time-varying perspective.”

<sup>24</sup> The Exchange believes that bitcoin is resistant to price manipulation and that “other means to prevent fraudulent and manipulative acts and practices” exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of bitcoin trading render it difficult and prohibitively costly to manipulate the price of bitcoin. The fragmentation across bitcoin platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of bitcoin prices through continuous trading activity challenging. To the extent that there are bitcoin exchanges engaged in or allowing wash trading or other activity intended to manipulate the price of bitcoin on other markets, such pricing does not normally impact prices on other exchange because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the bitcoin markets and the presence of arbitrageurs in those markets means that the manipulation of the price of bitcoin price on any single venue would require manipulation of the global bitcoin price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular bitcoin exchange or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

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

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place<sup>25</sup> with a regulated market of significant size. Both the Exchange and CME are members of ISG.<sup>26</sup> The only remaining issue to be addressed is whether the Bitcoin Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.<sup>27</sup>

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically

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<sup>25</sup> As previously articulated by the Commission, “The standard requires such surveillance-sharing agreements since “they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.” The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.” The Commission has historically held that joint membership in the Intermarket Surveillance Group (“ISG”) constitutes such a surveillance sharing agreement. See Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR-NYSEArca-2019-39) (the “Wilshire Phoenix Disapproval”).

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

<sup>27</sup> See Wilshire Phoenix Disapproval.

providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.<sup>28</sup>

*(A) Reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP*

Bitcoin Futures represent a growing influence on pricing in the spot bitcoin market as has been laid out above and in other proposals to list and trade Spot Bitcoin ETPs. Pricing in Bitcoin Futures is based on pricing from spot bitcoin markets. As noted above, the statement from the Teucrium Approval that “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...indirectly by trading outside of the CME bitcoin futures market,” makes clear that the Commission believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of Bitcoin Futures. While the Commission makes clear in the Teucrium Approval that the analysis only applies to the Bitcoin Futures market as it relates to an ETP that invests in Bitcoin Futures as its only non-cash or cash equivalent holding, if CME’s surveillance is sufficient to mitigate concerns related to trading in Bitcoin Futures for which the pricing is based directly on pricing from spot bitcoin markets, it’s not clear how such a conclusion could apply only to ETPs based on Bitcoin Futures and not extend to Spot Bitcoin ETPs.

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<sup>28</sup> See Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a ‘cannot be manipulated’ standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.” *Id.* at 37582.

Additionally, a Bitcoin Futures ETF is actually potentially more susceptible to manipulation than a Spot Bitcoin ETP where the underlying trust offers only in-kind creation and redemption. Specifically, the pricing of Bitcoin Futures is based on prices from spot bitcoin markets, while shares of a Spot Bitcoin ETP would represent an interest in bitcoin directly and authorized participants for a Spot Bitcoin ETP would be able to source bitcoin from any exchange and create or redeem with the applicable trust regardless of the price of the underlying index. Potential manipulation of a Bitcoin Futures ETF would require manipulation on the spot markets on which the pricing for Bitcoin Futures are based while the in-kind creation and redemption process and fungibility of bitcoin means that a would be manipulator of a Spot Bitcoin ETP would need to manipulate the price across all bitcoin markets or risk simply providing arbitrage opportunities for authorized participants. Further to this point, this arbitrage opportunity also acts to reduce any incentives to manipulate the price of a Spot Bitcoin ETP because the underlying trust will create and redeem shares at set rates of bitcoin per share without regard to the price that the ETP is trading at in the secondary market or the price of the underlying index. As such, the Exchange believes that part (a) of the significant market test outlined above is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the Shares.

*(B) Predominant Influence on Prices in Spot and Bitcoin Futures*

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the Bitcoin Futures market or spot market for a number of reasons, including the in-kind creation and redemption process, the spot market arbitrage opportunities that such in-kind creation and redemption process creates,

the significant volume in the Bitcoin Futures market, the size of bitcoin's market cap, and the significant liquidity available in the spot market. In addition to the Bitcoin Futures market data points cited above, the spot market for bitcoin is also very liquid. According to data from Skew, the cost to buy or sell \$5 million worth of bitcoin averages roughly 48 basis points with a market impact of \$139.08.<sup>29</sup> Stated another way, a market participant could enter a market buy or sell order for \$5 million of bitcoin and only move the market 0.48%. More strategic purchases or sales (such as using limit orders and executing through OTC bitcoin trade desks) would likely have less obvious impact on the market – which is consistent with MicroStrategy, Tesla, and Square being able to collectively purchase billions of dollars in bitcoin.

As such, the combination of the in-kind creation and redemption process, the 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 Bitcoin Futures markets, satisfying part (b) of the test outlined above.

(c) *Other Means to Prevent Fraudulent and Manipulative Acts and Practices*  
SSA with Bitcoin Spot Market

The Exchange is also proposing to take additional steps to those described above to supplement its ability to obtain information that would be helpful in detecting, investigating, and deterring fraud and market manipulation in the Commodity-Based

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<sup>29</sup> These statistics are based on samples of bitcoin liquidity in USD (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase, FTX and Kraken during the one year period ending May 2022.

Trust Shares.

On June 30, 2023, the Exchange executed a term sheet with Coinbase, Inc. (“Coinbase”) to enter into a surveillance-sharing agreement (“Spot BTC SSA”). Based on this agreement, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares. Trading of Bitcoin on Coinbase represents a significant portion of US-based Bitcoin trading. According to the Sponsor, the Exchange aims to enter into a surveillance-sharing agreement with Coinbase, the operator of the largest United States-based spot trading platform for Bitcoin representing a majority of global spot BTC trading paired with USD. The surveillance-sharing agreement would give the Exchange supplemental access to data regarding spot Bitcoin trades occurring on Coinbase if it is determined to be a necessary as part of its surveillance program for the Commodity-Based Trust Shares. Trading on Coinbase consistently accounts for over 50% of market share of BTC-USD spot trading volume.

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

exchange platform, if the Exchange determines that such information would be necessary to detect and investigate potential manipulation in the trading of the Commodity-Based Trust Shares.

As noted above, the Commission also permits a listing exchange to demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present. Consistent with prior points above, offering only in-kind creation and redemption will provide unique protections against potential attempts to manipulate the Shares. While the Sponsor believes that the Benchmark which it uses to value the Trust’s bitcoin is itself resistant to manipulation based on the methodology further described below, the fact that creations and redemptions are only available in-kind makes the manipulability of the Benchmark significantly less important. Specifically, because the Trust will not accept cash to buy bitcoin in order to create new shares or, barring a forced redemption of the Trust or under other extraordinary circumstances, be forced to sell bitcoin to pay cash for redeemed shares, the price that the Sponsor uses to value the Trust’s bitcoin is not particularly important.<sup>30</sup> When authorized participants are creating with the Trust, they need to deliver a certain number of bitcoin per share (regardless of the valuation used) and when they’re redeeming, they can similarly expect to receive a certain number of bitcoin per share. As such, even if the price used to value the Trust’s bitcoin is manipulated (which the Sponsor believes that its methodology is resistant to), the ratio of bitcoin per Share does not change and the Trust will either accept (for creations) or distribute (for redemptions) the same number of bitcoin regardless of the value. This not only mitigates

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<sup>30</sup> While the Benchmark will not be particularly important for the creation and redemption process, it will be used for calculating fees.

the risk associated with potential manipulation, but also discourages and disincentivizes manipulation of the Benchmark because there is little financial incentive to do so.

#### Availability of Information

The Trust's website (<https://valkyrieinvest.com/>) will include quantitative information on a per Share basis updated on a daily basis, including (i) the current NAV per Share daily and the prior business day's NAV and the reported closing price; (ii) the mid-point of the bid-ask price<sup>31</sup> 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 (iii) 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 each of the four previous calendar quarters (or for the life of the Trust, if shorter). In addition, on each business day the Trust's website will provide pricing information for the Shares. Also, an estimated value that reflects an estimated intraday value of the Trust's portfolio (the "Intraday Indicative Value"), will be disseminated.

The Trust's website will provide an IIV per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Market Session (9:30 a.m. to 4:00 p.m. (Eastern time)).<sup>32</sup> The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during the Exchange's Regular Market Session to reflect changes in the value of the Trust's NAV during the trading day.

The IIV disseminated during the Exchange's Regular Market Session should not be viewed as an actual real-time update of the NAV, which will be calculated only once

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<sup>31</sup> The bid-ask price of the Trust is determined using the highest bid and lowest offer on the Consolidated Tape as of the time of calculation of the closing day NAV.

<sup>32</sup> The IIV on a per Share basis disseminated during the Regular Market Session should not be viewed as a real-time update of the NAV, which is calculated once a day.



at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Market Session by one or more major market data vendors. In addition, the IIV will be available through on-line information services.

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

#### 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 will be calculated daily and will be made available to all market participants at the same time. Upon termination of the Trust, the Shares will be removed from listing. The Trustee, Delaware Trust Company, is a trust company having substantial capital and surplus and the experience and facilities for handling corporate trust business, as required under Nasdaq Rule 5711(d)(vi)(D) and no change will be made to the trustee without prior notice to and approval of the Exchange.

As required in Nasdaq Rule 5711(d)(vii), 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.

#### 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. (Eastern time). 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 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 bitcoin 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 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 the 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 bitcoin 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 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.

#### Surveillance

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

On June 30, 2023, the Exchange executed a term sheet with Coinbase to enter into a Spot BTC SSA. Based on this agreement, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares. Trading of Bitcoin on Coinbase represents a significant portion of US-based Bitcoin trading. According to the Sponsor, the Exchange aims to enter into a surveillance-sharing agreement with Coinbase, the operator of the largest United States-based spot trading platform for Bitcoin representing a majority of global spot BTC trading paired with USD. The surveillance-sharing agreement would give the Exchange supplemental access to data regarding spot Bitcoin trades occurring on Coinbase if it is determined to be a necessary as part of its surveillance program for the Commodity-Based Trust Shares. Trading on Coinbase consistently accounts for over 50% of market share of BTC-USD spot trading volume.

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

further information from Coinbase related to spot bitcoin trading activity on the Coinbase exchange platform, if the Exchange determines that such information would be necessary to detect and investigate potential manipulation in the trading of the Commodity-Based Trust Shares.

#### Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (1) the procedures for purchases and redemptions of Shares in Creation Units (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 IIV is disseminated; (4) 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; (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.

Additionally, the Information Circular will reference that the Trust is subject to various fees and expenses described in the Draft 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 Exchange believes that the proposal is consistent with Section 6(b) of the Act<sup>33</sup> in general and Section 6(b)(5) of the Act<sup>34</sup> in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Commission has approved numerous series of Trust Issued Receipts,<sup>35</sup> including Commodity-Based Trust Shares,<sup>36</sup> to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices; 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 standard that has previously been articulated by the Commission applicable to Commodity-Based Trust Shares has been met as outlined below.

### *Designed to Prevent Fraudulent and Manipulative Acts and Practices*

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<sup>33</sup> 15 U.S.C. 78f.

<sup>34</sup> 15 U.S.C. 78f(b)(5).

<sup>35</sup> See Exchange Rule 5720.

<sup>36</sup> Commodity-Based Trust Shares, as described in Exchange Rule 5711(d), are a type of Trust Issued Receipt.

In order for a proposal to list and trade a series of Commodity-Based Trust Shares to be deemed consistent with the Act, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place with a regulated market of significant size. Both the Exchange and CME are members of ISG.<sup>37</sup> As such, the only remaining issue to be addressed is whether the Bitcoin Futures market constitutes a market of significant size, which the Exchange believes that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.<sup>38</sup>

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.<sup>39</sup>

*(a) Reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP*

Bitcoin Futures represent a growing influence on pricing in the spot bitcoin

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<sup>37</sup> For a list of the current members and affiliate members of ISG, see <https://www.isgportal.com/>.

<sup>38</sup> See Wilshire Phoenix Disapproval.

<sup>39</sup> See Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a “cannot be manipulated” standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met. *Id.* at 37582.

market as has been laid out above and in other proposals to list and trade Spot Bitcoin ETPs. Pricing in Bitcoin Futures is based on pricing from spot bitcoin markets. As noted above, the statement from the Teucrium Approval that “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...indirectly by trading outside of the CME bitcoin futures market,” makes clear that the Commission believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of Bitcoin Futures. While the Commission makes clear in the Teucrium Approval that the analysis only applies to the Bitcoin Futures market as it relates to an ETP that invests in Bitcoin Futures as its only non-cash or cash equivalent holding, if CME’s surveillance is sufficient to mitigate concerns related to trading in Bitcoin Futures for which the pricing is based directly on pricing from spot bitcoin markets, it’s not clear how such a conclusion could apply only to ETPs based on Bitcoin Futures and not extend to Spot Bitcoin ETPs.

Additionally, a Bitcoin Futures ETF is actually potentially more susceptible to manipulation than a Spot Bitcoin ETP where the underlying trust offers only in-kind creation and redemption. Specifically, the pricing of Bitcoin Futures is based on prices from spot bitcoin markets, while shares of a Spot Bitcoin ETP would represent an interest in bitcoin directly and authorized participants for a Spot Bitcoin ETP would be able to source bitcoin from any exchange and create or redeem with the applicable trust regardless of the price of the underlying index. Potential manipulation of a Bitcoin Futures ETF would require manipulation on the spot markets on which the pricing for



Bitcoin Futures are based while the in-kind creation and redemption process and fungibility of bitcoin means that a would be manipulator of a Spot Bitcoin ETP would need to manipulate the price across all bitcoin markets or risk simply providing arbitrage opportunities for authorized participants. Further to this point, this arbitrage opportunity also acts to reduce any incentives to manipulate the price of a Spot Bitcoin ETP because the underlying trust will create and redeem shares at set rates of bitcoin per share without regard to the price that the ETP is trading at in the secondary market or the price of the underlying index. As such, the Exchange believes that part (a) of the significant market test outlined above is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the Shares.

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

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the Bitcoin Futures market or spot market for a number of reasons, including the in-kind creation and redemption process, the spot market arbitrage opportunities that such in-kind creation and redemption process creates, the significant volume in the Bitcoin Futures market, the size of bitcoin's market cap, and the significant liquidity available in the spot market. In addition to the Bitcoin Futures market data points cited above, the spot market for bitcoin is also very liquid. According to data from Skew, the cost to buy or sell \$5 million worth of bitcoin averages roughly 48 basis points with a market impact of \$139.08.<sup>40</sup> Stated another way, a market participant could enter a market buy or sell order for \$5 million of bitcoin and only move the market

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<sup>40</sup> These statistics are based on samples of bitcoin liquidity in USD (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase, FTX and Kraken during the one year period ending May 2022.

0.48%. More strategic purchases or sales (such as using limit orders and executing through OTC bitcoin trade desks) would likely have less obvious impact on the market – which is consistent with MicroStrategy, Tesla, and Square being able to collectively purchase billions of dollars in bitcoin.

As such, the combination of the in-kind creation and redemption process, the 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 Bitcoin Futures markets, satisfying part (b) of the test outlined above.

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

SSA with Bitcoin Spot Market

The Exchange is also proposing to take additional steps to those described above to supplement its ability to obtain information that would be helpful in detecting, investigating, and deterring fraud and market manipulation in the Commodity-Based Trust Shares.

On June 30, 2023, the Exchange executed a term sheet with Coinbase to enter into a Spot BTC SSA. Based on this agreement, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares. Trading of Bitcoin on Coinbase represents a significant portion of US-based Bitcoin trading. According to the Sponsor, the Exchange aims to enter into a surveillance-sharing agreement with Coinbase, the

operator of the largest United States-based spot trading platform for Bitcoin representing a majority of global spot BTC trading paired with USD. The surveillance-sharing agreement would give the Exchange supplemental access to data regarding spot Bitcoin trades occurring on Coinbase if it is determined to be a necessary as part of its surveillance program for the Commodity-Based Trust Shares. Trading on Coinbase consistently accounts for over 50% of market share of BTC-USD spot trading volume.

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

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

points above, offering only in-kind creation and redemption will provide unique protections against potential attempts to manipulate the Shares. While the Sponsor believes that the Benchmark which it uses to value the Trust's bitcoin is itself resistant to manipulation based on the methodology further described below, the fact that creations and redemptions are only available in-kind makes the manipulability of the Benchmark significantly less important. Specifically, because the Trust will not accept cash to buy bitcoin in order to create new shares or, barring a forced redemption of the Trust or under other extraordinary circumstances, be forced to sell bitcoin to pay cash for redeemed shares, the price that the Sponsor uses to value the Trust's bitcoin is not particularly important.<sup>41</sup> When authorized participants are creating with the Trust, they need to deliver a certain number of bitcoin per share (regardless of the valuation used) and when they're redeeming, they can similarly expect to receive a certain number of bitcoin per share. As such, even if the price used to value the Trust's bitcoin is manipulated (which the Sponsor believes that its methodology is resistant to), the ratio of bitcoin per Share does not change and the Trust will either accept (for creations) or distribute (for redemptions) the same number of bitcoin regardless of the value. This not only mitigates the risk associated with potential manipulation, but also discourages and disincentivizes manipulation of the Benchmark because there is little financial incentive to do so.

The Exchange also believes that reviewing this proposal through the lens of the Bitcoin Futures Approvals would also lead the Commission to approving this proposal. Previous disapproval orders have made clear that a market that constitutes a regulated market of significant size is generally a futures and/or options market based on the

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<sup>41</sup> While the Benchmark will not be particularly important for the creation and redemption process, it will be used for calculating fees.

underlying reference asset rather than the spot commodity markets, which are often unregulated.<sup>42</sup> The Exchange believes that the following excerpt from the Teucrium

Approval is particular informative:

The CME “comprehensively surveils futures market conditions and price movements on a real-time and ongoing basis in order to detect and prevent price distortions, including price distortions caused by manipulative efforts.” Thus, the CME’s surveillance can reasonably be relied upon to capture the effects on the CME 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. As such, when the CME shares its surveillance information with Arca, the information would assist in detecting and deterring fraudulent or manipulative misconduct related to the non-cash assets held by the proposed ETP.<sup>43</sup>

Bitcoin Futures pricing is based on pricing from spot bitcoin markets. The statement from the Teucrium Approval that “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...indirectly by trading outside of the CME bitcoin futures market,” makes clear that the Commission believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of Bitcoin Futures. If CME is able to detect such attempts at manipulation in the complex and interconnected spot bitcoin market, how would such an ability to detect attempted manipulation and the utility in sharing that

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<sup>42</sup> See Winklevoss Order at 37593, specifically footnote 202, which includes the language from numerous approval orders for which the underlying futures markets formed the basis for approving series of ETPs that hold physical metals, including gold, silver, palladium, platinum, and precious metals more broadly; and 37600, specifically where the Commission provides that “when the spot market is unregulated – the requirement of preventing fraudulent and manipulative acts may possibly be satisfied by showing that the ETP listing market has entered into a surveillance-sharing agreement with a regulated market of significant size in derivatives related to the underlying asset.” As noted above, the Exchange believes that these citations are particularly helpful in making clear that the spot market for a spot commodity ETP need not be “regulated” in order for a spot commodity ETP to be approved by the Commission, and in fact that it’s been the common historical practice of the Commission to rely on such derivatives markets as the regulated market of significant size because such spot commodities markets are largely unregulated.

<sup>43</sup> See Teucrium Approval at 21679.

information with the listing exchange apply only to Bitcoin Futures ETFs and not Spot Bitcoin ETPs? Stated a different way, given that there is significant trading volume on numerous bitcoin exchanges that are not part of the CME CF Bitcoin Reference Rate and that arbitrage opportunities across bitcoin exchanges means that such trading volume will influence spot bitcoin prices across the market and, despite this, the Commission still believes that CME can detect attempted manipulation of the Bitcoin Futures through “trading outside of the CME bitcoin futures market,” it is clear that such ability would apply equally to both Bitcoin Futures ETFs and Spot Bitcoin ETPs To take it a step further, such an ability would also seem to be a strong indication that the CME Bitcoin Futures market represents a regulated market of significant size. To be clear, the Exchange agrees with the Commission on this point (and the implications of their conclusions) and notes that the pricing mechanism applicable to the Shares is similar to the CME CF Bitcoin Reference Rate, as further discussed below.

The Exchange also notes that a Bitcoin Futures ETF may also be more susceptible to potential manipulation than a Spot Bitcoin ETP that offers only in-kind creation and redemption because Bitcoin Futures pricing (and thus the value of the underlying holdings of a Bitcoin Futures ETF) is based on a single price derived from spot bitcoin pricing, while shares of a Spot Bitcoin ETP would represent interest in bitcoin directly and authorized participants for a Spot Bitcoin ETP (as proposed herein) would be able to source bitcoin from any exchange and create or redeem with the applicable trust regardless of the price of the underlying index. As such, the Exchange believes that, in addition to the CME Bitcoin Futures market representing a regulated market of significant size as it relates to the spot bitcoin market, in-kind Spot Bitcoin ETPs are likely less susceptible to manipulation than Bitcoin Futures ETFs because of the

underlying creation and redemption arbitrage mechanism that will operate in the same manner as it does for all other ETFs.

In addition to potentially being more susceptible to manipulation than a Spot Bitcoin ETP, the structure of Bitcoin Futures ETFs provides negative outcomes for buy and hold investors as compared to a Spot Bitcoin ETP.<sup>44</sup> Specifically, the cost of rolling Bitcoin Futures contracts will cause the Bitcoin Futures ETFs to lag the performance of bitcoin itself and, at over a billion dollars in assets under management, would cost U.S. investors significant amounts of money on an annual basis compared to Spot Bitcoin ETPs. Such rolling costs would not be required for Spot Bitcoin ETPs that hold bitcoin. Further, Bitcoin Futures ETFs could potentially hit CME position limits, which would force a Bitcoin Futures ETF to invest in non-futures assets for bitcoin exposure and cause potential investor confusion and lack of certainty about what such Bitcoin Futures ETFs are actually holding to try to get exposure to bitcoin, not to mention completely changing the risk profile associated with such an ETF. While Bitcoin Futures ETFs represent a useful trading tool, they are clearly a sub-optimal structure for U.S. investors that are looking for long-term exposure to bitcoin that will, based on the calculations above, unnecessarily cost U.S. investors significant amounts of money every year compared to Spot Bitcoin ETPs and the Exchange believes that any proposal to list and trade a Spot Bitcoin ETP should be reviewed by the Commission with this important investor protection context in mind.

Based on the foregoing, the Exchange and Sponsor believe that any objective

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<sup>44</sup> See e.g., “Bitcoin ETF’s Success Could Come at Fundholders’ Expense,” Wall Street Journal (October 24, 2021), available at: <https://www.wsj.com/articles/bitcoin-etfs-success-could-come-at-fundholders-expense-11635080580>; “Physical Bitcoin ETF Prospects Accelerate,” ETF.com (October 25, 2021), available at: [https://www.etf.com/sections/blog/physical-bitcoin-etf-prospects-shine?nopaging=1&cf\\_chl\\_jschl\\_tk=\\_pmd\\_JsK.fjXz9eAQW9zol0qpzhXDr\\_rI\\_pIVdoClolXbLjI44-1635476946-0-gqNtZGzNApCjenBszQql](https://www.etf.com/sections/blog/physical-bitcoin-etf-prospects-shine?nopaging=1&cf_chl_jschl_tk=_pmd_JsK.fjXz9eAQW9zol0qpzhXDr_rI_pIVdoClolXbLjI44-1635476946-0-gqNtZGzNApCjenBszQql).

review of the proposals to list Spot Bitcoin ETPs compared to the Bitcoin Futures ETFs and the Bitcoin Futures Approvals would lead to the conclusion that Spot Bitcoin ETPs should be available to U.S. investors and, as such, this proposal and other comparable proposals to list and trade Spot Bitcoin ETPs should be approved by the Commission. Stated simply, U.S. investors will continue to lose significant amounts of money from holding Bitcoin Futures ETFs as compared to Spot Bitcoin ETPs, losses which could be prevented by the Commission approving Spot Bitcoin ETPs. Additionally, any concerns related to preventing fraudulent and manipulative acts and practices related to Spot Bitcoin ETPs would apply equally to the spot markets underlying the futures contracts held by a Bitcoin Futures ETF. While the 1940 Act does offer certain investor protections, those protections do not relate to mitigating potential manipulation of the holdings of an ETF in a way that warrants distinction between Bitcoin Futures ETFs and Spot Bitcoin ETPs. To be clear, both the Exchange and Sponsor believe that the Bitcoin Futures market is a regulated market of significant size and that such manipulation concerns are mitigated as described throughout this proposal. After issuing the Bitcoin Futures Approvals which conclude the CME Bitcoin Futures market is a regulated market of significant size as it relates to Bitcoin Futures, the only consistent outcome would be approving Spot Bitcoin ETPs on the basis that the Bitcoin Futures market is also a regulated market of significant size as it relates to the bitcoin spot market. Including in the analysis the significant and preventable losses to U.S. investors that comes with Bitcoin Futures ETFs, disapproving Spot Bitcoin ETPs seems even more arbitrary and capricious. Given the current landscape, approving this proposal (and others like it) and allowing Spot Bitcoin ETPs to be listed and traded alongside Bitcoin Futures ETFs would establish a consistent regulatory approach, provide U.S. investors with choice in product



structures for bitcoin exposure, and offer flexibility in the means of gaining exposure to bitcoin through transparent, regulated, U.S. exchange-listed vehicles.

#### Spot and Proxy Exposure to Bitcoin

Exposure to bitcoin through an ETP also presents certain advantages for retail investors compared to buying spot bitcoin directly. The most notable advantage from the Sponsor's perspective is the elimination of the need for an individual retail investor to either manage their own private keys or to hold bitcoin through a cryptocurrency exchange that lacks sufficient protections. Typically, retail exchanges hold most, if not all, retail investors' bitcoin in "hot" (Internet-connected) storage and do not make any commitments to indemnify retail investors or to observe any particular cybersecurity standard. Meanwhile, a retail investor holding spot bitcoin directly in a self-hosted wallet may suffer from inexperience in private key management (e.g., insufficient password protection, lost key, etc.), which could cause them to lose some or all of their bitcoin holdings. Thus, with respect to custody of the Trust's bitcoin assets, the Trust presents advantages from an investment protection standpoint for retail investors compared to owning spot bitcoin directly.

Finally, a number of operating companies largely engaged in unrelated businesses – such as Tesla (a car manufacturer) and MicroStrategy (an enterprise software company) – have announced significant investments in bitcoin. Without access to bitcoin exchange-traded products, retail investors seeking investment exposure to bitcoin may end up purchasing shares in these companies in order to gain the exposure to bitcoin that they seek.<sup>45</sup> In fact, mainstream financial news networks have written a number of

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<sup>45</sup> In August 2017, the Commission's Office of Investor Education and Advocacy warned investors about situations where companies were publicly announcing events relating to digital coins or tokens in an effort to affect the price of the company's publicly traded common stock. See [https://www.sec.gov/oiea/investor-alerts-and-bulletins/ia\\_icorelatedclaims](https://www.sec.gov/oiea/investor-alerts-and-bulletins/ia_icorelatedclaims).

articles providing investors with guidance for obtaining bitcoin exposure through publicly traded companies (such as MicroStrategy, Tesla, and bitcoin mining companies, among others) instead of dealing with the complications associated with buying spot bitcoin in the absence of a bitcoin ETP.<sup>46</sup> Such operating companies, however, are imperfect bitcoin proxies and provide investors with partial bitcoin exposure paired with a host of additional risks associated with whichever operating company they decide to purchase. Additionally, the disclosures provided by the aforementioned operating companies with respect to risks relating to their bitcoin holdings are generally substantially smaller than the registration statement of a bitcoin ETP, including the Registration Statement, typically amounting to a few sentences of narrative description and a handful of risk factors.<sup>47</sup> In other words, investors seeking bitcoin exposure through publicly traded companies are gaining only partial exposure to bitcoin and are not fully benefitting from the risk disclosures and associated investor protections that come from the securities registration process.

#### Commodity-Based Trust Shares

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed on the Exchange pursuant to the initial and continued listing criteria in Exchange Rule 5711(d). The Exchange believes that its surveillance procedures are adequate to properly monitor

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<sup>46</sup> See e.g., “7 public companies with exposure to bitcoin” (February 8, 2021) available at: <https://finance.yahoo.com/news/7-public-companies-with-exposure-to-bitcoin-154201525.html>; and “Want to get in the crypto trade without holding bitcoin yourself? Here are some investing ideas” (February 19, 2021) available at: <https://www.cnbc.com/2021/02/19/ways-to-invest-in-bitcoin-without-holding-the-cryptocurrency-yourself-.html>.

<sup>47</sup> See, e.g., Tesla 10-K for the year ended December 31, 2020, which mentions bitcoin just nine times: [https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000156459021004599/tsla-10k\\_20201231.htm](https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000156459021004599/tsla-10k_20201231.htm).

the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 5800 and following. The Exchange may obtain information regarding trading in the Shares and listed bitcoin 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.

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

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

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

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 (i) as the Commission may designate up to 90 days of such date 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-2023-019 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-2023-019. 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-2023-019 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>48</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>48</sup> 17 CFR 200.30-3(a)(12).