

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-99200; File No. SR-NASDAQ-2023-035)

December 18, 2023

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

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

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 98563 (Sept. 27, 2023), 88 FR 68214 (“Notice”). The Commission has received no comments on the proposal.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 98948, 88 FR 81156 (Nov. 21, 2023). The Commission designated January 1, 2024, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

⁶ 15 U.S.C. 78s(b)(2)(B).

I. Summary of the Proposal

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

The investment objective of the Fund is to have the daily changes in the net asset value (“NAV”) of the Shares reflect the daily changes in the price of the Nasdaq Ether Reference Price (NQETH) (“Benchmark”), less expenses from the Fund’s operations.⁸ The Benchmark is designed to track the price performance of ether.⁹ Under normal market conditions, the Fund will invest in ether, ether futures contracts listed on the Chicago Mercantile Exchange, Inc. (“CME”),¹⁰ and in cash and cash equivalents.¹¹ The Fund will use the CME’s Exchange for Physical (“EFP”) transactions to acquire and dispose of spot ether.¹² The Fund will be subject to investment restrictions on spot ether which cap the Fund’s exposure to the ether spot market to a specified proportion of the Fund’s NAV and restrict the Fund’s notional exposure to ether to a set proportion.¹³ The sub-administrator of the Fund will calculate the NAV of the Fund once

⁷ See Notice, supra note 3.

⁸ See Notice, 88 FR at 68215. The Fund is managed and controlled by Toroso Investments LLC (“Sponsor”). See id. at 68214.

⁹ See id.

¹⁰ According to the Exchange, the CME currently offers two ether futures contracts: one contract representing 50 ether (“ETH Contracts”) and another contract representing 0.10 ether (“MET Contracts,” and collectively, “Ether Futures Contracts”). See id. at 68214.

¹¹ See id. at 68214. The Fund will hold a mix of Ether Futures Contracts, spot ether, and cash and cash equivalents, subject to certain investment restrictions. See id. at 68219.

¹² See id. at 68219. According to the Exchange, EFP transactions are a type of private agreement between two parties to trade a futures position for the underlying asset. In an EFP transaction, two parties exchange equivalent but offsetting positions in an Ether Futures Contract and the underlying physical ether. In the context of the Fund, these transactions will be used to purchase and sell spot ether by delivering or receiving the equivalent futures position. See id. at 68229.

¹³ See id. at 68227-28.

each trading day, as of the earlier of the close of the Nasdaq or 4:00 p.m. New York time.¹⁴ To determine the value of Ether Futures Contracts, the Fund’s sub-administrator will use the Ether Futures Contract settlement price on the exchange on which the contract is traded, except that the fair value of Ether Futures Contracts may be used when Ether Futures Contracts close at their price fluctuation limit for the day. The value of spot ether held by the Fund would be determined by the Sponsor and by Hashdex Asset Management Ltd. (“Digital Asset Adviser”) in good faith based on a methodology that is entirely derived from the settlement prices of Ether Futures Contracts on the CME and that considers all available facts and all available information on the valuation date.¹⁵ When the Fund sells or redeems its Shares, it will do so in cash transactions with authorized participants in blocks of 10,000 Shares.¹⁶

II. Proceedings to Determine Whether to Approve or Disapprove SR-NASDAQ-2023-035 and Grounds for Disapproval under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹⁷ to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as

¹⁴ See id. at 68231. The Fund’s NAV will include any unrealized profit or loss on open ether futures contracts and any other credit or debit accruing to the Fund but unpaid or not received by the Fund. See id.

¹⁵ See id. at 68222, 68231-32. According to the Exchange, this “futures-based spot price” methodology involves a calculation that is sensitive to both the length of time (“tenor”) until each Ether Futures Contract is due for settlement and the final settlement price for each contract. The calculation takes into account each contract’s tenor and the tenor squared. This approach is designed to give more importance to contracts that are due for settlement in the near term. The calculation produces a set of weighting factors, with each factor indicating the contribution of the corresponding Ether Futures Contract to the estimated current spot price of ether. The estimated spot price is the component of the result corresponding to a tenor of zero days. The Sponsor and Digital Asset Advisor do not use data from ether trading platforms or directly from spot ether trading activity in determining the value of spot ether held by the Fund. See id. at 68222-23.

¹⁶ See id. at 68232-33.

¹⁷ 15 U.S.C. 78s(b)(2)(B).

described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,¹⁸ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change’s consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be “designed to prevent fraudulent and manipulative acts and practices” and “to protect investors and the public interest.”¹⁹

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

1. Given the nature of the underlying assets held by the Fund, has the Exchange properly filed its proposal to list and trade the Shares under Nasdaq Rule 5711(i) (Trust Units)?²⁰
2. The Exchange raises similar arguments to support the listing and trading of the Shares as those made in proposals to list and trade spot bitcoin exchange-traded products (“Bitcoin ETPs”). Do commenters agree that arguments to support the listing of Bitcoin ETPs apply equally to the Shares? Are there particular features related to ether and its ecosystem,

¹⁸ Id.

¹⁹ 15 U.S.C. 78f(b)(5).

²⁰ Nasdaq Rule 5711(i)(3)(B) defines the term “Trust Units” as a security that is issued by a trust or other similar entity that is constituted as a commodity pool that holds investments comprising or otherwise based on any combination of futures contracts, options on futures contracts, forward contracts, swap contracts, commodities and/or securities.

including its proof of stake consensus mechanism and concentration of control or influence by a few individuals or entities, that raise unique concerns about ether's susceptibility to fraud and manipulation?

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

4. Based on data and analysis provided by the Exchange,²¹ what are commenters' views on whether the CME, on which CME ether futures trade and through which the Fund intends to engage in EFP transactions to purchase or sell spot ether, represents a regulated market of significant size related to spot ether?²² What are commenters' views on whether there is a reasonable likelihood that a person attempting to manipulate the Shares would also have to trade on the CME to manipulate the Shares?²³ Do commenters agree with the Exchange that trading in the Shares would not be the predominant influence on prices in the CME ether futures market?²⁴

5. The Exchange states that the Fund intends to adopt "an innovative approach to mitigate the risks of fraud and manipulation that are unique to the Fund" by "structur[ing] the operation of the Fund such that the regulated market of significant size in relation to the Fund is the [CME] because it is the same market on which the Fund trades its non-cash assets."²⁵ The

²¹ See Notice, 88 FR at 68218, 68220-21, 68226-27.

²² See *id.* at 68219.

²³ See *id.* at 68219-20.

²⁴ See *id.* at 68220-21.

²⁵ See *id.* at 68219.

Exchange further states that the Fund has features that underscore its significant interrelationship with the CME, including that the Fund (i) utilizes futures-based pricing for spot ether such that the NAV calculation for the spot ether holdings of the Fund will be derived from the CME ether futures curve; (ii) is subject to investment restrictions on spot ether; (iii) will use CME EFP transactions to acquire and dispose of spot ether “instead of transactions on unregulated spot exchanges”; and (iv) will utilize only cash creations and redemptions.²⁶ Based on the structure and operation of the Fund and the Fund’s investments as described in the filing, what are commenters’ views on whether the CME represents a regulated market of significant size related to spot ether?²⁷

6. The Fund will only use CME EFP transactions to acquire and dispose of spot ether.²⁸ The Exchange states that “trading activity in EFP transactions is sporadic” but that, “[n]onetheless, the Sponsor believes that a large number of liquidity providers are ready to execute this type of transaction and can provide enough liquidity to support the [Fund’s] demand.”²⁹ Do commenters agree? Why or why not?

7. The value of spot ether held by the Fund would be determined using a futures-based spot price methodology that is derived from the settlement prices of ether futures contracts on the CME.³⁰ The Exchange presents data³¹ that it states “strongly suggests that [futures-based spot pricing] is a suitable choice for the NAV calculation.”³² The Exchange states that futures-

²⁶ See id.

²⁷ See id.

²⁸ See, e.g., id. at 68229-30.

²⁹ See id. at 68230.

³⁰ See id. at 68231.

³¹ See id. at 68222-25.

³² See id. at 68225.

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

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

³³ See id.

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

³⁵ See Notice, 88 FR at 68226-27.

III. Procedure: Request for Written Comments

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

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

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-NASDAQ-2023-035 on the subject line.

³⁶ Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

Paper Comments:

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

All submissions should refer to file number SR-NASDAQ-2023-035. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright

protection. All submissions should refer to file number SR-NASDAQ-2023-035 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

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

Sherry R. Haywood,

Assistant Secretary.

³⁷ 17 CFR 200.30-3(a)(57).