

SECURITIES AND EXCHANGE COMMISSION

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To List and Trade Shares of the Hashdex Nasdaq Ethereum ETF Under Nasdaq Rule 5711(i) (Trust Units)

December 18, 2023.

On September 20, 2023, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)1 and Rule 19b–4 thereunder,2 a proposed rule change to list and trade shares (“Shares”) of the Hashdex Nasdaq Ethereum ETF (“Fund”) under Nasdaq Rule 5711(i) (Trust Units). The proposed rule change was published for comment in the Federal Register on October 3, 2023.3

On November 15, 2023, pursuant to Section 19(b)(2) of the Act,4 the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.5 This order institutes proceedings under Section 19(b)(2)(B) of the Act6 to determine whether to approve or disapprove the proposed rule change.

I. Summary of the Proposal

As described in more detail in the Notice,7 the Exchange proposes to list and trade the Shares of the Fund, a series of the Tidal Commodities Trust I (“Trust”), under Nasdaq Rule 5711(i), which governs the listing and trading of Trust Units on the Exchange.

The investment objective of the Fund is to have the daily changes in the net asset value (“NAV”) of the Shares reflect the daily changes in the price of the Nasdaq Ether Reference Price (NQETH) (“Benchmark”), less expenses from the Fund’s operations.8 The Benchmark is designed to track the price performance of ether.9 Under normal market conditions, the Fund will invest in ether, ether futures contracts listed on the Chicago Mercantile Exchange, Inc. (“CME”),10 and in cash and cash equivalents.11 The Fund will use the CME’s Exchange for Physical (“EFF”) transactions to acquire and dispose of spot ether.12 The Fund will be subject to investment restrictions on spot ether which cap the Fund’s exposure to the ether spot market to a specified proportion of the Fund’s NAV and restrict the Fund’s notional exposure to ether to a set proportion.13 The sub-administrator of the Fund will calculate the NAV of the Fund once each trading day, as of the earlier of the close of the Nasdaq or 4:00 p.m. New York time.14 To determine the value of Ether Futures Contracts, the Fund’s sub-administrator will use the Ether Futures Contract settlement price on the exchange on which the contract is traded, except that the fair value of Ether Futures Contracts may be used when Ether Futures Contracts close at or near their price fluctuation limit for the day. The value of spot ether held by the Fund would be determined by the Sponsor and by Hashdex Asset Management Ltd. (“Digital Asset Adviser”) in good faith based on a methodology that is entirely derived from the settlement prices of Ether Futures Contracts on the CME and that considers all available facts and all available information on the valuation

8 See Notice, 88 FR at 68215. The Fund is managed and controlled by Toroos Investments LLC (“Sponsor”). See id. at 68214.
9 See id.
10 According to the Exchange, the CME currently offers two ether futures contracts: one contract representing 50 ether (“ETH Contracts”) and another contract representing 0.10 ether (“MET Contracts,” and collectively, “Ether Futures Contracts”). See id. at 68214.
11 See id. at 68214. The Fund would hold a mix of Ether Futures Contracts, spot ether, and cash and cash equivalents, subject to certain investment restrictions. See id. at 68219.
12 See id. at 68219. According to the Exchange, EFP transactions are a type of private agreement between two parties to trade a futures position for the underlying asset. In an EFP transaction, two parties exchange equivalent but offsetting positions in an Ether Futures Contract and the underlying physical ether. In the context of the Fund, these transactions will be used to purchase and sell spot ether by delivering or receiving the equivalent futures position. See id. at 68229.
13 See id. at 68227–28.
14 See id. at 68231. The Fund’s NAV will include any unrealized profit or loss on open ether futures contacts and any other credit or debit accruing to the Fund but unpaid or not received by the Fund. See id.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.31

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023–28193 Filed 12–21–23; 8:45 am]

BILLING CODE 8011–01–P


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Federal Register / Vol. 88, No. 245 / Friday, December 22, 2023 / Notices
II. Proceedings To Determine Whether To Approve or Disapprove SR-NASDAQ-2023–035 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act, the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change’s consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be “designed to prevent fraudulent and manipulative acts and practices” and “to protect investors and the public interest.”

The Commission asks that commenters address the sufficiency of the Exchange’s statements in support of the proposal, which are set forth in the Notice, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following questions and asks commenters to submit data where appropriate to support their views:

1. Given the nature of the underlying assets held by the Fund, has the Exchange properly filed its proposal to list and trade the Shares under Nasdaq Rule 5711(i) (Trust Units)?

2. The Exchange raises similar arguments to support the listing and trading of the Shares as those made in proposals to list and trade spot bitcoin exchange-traded products (“Bitcoin ETPs”). Do commenters agree that arguments to support the listing of Bitcoin ETPs apply equally to the Shares? Are there particular features related to ether and its ecosystem, including its proof of stake consensus mechanism and concentration of control or influence by a few individuals or entities, that raise unique concerns about ether’s susceptibility to fraud and manipulation?

3. What are commenters’ views on whether the proposed Fund and Shares would be susceptible to manipulation? What are commenters’ views generally on whether the Exchange’s proposal is designed to prevent fraudulent and manipulative acts and practices? What are commenters’ views generally with respect to the liquidity and transparency of the ether markets and the ether markets’ susceptibility to manipulation?

4. Based on data and analysis provided by the Exchange, what are commenters views on whether the CME, on which CME ether futures trade and through which the Fund intends to engage in EFP transactions to purchase or sell spot ether, represents a regulated market of significant size related to spot ether?

5. What are commenters views on whether there is a reasonable likelihood that a person attempting to manipulate the Shares would also have to trade on the CME to manipulate the Shares?

6. The Fund will only use CME EFP transactions to acquire and dispose of spot ether. The Exchange states that “trading activity in EFP transactions is sporadic” but that, “[n]otwithstanding, the Sponsor believes that a large number of liquidity providers are ready to execute this type of transaction and can provide enough liquidity to support the [Fund’s] demand.” Do commenters agree? Why or why not?

The Exchange states that futures-based spot pricing could create some level of uncertainty due to the potential divergences between the [futures-based spot pricing] and the spot prices observed in unregulated markets” but that authorized participants “will always be in a position to hedge their exposure using exclusively the [CME ether futures market], which will make them more likely to provide liquidity to the Fund.
thus making its market price converge to its NAV.” 33 Do commenters agree with the Exchange? Why or why not?

8. Some sponsors of proposed ether exchange-traded products have made statements regarding the correlation between ether spot markets and the CME ether futures market. 34 What are commenters’ views on the correlation between the ether spot market and the CME ether futures market? What are commenters’ views on the extent to which a surveillance-sharing agreement with the CME would assist in detecting and deterring fraud and manipulation that impacts an exchange-traded product (“ETP”) that also holds ether spot, and on whether correlation analysis provides any evidence to this effect? What are commenters’ views on the Sponsor’s own statistical analysis of the relationship between prices in certain unregulated ether markets and prices of CME ether futures contracts? 35 What are commenters’ views generally on whether an ETP that holds only CME ether futures and an ETP that also holds spot ether are similar products?

III. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) of the Act, and the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.36

33 See id.
34 See, e.g., Notice of Filing of a Proposed Rule Change to List and Trade Shares of the VanEck Etherium ETF under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 98457 (Sept. 20, 2023), 88 FR 66076 (Sept. 26, 2023), 66081 (stating that “The Sponsor’s research indicates daily correlation between the spot ETH and the CME ETH Futures is 0.998 from the period of 9/1/22 through 9/1/23.”).
35 See Notice, 88 FR at 68226–27.

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by January 12, 2024. Any person who wishes to file a rebuttal to any other person’s submission must file that rebuttal by January 26, 2024.

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);
• Send an email to rule-comments@sec.gov. Please include file number SR–NASDQ–2023–035 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–NASDQ–2023–035. 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–NASDQ–2023–035 and should be submitted on or before January 12, 2024. Rebuttal comments should be submitted by January 26, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.37

Sherry R. Haywood,
Assistant Secretary.

December 18, 2023.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)1 and Rule 19b–4 thereunder,2 notice is hereby given that on December 14, 2023, MIAX PEARL, LLC (“MIAX Pearl” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change as described in Items I and II 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 amend Exchange Rule 2615(d) regarding the Contingent Open performed on the Exchange’s equity trading platform (referred to herein as “MIAX Pearl Equities”).


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