

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 93		SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4		File No. * SR 2023 - * 095 Amendment No. (req. for Amendments *) 2	
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 * Kyle Last Name * Murray Title * VP, Associate General Counsel E-mail * kmurray@cboe.com Telephone * (913) 815-7121 Fax					
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 *) 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</div><div>Date: 2024.05.21 16:20:01 -05'00'</div></div>					

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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

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

Form 19b-4 Information *

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23-095 (Fidelity Eth ETF) 19b-4 Am. 2

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

Exhibit 1 - Notice of Proposed Rule Change *

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23-095 Exhibit 1 (Fidelity Eth ETF).do

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

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

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

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

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

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Exhibit Sent As Paper Document

Exhibit 3 - Form, Report, or Questionnaire

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

☐

Exhibit Sent As Paper Document

Exhibit 4 - Marked Copies

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

Exhibit 5 - Proposed Rule Text

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

Partial Amendment

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

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 Fidelity Ethereum Fund (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 November 17, 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 Kyle Murray, Vice President, Associate General Counsel, (913) 815-7121, Cboe BZX Exchange, Inc., 433 West Van Buren Street, Chicago, Illinois 60607.

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

(a) Purpose

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 October 31, 2023, and is operated as a grantor trust for U.S. federal tax purposes. The Trust has no fixed termination date.

This Amendment No. 2 to SR-CboeBZX-2023-095 amends and replaces in its entirety the proposal as originally submitted on November 17, 2023, and as amended by Amendment No. 1 on March 18, 2024. The Exchange submits this Amendment No. 2 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 FD Funds Management LLC 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

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.⁷ With this in mind, the Chicago Mercantile Exchange

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 May 21, 2024, the Trust filed with the Commission amendment no. 1 to the Registration Statement on Form S-1, submitted to the Commission by the Sponsor on behalf of the Trust (333-278249). The descriptions of the Trust, the Shares, and the Index (as defined below) contained herein are based, in part, on information in the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

⁷ 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

(“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”).⁸ By way of background, in 2022 the Commission disapproved proposals⁹ to list Spot Bitcoin ETPs, including a proposal sponsored by Grayscale Investments, LLC (“Grayscale”).¹⁰ Grayscale appealed the decision with the U.S. Court

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.

⁸ 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”).

⁹ 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.

¹⁰ 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”).

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.¹¹ 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.¹²

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 a network of computers all over the world that follow a set of rules called the Ethereum protocol. The Ethereum protocol creates a unified understanding of

¹¹ See Grayscale Investments, LLC v. SEC, 82 F.4th 1239 (D.C. Cir. 2023).

¹² See the Spot Bitcoin ETP Approval Order at 3011-3012.

ownership, commercial activity, and business logic. This allows users to engage in commerce without the need to trust any of their counterparties. Ethereum code creates verifiable and unambiguous rules that assign clear, strong property rights to create a platform for unrestrained application formation and free exchange. It is widely understood that no single person 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, including the native asset to the Ethereum network, 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 data storage, trading, and launching applications. 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 and 32 ETH

serves as the minimum capital required to run validator software and participate in consensus to add new blocks to the blockchain.

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.

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 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 Futures¹³

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.¹⁴ 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.¹⁵

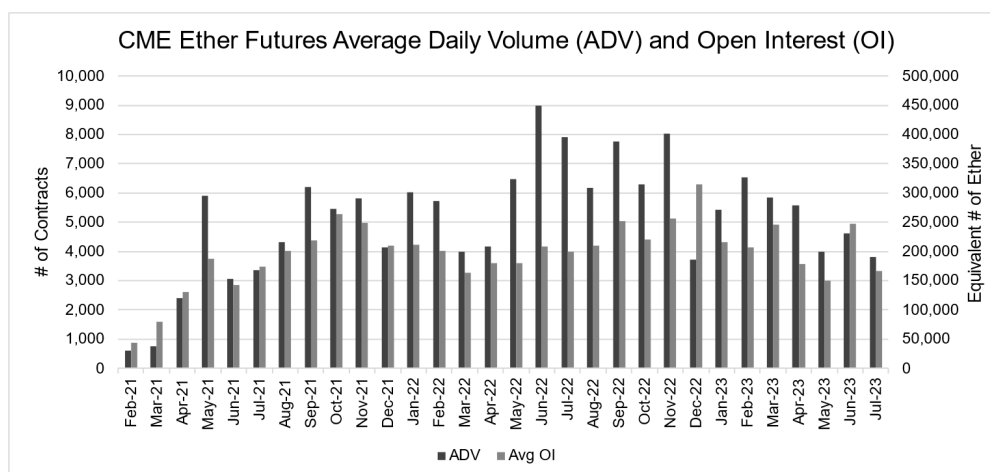
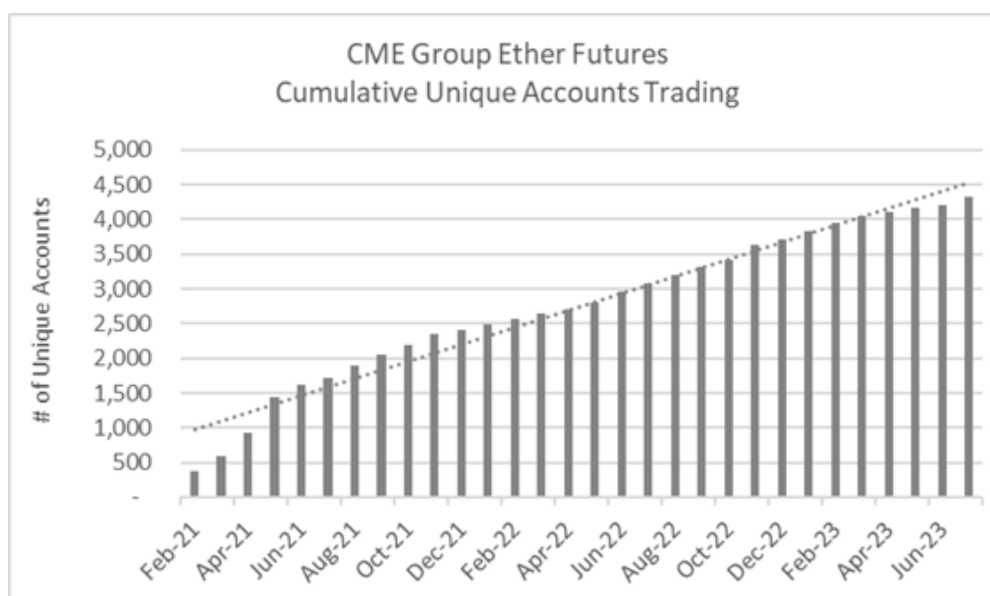
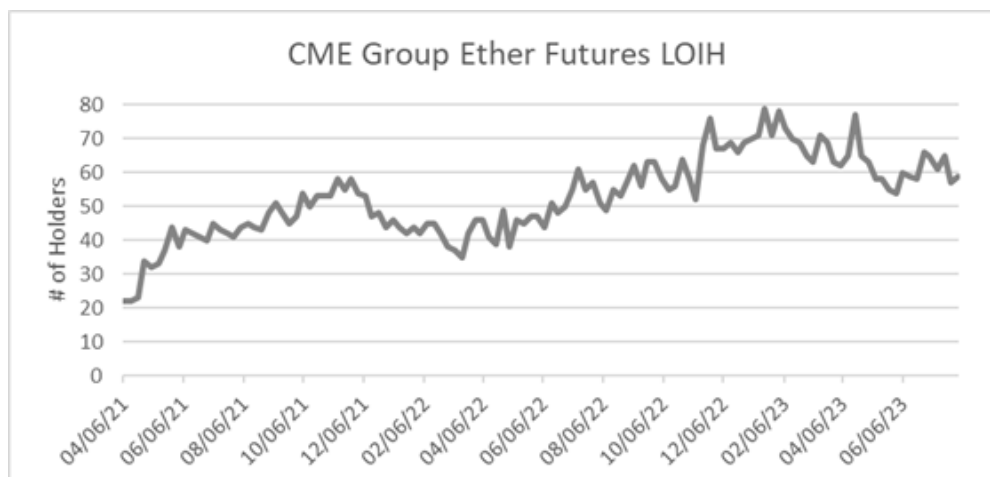
The number of large open interest holders¹⁶ and unique accounts trading CME Ether Futures have both increased, even in the face of heightened Ether price volatility.

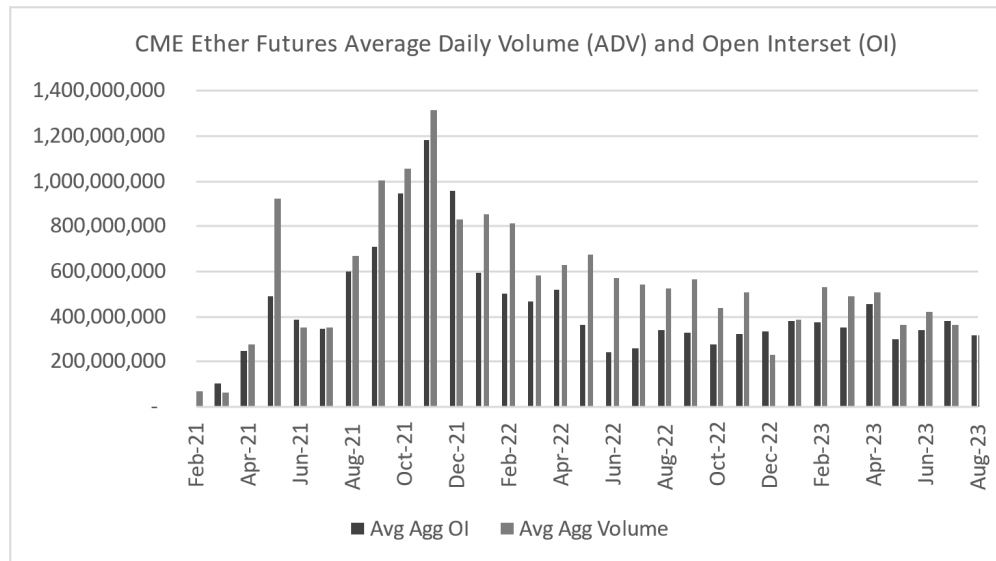
¹³ Unless otherwise noted, all data and analysis presented in this section and referenced elsewhere in the filing has been provided by the Sponsor.

¹⁴ The CME CF Ether-Dollar Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto trading platforms, including Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.

¹⁵ Source: CME, 7/31/23.

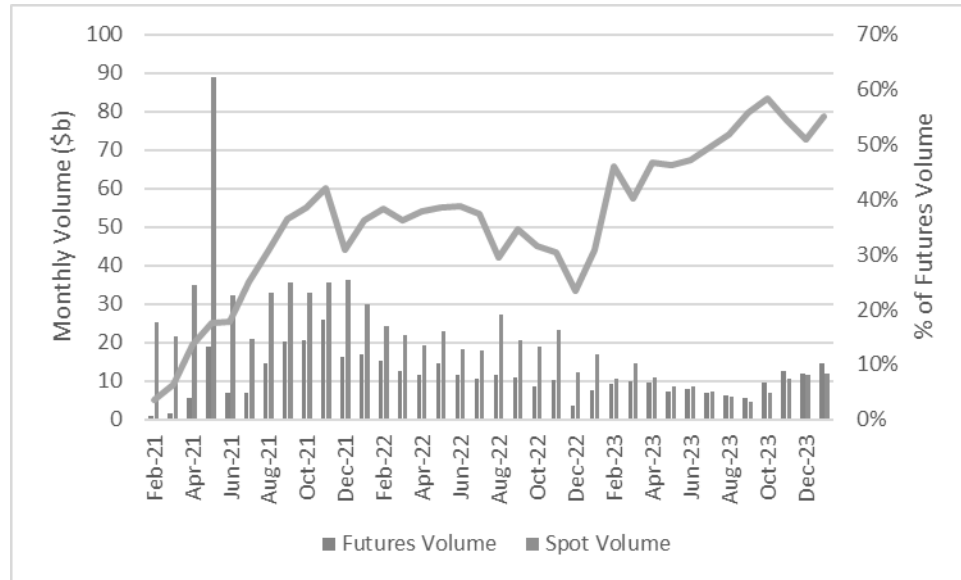
¹⁶ A large open interest holder in CME Ether Futures is an entity that holds at least 25 contracts, which is the equivalent of 1250 ether. At a price of approximately \$1,867 per ether on 7/31/2023, more than 59 firms had outstanding positions of greater than \$2.3 million in CME Ether Futures





The market for CFTC-regulated trading of ether derivatives has developed substantially recently. From February 2021 to January 2024, CFTC regulated ether futures notional trading volume on Chicago Mercantile Exchange increased from 0.94 to 14.68 USD billion on a monthly basis. At the same time, total ether spot volume decreased from 25.31 USD billion to 11.98 USD billion on a monthly basis using the CME CF Ether-Dollar Reference Rate related spot platforms¹⁷. As a result, CME Ether Futures represented an increasing amount of ETH/USD spot and futures volumes, up to 55% as of the end of January 2024.

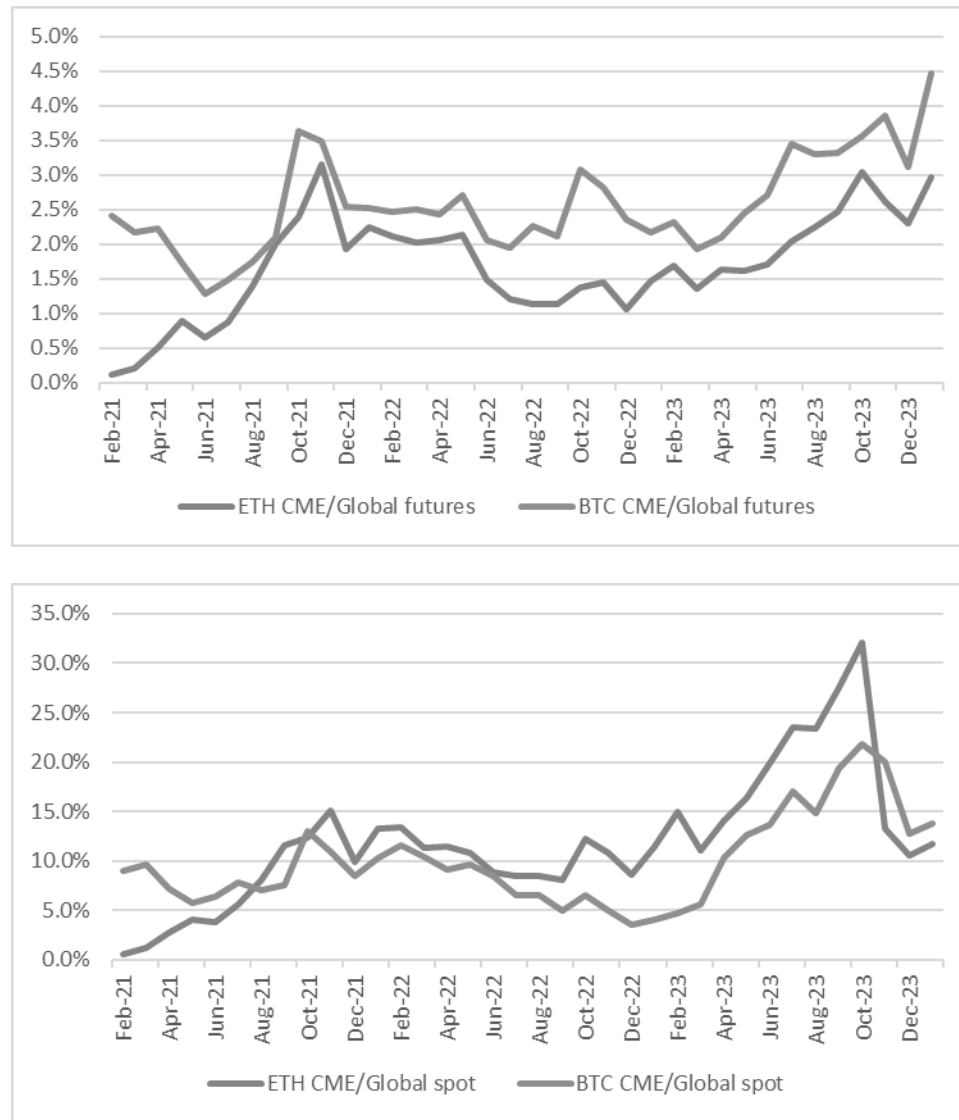
¹⁷ The CME CF Ether-Dollar Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto trading platforms, including Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.



Furthermore, while CME Ether Futures represent less than 3% of global ETH futures volumes¹⁸ these same futures contracts represent greater than 10% of global ETH spot volumes¹⁹, and has been as high as 30% of global ETH spot volumes in October 2023. Since the start of 2023, both BTC and CME Ether Futures volumes have trended higher in their overall volume share of global futures activity and CME Ether Futures have often represented a larger percentage of global spot volumes compared to the BTC CME futures.

¹⁸ List of platforms used to determine stated volume can be found here:
https://coverage.coinmetrics.io/exchange-metrics-v2/volume_reported_future_usd_1d.

¹⁹ List of platforms used to determine the stated volumes can be found here:
https://coverage.coinmetrics.io/exchange-metrics-v2/volume_reported_spot_usd_1d.



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

The Commission has approved numerous series of Trust Issued Receipts,²⁰ including Commodity-Based Trust Shares,²¹ 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

²⁰ See Exchange Rule 14.11(f).

²¹ Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

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;²² 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 place²³ with a regulated market of

²² 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 trading 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 trading 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 trading 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.

²³ 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

significant size. Both the Exchange and CME are members of the Intermarket Surveillance Group (“ISG”).²⁴ 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.²⁵

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.²⁶

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”).

²⁴ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

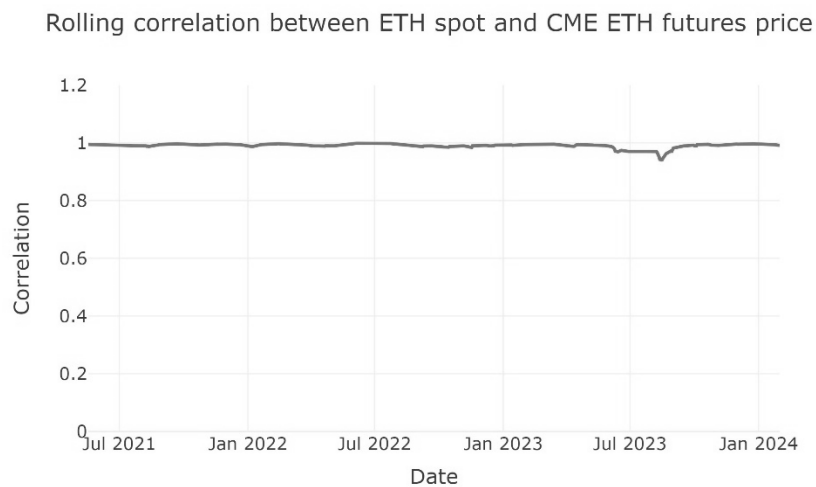
²⁵ See Wilshire Phoenix Disapproval.

²⁶ 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

(a) *Manipulation of the ETP*

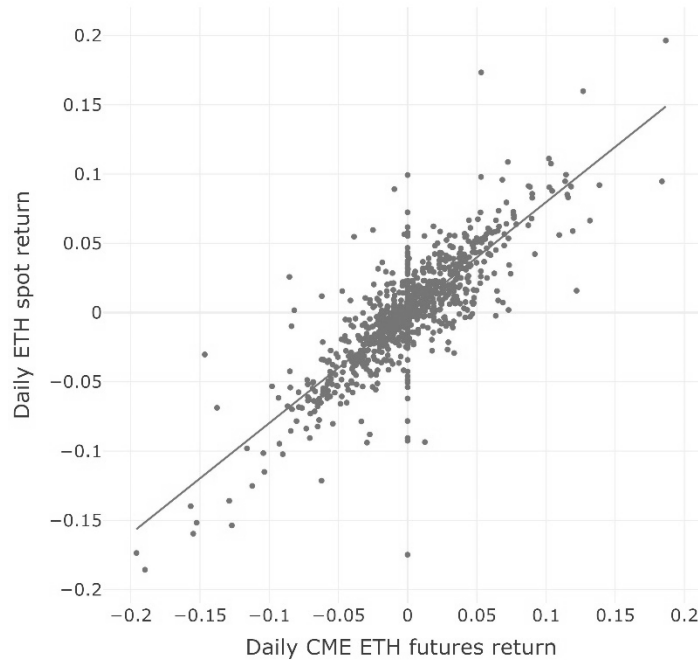
The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on the surveilled market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct.

The Sponsor examined the correlation between the ETH spot price and the CME Ether Futures price. In this study, the price of the CME Ether Futures front month contract, i.e., the contract with the nearest expiration date, is compared to the ETH spot price. The rolling correlation between the assets with 90 days windows shows that the futures and spot prices are highly correlated and ranged between 0.94 and 0.998. In addition, the daily returns for ETH spot and CME Ether Futures are highly correlated. The following charts evidence these relationships.



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.

ETH spot and CME ETH futures daily returns



Furthermore, the Sponsor examined intra-day correlations for both price and returns using historical pricing data every hour. This study further evidences the high correlation between the ETH/USD spot price and CME Ether Futures across six the CME CF Ether-Dollar Reference Rate related spot platforms²⁷ with hourly return correlations above 0.98.

ETH	Intraday Price	Hourly Returns	BTC	Intraday Price	Hourly Returns
	<i>Sample</i>	<i>Sample</i>		<i>Sample</i>	<i>Sample</i>
Spot Platform			Spot Platform		
Platform 1	0.985	0.985	Platform 1	0.999	0.989
Platform 2	0.985	0.985	Platform 2	0.999	0.988
Platform 3	0.982	0.982	Platform 3	0.999	0.986
Platform 4	0.981	0.981	Platform 4	0.999	0.986
Platform 5	0.985	0.985	Platform 5	0.999	0.986

²⁷

The six platforms are Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.

Platform 6	0.985	0.985	Platform 6	0.999	0.987
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The Sponsor also examined the distribution of hourly returns of spot ETH/USD to CME Ether Futures. One approach to detect potential price manipulation involves analyzing price movements on unregulated platforms compared to the surveilled market. This comparison focuses on identifying abnormal activity such as sudden price spikes or repetitive trades on unregulated platforms. A preliminary analysis of CME data compared to spot platforms revealed little to no extreme deviation in hourly returns. The following table shows at least 97.9% cases the hourly returns of the spot platforms from the regulated exchange are within 50 basis points. This suggests a high degree of similarity in price movements between the regulated exchange and the spot platforms for most hours. Further analysis using Bitcoin data reveals a similar pattern to the ether spot platforms. The Sponsor concludes that the manipulation in the ETP would require the manipulators to participate in the surveilled market.

Spot Platform	Hourly return within CME's for ETH			Hourly return within CME's for BTC		
	<200 bps	<100 bps	<50 bps	<200 bps	<100 bps	<50 bps
Platform 1	99.98%	99.92%	98.63%	99.96%	99.94%	99.46%
Platform 2	100.00%	99.83%	98.51%	99.96%	99.92%	99.38%
Platform 3	99.96%	99.69%	97.89%	99.96%	99.85%	98.99%
Platform 4	99.98%	99.81%	98.32%	99.98%	99.88%	99.27%
Platform 5	99.92%	99.71%	98.32%	99.94%	99.85%	99.25%
Platform 6	99.98%	99.86%	98.51%	99.98%	99.92%	99.28%

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 Order²⁸ 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.²⁹

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 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

²⁸ 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”).

²⁹ See the Spot Bitcoin ETP Approval Order at 3011-3012.

could be the predominant force on prices in that market is through the spot markets that CME Ether Futures contracts use for pricing.³⁰ The Sponsor notes that ETH total 24-hour spot trading volume has averaged \$9.4 billion over the year ending September 1, 2023.³¹ The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ETH 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 ETH 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.

³⁰ This logic is reflected by 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."

³¹ Source: TokenTerminal.

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 over-the-counter ether funds (“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.

Fidelity Ethereum Fund

The Registration Statement includes the following description of the Trust and its operations. The Trust will issue Shares that represent fractional undivided beneficial interests in and ownership of the Trust. The Trust is a Delaware statutory trust that operates pursuant to the Declaration of Trust and Trust Agreement (the “Trust

Agreement”), between Sponsor and Delaware Trust Company, the Delaware trustee of the Trust (the “Trustee”). Sponsor manages the Trust and is responsible for the ongoing registration of the Shares. The Trust will engage Fidelity Service Company, Inc. (“FSC”), a Sponsor affiliate, to be the administrator (“Administrator”). State Street and Trust Company the (the “Transfer Agent” and “Cash Custodian”)) will facilitate the issuance and redemption of Shares of the Trust and respond to correspondence by Trust shareholders and others relating to its duties, maintain shareholder accounts, and make periodic reports to the Trust. Another affiliate of Sponsor, Fidelity Distributors Company LLC, will be the distributor (“Distributor”) in connection with the creation and redemption of “Creation Baskets” of Shares. The Sponsor will provide assistance in the marketing of the Shares. Fidelity Digital Asset Services, LLC (“FDAS”), another Sponsor affiliate, will serve as the Custodian.

According to the Registration Statement, each Share will represent a fractional undivided beneficial interest in the Trust. The Trust’s assets will only consist of ether, cash, and cash equivalents.³² Except for cash temporarily held to pay Trust expenses, facilitate redemption transactions, or received in creation transactions, the Trust will only invest in ETH.

According to the Registration Statement, the Trust is neither an investment company registered under the 1940 Act,³³ nor a commodity pool for purposes of the Commodity Exchange Act (“CEA”), and neither the Trust nor the Sponsor is subject to

³² Cash equivalents are short-term instruments with maturities of less than 3 months.

³³ 15 U.S.C. 80a-1.

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.

Investment Objective

According to the Registration Statement, the investment objective of the Trust is to seek to track the performance of ETH, as measured by the performance of the Fidelity Ethereum Reference Rate (the "Index"), less the Trust's expenses and other liabilities. In seeking to achieve its investment objective, the Trust will hold ETH, cash, and cash equivalents and will value its Shares daily as of 4:00 p.m. Eastern time using the Index price to value the ether and process all creations and redemptions in transactions in cash transactions with authorized participants. The Trust is not actively managed.

The Index

The Index is designed to reflect the performance of ETH in U.S. dollars. The current digital trading platform composition of the Index is Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital. The Index methodology was developed by Fidelity

Product Services, LLC (the “Index Provider”) and is administered by the Fidelity Index Committee. Coin Metrics, Inc. is the third-party calculation agent for the Index.³⁴

The Index is constructed using ETH price feeds from eligible ETH spot markets and a volume-weighted median price (“VWMP”) methodology, calculated every 15 seconds based on VWMP spot market data over rolling sixty-minute increments to develop an ETH price composite. The Index market value is the volume-weighted median price of ETH in U.S. dollars over the previous sixty minutes, which is calculated by (1) ordering all individual transactions on eligible spot markets over the previous sixty minutes by price, and then (2) selecting the price associated with the 50th percentile of total volume. Using rolling sixty-minute segments means malicious actors would need to sustain efforts to manipulate the market over an extended period of time, or such malicious actors would need to replicate efforts multiple times across eligible ETH spot markets, potentially triggering review. This extended period also supports authorized participant activity by capturing volume over a longer time period, rather than forcing authorized participants to mark an individual close or auction. The use of a median price reduces the ability of outlier prices to impact the NAV, as it systematically excludes those prices from the NAV calculation. The use of a volume-weighted median (as opposed to a traditional median) serves as an additional protection against attempts to manipulate the NAV by executing a large number of low-dollar trades, because any manipulation attempt would have to involve a majority of global spot ETH volume in a sixty-minute window to have any influence on the NAV.

³⁴

The Sponsor’s affiliates have an ownership interest in Coin Metrics, Inc.

Index data and the description of the Index are based on information made publicly available by the Index Provider on its website at i.fidelity.com/indices.

Net Asset Value

As described in the Registration Statement, for purposes of calculating the Trust's NAV per Share, the Trust's holdings of ETH will be valued using the Index value as of 4:00 p.m. Eastern time. NAV means the total assets of the Trust which will include only ETH, cash, and cash equivalents, if any, less total liabilities of the Trust, each determined on the basis of generally accepted accounting principles. The Administrator calculates the NAV of the Trust once each Exchange trading day. The NAV for a normal trading day will be released after 4:00 p.m. Eastern time. Trading during the core trading session on the Exchange typically closes at 4:00 p.m. Eastern time. However, NAVs are not officially struck until later in the day (often by 5:30 p.m. Eastern time and almost always by 8:00 p.m. Eastern time). The pause between 4:00 p.m. Eastern time and 5:30 p.m. Eastern time (or later) provides an opportunity to algorithmically detect, flag, investigate, and correct unusual pricing should it occur.

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. If the Sponsor determines in good faith that the Index does not reflect an accurate ETH price, then the Trust will cause to be employed an alternative method to determine the fair value of the Trust's assets as reviewed and approved by the Sponsor's valuation committee.³⁵

Availability of Information

³⁵ 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 Price³⁶; (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 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 and available on the Sponsor's website at www.fidelity.com, or any successor thereto.

The Trust will provide an Intraday Indicative Value ("IIV") per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. Eastern time). The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours 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

³⁶

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.

Bloomberg and Reuters. The IIV calculation agent will use the Trust's ETH holdings and cash and cash equivalents expected to comprise that day's NAV calculation to calculate the IIV. The calculation agent currently uses the Blockstream Crypto Data Feed Streaming Level 1³⁷ as the pricing source for the spot ETH, which will be used to update the IIV. 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 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.

The value of the Index 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 calculated every day and is constructed using ETH price feeds from eligible ETH spot markets and a VWMP methodology, calculated every 15 seconds based on VWMP spot market data over rolling sixty-minute increments. Information about the Index and Index value, including key elements of how the Index is calculated, will be publicly available at i.fidelity.com/indices.

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.

³⁷ Blockstream provides cryptocurrency data feeds delivering real-time and historical trade data from the world's leading cryptocurrency venues. See blockstream.com/cryptofeed.

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 Sponsor has selected FDAS to be the Trust's Custodian. FDAS is a New York state limited liability trust³⁸ that serves as ETH custodian to institutional and individual investors. The Custodian maintains a substantial portion of the private keys associated with the Trust's ETH in "cold storage" or similarly secure technology. Cold storage is a safeguarding method with multiple layers of protections and protocols, by which the private key(s) corresponding to the Trust's ETH is (are) generated and stored in an offline manner. Private keys are generated in offline computers that are not connected to the internet so that they are resistant to being hacked. Cold storage of private keys may involve keeping such keys on a non-networked computer or electronic

³⁸ New York state trust companies are subject to rigorous oversight similar to other types of entities, such as nationally chartered banking entities, that hold customer assets. Like national banks, they must obtain specific approval of their primary regulator for the exercise of their fiduciary powers. Moreover, limited purpose trust companies engaged in the custody of digital assets are subject to even more stringent requirements than national banks which, following initial approval of trust powers, generally can exercise those powers broadly without further approval of the OCC. In contrast, NYDFS requires in their approval orders that limited purpose trust companies obtain separate approval for all material changes in business.

device or storing the public key and private keys on a storage device or printed medium and deleting the keys from all computers.

The Custodian may receive deposits of ETH but may not send ETH without use of the corresponding private keys. In order to send ETH when the private keys are kept in cold storage, either the private keys must be retrieved from cold storage and entered into a software program to sign the transaction, or the unsigned transaction must be sent to the “cold” server in which the private keys are held for signature by the private keys. At that point, the Custodian can transfer the ETH. The Trust’s Transfer Agent will facilitate the settlement of Shares in response to the placement of creation orders and redemption orders from authorized participants. The Trust will only hold ETH, cash and cash equivalents. The Trust will enter into a cash custody agreement with the Cash Custodian as custodian of the Trust’s cash and cash equivalents.

Creation and Redemption of Shares

When the Trust sells or redeems its Shares, it will do so in cash transactions in blocks of 25,000 Shares (a “Creation Basket”) that are based on the amount of ETH held by the Trust on a per unit (i.e., 25,000 Share) basis. 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 close of Regular Trading Hours on the Exchange or an earlier time as determined and communicated by the Sponsor and its agent. 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 p.m. 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 ETH held by the Trust as of the opening of business on that business day, adjusted for the amount of ETH 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 aggregation of Shares associated with 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—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 procedures by which an authorized participant can redeem one or more Creation Baskets mirror the procedures for the creation of Creation Baskets.

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 NAV will be calculated daily and that 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 commodity³⁹ 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 trust which will deliver to the redeeming holder the quantity of the underlying commodity and/or cash.

³⁹ 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.

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 contracts, 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 ETH 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 ether 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 ether derivative from such markets and other entities.⁴⁰ The Exchange may obtain information regarding trading in the Shares, CME Ether Futures, or any other ether derivative via ISG, from

⁴⁰ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

other exchanges who are 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. The

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 Hours⁴¹ 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

⁴¹ 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 ETH, that the Commission has no jurisdiction over the trading of ETH as a commodity, and that the CFTC has regulatory jurisdiction over the trading of CME Ether Futures contracts and options on CME Ether Futures contracts.

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 Act⁴² in general and Section 6(b)(5) of the Act⁴³ 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, including Commodity-Based Trust Shares, 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

⁴² 15 U.S.C. 78f.

⁴³ 15 U.S.C. 78f(b)(5).

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;⁴⁴ 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 and, as described and discussed above, the Sponsor's analysis demonstrates that the Exchange has satisfied the requirements under the Act that the CME Ether Futures Market (i) is a regulated market, (ii) has a comprehensive surveillance-sharing agreement with the Exchange; and (iii) satisfies the Commission's "significant market" definition." In addition, the Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act because this filing sufficiently demonstrates that the standard that has previously been articulated by the Commission applicable to Commodity-Based Trust Shares has been met as outlined below.

⁴⁴ 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 trading 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 trading 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 price 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 trading 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.

(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 place⁴⁵ with a regulated market of significant size. Both the Exchange and CME are members of ISG.⁴⁶ As such, 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.⁴⁷

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

⁴⁵ 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.

⁴⁶ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

⁴⁷ See Wilshire Phoenix Disapproval.

providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.⁴⁸

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.⁴⁹

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

⁴⁸ 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.

⁴⁹ 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.⁵⁰ The Sponsor notes that ether total 24-hour spot trading volume has averaged \$9.4 billion over the year ending September 1, 2023.⁵¹ 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

⁵⁰ 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 court in 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."

⁵¹ 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 – Rule 14.11(e)(4)

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 ETH 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 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 and available on the Sponsor's website at www.fidelity.com, or any successor thereto.

The Trust will provide an IIV per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. Eastern time). The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours 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 IIV calculation agent will use the Trust's ETH holdings and cash and cash

equivalents expected to comprise that day's NAV calculation to calculate the IIV. The calculation agent currently uses the Blockstream Crypto Data Feed Streaming Level 1⁵² as the pricing source for the spot ETH, which will be used to update the IIV. 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 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.

The value of the Index 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 calculated every day and is constructed using ETH price feeds from eligible ETH spot markets and a VWMP methodology, calculated every 15 seconds based on VWMP spot market data over rolling sixty-minute increments. Information about the Index and Index value, including key elements of how the Index is calculated, will be publicly available at i.fidelity.com/indices.

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.

⁵² Blockstream provides cryptocurrency data feeds delivering real-time and historical trade data from the world's leading cryptocurrency venues. See <https://blockstream.com/cryptofeed/>.

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 neither solicited nor received comments on the proposed rule change.

Item 6. Extension of Time Period for Commission Action

The Exchange does not consent to an extension of the time period for Securities and Exchange Commission (the “Commission”) action on the proposed rule change specified in Section 19(b)(2) of the Act.⁵³

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

The proposed rule change is not based on a rule either of another self-regulatory organization or of the Commission.

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 Proposed Rule Change for publication in the Federal Register.

Exhibit 2 - 5. Not applicable.

⁵³

15 U.S.C. 78s(b)(2).

EXHIBIT 1**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34- ; File No. SR-CboeBZX-2023-095]

[Insert date]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change to List and Trade Shares of the Fidelity Ethereum Fund (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 Fidelity Ethereum Fund (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 October 31, 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. 2 to SR-CboeBZX-2023-095 amends and replaces in its entirety the proposal as originally submitted on November 17, 2023, and as amended by Amendment No. 1 on March 18, 2024. The Exchange submits this Amendment No. 2 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 FD Funds Management LLC 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 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.⁷ With this in mind, the Chicago Mercantile Exchange ("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.

⁶ On May 21, 2024, the Trust filed with the Commission amendment no. 1 to the Registration Statement on Form S-1, submitted to the Commission by the Sponsor on behalf of the Trust (333-278249). The descriptions of the Trust, the Shares, and the Index (as defined below) contained herein are based, in part, on information in the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

⁷ 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.

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”).⁸ By way of background, in 2022 the Commission disapproved proposals⁹ to list Spot Bitcoin ETPs, including a proposal sponsored by Grayscale Investments, LLC (“Grayscale”).¹⁰ 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.¹¹ 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

⁸ 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”).

⁹ 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.

¹⁰ 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”).

¹¹ See Grayscale Investments, LLC v. SEC, 82 F.4th 1239 (D.C. Cir. 2023).

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.¹²

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 a network of computers all over the world that follow a set of rules called the Ethereum protocol. The Ethereum protocol creates a unified understanding of ownership, commercial activity, and business logic. This allows users to engage in commerce without the need to trust any of their counterparties. Ethereum code creates verifiable and unambiguous rules that assign clear, strong property rights to create a platform for unrestrained application formation and free exchange. It is widely understood that no single person 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, including the native asset to the Ethereum network, referred to as “ether” or “ETH”, which are recorded on a distributed public recordkeeping system or ledger known as a blockchain (the “Ethereum

¹² See the Spot Bitcoin ETP Approval Order at 3011-3012.

Blockchain”), and which can be used to pay for goods and services, including data storage, trading, and launching applications. 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 and 32 ETH serves as the minimum capital required to run validator software and participate in consensus to add new blocks to the blockchain.

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.

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 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 Futures¹³

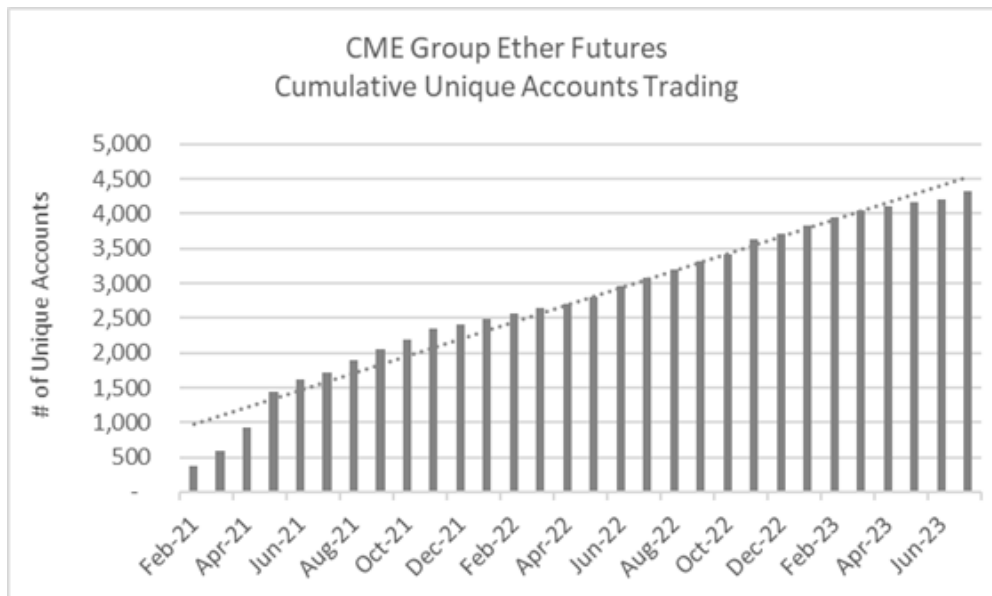
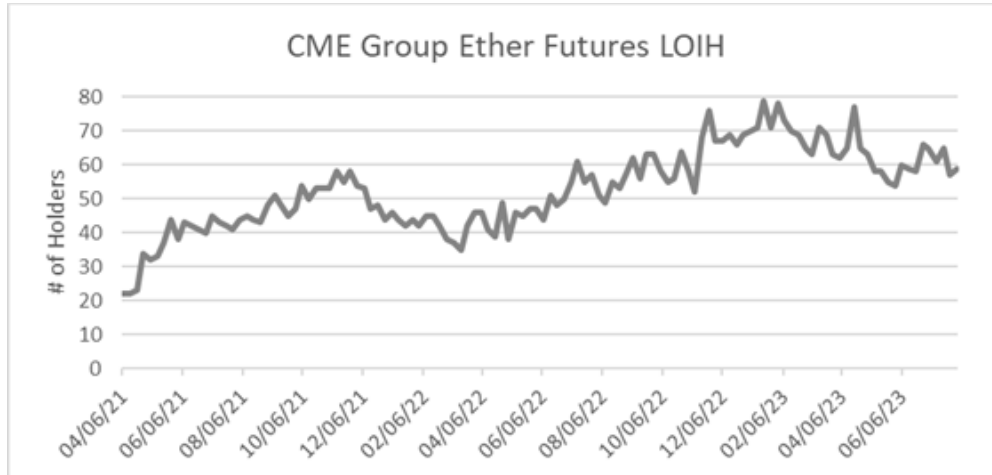
CME began offering trading in CME Ether Futures in February 2021. Each contract represents 50 ETH and is based on the CME CF Ether-Dollar Reference Rate.¹⁴ The contracts trade and settle like other cash-settled commodity futures contracts. Most measurable metrics related to CME Ether Futures have generally trended up since launch, although some metrics have slowed recently. For example, there were 76,293 CME Ether

¹³ Unless otherwise noted, all data and analysis presented in this section and referenced elsewhere in the filing has been provided by the Sponsor.

¹⁴ The CME CF Ether-Dollar Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto trading platforms, including Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.

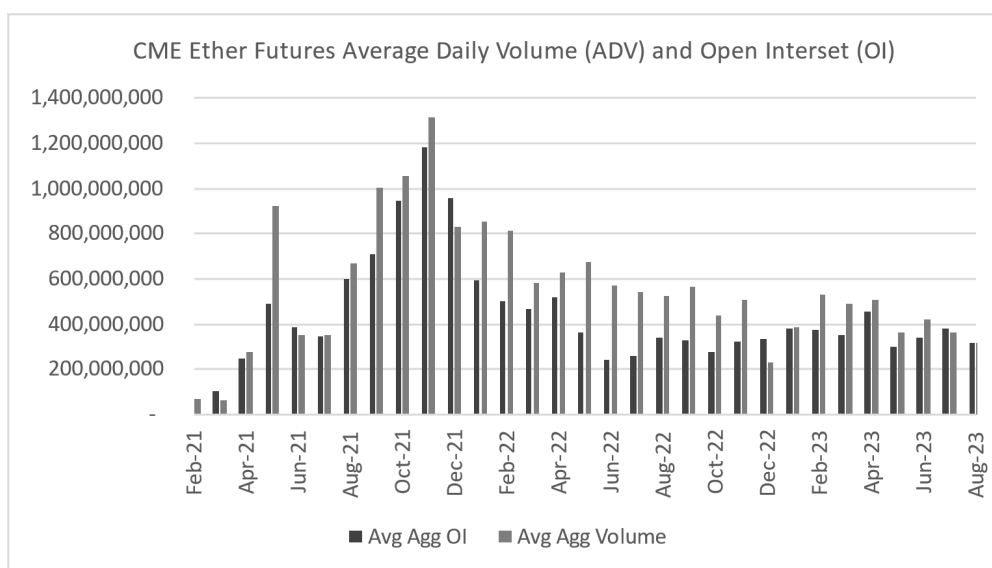
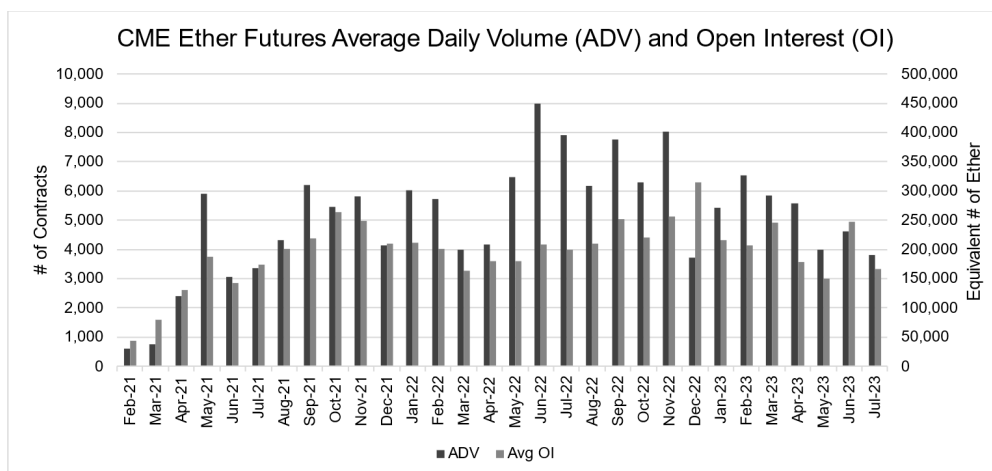
Futures contracts traded in July 2023 (approximately \$7.3 billion) compared to 70,305 (\$11.1 billion) and 158,409 (\$7.5 billion) contracts traded in July 2021, and July 2022 respectively.¹⁵

The number of large open interest holders¹⁶ and unique accounts trading CME Ether Futures have both increased, even in the face of heightened Ether price volatility.



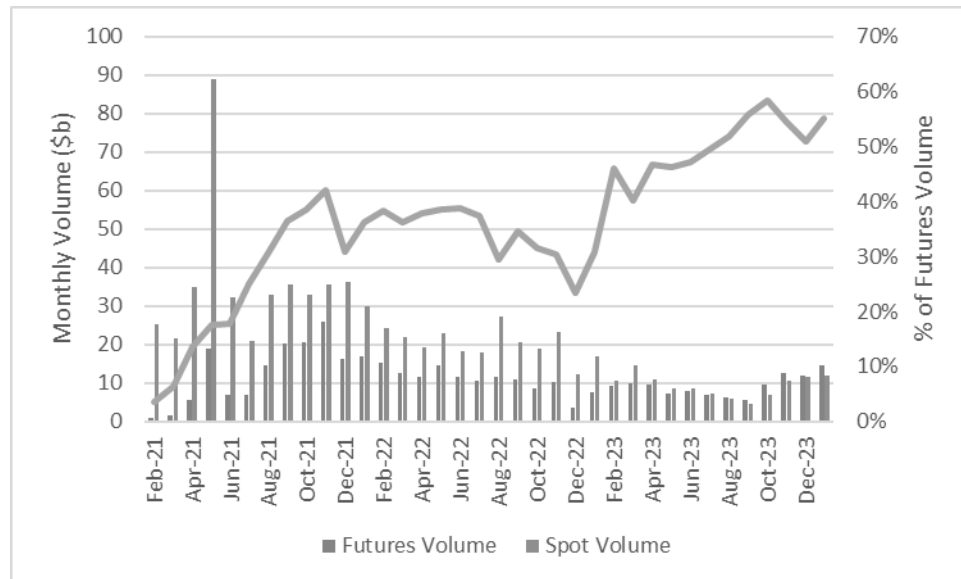
¹⁵ Source: CME, 7/31/23.

¹⁶ 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



The market for CFTC-regulated trading of ether derivatives has developed substantially recently. From February 2021 to January 2024, CFTC regulated ether futures notional trading volume on Chicago Mercantile Exchange increased from 0.94 to 14.68 USD billion on a monthly basis. At the same time, total ether spot volume decreased from 25.31 USD billion to 11.98 USD billion on a monthly basis using the CME CF Ether-Dollar Reference Rate related spot platforms¹⁷. As a result, CME Ether Futures represented an increasing amount of ETH/USD spot and futures volumes, up to 55% as of the end of January 2024.

¹⁷ The CME CF Ether-Dollar Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto trading platforms, including Bitstamp,

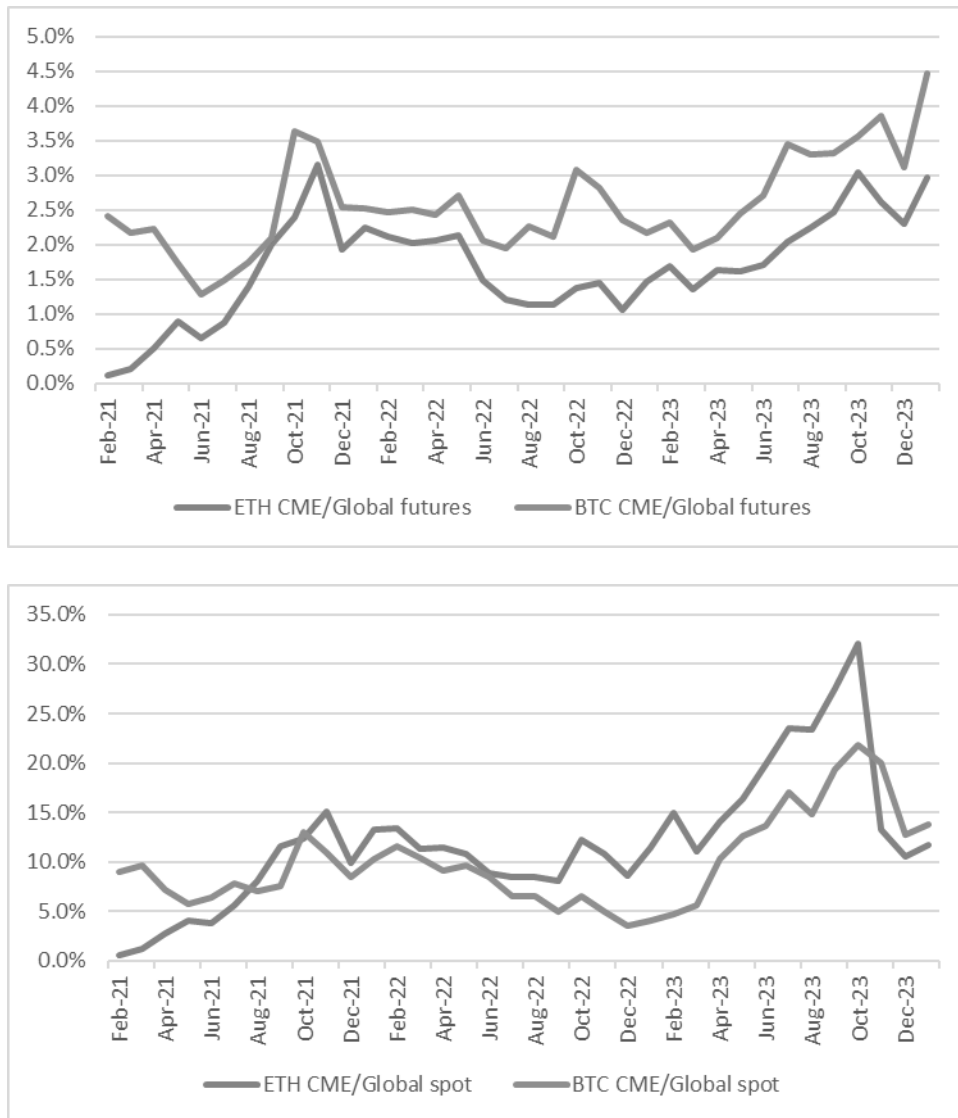


Furthermore, while CME Ether Futures represent less than 3% of global ETH futures volumes¹⁸ these same futures contracts represent greater than 10% of global ETH spot volumes¹⁹, and has been as high as 30% of global ETH spot volumes in October 2023. Since the start of 2023, both BTC and CME Ether Futures volumes have trended higher in their overall volume share of global futures activity and CME Ether Futures have often represented a larger percentage of global spot volumes compared to the BTC CME futures.

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

¹⁸ List of platforms used to determine stated volume can be found here:
https://coverage.coinmetrics.io/exchange-metrics-v2/volume_reported_future_usd_1d.

¹⁹ List of platforms used to determine the stated volumes can be found here:
https://coverage.coinmetrics.io/exchange-metrics-v2/volume_reported_spot_usd_1d.



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

The Commission has approved numerous series of Trust Issued Receipts,²⁰ including Commodity-Based Trust Shares,²¹ 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

²⁰ See Exchange Rule 14.11(f).

²¹ Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

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;²² 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 place²³ with a regulated market of

²² 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 trading 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 trading 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 trading 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.

²³ 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

significant size. Both the Exchange and CME are members of the Intermarket Surveillance Group (“ISG”).²⁴ 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.²⁵

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.²⁶

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”).

²⁴ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

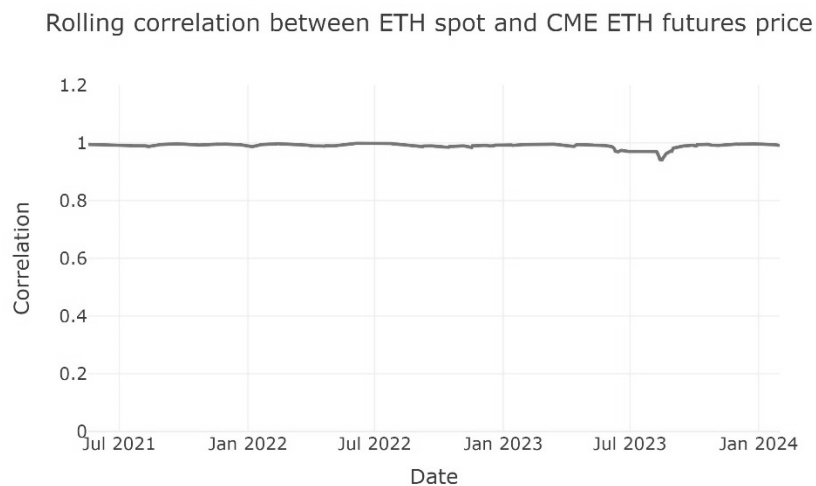
²⁵ See Wilshire Phoenix Disapproval.

²⁶ 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.

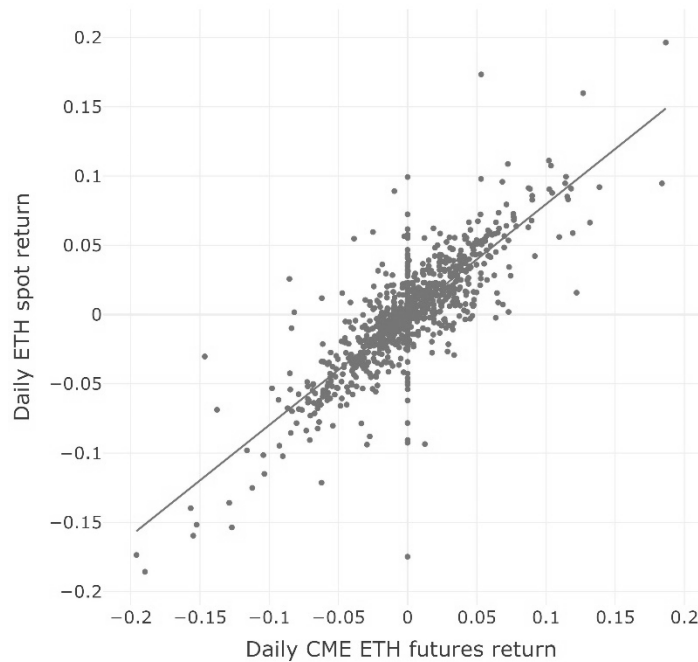
(a) *Manipulation of the ETP*

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 the surveilled market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct.

The Sponsor examined the correlation between the ETH spot price and the CME Ether Futures price. In this study, the price of the CME Ether Futures front month contract, i.e., the contract with the nearest expiration date, is compared to the ETH spot price. The rolling correlation between the assets with 90 days windows shows that the futures and spot prices are highly correlated and ranged between 0.94 and 0.998. In addition, the daily returns for ETH spot and CME Ether Futures are highly correlated. The following charts evidence these relationships.



ETH spot and CME ETH futures daily returns



Furthermore, the Sponsor examined intra-day correlations for both price and returns using historical pricing data every hour. This study further evidences the high correlation between the ETH/USD spot price and CME Ether Futures across six the CME CF Ether-Dollar Reference Rate related spot platforms²⁷ with hourly return correlations above 0.98.

ETH	Intraday Price	Hourly Returns	BTC	Intraday Price	Hourly Returns
	<i>Sample</i>	<i>Sample</i>		<i>Sample</i>	<i>Sample</i>
Spot Platform			Spot Platform		
Platform 1	0.985	0.985	Platform 1	0.999	0.989
Platform 2	0.985	0.985	Platform 2	0.999	0.988
Platform 3	0.982	0.982	Platform 3	0.999	0.986
Platform 4	0.981	0.981	Platform 4	0.999	0.986
Platform 5	0.985	0.985	Platform 5	0.999	0.986
Platform 6	0.985	0.985	Platform 6	0.999	0.987

²⁷

The six platforms are Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.

The Sponsor also examined the distribution of hourly returns of spot ETH/USD to CME Ether Futures. One approach to detect potential price manipulation involves analyzing price movements on unregulated platforms compared to the surveilled market. This comparison focuses on identifying abnormal activity such as sudden price spikes or repetitive trades on unregulated platforms. A preliminary analysis of CME data compared to spot platforms revealed little to no extreme deviation in hourly returns. The following table shows at least 97.9% cases the hourly returns of the spot platforms from the regulated exchange are within 50 basis points. This suggests a high degree of similarity in price movements between the regulated exchange and the spot platforms for most hours. Further analysis using Bitcoin data reveals a similar pattern to the ether spot platforms. The Sponsor concludes that the manipulation in the ETP would require the manipulators to participate in the surveilled market.

Spot Platform	Hourly return within CME's for ETH			Hourly return within CME's for BTC		
	<200 bps	<100 bps	<50 bps	<200 bps	<100 bps	<50 bps
Platform 1	99.98%	99.92%	98.63%	99.96%	99.94%	99.46%
Platform 2	100.00%	99.83%	98.51%	99.96%	99.92%	99.38%
Platform 3	99.96%	99.69%	97.89%	99.96%	99.85%	98.99%
Platform 4	99.98%	99.81%	98.32%	99.98%	99.88%	99.27%
Platform 5	99.92%	99.71%	98.32%	99.94%	99.85%	99.25%
Platform 6	99.98%	99.86%	98.51%	99.98%	99.92%	99.28%

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 Order²⁸ also indicates that

²⁸

See Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008 (January 17, 2024) (Self-

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.²⁹

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 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

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”).

²⁹ See the Spot Bitcoin ETP Approval Order at 3011-3012.

CME Ether Futures contracts use for pricing.³⁰ The Sponsor notes that ETH total 24-hour spot trading volume has averaged \$9.4 billion over the year ending September 1, 2023.³¹

The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ETH 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 ETH 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 over-

³⁰ This logic is reflected by 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."

³¹ Source: TokenTerminal.

the-counter ether funds (“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.

Fidelity Ethereum Fund

The Registration Statement includes the following description of the Trust and its operations. The Trust will issue Shares that represent fractional undivided beneficial interests in and ownership of the Trust. The Trust is a Delaware statutory trust that operates pursuant to the Declaration of Trust and Trust Agreement (the “Trust Agreement”), between Sponsor and Delaware Trust Company, the Delaware trustee of the Trust (the “Trustee”). Sponsor manages the Trust and is responsible for the ongoing

registration of the Shares. The Trust will engage Fidelity Service Company, Inc. (“FSC”), a Sponsor affiliate, to be the administrator (“Administrator”). State Street and Trust Company the (the “Transfer Agent” and “Cash Custodian”)) will facilitate the issuance and redemption of Shares of the Trust and respond to correspondence by Trust shareholders and others relating to its duties, maintain shareholder accounts, and make periodic reports to the Trust. Another affiliate of Sponsor, Fidelity Distributors Company LLC, will be the distributor (“Distributor”) in connection with the creation and redemption of “Creation Baskets” of Shares. The Sponsor will provide assistance in the marketing of the Shares. Fidelity Digital Asset Services, LLC (“FDAS”), another Sponsor affiliate, will serve as the Custodian.

According to the Registration Statement, each Share will represent a fractional undivided beneficial interest in the Trust. The Trust’s assets will only consist of ether, cash, and cash equivalents.³² Except for cash temporarily held to pay Trust expenses, facilitate redemption transactions, or received in creation transactions, the Trust will only invest in ETH.

According to the Registration Statement, the Trust is neither an investment company registered under the 1940 Act,³³ 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

³² Cash equivalents are short-term instruments with maturities of less than 3 months.

³³ 15 U.S.C. 80a-1.

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.

Investment Objective

According to the Registration Statement, the investment objective of the Trust is to seek to track the performance of ETH, as measured by the performance of the Fidelity Ethereum Reference Rate (the "Index"), less the Trust's expenses and other liabilities. In seeking to achieve its investment objective, the Trust will hold ETH, cash, and cash equivalents and will value its Shares daily as of 4:00 p.m. Eastern time using the Index price to value the ether and process all creations and redemptions in transactions in cash transactions with authorized participants. The Trust is not actively managed.

The Index

The Index is designed to reflect the performance of ETH in U.S. dollars. The current digital trading platform composition of the Index is Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital. The Index methodology was developed by Fidelity Product Services, LLC (the "Index Provider") and is administered by the Fidelity Index Committee. Coin Metrics, Inc. is the third-party calculation agent for the Index.³⁴

The Index is constructed using ETH price feeds from eligible ETH spot markets and a volume-weighted median price ("VWMP") methodology, calculated every 15

³⁴

The Sponsor's affiliates have an ownership interest in Coin Metrics, Inc.

seconds based on VWMP spot market data over rolling sixty-minute increments to develop an ETH price composite. The Index market value is the volume-weighted median price of ETH in U.S. dollars over the previous sixty minutes, which is calculated by (1) ordering all individual transactions on eligible spot markets over the previous sixty minutes by price, and then (2) selecting the price associated with the 50th percentile of total volume. Using rolling sixty-minute segments means malicious actors would need to sustain efforts to manipulate the market over an extended period of time, or such malicious actors would need to replicate efforts multiple times across eligible ETH spot markets, potentially triggering review. This extended period also supports authorized participant activity by capturing volume over a longer time period, rather than forcing authorized participants to mark an individual close or auction. The use of a median price reduces the ability of outlier prices to impact the NAV, as it systematically excludes those prices from the NAV calculation. The use of a volume-weighted median (as opposed to a traditional median) serves as an additional protection against attempts to manipulate the NAV by executing a large number of low-dollar trades, because any manipulation attempt would have to involve a majority of global spot ETH volume in a sixty-minute window to have any influence on the NAV.

Index data and the description of the Index are based on information made publicly available by the Index Provider on its website at i.fidelity.com/indices.

Net Asset Value

As described in the Registration Statement, for purposes of calculating the Trust's NAV per Share, the Trust's holdings of ETH will be valued using the Index value as of 4:00 p.m. Eastern time. NAV means the total assets of the Trust which will include only

ETH, cash, and cash equivalents, if any, less total liabilities of the Trust, each determined on the basis of generally accepted accounting principles. The Administrator calculates the NAV of the Trust once each Exchange trading day. The NAV for a normal trading day will be released after 4:00 p.m. Eastern time. Trading during the core trading session on the Exchange typically closes at 4:00 p.m. Eastern time. However, NAVs are not officially struck until later in the day (often by 5:30 p.m. Eastern time and almost always by 8:00 p.m. Eastern time). The pause between 4:00 p.m. Eastern time and 5:30 p.m. Eastern time (or later) provides an opportunity to algorithmically detect, flag, investigate, and correct unusual pricing should it occur.

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. If the Sponsor determines in good faith that the Index does not reflect an accurate ETH price, then the Trust will cause to be employed an alternative method to determine the fair value of the Trust's assets as reviewed and approved by the Sponsor's valuation committee.³⁵

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 Price³⁶; (b) the

³⁵ 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.

³⁶ 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.

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 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 and available on the Sponsor's website at www.fidelity.com, or any successor thereto.

The Trust will provide an Intraday Indicative Value ("IIV") per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. Eastern time). The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours 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 IIV calculation agent will use the Trust's ETH holdings and cash and cash equivalents expected to comprise that day's NAV calculation to calculate the IIV. The calculation agent currently uses the Blockstream Crypto Data Feed Streaming Level 1³⁷ as the pricing source for the spot ETH, which will be used to update the IIV. The IIV disseminated during Regular Trading Hours should not be viewed as an

³⁷ Blockstream provides cryptocurrency data feeds delivering real-time and historical trade data from the world's leading cryptocurrency venues. See blockstream.com/cryptofeed.

actual real-time update of the NAV, which will be calculated only once at the end of each trading day.

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.

The value of the Index 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 calculated every day and is constructed using ETH price feeds from eligible ETH spot markets and a VWMP methodology, calculated every 15 seconds based on VWMP spot market data over rolling sixty-minute increments. Information about the Index and Index value, including key elements of how the Index is calculated, will be publicly available at i.fidelity.com/indices.

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 Sponsor has selected FDAS to be the Trust's Custodian. FDAS is a New York state limited liability trust³⁸ that serves as ETH custodian to institutional and individual investors. The Custodian maintains a substantial portion of the private keys associated with the Trust's ETH in "cold storage" or similarly secure technology. Cold storage is a safeguarding method with multiple layers of protections and protocols, by which the private key(s) corresponding to the Trust's ETH is (are) generated and stored in an offline manner. Private keys are generated in offline computers that are not connected to the internet so that they are resistant to being hacked. Cold storage of private keys may involve keeping such keys on a non-networked computer or electronic device or storing the public key and private keys on a storage device or printed medium and deleting the keys from all computers.

The Custodian may receive deposits of ETH but may not send ETH without use of the corresponding private keys. In order to send ETH when the private keys are kept in cold storage, either the private keys must be retrieved from cold storage and entered into a software program to sign the transaction, or the unsigned transaction must be sent to the "cold" server in which the private keys are held for signature by the private keys. At that point, the Custodian can transfer the ETH. The Trust's Transfer Agent will facilitate the settlement of Shares in response to the placement of creation orders and redemption

³⁸ New York state trust companies are subject to rigorous oversight similar to other types of entities, such as nationally chartered banking entities, that hold customer assets. Like national banks, they must obtain specific approval of their primary regulator for the exercise of their fiduciary powers. Moreover, limited purpose trust companies engaged in the custody of digital assets are subject to even more stringent requirements than national banks which, following initial approval of trust powers, generally can exercise those powers broadly without further approval of the OCC. In contrast, NYDFS requires in their approval orders that limited purpose trust companies obtain separate approval for all material changes in business.

orders from authorized participants. The Trust will only hold ETH, cash and cash equivalents. The Trust will enter into a cash custody agreement with the Cash Custodian as custodian of the Trust's cash and cash equivalents.

Creation and Redemption of Shares

When the Trust sells or redeems its Shares, it will do so in cash transactions in blocks of 25,000 Shares (a "Creation Basket") that are based on the amount of ETH held by the Trust on a per unit (i.e., 25,000 Share) basis. 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 close of Regular Trading Hours on the Exchange or an earlier time as determined and communicated by the Sponsor and its agent. 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 p.m. 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 ETH held by the Trust as of the opening of business on that business day, adjusted for the amount of ETH 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 aggregation of Shares associated with 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—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 procedures by which an authorized participant can redeem one or more Creation Baskets mirror the procedures for the creation of Creation Baskets.

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 NAV will be calculated daily and that 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 commodity³⁹ 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 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

³⁹ 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.

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 contracts, 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 ETH 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 ether 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 ether derivative from such markets and other entities.⁴⁰ The Exchange may obtain information regarding trading in the Shares, CME Ether Futures, or any other ether derivative via 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.

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

⁴⁰ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

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

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 Hours⁴¹ 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 information. The Information Circular will also reference the fact that there is no regulated source of last sale information regarding ETH, that the Commission has no jurisdiction over the trading of ETH as a commodity, and that the CFTC has regulatory jurisdiction over the trading of CME Ether Futures contracts and options on CME Ether Futures contracts.

In addition, the Information Circular will advise members, prior to the commencement of trading, of the prospectus delivery requirements applicable to the

⁴¹ Regular Trading Hours is the time between 9:30 a.m. and 4:00 p.m. Eastern Time.

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 Act⁴² in general and Section 6(b)(5) of the Act⁴³ 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, including Commodity-Based Trust Shares, 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;⁴⁴ and (ii) the requirement that an exchange proposal be designed, in general, to

⁴² 15 U.S.C. 78f.

⁴³ 15 U.S.C. 78f(b)(5).

⁴⁴ 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 trading 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 trading platforms

protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the and, as described and discussed above, the Sponsor's analysis demonstrates that the Exchange has satisfied the requirements under the Act that the CME Ether Futures Market (i) is a regulated market, (ii) has a comprehensive surveillance-sharing agreement with the Exchange; and (iii) satisfies the Commission's "significant market" definition." In addition, the Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act because this filing sufficiently demonstrates that the standard that has previously been articulated by the Commission applicable to Commodity-Based Trust Shares has been met as outlined below.

(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 place⁴⁵ with a regulated market of

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 price 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 trading 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.

⁴⁵ 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,

significant size. Both the Exchange and CME are members of ISG.⁴⁶ As such, 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.⁴⁷

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.⁴⁸

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 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.

⁴⁶ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

⁴⁷ See Wilshire Phoenix Disapproval.

⁴⁸ 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.

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.⁴⁹

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 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

⁴⁹ See the Spot Bitcoin ETP Approval Order at 3011-3012.

could be the predominant force on prices in that market is through the spot markets that CME Ether Futures contracts use for pricing.⁵⁰ The Sponsor notes that ether total 24-hour spot trading volume has averaged \$9.4 billion over the year ending September 1, 2023.⁵¹ 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.

⁵⁰ 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 court in 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."

⁵¹ Source: TokenTerminal.

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 – Rule 14.11(e)(4)

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 ETH 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 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 and available on the Sponsor's website at www.fidelity.com, or any successor thereto.

The Trust will provide an IIV per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. Eastern time). The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours 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 IIV calculation agent will use the Trust's ETH holdings and cash and cash equivalents expected to comprise that day's NAV calculation to calculate the IIV. The calculation agent currently uses the Blockstream Crypto Data Feed Streaming Level 1⁵² as the pricing source for the spot ETH, which will be used to update the IIV. 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 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.

⁵² Blockstream provides cryptocurrency data feeds delivering real-time and historical trade data from the world's leading cryptocurrency venues. See <https://blockstream.com/cryptofeed/>.

The value of the Index 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 calculated every day and is constructed using ETH price feeds from eligible ETH spot markets and a VWMP methodology, calculated every 15 seconds based on VWMP spot market data over rolling sixty-minute increments. Information about the Index and Index value, including key elements of how the Index is calculated, will be publicly available at i.fidelity.com/indices.

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 neither solicited nor received 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-2023-095 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-2023-095. 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-2023-095 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.⁵³

Sherry R. Haywood,

Assistant Secretary.

⁵³ 17 CFR 200.30-3(a)(12).