



November 29, 2021

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-0609

RE: NYSE Arca Inc.'s Application to Convert Grayscale BTC Trust to ETF

Dear Ms. Countryman:

The Blockchain Association (the "Association") submits these comments in support of the application by NYSE Arca Inc. pursuant to Rule 19b-4 under the Securities Exchange Act of 1934 (as amended, the "Exchange Act") to list shares of BTC under NYSE Arca Rule 8.201-E as an exchange-traded product ("ETP"). The Association strongly urges the Securities and Exchange Commission (the "Commission") to approve NYSE Arca's application.

The Association is a not-for-profit organization dedicated to improving the public policy environment for public blockchain networks to allow them to develop and prosper in the United States. The Association endeavors to educate policymakers, courts, law enforcement, and the public about blockchain technology and the need for regulatory clarity to allow for a more secure, competitive, and innovative digital marketplace. The Association is comprised of industry leaders who are committed to responsibly developing and supporting public blockchain networks fueled by digital assets. Its diverse membership reflects the wide range of this dynamic market and includes digital asset exchanges and custodians, open-source software developers, trading firms, early-stage investors, and others supporting the entire ecosystem. Given our membership, the Association is well-positioned to provide the Commission with compelling reasons as to why NYSE Arca's application should be approved and insight into the importance of this decision.

Recently, the Commission has rightly focused its attention on the crucial mission of protecting investors. Inherent in the goal of investor protection is investor choice: the freedom to make well-informed decisions about investment opportunities that offer Americans the chance to grow and preserve their wealth. In the case of bitcoin, the investing public has clearly demonstrated its desire to invest. According to a survey conducted by the New York Digital Investment Group, 46 million Americans owned bitcoin as of May 2021. While there may be times when it is appropriate for the Commission to prohibit Americans from accessing certain investments, this is not one of those times.

Although retail investors can already invest in bitcoin through several methods, such as using a digital asset exchange, participating in a private placement, or investing in an ETP that holds bitcoin futures contracts, these investment methods are not well-suited to every investor. Some lack the knowledge and motivation to register new accounts and manage relationships with digital asset exchanges. Others prefer to invest through brokerages or advisers whom they already trust, or with funds from retirement accounts that cannot be used for spot digital asset purchases. Additionally, many lack the “accredited investor” status they would need to gain exposure to exclusive offerings from venture capital and private equity firms. Approving a spot bitcoin ETP is the best way to protect and serve the interests of these American investors.

We applaud the Commission’s recent decision to allow the listing and trading of ETPs that hold bitcoin futures contracts. Yet, while bitcoin futures ETPs have certain useful features, they are inferior investment products for many Americans due to their relatively higher cost and risk profile. Unlike spot ETPs, futures ETPs must roll their positions forward at the end of each month as their underlying futures contracts expire. The process of rolling positions forward can incur an additional cost to investors if later-month contracts are more expensive than near-month contracts, as is typically the case in bitcoin futures markets. These costs can add up quickly, costing investors as much as 10% per year plus fees. Futures ETPs are also subject to additional, unique risks related to position limits, limited liquidity, dilution, and other factors. For these reasons, a spot bitcoin ETP would provide many Americans a better vehicle for investing in bitcoin due to lower costs and less risk than futures ETPs.

In the past, the Commission has rejected spot bitcoin ETP applications due to concerns regarding Exchange Act Section 6(b)(5), which requires that the rules of a national securities exchange be designed to “prevent fraudulent and manipulative acts and practices” and “protect investors and the public interest.”¹ According to the Commission, an exchange can satisfy Section 6(b)(5) by “demonstrating that there is a comprehensive surveillance-sharing agreement with a regulated market of significant size relating to the underlying assets” or that “the bitcoin market as a whole or the relevant underlying bitcoin market is ‘uniquely’ and ‘inherently’ resistant to manipulation.”²

To date, no exchange seeking to list a spot bitcoin ETP has been able to demonstrate either surveillance-sharing agreements or inherent resistance to manipulation to the Commission’s satisfaction. However, as previously mentioned, the Commission recently permitted the listing of bitcoin futures ETPs registered under the Investment Company Act of 1940 (“1940 Act”), despite the fact that these ETPs are based on the same underlying spot bitcoin markets and pose identical risks of manipulation as spot bitcoin ETPs. The Commission’s approval of bitcoin futures ETPs naturally leads to the conclusion that its concerns regarding Section 6(b)(5) have been

¹ 15 U.S.C. 78f(b)(5).

² Order Disapproving [] the United States Bitcoin and Treasury Investment Trust [], 85 Fed. Reg. 12595 (Mar. 3, 2020), 12596.

satisfied. Yet, the Commission once again invoked Section 6(b)(5) in rejecting a spot bitcoin ETP proposal less than two weeks ago.³

In so doing, the Commission has unjustifiably evaluated bitcoin futures and spot ETPs under different standards. For example, the reference rate used to price bitcoin contracts underlying futures ETPs is subject to the same pricing quality risks as the index used to price spot bitcoin and calculate net asset value in spot ETPs; indeed, both pull data from largely-overlapping or identical trading platforms. While the Commission did not conclude that bitcoin futures ETPs use pricing data that is insufficiently protected from fraud and manipulation, it has done so for spot ETPs. There is no valid justification for this double standard.

The Commission has explained that the law allows for approval of bitcoin futures ETPs and denial of spot bitcoin ETPs simultaneously because futures ETPs are registered under the 1940 Act, and because bitcoin futures markets are more established and better regulated than spot markets. This explanation lacks merit for at least two reasons.

First, the 1940 Act was “intended to deter mismanagement of investment companies for the protection of investment company security holders.”⁴ The added investor protections for 1940 Act funds are designed and intended to protect investors against self-interested managers. This protection does not relate to the risk of fraud and manipulation in ETPs’ underlying spot markets. Funds registered under the Securities Act of 1933 and those registered under the 1940 Act provide the same protections for investors regarding fraud and manipulation in the ETPs’ underlying markets. Therefore, the Commission’s belief that the 1940 Act confers additional investor protections relevant to the requirements of Section 6(b)(5) has no basis in law.

Second, both bitcoin’s futures markets and spot markets are well-established and well-regulated. The Commodity Futures Trading Commission (“CFTC”) has exercised its anti-manipulation and anti-fraud enforcement authority over bitcoin spot markets since 2014, three years longer than the CFTC has overseen bitcoin futures markets. Moreover, the CFTC’s regulation of designated contract markets and other venues where bitcoin futures contracts are traded does not address the prospect of fraud and manipulation in bitcoin spot markets, the very markets that determine the pricing of those futures contracts. Therefore, the Commission’s belief that futures ETPs and spot ETPs pose different levels of fraud and manipulation risk to investors is unfounded.

In short, the Commission’s use of a double standard to evaluate bitcoin futures ETPs and spot ETPs is not only bad policy, it is in contravention of law. “A fundamental norm of administrative procedure requires an agency to treat like cases alike.”⁵ The Commission has not established material differences between futures ETPs and spot ETPs to justify different treatment, nor has it provided exchanges with a “principled way” to meet its interpretation of the requirements of

³ See Order Disapproving *VanEck Bitcoin Trust*, 86 Fed. Reg. 64539 (Nov. 12, 2021), 64551-52.

⁴ *Herpich v. Wallace*, 430 F.2d 792, 815 (5th Cir. 1970).

⁵ *Westar Energy, Inc. v. Fed. Energy Reg. Comm’n*, 473 F.3d 1239, 1241 (D.C. Cir. 2007).

Section 6(b)(5).⁶ Lawful action under the Administrative Procedures Act demands more. The time has come for the Commission to approve a spot bitcoin ETP.

The Association thanks the Commission for the opportunity to provide comment on this important matter. If the Commission has questions or seeks further input on the benefits of a bitcoin spot ETP and the grounds for its approval, the Association and its members stand ready to devote their energy and expertise to assist the Commission in this critical endeavor.

Sincerely,



Kristin Smith
Executive Director



Jake Chervinsky
Head of Policy

⁶ *Rapoport v. SEC*, 682 F.3d 98, 107 (D.C. Cir. 2012) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 197 (1947)).