

May 31, 2022

Ms. Vanessa Countryman  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: Release No. 34-94844; File No. SR-NYSEArca-2021-90

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 1 to, and Designation of a Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove, a Proposed Rule Change To List and Trade Shares of Grayscale Bitcoin Trust (BTC) Under NYSE Arca Rule 8.201-E

Dear Secretary Countryman:

We value this opportunity from the Commission and submit the following comment, on our own behalf and in our personal capacities,<sup>1</sup> on the NYSE Arca's Proposed Rule Change to List and Trade Shares of Grayscale Bitcoin Trust (BTC) under NYSE Arca Rule 8.201-E.<sup>2</sup>

For too long, leaders in our country's key institutions have attempted to solve difficult problems with a one-size-fits-all, top-down approach at the expense of American technological innovation, economic opportunity, and social development. That approach must change. Instead of top-down mandates, we believe entrepreneurs—from students to business leaders and everyone in between—are best positioned to address the problems that they encounter in their individual pursuits of prosperity. That is why we support and urge the Commission to approve the NYSE Arca's proposed rule change to list and trade shares of Grayscale's Bitcoin Trust ("BTC") as a Bitcoin spot exchanged-traded product ("ETP(s)") along with all other similarly situated ETPs.

Blockchains, digital assets like cryptocurrencies, and decentralized organizations are leading the world into a new era of technological progress. These emerging technologies are being used to build novel, transparent, and more accessible platforms to overcome barriers that have long hindered individuals' ability to self-actualize. But these platforms cannot drive human progress if they're smothered by government regulation and bureaucracy.

In our country today, government regulators and those in power too often expect perfect design and flawless implementation of new technologies. But such expectations are unrealistic and have discouraged firms from bringing new products to market, in part, for fear of civil fines or

---

<sup>1</sup> Neil Chilson is currently the Senior Research Fellow for Technology and Innovation at Stand Together; formerly, acting Chief Technologist at the Federal Trade Commission and an attorney advisor to acting Chairman Maureen K. Ohlhausen; in March of 2018, established the FTC's Blockchain Working Group to coordinate blockchain- and cryptocurrency-related enforcement and education efforts within the agency. Jonathan Zalewski is currently an in-house attorney at Stand Together, formerly an investment operations analyst in the financial services industry.

<sup>2</sup> Securities Exchange Act Release No. 94844 (May 10, 2022), 87 Fed. Reg. 28043; Securities Exchange Act Release No. 93504 (Nov. 2, 2021), 86 Fed. Reg. 61804.

criminal prosecution. Government regulators must therefore do better at creating proper incentives to foster innovation and reserving punitive enforcement for those who intentionally defraud and harm others. While malicious actors unfortunately do and will always exist, legitimate emerging technology firms attempting to advance a better society should be encouraged to create new products and services, even though not all products and services will succeed. Companies should not fear post-hoc punitive government enforcement actions against them for good-faith products that fail the market test. Instead, these firms should be incentivized to work with regulators to create a permissionless yet responsible environment in which they can build secure, reliable, and efficient products and markets. Yet, to date, the Commission has opted for a precautionary, arbitrary, and ad-hoc enforcement-based approach, contrary to a principles-based approach to digital asset regulation.<sup>3</sup>

Since the first Bitcoin spot ETP application was filed in 2016, the Commission has denied or delayed a decision on every Bitcoin spot ETP application.<sup>4</sup> During that time period, the Commission has issued \$2.4 billion in enforcement penalties.<sup>5</sup> In doing so, the Commission has obstructed American innovation in the digital asset industry and in emerging technologies more broadly. But the Commission is not too late. It still can correct course and propel the United States to the lead as the principled regulatory steward across global digital asset ecosystems and markets. In doing so, the Commission can help ensure that digital asset markets are durable and that investors are secure. If the Commission does nothing, there will be a leadership void that will be filled by others, including America's political rivals.

NYSE Arca's proposed rule change application therefore presents the Commission with an opportunity to approve a principled, bottom-up solution to a novel digital asset problem, and as a result, advance President Biden's stated goal for America to be the leader on the digital asset frontier.<sup>6</sup> If, however, the Commission continues to reject or delay Bitcoin spot ETP applications, the Commission will also hamper the United States' economic competitiveness against other countries that have already approved Bitcoin spot ETP listings on their national stock exchanges.

The Commission's hesitancy to approve Grayscale's and other firms' Bitcoin spot ETP applications also has negative implications beyond technology. The Commission's delays continue

---

<sup>3</sup> To be sure, Chairman Gensler has acknowledged that the Commission aims to "remain the cop on the beat," with a particular focus on cryptocurrency enforcement. *See* Fiscal Year 2023 Budget Request for the Federal Trade Commission and the Securities and Exchange Commission: Hearing Before the H. Subcomm. on Financial Services & General Government on H. Comm. on Appropriations, 117<sup>th</sup> Cong. 2 (written statement of Hon. Gary Gensler, Chair, U.S. Securities & Exchange Commission), House.gov (2022), <https://docs.house.gov/meetings/AP/AP23/20220518/114778/HHRG-117-AP23-Wstate-GenslerG-20220518.pdf>; *see also* Thomas Franck, *SEC Nearly Doubles Crypto Unit Staff to Crack Down on abuses in the Booming Market*, CNBC (May 3, 2022), <https://www.cnbc.com/2022/05/03/sec-adds-to-cryptocurrency-regulation-staff.html>.

<sup>4</sup> *See generally* Hailey Lennon, *Why the SEC's Stance on Bitcoin ETFs May Need to Change*, FORBES (Dec. 1, 2021), <https://www.forbes.com/sites/haileylennon/2021/12/01/why-the-secs-stance-on-bitcoin-etfs-may-need-to-change/?sh=17636ad2a970>.

<sup>5</sup> Keira Wright, *The SEC Has Issued \$2.4B in Crypto-Related Penalties Since 2013*, COINTELEGRAPH (Jan. 20, 2022), <https://cointelegraph.com/news/the-sec-has-issued-2-4b-in-crypto-related-penalties-since-2013>.

<sup>6</sup> Press Release, *Executive Order on Ensuring Responsible Development of Digital Assets*, WHITE HOUSE (Mar. 9, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets/>.

to impose financial and economic costs, including high transaction costs,<sup>7</sup> on digital asset market participants, both current and potential. The lack of a Bitcoin spot ETP in the United States is also pushing investment offshore. Both consequences are inhibiting investors' access to digital assets and capital more broadly, which is a barrier to economic prosperity.

Today, investors, both retail and institutional alike, have a strong appetite and sound risk-tolerances for Bitcoin exposure, including indirect exposure. Recent NASDAQ poll results show that more than two-thirds of the 500 financial advisors surveyed "would likely invest client assets in crypto once a Bitcoin [ ] spot exchange-traded fund [ ] is approved in the United States."<sup>8</sup> Ignoring this appetite and these risk profiles, the Commission refuses to permit investors the opportunity to gain indirect exposure—even though the Commission lacks authority to regulate asset class suitability.<sup>9</sup>

As related to the NYSE Arca's proposed rule change to list Grayscale's BTC spot ETP, the Commission's delays have all but barred firms and investors from offering more alternatives to direct Bitcoin exposure. Moreover, for alternatives that do exist, such as closed-end Bitcoin funds like Grayscale's BTC, the funds' values are not in parity with Bitcoin's value—resulting in a share price that trades at a premium or discount to Bitcoin's spot market price and therefore disproportionate financial losses and profits.<sup>10</sup> For most of this year, Grayscale's BTC has been undervalued against Bitcoin's price. But this is no fault of any closed-end fund or firm. Instead, in the United States, it's the product of overregulation and unnecessary bureaucracy, all the while other developed countries are approving Bitcoin spot ETP to be listed on their national stock exchanges.

To date, Australia, Brazil, Canada, and Singapore do offer or plan to offer a Bitcoin spot ETP to investors.<sup>11</sup> The U.S. economy is therefore losing ground to other countries both in terms of digital asset investment and adoption. For the world's largest economy, such a consequence is unacceptable, and the Commission is responsible for causing it. At the same time, the Commission has expressed legitimate concerns about fraud and manipulation in underlying digital asset markets. The problem is that, now, those concerns are largely antiquated, particularly when considering the Commission's recent orders that approved Bitcoin futures ETP listings on U.S. exchanges.

The Commission's prior Bitcoin spot ETP application denials are premised on a purported lack of sufficient oversight in the underlying Bitcoin spot market to ensure the market is protected from fraud and manipulation. The Commission is right, consistent with its three-part mission and

---

<sup>7</sup> Transaction costs resulting, in part, from pushing investors into direct digital asset exposure, which involves greater costs, such as setting up a hardware wallet, to secure transactions and storage than traditional markets.

<sup>8</sup> Tor Constantino, *70% of Financial Advisors Say They Would Invest Client Funds in a Crypto Spot ETF*, NASDAQ (May 27, 2022), <https://www.nasdaq.com/articles/70-of-financial-advisors-say-they-would-invest-client-funds-in-a-crypto-spot-etf>.

<sup>9</sup> This is particularly concerning because the Commission has since approved several Bitcoin futures ETPs. See Dissent of Commissioner Hester M. Peirce to Release No. 34-83723, File No. SR-BatsBZX-2016-30 (July 26, 2018), <https://www.sec.gov/news/publicstatement/peirce-dissent-34-83723>.

<sup>10</sup> See Katherine Greifeld, *Biggest Bitcoin Fund Sinks Near 30% Discount in Crypto Rout*, BLOOMBERG (Jan. 19, 2022), <https://www.bloomberg.com/news/articles/2022-01-19/biggest-bitcoin-fund-sinks-toward-30-discount-in-crypto-selloff>; see also William Suberg, *GBTC Premium Nears 2022 High as SEC Faces Call to Approve Bitcoin ETF*, COINTELEGRAPH (Apr. 21, 2022), <https://cointelegraph.com/news/gbtc-premium-nears-2022-high-as-sec-faces-call-to-approve-bitcoin-etf-people-really-want>.

<sup>11</sup> Namcios, *Australia's First Spot Bitcoin ETF to Launch Next Week*, Bitcoin Magazine (Apr. 20, 2022), <https://bitcoinmagazine.com/markets/australias-first-spot-bitcoin-etf-to-launch-next-week>.

Section 6(b)(5) of the Securities Exchange Act of 1933 (the “Exchange Act”),<sup>12</sup> to be concerned about the integrity of the Bitcoin spot market, and digital asset markets generally. But the Commission has withheld any meaningful guidance in how an applicant can resolve or mitigate the Commission’s integrity concerns.<sup>13</sup> Moreover, while there might be pertinent structural differences between futures and spot digital asset markets—such as off- vs. on-chain settlement—the Commission has not identified those differences as the concern. Instead, the Commission has, for the first time while conduct an ETP listing review, cited the absence of a surveillance sharing-agreement with exchanges in a market of “significant size” as the principal rationale for denying Bitcoin spot ETP applications.<sup>14</sup>

The problem with that analysis and reasoning is that it is inconsistent with the Commission’s decisions approving Bitcoin futures ETPs.<sup>15</sup> The Commission has failed to explain or even assert any basis for its differing analysis of Bitcoin spot and futures ETPs beyond the fact that futures ETPs are traded on federally regulated exchanges and thus satisfy its surveillance-sharing requirement.<sup>16</sup> But spot Bitcoin is not traded on such an exchange, which renders a surveillance-sharing agreement requirement unattainable for a Bitcoin spot ETP. As a result, the Commission’s disparate treatment has yet to be justified under the law, and that calls into question whether the Commission’s decision to deny Bitcoin spot ETP application is grounded in anything more than an animus for the asset.

On July 6, 2022, the Commission will have yet another opportunity to approve a Bitcoin spot ETP application. To date, the Commission has denied every application of the kind. In doing so, the Commission has stonewalled American technological innovation, economic opportunity, and social development. First, from a technological perspective, overregulation continues to plague legitimate entrepreneurs who are looking to elevate the United States as an emerging technology leader instead of as a follower. Second, for the economy, now is not the time to constrain economic growth and development in the private sector by pushing financial investments offshore, especially when market participants are demanding this opportunity within the United States. Third, and lastly, on market integrity, the Commission has neither justified its fraud and manipulation concerns or offered an articulable standard by which those concerns can be overcome. These failures are even more distinct now that the Commission has approved Bitcoin futures ETP applications.

The Commission can help drive American greater progress on the digital asset frontier, as desired by the president. It can also embrace the notion of a better, bottom-up approach to addressing our country’s problems; an approach that empowers entrepreneurs to develop principled solutions. If the Commission fails to approve Grayscale’s Bitcoin spot ETP and other similarly situated applications, it will be doubling down on a top-down, regulate-by-enforcement approach for digital assets, thereby dragging the United States even further behind its political rivals and economic competitors.

---

<sup>12</sup> The Commission’s three-part mission is to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. *See What We Do*, SEC (2022), <https://www.sec.gov/about/what-we-do>.

<sup>13</sup> See Dissent of Commissioner Hester M. Peirce to Release No. 34-88284; File No. SR-NYSEArca-2019-39 (Feb. 26, 2020), <https://www.sec.gov/news/public-statement/peirce-dissenting-statement-34-88284> (“Peirce 2020 Dissent”).

<sup>14</sup> *See* Order Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, to BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, to List and Trade Shares Issued by the Winklevoss Bitcoin Trust, Release No. 34-80206 (Mar. 10, 2017), <https://www.sec.gov/rules/sro/cboebzx/2021/34-93559.pdf>.

<sup>15</sup> *See* Peirce 2020 Dissent, *supra* note 15.

<sup>16</sup> *See* Letter from Davis Polk & Wardwell LLP on behalf of Grayscale Investments, LLC to Vanessa Countryman, Sec’y, SEC, at 3 (Apr. 18, 2022), <https://www.sec.gov/comments/sr-nysearca-2021-90/srnysearca202190-20123987-280130.pdf>.

We therefore urge the Commission to approve a Bitcoin spot ETP.

Thank you for your time and attention.

Respectfully submitted,

/s/ Neil Chilson  
Neil Chilson

[REDACTED]  
[REDACTED]

/s/ Jonathan M. Zalewski  
Jonathan M. Zalewski

[REDACTED]  
[REDACTED]