

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 91		SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4		File No. * SR 2023 - * 087 Amendment No. (req. for Amendments *) 1	
Filing by Cboe BZX Exchange, Inc. Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934					
Initial * <input type="checkbox"/>		Amendment * <input checked="" 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"/>	
Pilot <input type="checkbox"/>		Extension of Time Period for Commission Action * <input type="checkbox"/>		Date Expires * <input type="text"/>	
		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) * <input type="checkbox"/>			Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934 Section 3C(b)(2) * <input type="checkbox"/>		
Exhibit 2 Sent As Paper Document <input type="checkbox"/>			Exhibit 3 Sent As Paper Document <input type="checkbox"/>		
Description Provide a brief description of the action (limit 250 characters, required when Initial is checked *). <div></div>					
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 * Sarah Last Name * Tadtman Title * Senior Counsel E-mail * stadtman@cboe.com Telephone * (913) 815-7203 Fax <input type="text"/>					
Signature Pursuant to the requirements of the Securities Exchange of 1934, Cboe BZX Exchange, Inc. has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized. Date 05/21/2024 (Title *) By Kyle Murray VP, Associate General Counsel (Name *) <div>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.</div> <div>Kyle Murray Date: 2024.05.21 15:56:02 -05'00'</div>					

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 EFFT website.

Form 19b-4 Information *

Add Remove View

23-087 19b-4 (Invesco Eth ETF) Am.

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 *

Add Remove View

23-087 Exhibit 1 (Invesco Eth ETF).dc

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 *

Add Remove View

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

Add Remove View

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

Add Remove View

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

Add Remove View

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

Add Remove View

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

Add Remove View

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.

Item 1. Text of the Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) under the Securities Exchange Act of 1934 (“Exchange Act” or the “Act”),¹ and Rule 19b-4 thereunder,² Cboe BZX Exchange, Inc. (“BZX” or the “Exchange”) is filing with the Securities and Exchange Commission (“Commission” or “SEC”) a proposed rule change to list and trade shares of the Invesco Galaxy Ethereum ETF (the “Trust”),³ under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. The shares of the Trust are referred to herein as the “Shares.”

(b) Not applicable.

(c) Not applicable.

Item 2. Procedures of the Self-Regulatory Organization

(a) The Exchange’s President (or designee) pursuant to delegated authority approved the proposed rule change on October 19, 2023.

(b) Please refer questions and comments on the proposed rule change to Pat Sexton, Executive Vice President, General Counsel, and Corporate Secretary, (312) 786-7467, or Sarah Tadtman, (913) 815-7203 Cboe BZX Exchange, Inc., 433 West Van Buren Street, Chicago, Illinois 60607.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

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

(a) Purpose

This Amendment No. 1 to SR-CboeBZX-2023-087 amends and replaces in its entirety the proposal as originally submitted on October 20, 2023. The Exchange submits this Amendment No. 1 in order to clarify certain points and add additional details to the proposal.

The Exchange proposes to list and trade the Shares under BZX Rule 14.11(e)(4),⁴ which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.⁵ Invesco Capital Management is the sponsor of the Trust (“Sponsor”). The Shares will be registered with the Commission by means of the Trust’s registration statement on Form S-1 (the “Registration Statement”).⁶

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

⁵ Any of the statements or representations regarding the index composition, the description of the portfolio or reference assets, limitations on portfolio holdings or reference assets, dissemination and availability of index, reference asset, and intraday indicative values, or the applicability of Exchange listing rules specified in this filing to list a series of Other Securities (collectively, “Continued Listing Representations”) shall constitute continued listing requirements for the Shares listed on the Exchange.

⁶ On September 29, 2023, the Trust filed with the Commission an initial registration statement (the “Registration Statement”) on Form S-1 under the Securities Act of 1933 (15 U.S.C. 77a). The description of the operation of the Trust herein is based, in part, on the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

The Exchange proposes to list and trade the Shares of the Invesco Galaxy Ethereum ETF⁷ under BZX Rule 14.11(e)(4),⁸ which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.⁹

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.¹⁰ With this in mind, the Chicago Mercantile Exchange

⁷ On September 29, 2023, the Trust filed with the Commission an initial registration statement (the “Registration Statement”) on Form S-1 under the Securities Act of 1933 (15 U.S.C. 77a). The description of the operation of the Trust herein is based, in part, on the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

⁸ The Commission approved BZX Rule 14.11(e)(4) in Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR-BATS-2011-018).

⁹ All statements and representations made in this filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange.

¹⁰ See Securities Exchange Act Release No. 78262 (July 8, 2016), 81 FR 78262 (July 14, 2016) (the “Winklevoss Proposal”). The Winklevoss Proposal was subsequently disapproved by the Commission. See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the “Winklevoss Order”). Prior orders from the Commission have pointed out that in every prior approval order for Commodity-Based Trust Shares, there has been a derivatives market that represents the regulated market of significant size, generally a Commodity Futures Trading Commission (the “CFTC”) regulated futures market. Further to this point, the Commission’s prior orders have noted that the spot commodities and currency markets for which it has previously approved spot ETPs are generally unregulated and that the Commission relied on the underlying futures market as the regulated market of significant size that formed the basis for approving the series of Currency and Commodity-Based Trust Shares, including gold, silver, platinum, palladium, copper, and other commodities and currencies. The Commission specifically noted in the Winklevoss Order that the approval order issued related to the first spot gold ETP “was based on an assumption that the currency market and the spot gold market were largely unregulated.” See Winklevoss Order at 37592. As such, the regulated market of significant size test does not require that the spot ether market be regulated in order for the Commission to approve this proposal, and precedent makes clear that an underlying market for a spot commodity or currency being a regulated market would actually be an exception to the norm. These largely unregulated currency and commodity markets do not provide the same protections as the markets that are subject to the Commission’s oversight, but the Commission has consistently looked to surveillance sharing agreements with the underlying futures market in order to determine whether such products were consistent with the Act.

(“CME”) ether futures (“Ether Futures”) market, which launched in February 2021, is the proper market to consider in determining whether there is a related regulated market of significant size.

Recently, the Commission issued an order granting approval for proposals to list bitcoin-based commodity trust and bitcoin-based trust issued receipts (these proposed funds are nearly identical to the Trust, but proposed to hold bitcoin instead of ether) (“Spot Bitcoin ETPs”).¹¹ By way of background, in 2022 the Commission disapproved proposals¹² to list Spot Bitcoin ETPs, including a proposal sponsored by Grayscale Investments, LLC (“Grayscale”).¹³ Grayscale appealed the decision with the U.S. Court of Appeals for the D.C. Circuit, which held that the Commission had failed to adequately explain its reasoning that the proposing exchange had not established that the CME bitcoin futures market was a market of significant size related to spot bitcoin, or that the “other means” asserted were sufficient to satisfy the statutory standard. As a result, the court vacated the Grayscale Order and remanded the matter to the Commission.¹⁴ In considering the remand of the Grayscale Order and Spot Bitcoin ETPs, the Commission determined in the Spot Bitcoin ETP Approval Order that the CME bitcoin futures

¹¹ See Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008 (January 17, 2024) (Self-Regulatory Organizations; NYSE Arca, Inc.; The Nasdaq Stock Market LLC; Cboe BZX Exchange, Inc.; Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, To List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units) (the “Spot Bitcoin ETP Approval Order”).

¹² See Order Disapproving a Proposed Rule Change To List and Trade Shares of the VanEck Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 97102 (Mar. 10, 2023), 88 FR 16055 (Mar. 15, 2023) (SR-CboeBZX-2022-035) (“VanEck Order II”) and n.11 therein for the complete list of previous proposals.

¹³ See Securities Exchange Act Release No. 95180 (June 29, 2022) 87 FR 40299 (July 6, 2022) (SR-NYSEArca-2021-90) (Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade Shares of Grayscale Bitcoin Trust Under NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares) (the “Grayscale Order”).

¹⁴ See Grayscale Investments, LLC v. SEC, 82 F.4th 1239 (D.C. Cir. 2023).

(“Bitcoin Futures”) market is highly correlated to spot bitcoin. Specifically, the

Commission stated:

[B]ased on the record before the Commission and the improved quality of the correlation analysis in the record...the Commission is able to conclude that fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME’s surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges’ comprehensive surveillance-sharing agreement with the CME—a U.S. regulated market whose bitcoin futures market is consistently highly correlated to spot bitcoin, albeit not of “significant size” related to spot bitcoin—can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.¹⁵

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

Background

Ethereum is free software that is hosted on computers distributed throughout the globe. It employs an array of logic, called a protocol, to create a unified understanding of ownership, commercial activity, and business logic. This allows users to engage in commerce without the need to trust any of its participants or counterparties. Ethereum code creates verifiable and unambiguous rules that assign clear, strong property rights to create a platform for unrestrained business formation and free exchange. It is widely understood that no single intermediary or entity operates or controls the Ethereum network (referred to as “decentralization”), the transaction validation and recordkeeping infrastructure of which is collectively maintained by a disparate user base. The Ethereum

¹⁵ See the Spot Bitcoin ETP Approval Order at 3011-3012.

network allows people to exchange tokens of value, referred to as “ether” or “ETH”, which are recorded on a distributed public recordkeeping system or ledger known as a blockchain (the “Ethereum Blockchain”), and which can be used to pay for goods and services, including computational power on the Ethereum network, or converted to fiat currencies, such as the U.S. dollar, at rates determined on digital asset platforms or in individual peer-to-peer transactions. Furthermore, by combining the recordkeeping system of the Ethereum Blockchain with a flexible scripting language that is programmable and can be used to implement sophisticated logic and execute a wide variety of instructions, the Ethereum network is intended to act as a foundational infrastructure layer on top of which users can build their own custom software programs, as an alternative to centralized web servers. In theory, anyone can build their own custom software programs on the Ethereum network. In this way, the Ethereum network represents a project to expand blockchain deployment beyond a limited-purpose, peer-to-peer private money system into a flexible, distributed alternative computing infrastructure that is available to all. On the Ethereum network, ETH is the unit of account that users pay for the computational resources consumed by running their programs.

Heretofore, U.S. retail investors have lacked a U.S. regulated, U.S. exchange-traded vehicle to gain exposure to ETH. Instead current options include: (i) facing the counter-party risk, legal uncertainty, technical risk, and complexity associated with accessing spot ether; or (ii) over-the-counter ether funds (“OTC ETH Funds”) with high management fees and potentially volatile premiums and discounts. Meanwhile, investors in other countries, including Germany, Switzerland and France, are able to use more traditional exchange listed and traded products (including exchange-traded funds holding

physical ETH) to gain exposure to ETH. Investors across Europe have access to products which trade on regulated exchanges and provide exposure to a broad array of spot crypto assets. U.S. investors, by contrast, are left with fewer and more risky means of getting ether exposure.¹⁶

To this point, the lack of an ETP that holds spot ETH (a “Spot Ether ETP”) exposes U.S. investor assets to significant risk because investors that would otherwise seek cryptoasset exposure through a Spot Ether ETP are forced to find alternative exposure through generally riskier means. For example, investors in OTC ETH Funds are not afforded the benefits and protections of regulated Spot Ether ETPs, resulting in retail investors suffering losses due to drastic movements in the premium/discount of OTC ETH Funds. An investor who purchased the largest OTC ETH Fund in January 2021 and held the position at the end of 2022 would have suffered a 69% loss due to the premium/discount, even if the price of ETH did not change. Many retail investors likely suffered losses due to this premium/discount in OTC ETH Fund trading; all such losses could have been avoided if a Spot Ether ETP had been available. Additionally, many U.S. investors that held their digital assets in accounts at FTX,¹⁷ Celsius Network LLC,¹⁸ BlockFi Inc.¹⁹ and Voyager Digital Holdings, Inc.²⁰ have become unsecured creditors in the insolvencies of those entities. If a Spot Ether ETP was available, it is likely that at

¹⁶ The Exchange notes that the list of countries above is not exhaustive and that securities regulators in a number of additional countries have either approved or otherwise allowed the listing and trading of Spot Ether ETPs.

¹⁷ See FTX Trading Ltd., et al., Case No. 22-11068.

¹⁸ See Celsius Network LLC, et al., Case No. 22-10964.

¹⁹ See BlockFi Inc., Case No. 22-19361.

²⁰ See Voyager Digital Holdings, Inc., et al., Case No. 22-10943.

least a portion of the billions of dollars tied up in those proceedings would still reside in the brokerage accounts of U.S. investors, having instead been invested in a transparent, regulated, and well-understood structure – a Spot Ether ETP. To this point, approval of a Spot Ether ETP would represent a major win for the protection of U.S. investors in the cryptoasset space. The Trust, like all other series of Commodity-Based Trust Shares, is designed to protect investors against the risk of losses through fraud and insolvency that arise by holding digital assets, including ETH, on centralized platforms.

Ether Futures ETFs

The Exchange and Sponsor applaud the Commission for allowing the launch of ETFs registered under the Investment Company Act of 1940, as amended (the “1940 Act”) that provide exposure to ether primarily through CME Ether Futures (“Ether 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 ether.

The structure of Ether Futures ETFs provides negative outcomes for buy and hold investors as compared to a Spot Ether ETP. Specifically, the cost of rolling CME Ether Futures contracts will cause the Ether Futures ETFs to lag the performance of ether 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 Ether ETPs. Such rolling costs would not be required for Spot Ether ETPs that hold ether. Further, Ether Futures ETFs could potentially hit CME position limits, which would force an Ether Futures ETF to invest in non-futures assets for ether exposure and cause potential investor confusion and lack of certainty about what such Ether Futures ETFs are actually

holding to try to get exposure to ether, not to mention completely changing the risk profile associated with such an ETF. While Ether 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 ether that will unnecessarily cost U.S. investors significant amounts of money every year compared to Spot Ether ETPs and the Exchange believes that any proposal to list and trade a Spot Ether ETP should be reviewed by the Commission with this important investor protection context in mind.

To the extent the Commission may view differential treatment of Ether Futures ETFs and Spot Ether ETPs as warranted based on the Commission's concerns about the custody of physical ether that a Spot Ether ETP would hold (compared to cash-settled futures contracts),²¹ the Sponsor believes this concern is mitigated to a significant degree by the custodial arrangements that the Trust has contracted with the Custodian (as defined below) to provide, as further outlined below. In the custody statement, the Commission stated that the fourth step that a broker-dealer could take to shield traditional securities customers and others from the risks and consequences of digital asset security fraud, theft, or loss is to establish, maintain, and enforce reasonably designed written policies, procedures, and controls for safekeeping and demonstrating the broker-dealer has exclusive possession or control over digital asset securities that are consistent with industry best practices to protect against the theft, loss, and unauthorized and accidental use of the private keys necessary to access and transfer the digital asset securities the

²¹ See, e.g., Division of Investment Management Staff, Staff Statement on Funds Registered Under the Investment Company Act Investing in the Bitcoin Futures Market, May 11, 2021 ("The Bitcoin Futures market also has not presented the custody challenges associated with some cryptocurrency-based investing because the futures are cash-settled").

broker-dealer holds in custody. While ether is not a security and the Custodian is not a broker-dealer, the Sponsor believes that similar considerations apply to the Custodian's holding of the Trust's ether. After diligent investigation, the Sponsor believes that the Custodian's policies, procedures, and controls for safekeeping, exclusively possessing, and controlling the Trust's ether holdings are consistent with industry best practices to protect against the theft, loss, and unauthorized and accidental use of the private keys. As a trust company chartered by the New York Department of Financial Services ("NYDFS"), the Sponsor notes that the Custodian is subject to extensive regulation and has among longest track records in the industry of providing custodial services for digital asset private keys. Under the circumstances, therefore, to the extent the Commission believes that its concerns about the risks of spot ether custody justifies differential treatment of a Ether Futures ETF versus a Spot Ether ETP, the Sponsor believes that the fact that the Custodian employs the same types of policies, procedures, and safeguards in handling spot ether that the Commission has stated that broker-dealers should implement with respect to digital asset securities would appear to weaken the justification for treating a Ether Futures ETF compared to a Spot Ether ETP differently due to spot ether custody concerns.

Based on the foregoing, the Exchange and Sponsor believe that any objective review of the proposals to list Spot Ether ETPs compared to the Ether Futures ETFs would lead to the conclusion that Spot Ether ETPs should be available to U.S. investors and, as such, this proposal and other comparable proposals to list and trade Spot Ether ETPs should be approved by the Commission. Stated simply, U.S. investors will continue to lose significant amounts of money from holding Ether Futures ETFs as compared to

Spot Ether ETPs, losses which could be prevented by the Commission approving Spot Ether ETPs. Additionally, any concerns related to preventing fraudulent and manipulative acts and practices related to Spot Ether ETPs would apply equally to the spot markets underlying the futures contracts held by an Ether Futures ETF. Both the Exchange and Sponsor believe that the CME Ether Futures market is a regulated market of significant size and that such manipulation concerns are mitigated, as described extensively below. After allowing the listing and trading of Ether Futures ETFs that hold primarily CME Ether Futures, however, the only consistent outcome would be approving Spot Ether ETPs on the basis that the CME Ether Futures market is a regulated market of significant size.

Given the current landscape, approving this proposal (and others like it) and allowing Spot Ether ETPs to be listed and traded alongside Ether Futures ETFs and Spot Bitcoin ETPs would establish a consistent regulatory approach, provide U.S. investors with choice in product structures for ether exposure, and offer flexibility in the means of gaining exposure to ether through transparent, regulated, U.S. exchange-listed vehicles.

CME Ether Futures²²

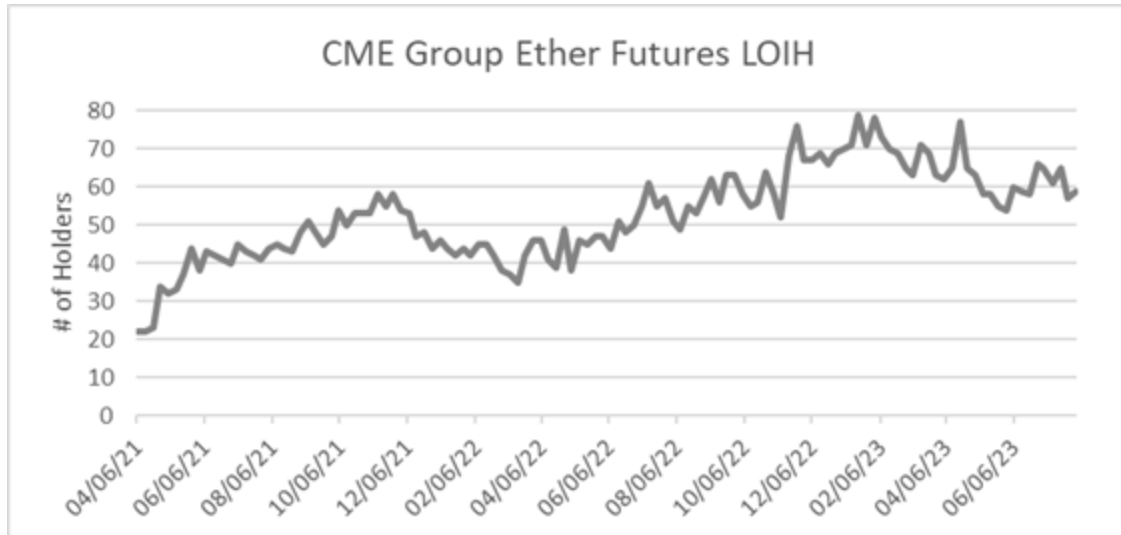
CME began offering trading in CME Ether Futures in February 2021. Each contract represents 50 ETH and is based on the CME CF Ether-Dollar Reference Rate.²³ The contracts trade and settle like other cash-settled commodity futures contracts. Most measurable metrics related to CME Ether Futures have generally trended up since launch,

²² Unless otherwise noted, all data and analysis presented in this section and referenced elsewhere in the filing has been provided by the Sponsor.

²³ The CME CF Ether-Dollar Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto exchanges and trading platforms, including Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.

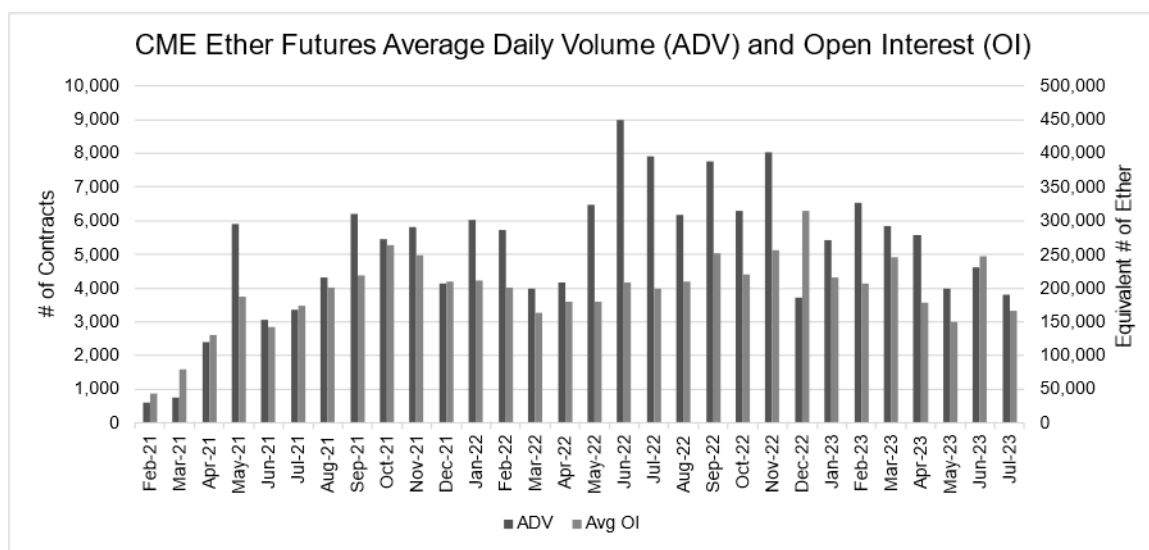
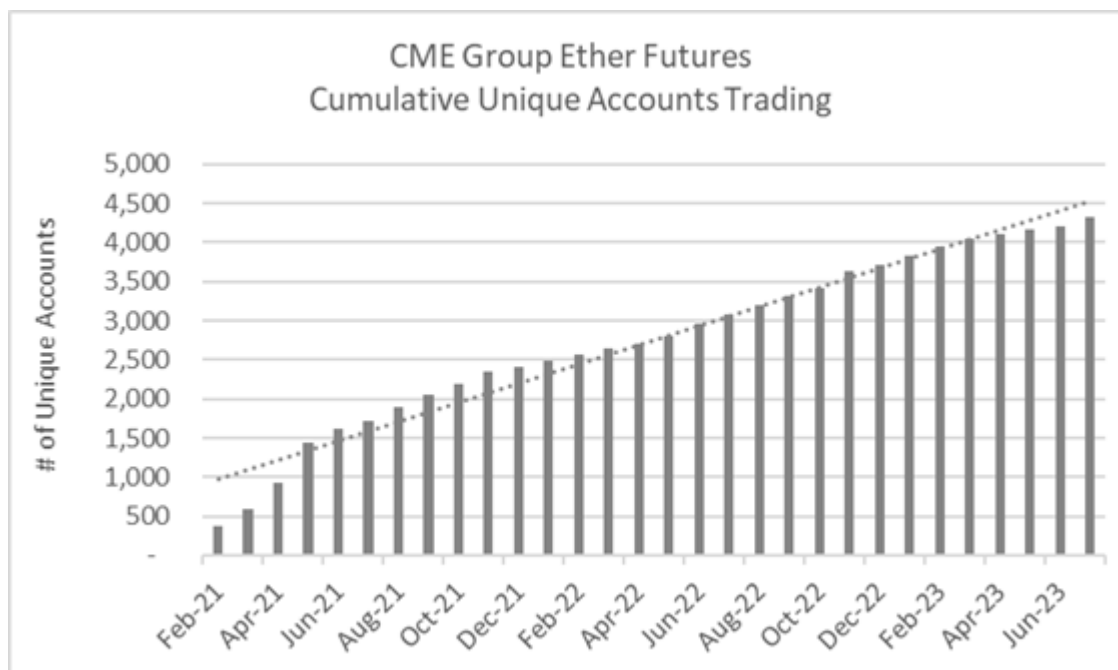
although some metrics have slowed recently. For example, there were 76,293 CME Ether Futures contracts traded in July 2023 (approximately \$7.3 billion) compared to 70,305 (\$11.1 billion) and 158,409 (\$7.5 billion) contracts traded in July 2021, and July 2022 respectively.²⁴ The Sponsor's research indicates daily correlation between the spot ETH and the CME Ether Futures is 0.998 from the period of 9/1/22 through 9/1/23.

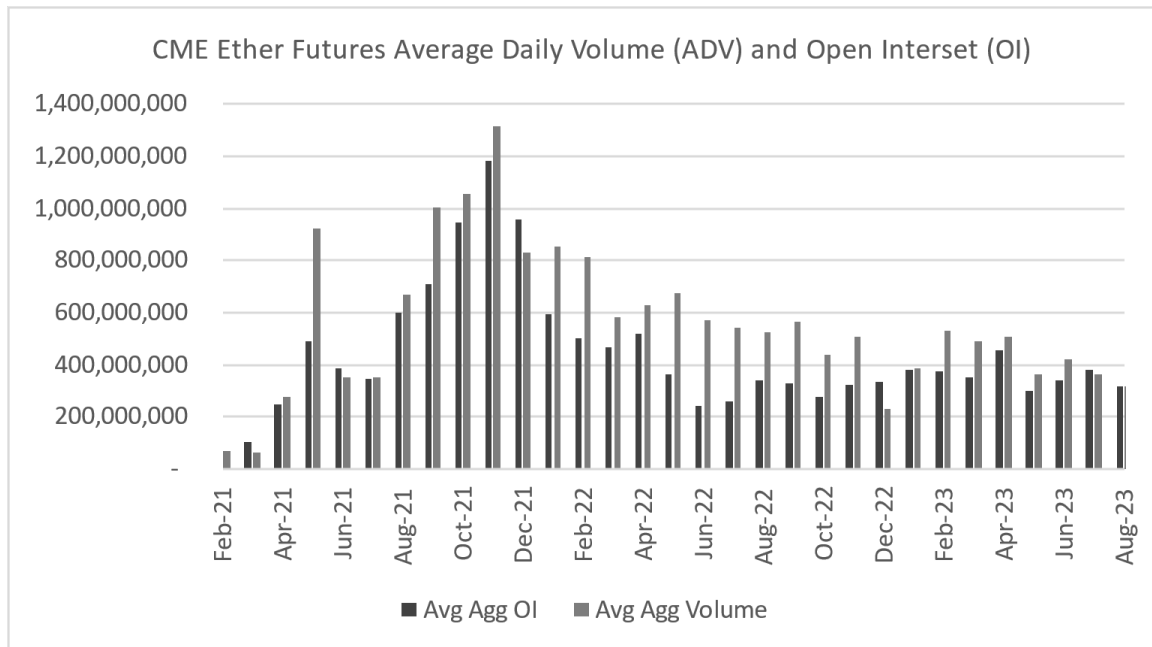
The number of large open interest holders²⁵ and unique accounts trading CME Ether Futures have both increased, even in the face of heightened Ether price volatility.



²⁴ Source: CME, 7/31/23

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





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

The Commission has approved numerous series of Trust Issued Receipts,²⁶ including Commodity-Based Trust Shares,²⁷ 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,²⁸ and (ii) the requirement that an exchange proposal be designed, in general, to

²⁶ See Exchange Rule 14.11(f).

²⁷ Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

²⁸ The Exchange believes that ETH is resistant to price manipulation and that "other means to prevent fraudulent and manipulative acts and practices" exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ETH trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ETH platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ETH prices through continuous trading activity challenging. To the extent that there are ETH platforms engaged in or allowing wash trading or other activity intended to manipulate the price of ETH on other markets, such pricing does not normally impact prices on other platforms because

protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that this filing sufficiently demonstrates that the CME Ether 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 place²⁹ with a regulated market of significant size. Both the Exchange and CME are members of the Intermarket

participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ETH markets and the presence of arbitrageurs in those markets means that the manipulation of the price of ETH on any single venue would require manipulation of the global ETH price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ETH platform 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.

²⁹ As previously articulated by the Commission, “The standard requires such surveillance-sharing agreements since “they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.” The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.” The Commission has historically held that joint membership in the ISG constitutes such a surveillance sharing agreement. See Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR-NYSEArca-2019-39) (the “Wilshire Phoenix Disapproval”).

Surveillance Group (“ISG”).³⁰ The only remaining issue to be addressed is whether the CME Ether 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.³¹

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.³²

(a) Manipulation of the ETP

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct. In light of the similarly high correlation between spot ETH/CME Ether Futures and spot bitcoin/CME Bitcoin Futures, applying the same

³⁰ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

³¹ See Wilshire Phoenix Disapproval.

³² 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.

rationale that the Commission applied to a Spot Bitcoin ETP in the Spot Bitcoin ETP

Approval Order also indicates that this test is satisfied for this proposal. As noted above, in the Spot Bitcoin ETP Approval Order, the SEC concluded that:

...fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME's surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges' comprehensive surveillance-sharing agreement with the CME...can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.³³

The assumptions from this statement are also true for CME Ether Futures. CME Ether Futures pricing is based on pricing from spot ether markets. The statement from the Spot Bitcoin ETP Approval Order that the surveillance-sharing agreement with the CME "can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals" makes clear that the Commission believes that CME's surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME Bitcoin Futures. This same logic would extend to CME Ether Futures markets where CME's surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME Ether Futures.

(b) Predominant Influence on Prices in Spot and Ether Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME Ether Futures market for a number of reasons. First, because the Trust would not hold CME Ether Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that

³³ See the Spot Bitcoin ETP Approval Order at 3011-3012.

CME Ether Futures contracts use for pricing.³⁴ The Sponsor notes that ether total 24-hour spot trading volume has averaged \$9.4 billion over the year ending September 1, 2023.³⁵ The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ether market even in its most aggressive projections for the Trust's assets and, thus, the Trust would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME Ether Futures market. Second, much like the CME Bitcoin Futures market, the CME Ether Futures market has progressed and matured significantly. As the U.S. Court of Appeals for the D.C. Circuit found in its review of the Grayscale Order, "Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less." The Exchange and sponsor agree with this sentiment and believe it applies equally to the spot ether and CME Ether Futures markets.

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

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

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ether through OTC

³⁴ This logic is reflected by the U.S. Court of Appeals for the D.C. Circuit on its review of the Grayscale Order at 17-18. See Grayscale Investments, LLC v. SEC, 82 F. 4th 1239 (D.C. Cir. 2023). Specifically, the court found that "Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market...But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin."

³⁵ Source: TokenTerminal.

ETH Funds has grown into the tens of billions of dollars and more than a billion dollars of exposure through Ether Futures ETFs. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through roll costs for Ether Futures ETFs and premium/discount volatility and management fees for OTC ETH Funds. The Exchange believes that the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, also believes that such concerns are now outweighed by these investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ether in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in Ether Futures ETFs and operating companies that are imperfect proxies for ether exposure; and (iv) providing an alternative to custodial spot ether.

Invesco Galaxy Ethereum ETF

Delaware Trust Company is the trustee (“Trustee”). The Bank of New York Mellon will be the administrator (“Administrator”) and transfer agent (“Transfer Agent”). As noted above, Coinbase Custody Trust Company, LLC, is the Custodian and will be responsible for custody of the Trust’s ETH. The Bank of New York Mellon (the “Cash Custodian”) will act as custodian of the Trust’s cash and cash equivalents.³⁶

According to the Registration Statement, each Share will represent a fractional

³⁶

Cash equivalents are short-term instruments with maturities of less than 3 months.

undivided beneficial interest and ownership in the Trust. The Trust's assets will consist only of ETH, cash, and cash equivalents.

According to the Registration Statement, the Trust is neither an investment company registered under the Investment Company Act of 1940, as amended,³⁷ nor a commodity pool for purposes of the Commodity Exchange Act ("CEA"), and neither the Trust nor the Sponsor is subject to regulation as a commodity pool operator or a commodity trading adviser in connection with the Shares.

Neither the Trust, nor the Sponsor, nor the Custodian, nor any other person associated with the Trust will, directly or indirectly, engage in action where any portion of the Trust's ETH becomes subject to the Ethereum proof-of-stake validation or is used to earn additional ETH or generate income or other earnings. The Trust will not acquire and will disclaim any incidental right ("IR") or IR asset received, for example as a result of forks or airdrops, and such assets will not be taken into account for purposes of determining NAV.

When the Trust sells or redeems its Shares, it will do so in cash transactions in blocks of 5,000 Shares (a "Creation Basket") at the Trust's net asset value ("NAV"). Authorized participants will deliver, or facilitate the delivery of, cash to the Trust's account with the Cash Custodian in exchange for Shares when they purchase Shares, and the Trust, through the Cash Custodian, will deliver cash to such authorized participants when they redeem Shares with the Trust. Authorized participants may then offer Shares to the public at prices that depend on various factors, including the supply and demand for Shares, the value of the Trust's assets, and market conditions at the time of a

³⁷

15 U.S.C. 80a-1.

transaction. Shareholders who buy or sell Shares during the day from their broker may do so at a premium or discount relative to the NAV of the Shares of the Trust.

Investment Objective

According to the Registration Statement, the investment objective of the Trust is for the Shares to reflect the spot price of Ether as measured by using the Lukka Prime Reference Rate (the “Index”) less the Trust’s expenses and other liabilities. In seeking to achieve its investment objective, the Trust will hold only ETH, cash, and cash equivalents. The Trust will value its Shares daily based on the value of the Index as of 4:00 p.m. ET, which is calculated based on the fair market value price for ETH, reflecting the execution price of ETH on its principal market as determined by Lukka Inc., an independent third-party digital asset company (the “Index Provider”). The Trust will process all creations and redemptions in cash transactions with authorized participants. The Trust is not actively managed.

The Index

As described in the Registration Statement, the Trust will use the Index to calculate the Trust’s NAV. The Index is designed to be a robust price for ETH in USD and there is no component other than ETH in the index. The underlying trading platforms are sourced from the Index Provider. As of December 2023, the following platforms are considered to be eligible by the Index Provider: Binance, Bitfinex, Bitflyer, Bittrex, Bitstamp, Coinbase, Crypto.com, Gemini, HitBTC, Huobi, Kraken, KuCoin, OKEx, Poloniex (collectively, “Index Pricing Sources”). The Index Provider reviews eligible trading platforms quarterly. In determining which trading platforms to include, the Index Provider evaluates each trading platform using proprietary ratings criteria. The Index

Provider constantly reassesses the trading platforms to be eligible for inclusion in the Index, and makes adjustments as needed.

In determining the value of ETH, the Index Provider applies a five-step weighting process for identifying the principal trading platform for Ether and the last price on that trading platform. A “base exchange score” (“BES”) that takes into account this criteria is assigned to each Index Pricing Source in order to select the most appropriate primary trading platform and then an executed trading platform price is determined at 4:00 p.m. ET., although the Index Provider performs this calculation every second each day.

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

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

Step 3: Decay the adjusted score based on the time passed since last trade on platform, assessing the level of activity in the market by considering the frequency (volume) of trades. The decay factor reflects the time since the last trade on the platform. This is the final Decayed Volume Adjusted Score (DVAS), which reflects freshness of data by tracking most recent trades.

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

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

Index data and the description of the Index are based on information made publicly available by the Index Provider on its website at <https://lukka.tech>.

Net Asset Value

The Trust's NAV per Share is calculated by (1) taking the current market value of its ETH (calculated by the Index Provider) and any other assets; (2) subtracting any liabilities (including accrued by unpaid expenses); and (3) dividing that total by the total number of outstanding Shares. The Administrator calculates the NAV of the Trust on each day that the Exchange is open for regular trading, using the execution price of ETH on the principal market selected by the Index Provider as of 4:00 p.m. ET. However, NAVs are not officially struck until later in the day (often by 5:30 p.m. ET and almost always by 8:00 p.m. ET).

The NAV for the Trust will be calculated by the Administrator once a day and will be disseminated daily to all market participants at the same time.

In the event that the Index is unavailable or if the Sponsor or Administrator determines that the price provided by the Index does not reflect an accurate ETH price, the Sponsor's pricing team will evaluate the prices of other similar benchmarks in an effort to ensure that the Trust's NAV is determined based on consistent, accurate pricing that the Sponsor believes is reflective of the value of the Trust's ETH, and also a transparent index methodology and process. The pricing team will recommend the price to be used to the Sponsor's valuation committee who will then review the recommendation and approve it for use by the Trust if found appropriate.³⁸

³⁸ Such alternative method will only be employed on an ad hoc basis. Any permanent change to the calculation of the NAV would require a proposed rule change under Rule 19b-4.

Availability of Information

In addition to the price transparency of the Index, the Trust will provide information regarding the Trust's ETH holdings as well as additional data regarding the Trust. The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV per Share and the reported BZX Official Closing Price³⁹; (b) the BZX Official Closing Price in relation to the NAV per Share as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV per Share; (c) data in chart form displaying the frequency distribution of discounts and premiums of the BZX Official Closing Price against the NAV per Share, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The Trust will also disseminate its holdings on a daily basis on its website. The aforementioned information will be published as of the close of business available on the Sponsor's website at www.invesco.com/etfs, or any successor thereto.

The Intraday Indicative Value ("IIV") will be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the most recently reported price of ETH as reported by the Index Provider or another reporting service. The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV may differ from the NAV

³⁹

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

due to the differences in the time window of trades used to calculate each price. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours by one or more major market data vendors. In addition, the IIV will be available through the facilities of the consolidated tape association (CTA) and Consolidated Quotation System (CQS) high speed lines. In addition, the IIV will be available through on-line information services such as Bloomberg and Reuters.

The price of ETH will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours.

As noted above, the Index is designed to provide an estimated fair market value for ETH. Information about the Index and Index value, including key elements of how the Index is calculated, will be publicly available at <https://lukka.tech>.

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

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's BZX Official Closing Price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA.

The ETH Custodian

The Custodian carefully considers the design of the physical, operational and cryptographic systems for secure storage of the Trust's private keys in an effort to lower the risk of loss or theft. The Custodian utilizes a variety of security measures to ensure that private keys necessary to transfer digital assets remain uncompromised and that the Trust maintains exclusive ownership of its assets. The operational procedures of the Custodian are reviewed by third-party advisors with specific expertise in physical security. The devices that store the keys will never be connected to the internet or any other public or private distributed network—this is colloquially known as “cold storage.” Only specific individuals are authorized to participate in the custody process, and no individual acting alone will be able to access or use any of the private keys. In addition, no combination of the executive officers of the Sponsor or the investment professionals managing the Trust, acting alone or together, will be able to access or use any of the private keys that hold the Trust's ETH.

Creation and Redemption of Shares

When the Trust sells or redeems its Shares, it will do so in cash transactions in blocks of 5,000 Shares (e.g., a Creation Basket) that are based on the quantity of ETH attributable to each Share of the Trust at the Trust's NAV. According to the Registration Statement, on any business day, an authorized participant may place an order to create one or more Creation Baskets. Purchase orders must be placed by 4:00 p.m. Eastern Time, or the close of regular trading on the Exchange, whichever is earlier. The day on which an order is received is considered the purchase order date. The total deposit of cash required is based on the combined NAV of the number of Shares included in the Creation

Baskets being created determined as of 4:00 ET on the date the order to purchase is properly received. The Administrator determines the quantity of ether associated with a Creation Basket for a given day by dividing the number of ether held by the Trust as of the opening of business on that business day, adjusted for the amount of ether constituting estimated accrued but unpaid fees and expenses of the Trust as of the opening of business on that business day, by the quotient of the number of Shares outstanding at the opening of business divided by the number of Shares in a Creation Basket.

The procedures by which an authorized participant can redeem one or more Creation Baskets mirror the procedures for the creation of Creation Baskets.

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

The Trust will create Shares by receiving ETH from a third party that is not the authorized participant and the Trust (through an execution agent that is acting in an agency capacity)—not the authorized participant—is responsible for selecting the third party to deliver the ETH. Further, the third party will not be acting as an agent of the authorized participant with respect to the delivery of the ETH to the Trust or acting at the direction of the authorized participant with respect to the delivery of the ETH to the Trust. The Trust will redeem Shares by delivering ETH to a third party that is not the

authorized participant and the Trust—not the authorized participant—is responsible for selecting the third party to receive the ETH. Further, the third party will not be acting as an agent of the authorized participant with respect to the receipt of the ETH from the Trust or acting at the direction of the authorized participant with respect to the receipt of the ETH from the Trust.

The Sponsor will maintain ownership and control of ETH in a manner consistent with good delivery requirements for spot commodity transactions.

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

The Shares will be subject to BZX Rule 14.11(e)(4), which sets forth the initial and continued listing criteria applicable to Commodity-Based Trust Shares. The Exchange represents that, for initial and continued listing, the Trust must be in compliance with Rule 10A-3 under the Act. A minimum of 100,000 Shares will be outstanding at the commencement of listing on the Exchange. The Exchange will obtain a representation that the Trust's NAV will be calculated daily and the NAV and information about the assets of the Trust will be made available to all market participants at the same time. The Exchange notes that, as defined in Rule 14.11(e)(4)(C)(i), the Shares will be: (a) issued by a trust that holds (1) a specified commodity⁴⁰ deposited with the trust, or (2) a specified commodity and, in addition to such specified commodity, cash; (b) issued by such trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity and/or cash; and (c) when aggregated in the same specified minimum number, may be redeemed at a holder's request by such

⁴⁰ For purposes of Rule 14.11(e)(4), the term commodity takes on the definition of the term as provided in the Commodity Exchange Act.

trust which will deliver to the redeeming holder the quantity of the underlying commodity and/or cash.

Upon termination of the Trust, the Shares will be removed from listing. The Trustee, Delaware Trust Company, is a trust company having substantial capital and surplus and the experience and facilities for handling corporate trust business, as required under Rule 14.11(e)(4)(E)(iv)(a) and that no change will be made to the trustee without prior notice to and approval of the Exchange. The Exchange also notes that, pursuant to Rule 14.11(e)(4)(F), neither the Exchange nor any agent of the Exchange shall have any liability for damages, claims, losses or expenses caused by any errors, omissions or delays in calculating or disseminating any underlying commodity value, the current value of the underlying commodity required to be deposited to the Trust in connection with issuance of Commodity-Based Trust Shares; resulting from any negligent act or omission by the Exchange, or any agent of the Exchange, or any act, condition or cause beyond the reasonable control of the Exchange, its agent, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission or delay in the reports of transactions in an underlying commodity. Finally, as required in Rule 14.11(e)(4)(G), the Exchange notes that any registered market maker (“Market Maker”) in the Shares must file with the Exchange in a manner prescribed by the Exchange and keep current a list identifying all accounts for trading in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, which the registered Market Maker may have or over which it may exercise investment discretion. No

registered Market Maker shall trade in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, in an account in which a registered Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by this Rule. In addition to the existing obligations under Exchange rules regarding the production of books and records (see, e.g., Rule 4.2), the registered Market Maker in Commodity-Based Trust Shares shall make available to the Exchange such books, records or other information pertaining to transactions by such entity or registered or non-registered employee affiliated with such entity for its or their own accounts for trading the underlying physical commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, as may be requested by the Exchange.

The Exchange is able to obtain information regarding trading in the Shares and the underlying ETH, CME Ether Futures, options on CME Ether Futures, or any other ETH derivative through members acting as registered Market Makers, in connection with their proprietary or customer trades.

As a general matter, the Exchange has regulatory jurisdiction over its Members and their associated persons, which include any person or entity controlling a Member. To the extent the Exchange may be found to lack jurisdiction over a subsidiary or affiliate of a Member that does business only in commodities or futures contracts, the Exchange could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. The Exchange will halt trading in the Shares under the conditions specified in BZX Rule 11.18. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the ether underlying the Shares; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Rule 14.11(e)(4)(E)(ii), which sets forth circumstances under which trading in the Shares may be halted.

If the IIV or the value of the Index is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the IIV or the value of the Index occurs. If the interruption to the dissemination of the IIV or the value of the Index persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

In addition, if the Exchange becomes aware that the NAV 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.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. BZX will allow trading in the Shares during all trading sessions on the

Exchange. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in BZX Rule 11.11(a) the minimum price variation for quoting and entry of orders in securities traded on the Exchange is \$0.01 where the price is greater than \$1.00 per share or \$0.0001 where the price is less than \$1.00 per share. The Shares of the Trust will conform to the initial and continued listing criteria set forth in BZX Rule 14.11(e)(4).

Surveillance

The Exchange represents 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. FINRA conducts certain cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares, CME Ether Futures, or any other derivative with other markets and other entities that are members of the ISG, and the Exchange, or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares, CME Ether Futures, or any other derivative from such markets and other entities.⁴¹ The Exchange may obtain information regarding trading in the Shares, CME Ether Futures, or any other derivative via ISG, from other exchanges who are

⁴¹ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

The Sponsor has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12.

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (i) the procedures for the creation and redemption of Creation Baskets (and that the Shares are not individually redeemable); (ii) BZX Rule 3.7, which imposes suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers; (iii) how information regarding the IIV and the Trust's NAV are disseminated; (iv) the risks involved in trading the Shares outside of Regular Trading Hours⁴² when an updated IIV will not be calculated or publicly disseminated; (v) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (vi) trading

⁴² Regular Trading Hours is the time between 9:30 a.m. and 4:00 p.m. Eastern Time.

information. The Information Circular will also reference the fact that there is no regulated source of last sale information regarding ether, that the Commission has no jurisdiction over the trading of ether as a commodity, and that the CFTC has regulatory jurisdiction over the trading of CME Ether Futures and options on CME Ether Futures.

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

(b) Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act⁴³ in general and Section 6(b)(5) of the Act⁴⁴ 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,⁴⁵ including Commodity-Based Trust Shares,⁴⁶ to be listed on U.S. national securities. In

⁴³ 15 U.S.C. 78f.

⁴⁴ 15 U.S.C. 78f(b)(5).

⁴⁵ See Exchange Rule 14.11(f).

⁴⁶ Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

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;⁴⁷ 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 CME Ether 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

⁴⁷ The Exchange believes that ETH is resistant to price manipulation and that “other means to prevent fraudulent and manipulative acts and practices” exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ETH trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ETH platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ETH prices through continuous trading activity challenging. To the extent that there are ETH platforms engaged in or allowing wash trading or other activity intended to manipulate the price of ETH on other markets, such pricing does not normally impact prices on other platforms because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ETH markets and the presence of arbitrageurs in those markets means that the manipulation of the price of ETH on any single venue would require manipulation of the global ETH price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ETH platform 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.

that there is a comprehensive surveillance-sharing agreement in place⁴⁸ with a regulated market of significant size. Both the Exchange and CME are members of ISG.⁴⁹ The only remaining issue to be addressed is whether the CME Ether 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.⁵⁰

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

⁴⁸ 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 ISG constitutes such a surveillance sharing agreement. See Wilshire Phoenix Disapproval.

⁴⁹ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

⁵⁰ See Wilshire Phoenix Disapproval.

and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.⁵¹

(a) *Manipulation of the ETP*

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct. In light of the similarly high correlation between spot ETH/CME Ether Futures and spot bitcoin/CME Bitcoin Futures, applying the same rationale that the Commission applied to a Spot Bitcoin ETP in the Spot Bitcoin ETP Approval Order also indicates that this test is satisfied for this proposal. As noted above, in the Spot Bitcoin ETP Approval Order, the SEC concluded that:

...fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME’s surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges’ comprehensive surveillance-sharing agreement with the CME...can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.⁵²

The assumptions from this statement are also true for CME Ether Futures. CME Ether Futures pricing is based on pricing from spot ether markets. The statement from the Spot Bitcoin ETP Approval Order that the surveillance-sharing agreement with the CME “can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals” makes clear that the Commission

⁵¹ 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.

⁵² See the Spot Bitcoin ETP Approval Order at 3011-3012.

believes that CME's surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME Bitcoin Futures. This same logic would extend to CME Ether Futures markets where CME's surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME Ether Futures.

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

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME Ether Futures market for a number of reasons. First, because the Trust would not hold CME Ether Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME Ether Futures contracts use for pricing.⁵³ The Sponsor notes that ether total 24-hour spot trading volume has averaged \$9.4 billion over the year ending September 1, 2023.⁵⁴ The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ether market even in its most aggressive projections for the Trust's assets and, thus, the Trust would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME Ether Futures market. Second, much like the CME Bitcoin Futures market, the CME Ether Futures market has progressed and matured significantly. As the U.S. Court of Appeals for the D.C. Circuit found in its review of the Grayscale Order, "Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less." The Exchange and sponsor

⁵³ This logic is reflected by the U.S. Court of Appeals for the D.C. Circuit on its review of the Grayscale Order at 17-18. See Grayscale Investments, LLC v. SEC, 82 F. 4th 1239 (D.C. Cir. 2023). Specifically, the court found that "Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market...But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin."

⁵⁴ Source: TokenTerminal.

agree with this sentiment and believe it applies equally to the spot ether and CME Ether Futures markets.

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

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

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ether through OTC ETH Funds has grown into the tens of billions of dollars and more than a billion dollars of exposure through Ether Futures ETFs. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through roll costs for Ether Futures ETFs and premium/discount volatility and management fees for OTC ETH Funds. The Exchange believes that the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, also believes that such concerns are now outweighed by these investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ether in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing

in Ether Futures ETFs and operating companies that are imperfect proxies for ether exposure; and (iv) providing an alternative to custodying spot ether.

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

Availability of Information

The Exchange also believes that the proposal promotes market transparency in that a large amount of information is currently available about ETH and will be available regarding the Trust and the Shares. In addition to the price transparency of the Index, the Trust will provide information regarding the Trust's ETH holdings as well as additional data regarding the Trust. The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV per Share and the reported BZX Official Closing Price; (b) the BZX Official Closing Price in relation to the NAV per Share as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV per Share; (c) data in chart form displaying the frequency distribution of discounts and premiums of the BZX Official Closing Price against the NAV per Share, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The Trust will also disseminate its holdings on a daily basis on its website. The aforementioned information will be published as of the close of business available on the Sponsor's website at www.invesco.com/etfs, or any successor thereto.

The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the most recently reported price of ETH as reported by the Index Provider or another reporting service. The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV may differ from the NAV due to the differences in the time window of trades used to calculate each price. The IIV will be widely disseminated on a per Share

basis every 15 seconds during the Exchange's Regular Trading Hours by one or more major market data vendors. In addition, the IIV will be available through the facilities of the CTA and CQS high speed lines. In addition, the IIV will be available through on-line information services such as Bloomberg and Reuters.

The price of ETH will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours.

As noted above, the Index is designed to provide an estimated fair market value for ETH. Information about the Index and Index value, including key elements of how the Index is calculated, will be publicly available at <https://lukka.tech>.

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

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's BZX Official Closing Price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA.

In sum, the Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act, that this filing sufficiently demonstrates that the CME Ether

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

Item 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 an additional exchange-traded product that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

Item 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.

Item 6. Extension of Time Period for Commission Action

Not applicable.

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

Not applicable.

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

Not applicable.

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

Not applicable.

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

Not applicable.

Item 11. Exhibits

Exhibit 1: Completed Notice of the Proposed Rule Change for publication in the Federal Register.

Exhibit 2 – 5: Not applicable.

EXHIBIT 1**SECURITIES AND EXCHANGE COMMISSION**

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

[Insert date]

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

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

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

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

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

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

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

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

1. Purpose

This Amendment No. 1 to SR-CboeBZX-2023-087 amends and replaces in its entirety the proposal as originally submitted on October 20, 2023. The Exchange submits this Amendment No. 1 in order to clarify certain points and add additional details to the proposal.

The Exchange proposes to list and trade the Shares under BZX Rule 14.11(e)(4),⁴ which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.⁵ Invesco Capital Management is the sponsor of the Trust ("Sponsor"). The Shares will be

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

⁵ Any of the statements or representations regarding the index composition, the description of the portfolio or reference assets, limitations on portfolio holdings or reference assets, dissemination and availability of index, reference asset, and intraday indicative values, or the applicability of Exchange listing rules specified in this filing to list a series of Other Securities (collectively, "Continued Listing Representations") shall constitute continued listing requirements for the Shares listed on the Exchange.

registered with the Commission by means of the Trust's registration statement on Form S-1 (the "Registration Statement").⁶

The Exchange proposes to list and trade the Shares of the Invesco Galaxy Ethereum ETF⁷ under BZX Rule 14.11(e)(4),⁸ which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.⁹

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.¹⁰ With this in mind, the Chicago Mercantile Exchange

⁶ On September 29, 2023, the Trust filed with the Commission an initial registration statement (the "Registration Statement") on Form S-1 under the Securities Act of 1933 (15 U.S.C. 77a). The description of the operation of the Trust herein is based, in part, on the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

⁷ On September 29, 2023, the Trust filed with the Commission an initial registration statement (the "Registration Statement") on Form S-1 under the Securities Act of 1933 (15 U.S.C. 77a). The description of the operation of the Trust herein is based, in part, on the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

⁸ The Commission approved BZX Rule 14.11(e)(4) in Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR-BATS-2011-018).

⁹ All statements and representations made in this filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange.

¹⁰ See Securities Exchange Act Release No. 78262 (July 8, 2016), 81 FR 78262 (July 14, 2016) (the "Winklevoss Proposal"). The Winklevoss Proposal was subsequently disapproved by the Commission. See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the "Winklevoss Order"). Prior orders from the Commission have pointed out that in every prior approval order for Commodity-Based Trust Shares, there has been a derivatives market that represents the regulated market of significant size, generally a Commodity Futures Trading Commission (the "CFTC") regulated futures market. Further to this point, the Commission's prior orders have noted that the spot commodities and currency markets for which it has previously approved spot ETPs are generally unregulated and that the Commission relied on the underlying futures market as the regulated market of significant size that formed the basis for approving the series of Currency and Commodity-Based Trust Shares, including gold, silver, platinum, palladium, copper, and other commodities and currencies. The Commission specifically noted in the Winklevoss Order that the approval order issued related to the first spot gold ETP

(“CME”) ether futures (“Ether Futures”) market, which launched in February 2021, is the proper market to consider in determining whether there is a related regulated market of significant size.

Recently, the Commission issued an order granting approval for proposals to list bitcoin-based commodity trust and bitcoin-based trust issued receipts (these proposed funds are nearly identical to the Trust, but proposed to hold bitcoin instead of ether) (“Spot Bitcoin ETPs”).¹¹ By way of background, in 2022 the Commission disapproved proposals¹² to list Spot Bitcoin ETPs, including a proposal sponsored by Grayscale Investments, LLC (“Grayscale”).¹³ Grayscale appealed the decision with the U.S. Court of Appeals for the D.C. Circuit, which held that the Commission had failed to adequately explain its reasoning that the proposing exchange had not established that the CME bitcoin futures market was a market of significant size related to spot bitcoin, or that the

“was based on an assumption that the currency market and the spot gold market were largely unregulated.” See Winklevoss Order at 37592. As such, the regulated market of significant size test does not require that the spot ether market be regulated in order for the Commission to approve this proposal, and precedent makes clear that an underlying market for a spot commodity or currency being a regulated market would actually be an exception to the norm. These largely unregulated currency and commodity markets do not provide the same protections as the markets that are subject to the Commission’s oversight, but the Commission has consistently looked to surveillance sharing agreements with the underlying futures market in order to determine whether such products were consistent with the Act.

¹¹ See Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008 (January 17, 2024) (Self-Regulatory Organizations; NYSE Arca, Inc.; The Nasdaq Stock Market LLC; Cboe BZX Exchange, Inc.; Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, To List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units) (the “Spot Bitcoin ETP Approval Order”).

¹² See Order Disapproving a Proposed Rule Change To List and Trade Shares of the VanEck Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 97102 (Mar. 10, 2023), 88 FR 16055 (Mar. 15, 2023) (SR-CboeBZX-2022-035) (“VanEck Order II”) and n.11 therein for the complete list of previous proposals.

¹³ See Securities Exchange Act Release No. 95180 (June 29, 2022) 87 FR 40299 (July 6, 2022) (SR-NYSEArca-2021-90) (Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade Shares of Grayscale Bitcoin Trust Under NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares) (the “Grayscale Order”).

“other means” asserted were sufficient to satisfy the statutory standard. As a result, the court vacated the Grayscale Order and remanded the matter to the Commission.¹⁴ In considering the remand of the Grayscale Order and Spot Bitcoin ETPs, the Commission determined in the Spot Bitcoin ETP Approval Order that the CME bitcoin futures (“Bitcoin Futures”) market is highly correlated to spot bitcoin. Specifically, the Commission stated:

[B]ased on the record before the Commission and the improved quality of the correlation analysis in the record...the Commission is able to conclude that fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME’s surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges’ comprehensive surveillance-sharing agreement with the CME—a U.S. regulated market whose bitcoin futures market is consistently highly correlated to spot bitcoin, albeit not of “significant size” related to spot bitcoin—can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.¹⁵

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

Background

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

¹⁴ See Grayscale Investments, LLC v. SEC, 82 F.4th 1239 (D.C. Cir. 2023).

¹⁵ See the Spot Bitcoin ETP Approval Order at 3011-3012.

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

Heretofore, U.S. retail investors have lacked a U.S. regulated, U.S. exchange-traded vehicle to gain exposure to ETH. Instead current options include: (i) facing the counter-party risk, legal uncertainty, technical risk, and complexity associated with

accessing spot ether; or (ii) over-the-counter ether funds (“OTC ETH Funds”) with high management fees and potentially volatile premiums and discounts. Meanwhile, investors in other countries, including Germany, Switzerland and France, are able to use more traditional exchange listed and traded products (including exchange-traded funds holding physical ETH) to gain exposure to ETH. Investors across Europe have access to products which trade on regulated exchanges and provide exposure to a broad array of spot crypto assets. U.S. investors, by contrast, are left with fewer and more risky means of getting ether exposure.¹⁶

To this point, the lack of an ETP that holds spot ETH (a “Spot Ether ETP”) exposes U.S. investor assets to significant risk because investors that would otherwise seek cryptoasset exposure through a Spot Ether ETP are forced to find alternative exposure through generally riskier means. For example, investors in OTC ETH Funds are not afforded the benefits and protections of regulated Spot Ether ETPs, resulting in retail investors suffering losses due to drastic movements in the premium/discount of OTC ETH Funds. An investor who purchased the largest OTC ETH Fund in January 2021 and held the position at the end of 2022 would have suffered a 69% loss due to the premium/discount, even if the price of ETH did not change. Many retail investors likely suffered losses due to this premium/discount in OTC ETH Fund trading; all such losses could have been avoided if a Spot Ether ETP had been available. Additionally, many U.S. investors that held their digital assets in accounts at FTX,¹⁷ Celsius Network LLC,¹⁸

¹⁶ The Exchange notes that the list of countries above is not exhaustive and that securities regulators in a number of additional countries have either approved or otherwise allowed the listing and trading of Spot Ether ETPs.

¹⁷ See FTX Trading Ltd., et al., Case No. 22-11068.

¹⁸ See Celsius Network LLC, et al., Case No. 22-10964.

BlockFi Inc.¹⁹ and Voyager Digital Holdings, Inc.²⁰ have become unsecured creditors in the insolvencies of those entities. If a Spot Ether ETP was available, it is likely that at least a portion of the billions of dollars tied up in those proceedings would still reside in the brokerage accounts of U.S. investors, having instead been invested in a transparent, regulated, and well-understood structure – a Spot Ether ETP. To this point, approval of a Spot Ether ETP would represent a major win for the protection of U.S. investors in the cryptoasset space. The Trust, like all other series of Commodity-Based Trust Shares, is designed to protect investors against the risk of losses through fraud and insolvency that arise by holding digital assets, including ETH, on centralized platforms.

Ether Futures ETFs

The Exchange and Sponsor applaud the Commission for allowing the launch of ETFs registered under the Investment Company Act of 1940, as amended (the “1940 Act”) that provide exposure to ether primarily through CME Ether Futures (“Ether 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 ether.

The structure of Ether Futures ETFs provides negative outcomes for buy and hold investors as compared to a Spot Ether ETP. Specifically, the cost of rolling CME Ether Futures contracts will cause the Ether Futures ETFs to lag the performance of ether 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 Ether ETPs. Such

¹⁹ See BlockFi Inc., Case No. 22-19361.

²⁰ See Voyager Digital Holdings, Inc., et al., Case No. 22-10943.

rolling costs would not be required for Spot Ether ETPs that hold ether. Further, Ether Futures ETFs could potentially hit CME position limits, which would force an Ether Futures ETF to invest in non-futures assets for ether exposure and cause potential investor confusion and lack of certainty about what such Ether Futures ETFs are actually holding to try to get exposure to ether, not to mention completely changing the risk profile associated with such an ETF. While Ether 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 ether that will unnecessarily cost U.S. investors significant amounts of money every year compared to Spot Ether ETPs and the Exchange believes that any proposal to list and trade a Spot Ether ETP should be reviewed by the Commission with this important investor protection context in mind.

To the extent the Commission may view differential treatment of Ether Futures ETFs and Spot Ether ETPs as warranted based on the Commission's concerns about the custody of physical ether that a Spot Ether ETP would hold (compared to cash-settled futures contracts),²¹ the Sponsor believes this concern is mitigated to a significant degree by the custodial arrangements that the Trust has contracted with the Custodian (as defined below) to provide, as further outlined below. In the custody statement, the Commission stated that the fourth step that a broker-dealer could take to shield traditional securities customers and others from the risks and consequences of digital asset security fraud, theft, or loss is to establish, maintain, and enforce reasonably designed written policies, procedures, and controls for safekeeping and demonstrating the broker-dealer

²¹ See, e.g., Division of Investment Management Staff, Staff Statement on Funds Registered Under the Investment Company Act Investing in the Bitcoin Futures Market, May 11, 2021 ("The Bitcoin Futures market also has not presented the custody challenges associated with some cryptocurrency-based investing because the futures are cash-settled").

has exclusive possession or control over digital asset securities that are consistent with industry best practices to protect against the theft, loss, and unauthorized and accidental use of the private keys necessary to access and transfer the digital asset securities the broker-dealer holds in custody. While ether is not a security and the Custodian is not a broker-dealer, the Sponsor believes that similar considerations apply to the Custodian's holding of the Trust's ether. After diligent investigation, the Sponsor believes that the Custodian's policies, procedures, and controls for safekeeping, exclusively possessing, and controlling the Trust's ether holdings are consistent with industry best practices to protect against the theft, loss, and unauthorized and accidental use of the private keys. As a trust company chartered by the New York Department of Financial Services ("NYDFS"), the Sponsor notes that the Custodian is subject to extensive regulation and has among longest track records in the industry of providing custodial services for digital asset private keys. Under the circumstances, therefore, to the extent the Commission believes that its concerns about the risks of spot ether custody justifies differential treatment of a Ether Futures ETF versus a Spot Ether ETP, the Sponsor believes that the fact that the Custodian employs the same types of policies, procedures, and safeguards in handling spot ether that the Commission has stated that broker-dealers should implement with respect to digital asset securities would appear to weaken the justification for treating a Ether Futures ETF compared to a Spot Ether ETP differently due to spot ether custody concerns.

Based on the foregoing, the Exchange and Sponsor believe that any objective review of the proposals to list Spot Ether ETPs compared to the Ether Futures ETFs would lead to the conclusion that Spot Ether ETPs should be available to U.S. investors

and, as such, this proposal and other comparable proposals to list and trade Spot Ether ETPs should be approved by the Commission. Stated simply, U.S. investors will continue to lose significant amounts of money from holding Ether Futures ETFs as compared to Spot Ether ETPs, losses which could be prevented by the Commission approving Spot Ether ETPs. Additionally, any concerns related to preventing fraudulent and manipulative acts and practices related to Spot Ether ETPs would apply equally to the spot markets underlying the futures contracts held by an Ether Futures ETF. Both the Exchange and Sponsor believe that the CME Ether Futures market is a regulated market of significant size and that such manipulation concerns are mitigated, as described extensively below. After allowing the listing and trading of Ether Futures ETFs that hold primarily CME Ether Futures, however, the only consistent outcome would be approving Spot Ether ETPs on the basis that the CME Ether Futures market is a regulated market of significant size.

Given the current landscape, approving this proposal (and others like it) and allowing Spot Ether ETPs to be listed and traded alongside Ether Futures ETFs and Spot Bitcoin ETPs would establish a consistent regulatory approach, provide U.S. investors with choice in product structures for ether exposure, and offer flexibility in the means of gaining exposure to ether through transparent, regulated, U.S. exchange-listed vehicles.

CME Ether Futures²²

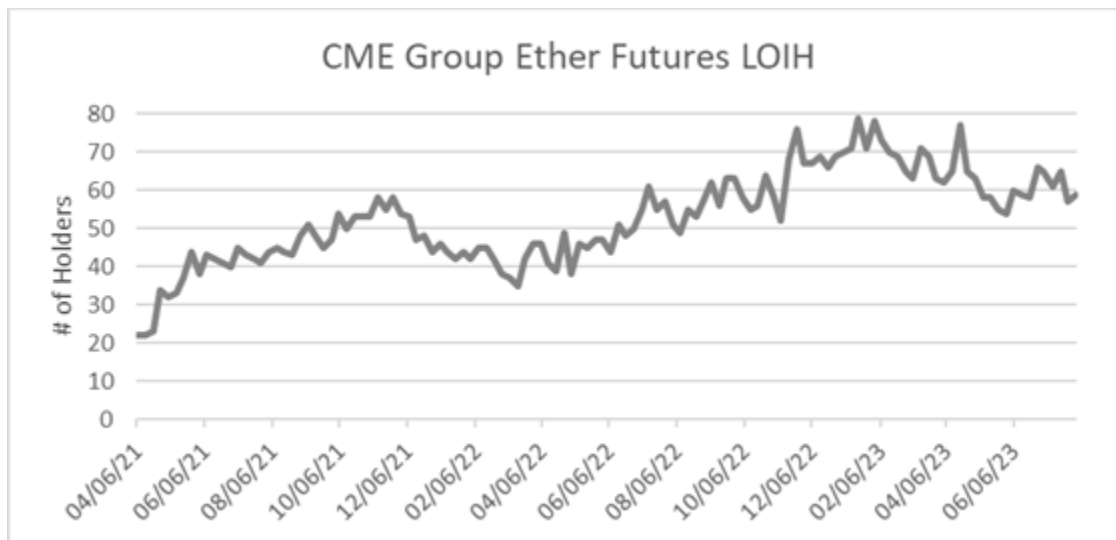
CME began offering trading in CME Ether Futures in February 2021. Each contract represents 50 ETH and is based on the CME CF Ether-Dollar Reference Rate.²³

²² Unless otherwise noted, all data and analysis presented in this section and referenced elsewhere in the filing has been provided by the Sponsor.

²³ The CME CF Ether-Dollar Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto exchanges and trading platforms,

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

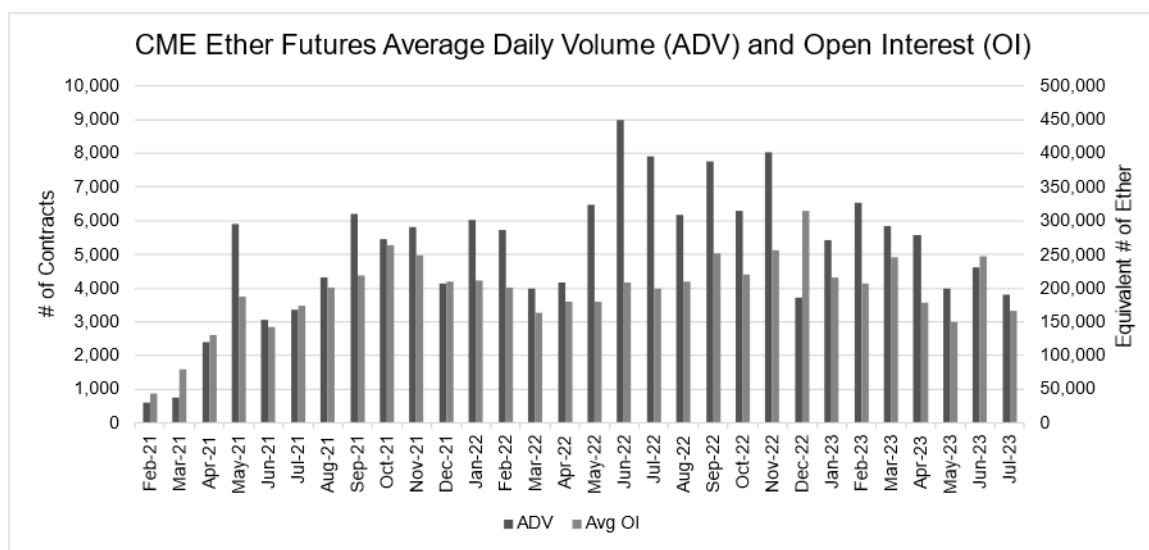
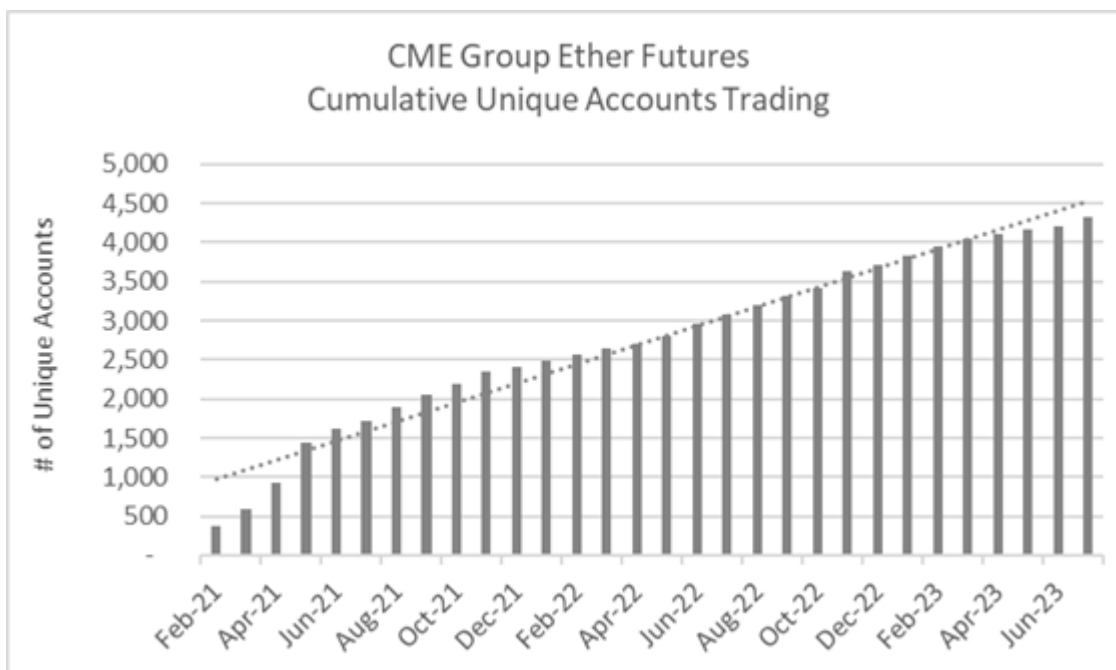
The number of large open interest holders²⁵ and unique accounts trading CME Ether Futures have both increased, even in the face of heightened Ether price volatility.

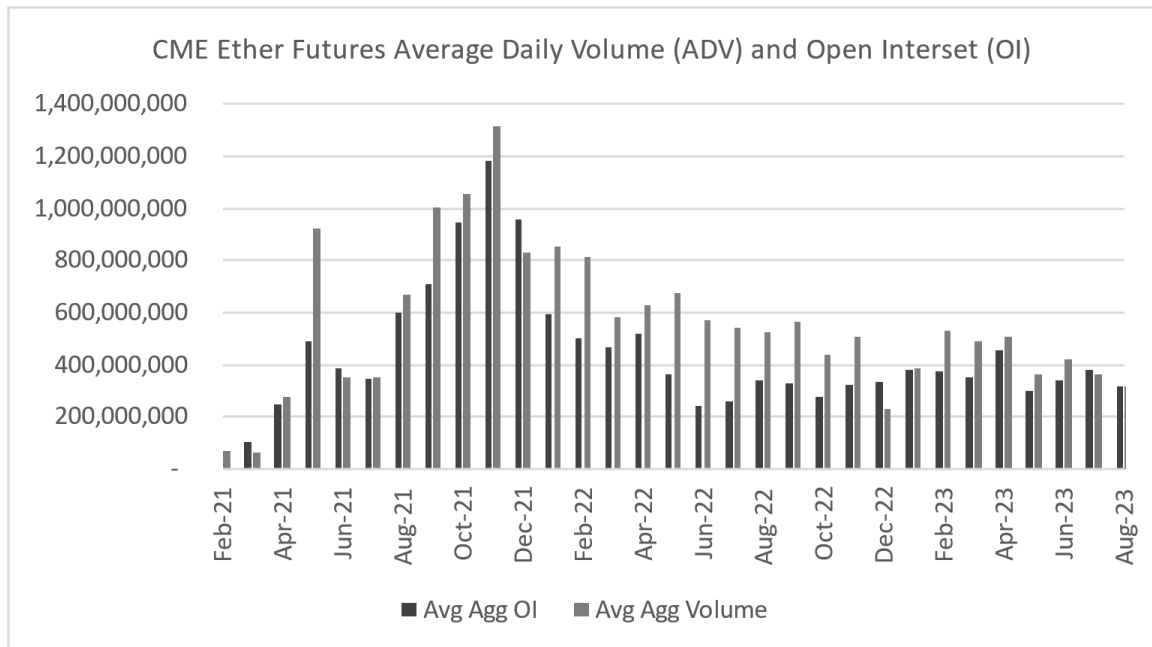


including Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.

²⁴ Source: CME, 7/31/23

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





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

The Commission has approved numerous series of Trust Issued Receipts,²⁶ including Commodity-Based Trust Shares,²⁷ 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;²⁸ and (ii) the requirement that an exchange proposal be designed, in general, to

²⁶ See Exchange Rule 14.11(f).

²⁷ Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

²⁸ The Exchange believes that ETH is resistant to price manipulation and that "other means to prevent fraudulent and manipulative acts and practices" exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ETH trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ETH platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ETH prices through continuous trading activity challenging. To the extent that there are ETH platforms engaged in or allowing wash trading or other activity intended to manipulate the price of ETH on other markets, such pricing does not normally impact prices on other platforms because

protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that this filing sufficiently demonstrates that the CME Ether 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 place²⁹ with a regulated market of significant size. Both the Exchange and CME are members of the Intermarket

participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ETH markets and the presence of arbitrageurs in those markets means that the manipulation of the price of ETH on any single venue would require manipulation of the global ETH price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ETH platform 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.

²⁹ As previously articulated by the Commission, “The standard requires such surveillance-sharing agreements since “they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.” The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance- sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.” The Commission has historically held that joint membership in the ISG constitutes such a surveillance sharing agreement. See Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR-NYSEArca-2019-39) (the “Wilshire Phoenix Disapproval”).

Surveillance Group (“ISG”).³⁰ The only remaining issue to be addressed is whether the CME Ether 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.³¹

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.³²

(a) Manipulation of the ETP

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct. In light of the similarly high correlation between spot ETH/CME Ether Futures and spot bitcoin/CME Bitcoin Futures, applying the same

³⁰ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

³¹ See Wilshire Phoenix Disapproval.

³² 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.

rationale that the Commission applied to a Spot Bitcoin ETP in the Spot Bitcoin ETP

Approval Order also indicates that this test is satisfied for this proposal. As noted above, in the Spot Bitcoin ETP Approval Order, the SEC concluded that:

...fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME’s surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges’ comprehensive surveillance-sharing agreement with the CME...can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.³³

The assumptions from this statement are also true for CME Ether Futures. CME Ether Futures pricing is based on pricing from spot ether markets. The statement from the Spot Bitcoin ETP Approval Order that the surveillance-sharing agreement with the CME “can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals” makes clear that the Commission believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME Bitcoin Futures. This same logic would extend to CME Ether Futures markets where CME’s surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME Ether Futures.

(b) Predominant Influence on Prices in Spot and Ether Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME Ether Futures market for a number of reasons. First, because the Trust would not hold CME Ether Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME Ether Futures contracts use for pricing.³⁴ The Sponsor notes that ether total 24-hour

³³ See the Spot Bitcoin ETP Approval Order at 3011-3012.

³⁴ This logic is reflected by the U.S. Court of Appeals for the D.C. Circuit on its review of the Grayscale Order at 17-18. See Grayscale Investments, LLC v. SEC, 82 F. 4th 1239 (D.C. Cir.

spot trading volume has averaged \$9.4 billion over the year ending September 1, 2023.³⁵

The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ether market even in its most aggressive projections for the Trust's assets and, thus, the Trust would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME Ether Futures market. Second, much like the CME Bitcoin Futures market, the CME Ether Futures market has progressed and matured significantly. As the U.S. Court of Appeals for the D.C. Circuit found in its review of the Grayscale Order, "Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less." The Exchange and sponsor agree with this sentiment and believe it applies equally to the spot ether and CME Ether Futures markets.

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

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

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ether through OTC ETH Funds has grown into the tens of billions of dollars and more than a billion dollars of exposure through Ether Futures ETFs. With that growth, so too has grown the

2023). Specifically, the court found that "Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market...But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin."

³⁵

Source: TokenTerminal.

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

Invesco Galaxy Ethereum ETF

Delaware Trust Company is the trustee (“Trustee”). The Bank of New York Mellon will be the administrator (“Administrator”) and transfer agent (“Transfer Agent”). As noted above, Coinbase Custody Trust Company, LLC, is the Custodian and will be responsible for custody of the Trust’s ETH. The Bank of New York Mellon (the “Cash Custodian”) will act as custodian of the Trust’s cash and cash equivalents.³⁶

According to the Registration Statement, each Share will represent a fractional undivided beneficial interest and ownership in the Trust. The Trust’s assets will consist only of ETH, cash, and cash equivalents.

³⁶ Cash equivalents are short-term instruments with maturities of less than 3 months.

According to the Registration Statement, the Trust is neither an investment company registered under the Investment Company Act of 1940, as amended,³⁷ nor a commodity pool for purposes of the Commodity Exchange Act (“CEA”), and neither the Trust nor the Sponsor is subject to regulation as a commodity pool operator or a commodity trading adviser in connection with the Shares.

Neither the Trust, nor the Sponsor, nor the Custodian, nor any other person associated with the Trust will, directly or indirectly, engage in action where any portion of the Trust’s ETH becomes subject to the Ethereum proof-of-stake validation or is used to earn additional ETH or generate income or other earnings. The Trust will not acquire and will disclaim any incidental right (“IR”) or IR asset received, for example as a result of forks or airdrops, and such assets will not be taken into account for purposes of determining NAV.

When the Trust sells or redeems its Shares, it will do so in cash transactions in blocks of 5,000 Shares (a “Creation Basket”) at the Trust’s net asset value (“NAV”). Authorized participants will deliver, or facilitate the delivery of, cash to the Trust’s account with the Cash Custodian in exchange for Shares when they purchase Shares, and the Trust, through the Cash Custodian, will deliver cash to such authorized participants when they redeem Shares with the Trust. Authorized participants may then offer Shares to the public at prices that depend on various factors, including the supply and demand for Shares, the value of the Trust’s assets, and market conditions at the time of a transaction. Shareholders who buy or sell Shares during the day from their broker may do so at a premium or discount relative to the NAV of the Shares of the Trust.

³⁷ 15 U.S.C. 80a-1.

Investment Objective

According to the Registration Statement, the investment objective of the Trust is for the Shares to reflect the spot price of Ether as measured by using the Lukka Prime Reference Rate (the “Index”) less the Trust’s expenses and other liabilities. In seeking to achieve its investment objective, the Trust will hold only ETH, cash, and cash equivalents. The Trust will value its Shares daily based on the value of the Index as of 4:00 p.m. ET, which is calculated based on the fair market value price for ETH, reflecting the execution price of ETH on its principal market as determined by Lukka Inc., an independent third-party digital asset company (the “Index Provider”). The Trust will process all creations and redemptions in cash transactions with authorized participants. The Trust is not actively managed.

The Index

As described in the Registration Statement, the Trust will use the Index to calculate the Trust’s NAV. The Index is designed to be a robust price for ETH in USD and there is no component other than ETH in the index. The underlying trading platforms are sourced from the Index Provider. As of December 2023, the following platforms are considered to be eligible by the Index Provider: Binance, Bitfinex, Bitflyer, Bittrex, Bitstamp, Coinbase, Crypto.com, Gemini, HitBTC, Huobi, Kraken, KuCoin, OKEx, Poloniex (collectively, “Index Pricing Sources”). The Index Provider reviews eligible trading platforms quarterly. In determining which trading platforms to include, the Index Provider evaluates each trading platform using proprietary ratings criteria. The Index Provider constantly reassesses the trading platforms to be eligible for inclusion in the Index, and makes adjustments as needed.

In determining the value of ETH, the Index Provider applies a five-step weighting process for identifying the principal trading platform for Ether and the last price on that trading platform. A “base exchange score” (“BES”) that takes into account this criteria is assigned to each Index Pricing Source in order to select the most appropriate primary trading platform and then an executed trading platform price is determined at 4:00 p.m. ET., although the Index Provider performs this calculation every second each day.

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

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

Step 3: Decay the adjusted score based on the time passed since last trade on platform, assessing the level of activity in the market by considering the frequency (volume) of trades. The decay factor reflects the time since the last trade on the platform. This is the final Decayed Volume Adjusted Score (DVAS), which reflects freshness of data by tracking most recent trades.

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

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

Index data and the description of the Index are based on information made publicly available by the Index Provider on its website at <https://lukka.tech>.

Net Asset Value

The Trust's NAV per Share is calculated by (1) taking the current market value of its ETH (calculated by the Index Provider) and any other assets; (2) subtracting any liabilities (including accrued by unpaid expenses); and (3) dividing that total by the total number of outstanding Shares. The Administrator calculates the NAV of the Trust on each day that the Exchange is open for regular trading, using the execution price of ETH on the principal market selected by the Index Provider as of 4:00 p.m. ET. However, NAVs are not officially struck until later in the day (often by 5:30 p.m. ET and almost always by 8:00 p.m. ET).

The NAV for the Trust will be calculated by the Administrator once a day and will be disseminated daily to all market participants at the same time.

In the event that the Index is unavailable or if the Sponsor or Administrator determines that the price provided by the Index does not reflect an accurate ETH price, the Sponsor's pricing team will evaluate the prices of other similar benchmarks in an effort to ensure that the Trust's NAV is determined based on consistent, accurate pricing that the Sponsor believes is reflective of the value of the Trust's ETH, and also a transparent index methodology and process. The pricing team will recommend the price to be used to the Sponsor's valuation committee who will then review the recommendation and approve it for use by the Trust if found appropriate.³⁸

Availability of Information

³⁸ Such alternative method will only be employed on an ad hoc basis. Any permanent change to the calculation of the NAV would require a proposed rule change under Rule 19b-4.

In addition to the price transparency of the Index, the Trust will provide information regarding the Trust's ETH holdings as well as additional data regarding the Trust. The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV per Share and the reported BZX Official Closing Price³⁹; (b) the BZX Official Closing Price in relation to the NAV per Share as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV per Share; (c) data in chart form displaying the frequency distribution of discounts and premiums of the BZX Official Closing Price against the NAV per Share, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The Trust will also disseminate its holdings on a daily basis on its website. The aforementioned information will be published as of the close of business available on the Sponsor's website at www.invesco.com/etfs, or any successor thereto.

The Intraday Indicative Value ("IIV") will be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the most recently reported price of ETH as reported by the Index Provider or another reporting service. The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV may differ from the NAV due to the differences in the time window of trades used to calculate each price. The IIV

³⁹ As defined in Rule 11.23(a)(3), the term "BZX Official Closing Price" shall mean the price disseminated to the consolidated tape as the market center closing trade.

will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours by one or more major market data vendors. In addition, the IIV will be available through the facilities of the consolidated tape association (CTA) and Consolidated Quotation System (CQS) high speed lines. In addition, the IIV will be available through on-line information services such as Bloomberg and Reuters.

The price of ETH will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours.

As noted above, the Index is designed to provide an estimated fair market value for ETH. Information about the Index and Index value, including key elements of how the Index is calculated, will be publicly available at <https://lukka.tech>.

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

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's BZX Official Closing Price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA.

The ETH Custodian

The Custodian carefully considers the design of the physical, operational and cryptographic systems for secure storage of the Trust's private keys in an effort to lower the risk of loss or theft. The Custodian utilizes a variety of security measures to ensure that private keys necessary to transfer digital assets remain uncompromised and that the Trust maintains exclusive ownership of its assets. The operational procedures of the Custodian are reviewed by third-party advisors with specific expertise in physical security. The devices that store the keys will never be connected to the internet or any other public or private distributed network—this is colloquially known as “cold storage.” Only specific individuals are authorized to participate in the custody process, and no individual acting alone will be able to access or use any of the private keys. In addition, no combination of the executive officers of the Sponsor or the investment professionals managing the Trust, acting alone or together, will be able to access or use any of the private keys that hold the Trust's ETH.

Creation and Redemption of Shares

When the Trust sells or redeems its Shares, it will do so in cash transactions in blocks of 5,000 Shares (e.g., a Creation Basket) that are based on the quantity of ETH attributable to each Share of the Trust at the Trust's NAV. According to the Registration Statement, on any business day, an authorized participant may place an order to create one or more Creation Baskets. Purchase orders must be placed by 4:00 p.m. Eastern Time, or the close of regular trading on the Exchange, whichever is earlier. The day on which an order is received is considered the purchase order date. The total deposit of cash required is based on the combined NAV of the number of Shares included in the Creation Baskets being created determined as of 4:00 ET on the date the order to purchase is

properly received. The Administrator determines the quantity of ether associated with a Creation Basket for a given day by dividing the number of ether held by the Trust as of the opening of business on that business day, adjusted for the amount of ether constituting estimated accrued but unpaid fees and expenses of the Trust as of the opening of business on that business day, by the quotient of the number of Shares outstanding at the opening of business divided by the number of Shares in a Creation Basket.

The procedures by which an authorized participant can redeem one or more Creation Baskets mirror the procedures for the creation of Creation Baskets.

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

The Trust will create Shares by receiving ETH from a third party that is not the authorized participant and the Trust (through an execution agent that is acting in an agency capacity)—not the authorized participant—is responsible for selecting the third party to deliver the ETH. Further, the third party will not be acting as an agent of the authorized participant with respect to the delivery of the ETH to the Trust or acting at the direction of the authorized participant with respect to the delivery of the ETH to the Trust. The Trust will redeem Shares by delivering ETH to a third party that is not the authorized participant and the Trust—not the authorized participant—is responsible for

selecting the third party to receive the ETH. Further, the third party will not be acting as an agent of the authorized participant with respect to the receipt of the ETH from the Trust or acting at the direction of the authorized participant with respect to the receipt of the ETH from the Trust.

The Sponsor will maintain ownership and control of ETH in a manner consistent with good delivery requirements for spot commodity transactions.

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

The Shares will be subject to BZX Rule 14.11(e)(4), which sets forth the initial and continued listing criteria applicable to Commodity-Based Trust Shares. The Exchange represents that, for initial and continued listing, the Trust must be in compliance with Rule 10A-3 under the Act. A minimum of 100,000 Shares will be outstanding at the commencement of listing on the Exchange. The Exchange will obtain a representation that the Trust's NAV will be calculated daily and the NAV and information about the assets of the Trust will be made available to all market participants at the same time. The Exchange notes that, as defined in Rule 14.11(e)(4)(C)(i), the Shares will be: (a) issued by a trust that holds (1) a specified commodity⁴⁰ deposited with the trust, or (2) a specified commodity and, in addition to such specified commodity, cash; (b) issued by such trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity and/or cash; and (c) when aggregated in the same specified minimum number, may be redeemed at a holder's request by such

⁴⁰ For purposes of Rule 14.11(e)(4), the term commodity takes on the definition of the term as provided in the Commodity Exchange Act.

trust which will deliver to the redeeming holder the quantity of the underlying commodity and/or cash.

Upon termination of the Trust, the Shares will be removed from listing. The Trustee, Delaware Trust Company, is a trust company having substantial capital and surplus and the experience and facilities for handling corporate trust business, as required under Rule 14.11(e)(4)(E)(iv)(a) and that no change will be made to the trustee without prior notice to and approval of the Exchange. The Exchange also notes that, pursuant to Rule 14.11(e)(4)(F), neither the Exchange nor any agent of the Exchange shall have any liability for damages, claims, losses or expenses caused by any errors, omissions or delays in calculating or disseminating any underlying commodity value, the current value of the underlying commodity required to be deposited to the Trust in connection with issuance of Commodity-Based Trust Shares; resulting from any negligent act or omission by the Exchange, or any agent of the Exchange, or any act, condition or cause beyond the reasonable control of the Exchange, its agent, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission or delay in the reports of transactions in an underlying commodity. Finally, as required in Rule 14.11(e)(4)(G), the Exchange notes that any registered market maker (“Market Maker”) in the Shares must file with the Exchange in a manner prescribed by the Exchange and keep current a list identifying all accounts for trading in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, which the registered Market Maker may have or over which it may exercise investment discretion. No

registered Market Maker shall trade in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, in an account in which a registered Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by this Rule. In addition to the existing obligations under Exchange rules regarding the production of books and records (see, e.g., Rule 4.2), the registered Market Maker in Commodity-Based Trust Shares shall make available to the Exchange such books, records or other information pertaining to transactions by such entity or registered or non-registered employee affiliated with such entity for its or their own accounts for trading the underlying physical commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, as may be requested by the Exchange.

The Exchange is able to obtain information regarding trading in the Shares and the underlying ETH, CME Ether Futures, options on CME Ether Futures, or any other ETH derivative through members acting as registered Market Makers, in connection with their proprietary or customer trades.

As a general matter, the Exchange has regulatory jurisdiction over its Members and their associated persons, which include any person or entity controlling a Member. To the extent the Exchange may be found to lack jurisdiction over a subsidiary or affiliate of a Member that does business only in commodities or futures contracts, the Exchange could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. The Exchange will halt trading in the Shares under the conditions specified in BZX Rule 11.18. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the ether underlying the Shares; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Rule 14.11(e)(4)(E)(ii), which sets forth circumstances under which trading in the Shares may be halted.

If the IIV or the value of the Index is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the IIV or the value of the Index occurs. If the interruption to the dissemination of the IIV or the value of the Index persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

In addition, if the Exchange becomes aware that the NAV 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.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. BZX will allow trading in the Shares during all trading sessions on the

Exchange. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in BZX Rule 11.11(a) the minimum price variation for quoting and entry of orders in securities traded on the Exchange is \$0.01 where the price is greater than \$1.00 per share or \$0.0001 where the price is less than \$1.00 per share. The Shares of the Trust will conform to the initial and continued listing criteria set forth in BZX Rule 14.11(e)(4).

Surveillance

The Exchange represents 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. FINRA conducts certain cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares, CME Ether Futures, or any other derivative with other markets and other entities that are members of the ISG, and the Exchange, or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares, CME Ether Futures, or any other derivative from such markets and other entities.⁴¹ The Exchange may obtain information regarding trading in the Shares, CME Ether Futures, or any other derivative via ISG, from other exchanges who are

⁴¹ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

The Sponsor has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12.

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (i) the procedures for the creation and redemption of Creation Baskets (and that the Shares are not individually redeemable); (ii) BZX Rule 3.7, which imposes suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers; (iii) how information regarding the IIV and the Trust's NAV are disseminated; (iv) the risks involved in trading the Shares outside of Regular Trading Hours⁴² when an updated IIV will not be calculated or publicly disseminated; (v) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (vi) trading

⁴² Regular Trading Hours is the time between 9:30 a.m. and 4:00 p.m. Eastern Time.

information. The Information Circular will also reference the fact that there is no regulated source of last sale information regarding ether, that the Commission has no jurisdiction over the trading of ether as a commodity, and that the CFTC has regulatory jurisdiction over the trading of CME Ether Futures and options on CME Ether Futures.

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

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act⁴³ in general and Section 6(b)(5) of the Act⁴⁴ 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,⁴⁵ including Commodity-Based Trust Shares,⁴⁶ to be listed on U.S. national securities. In order for any proposed rule change from an exchange to be approved, the Commission must

⁴³ 15 U.S.C. 78f.

⁴⁴ 15 U.S.C. 78f(b)(5).

⁴⁵ See Exchange Rule 14.11(f).

⁴⁶ Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

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;⁴⁷ 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 CME Ether 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 place⁴⁸ with a regulated

⁴⁷ The Exchange believes that ETH is resistant to price manipulation and that “other means to prevent fraudulent and manipulative acts and practices” exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ETH trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ETH platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ETH prices through continuous trading activity challenging. To the extent that there are ETH platforms engaged in or allowing wash trading or other activity intended to manipulate the price of ETH on other markets, such pricing does not normally impact prices on other platforms because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ETH markets and the presence of arbitrageurs in those markets means that the manipulation of the price of ETH on any single venue would require manipulation of the global ETH price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ETH platform 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.

⁴⁸ 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

market of significant size. Both the Exchange and CME are members of ISG.⁴⁹ The only remaining issue to be addressed is whether the CME Ether 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.⁵⁰

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.⁵¹

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 ISG constitutes such a surveillance sharing agreement. See Wilshire Phoenix Disapproval.

⁴⁹ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

⁵⁰ See Wilshire Phoenix Disapproval.

⁵¹ 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.

(a) *Manipulation of the ETP*

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct. In light of the similarly high correlation between spot ETH/CME Ether Futures and spot bitcoin/CME Bitcoin Futures, applying the same rationale that the Commission applied to a Spot Bitcoin ETP in the Spot Bitcoin ETP Approval Order also indicates that this test is satisfied for this proposal. As noted above, in the Spot Bitcoin ETP Approval Order, the SEC concluded that:

...fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME's surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges' comprehensive surveillance-sharing agreement with the CME...can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.⁵²

The assumptions from this statement are also true for CME Ether Futures. CME Ether Futures pricing is based on pricing from spot ether markets. The statement from the Spot Bitcoin ETP Approval Order that the surveillance-sharing agreement with the CME “can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals” makes clear that the Commission believes that CME's surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME Bitcoin Futures. This same logic would extend to CME Ether Futures markets where CME's surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME Ether Futures.

⁵² See the Spot Bitcoin ETP Approval Order at 3011-3012.

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

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME Ether Futures market for a number of reasons. First, because the Trust would not hold CME Ether Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME Ether Futures contracts use for pricing.⁵³ The Sponsor notes that ether total 24-hour spot trading volume has averaged \$9.4 billion over the year ending September 1, 2023.⁵⁴ The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ether market even in its most aggressive projections for the Trust's assets and, thus, the Trust would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME Ether Futures market. Second, much like the CME Bitcoin Futures market, the CME Ether Futures market has progressed and matured significantly. As the U.S. Court of Appeals for the D.C. Circuit found in its review of the Grayscale Order, "Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less." The Exchange and sponsor agree with this sentiment and believe it applies equally to the spot ether and CME Ether Futures markets.

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

⁵³ This logic is reflected by the U.S. Court of Appeals for the D.C. Circuit on its review of the Grayscale Order at 17-18. See Grayscale Investments, LLC v. SEC, 82 F. 4th 1239 (D.C. Cir. 2023). Specifically, the court found that "Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market...But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin."

⁵⁴ Source: TokenTerminal.

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

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ether through OTC ETH Funds has grown into the tens of billions of dollars and more than a billion dollars of exposure through Ether Futures ETFs. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through roll costs for Ether Futures ETFs and premium/discount volatility and management fees for OTC ETH Funds. The Exchange believes that the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, also believes that such concerns are now outweighed by these investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ether in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in Ether Futures ETFs and operating companies that are imperfect proxies for ether exposure; and (iv) providing an alternative to custodial spot ether.

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

Availability of Information

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

data regarding the Trust. The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV per Share and the reported BZX Official Closing Price; (b) the BZX Official Closing Price in relation to the NAV per Share as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV per Share; (c) data in chart form displaying the frequency distribution of discounts and premiums of the BZX Official Closing Price against the NAV per Share, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The Trust will also disseminate its holdings on a daily basis on its website. The aforementioned information will be published as of the close of business available on the Sponsor's website at www.invesco.com/etfs, or any successor thereto.

The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the most recently reported price of ETH as reported by the Index Provider or another reporting service. The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV may differ from the NAV due to the differences in the time window of trades used to calculate each price. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours by one or more major market data vendors. In addition, the IIV will be available through the facilities of the CTA and CQS high speed lines. In addition, the IIV will be available through on-line information services such as Bloomberg and Reuters.

The price of ETH will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours.

As noted above, the Index is designed to provide an estimated fair market value for ETH. Information about the Index and Index value, including key elements of how the Index is calculated, will be publicly available at <https://lukka.tech>.

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

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's BZX Official Closing Price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA.

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

approving this proposal. For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

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

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

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

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

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

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

IV. Solicitation of Comments

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

Electronic Comments:

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

Paper Comments:

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

All submissions should refer to file number SR-CboeBZX-2023-087. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or

subject to copyright protection. All submissions should refer to file number SR-CboeBZX-2023-087 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁵

Sherry R. Haywood,

Assistant Secretary.

⁵⁵ 17 CFR 200.30-3(a)(12).