



January 12, 2024

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

Re: Grayscale Ethereum Futures Trust (ETH) ETF, File No. SR-NYSEARCA-2023-63

Dear Ms. Countryman:

Better Markets¹ appreciates the opportunity to comment on the proposed rule change (“Proposal”) filed by NYSE Arca, Inc., with the Securities and Exchange Commission (“SEC” or “Commission”), seeking to list and trade shares of the Grayscale Ethereum Futures Trust (ETH) ETF.²

Two days ago, on January 10, 2024, the Commission approved the first spot bitcoin exchange-traded products (“ETPs”). That action was not supported by the law or facts and was a grievous, historic mistake that will result in untold investor harm. In truth, *it is little more than an ETP for Ponzi schemes* that is already being widely if not fraudulently misdescribed and mis-sold as an ETF. The SEC’s approval of a spot bitcoin ETP is the height of irresponsibility, no better than a police commissioner who, knowing there’s a very high crime area with no cops on the beat and no lights, nonetheless authorizes companies to send busloads of unsuspecting travelers into those neighborhoods in the middle of the night, even though they have exposed wallets filled with cash and lots of expensive jewelry hanging around their necks. We all know how that’s going to turn out. The SEC must not make the same mistake again.

As you know, the SEC’s approval of a spot bitcoin ETP does not change the fundamental facts about that worthless product: bitcoin still has no legitimate use after 15 years; it will remain the preferred financial product of speculators, gamblers, predators, and criminals worldwide; and it will continue to be a cesspool of fraud, manipulation, and criminality. Nevertheless, *the SEC’s approval will provide America’s investors with at least four levels of false comfort:*

1. it will be and has already been seen as an approval if not an endorsement of bitcoin and crypto more generally;

¹ Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans’ jobs, savings, retirements, and more.

² Grayscale Ethereum Futures Trust (ETH) ETF, File No. SR-NYSEARCA-2023-63.

2. it will be and already has been misreported and misdescribed as an approval of the much more well-known and trusted ETF investment vehicle which has materially more investor protections;
3. it will allow the involvement of traditional and trusted financial firms like Blackrock and Fidelity to suggest an unmerited level of legitimacy; and
4. it will inevitably lead investors to assume that these ETPs will be subject to meaningful regulation and investor protections, because they'll believe that otherwise the SEC wouldn't have approved them, even though that won't be the case.

This is all false comfort that is going to result in millions of American investors, including many just trying to save for a decent retirement, risking their hard-earned money in a worthless, speculative, and highly volatile financial product. There is no - and will be no - effective cop on the bitcoin beat. The same is true for ether and the Ethereum ecosystem. The Commission must not compound the spot bitcoin ETP mistake by now approving an ether futures ETP. The Commission should reject the Proposal.³

The Grayscale Decision Does Not Require Approval.

In *Grayscale Investments, LLC, v. SEC*, 82 F.4th 1239 (D.C. Cir. 2023), the D.C. Circuit vacated a Commission order denying a proposed rule change to list and trade shares of Grayscale's spot bitcoin ETP. It did so on the ground that the Commission did not adequately explain why it denied approval of the spot bitcoin ETP after previously approving the trading of two bitcoin futures funds. The court considered the products similar and found that the Commission had acted arbitrarily and capriciously by failing to explain its different treatment of what the court regarded as similar products.

In reality, spot and futures based crypto ETPs are profoundly different. Moreover, for purposes of this Proposal, and as demonstrated below, the ether futures market is materially different from the bitcoin futures market. Accordingly, the Commission's prior approval of the bitcoin futures ETPs does not require its approval of the pending Proposal regarding an ether futures ETP.

The Statutory Standard and the Applicable Test.

The rules of an exchange must be designed to "prevent fraudulent and manipulative acts and practices" and "protect investors and the public interest."⁴ NYSE Arca states that it can

³ Today, we are also filing a comment letter addressing three proposed rule changes that exchanges filed seeking to list and trade shares of spot ether ETPs: Ark 21Shares Ethereum ETF, SR-CboeBZX-2023-070; VanEck Ethereum ETF, SR-CboeBZX-2023-069; and Hashdex Nasdaq Ethereum ETF, SR-NASDAQ-2023-035. Many of the concerns that we articulate in that comment letter also apply here. We incorporate that letter by reference as if fully set forth here. See Better Markets, Comment Letter re: Ark 21Shares Ethereum ETF, File No. SR-CboeBZX-2023-070; VanEck Ethereum ETF, File No. SR-CboeBZX-2023-069; Hashdex Nasdaq Ethereum ETF, File No. SR-NASDAQ-2023-035 (Jan. 12, 2024).

⁴ 15 U.S.C. § 78f(b)(5).

establish that the proposed rule change satisfies these requirements and allay any concerns about fraud or manipulation by demonstrating that it has entered into a surveillance-sharing agreement with a regulated market of significant size related to ether futures contracts.⁵ Such a market is one in which (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP so that a surveillance-sharing agreement would assist the ETP listing market in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominate influence on prices in that market.⁶

With respect to the Commission's prior approval of bitcoin futures ETPs, NYSE Arca states that "[k]ey to the Commission's approval was that the significant regulated market (i.e., the CME) with which the listing exchange had a surveillance-sharing agreement, was the same market on which the assets in the ETP trade."⁷ NYSE Arca says that the facts and circumstances of its proposed rule change are the same as those at issue in the bitcoin futures ETPs that the Commission has previously approved.⁸ The exclusive holdings of the Trust are CME Ether Futures Contracts, and the exchange has a surveillance-sharing agreement with a regulated market of significant size related to CME Ether Futures Contracts because it has a surveillance-sharing agreement with the CME where ether futures contracts are traded.⁹

NYSE Arca also asserts that "it is unlikely that the ETP would become the predominant influence on prices in the market."¹⁰ But, here, as demonstrated below, NYSE Arca cannot say that the facts and circumstances of its proposed rule change are the same as those at issue in the bitcoin futures ETPs that the Commission approved. NYSE Arca therefore cannot simply rely on that past approval as grounds for approving the proposed rule change to list and trade an ether futures ETP.

NYSE Arca Has Failed to Show That the Ether Futures Market Is Sufficiently Mature or That It Will Not Be Dominated by the Proposed ETP.

In approving the bitcoin futures ETPs and finding that it was unlikely that trading in the proposed ETP would be the predominant influence on prices in the CME bitcoin futures market, the Commission said that it had to find that it was "dealing with a large futures market that had been trading for a number of years before an exchange proposed an ETP based on those futures."¹¹ The Commission made that finding after "observ[ing] that the CME bitcoin futures market ha[d]

⁵ *Notice of Filing of a Proposed Rule Change to List and Trade Shares of the Grayscale Ethereum Futures Trust (ETH) ETF under NYSE Arca Rule 8.200-E, Commentary .02 (Trust Issued Receipts)*, Exchange Act Release No. 98567, 2023 WL 6307202, at *6-7 (Sept. 27, 2023).

⁶ *Id.* at *7.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at *8.

¹¹ *Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to List and Trade Shares of the Teucrium Bitcoin Futures Fund under NYSE Arca Rule 8.200-E, Commentary .02 (Trust Issued Receipts)*, 87 Fed. Reg. 21,676, 21,680 (Apr. 12, 2022).

‘progressed and matured significantly.’”¹² CME began offering trading in bitcoin futures contracts in 2017, “nearly every measurable metric related to BTC Contracts ha[d] trended consistently up since launch and/or accelerated upward in the past year,” and there was a “‘clear trend in year-over-year growth’ in the CME bitcoin futures market,” which was “‘still growing in size.’”¹³ Here, CME Ether Futures Contracts did not begin trading until 2021,¹⁴ and *NYSE Arca does not introduce similar evidence as to the growth of the CME ether futures market.*

In approving the bitcoin futures ETPs, the Commission stated further: “Significantly, evidence from the recent introduction of 1940 Act-registered Bitcoin Futures ETFs also supports the Commission’s conclusion that it is unlikely that trading in the proposed ETP would be the predominant influence on prices in the CME bitcoin futures market.”¹⁵ The Commission then used that conclusion to find that the Bitcoin Futures ETFs had not “exerted a dominant influence on CME bitcoin futures prices.”¹⁶ No similar “evidence” exists with respect to 1940 Act-registered ether-based ETFs, and NYSE Arca does not assert that there is such evidence. Instead, NYSE Arca states that it “does not believe this distinction is relevant.”¹⁷ Yet it does not explain how that could be when the Commission considered such evidence significant if not determinative in approving the bitcoin futures ETPs.

NYSE Arca therefore has not established that the ETP would not become the predominant influence on prices in the futures market. “Taken together,” the Commission said in approving the bitcoin futures ETPs, “the maturation of the CME bitcoin futures market since its inception in 2017 . . . and evidence from the 1940 Act-registered Bitcoin Futures ETFs persuade the Commission that trading in the proposed ETP is not likely to be the predominant influence on prices in the CME bitcoin futures market.”¹⁸ NYSE Arca has not shown a similarly mature CME ether futures market, and it has not attempted to use evidence from 1940s Act-registered Ether Futures ETFs. Thus, unlike with respect to bitcoin futures ETPs, the second prong of the relevant test has not been satisfied with respect to the proposed rule change. NYSE Arca has therefore not entered into the requisite surveillance-sharing agreement and the proposed rule change must be denied.

¹² *Id.* (citation omitted).

¹³ *Id.* at 21,680-21,681 (citation omitted).

¹⁴ Release No. 98567, 2023 WL 6307202, at *2.

¹⁵ 87 Fed. Reg. at 21,681.

¹⁶ *Id.*

¹⁷ Release No. 98567, 2023 WL 6307202, at *8 n.23.

¹⁸ 87 Fed. Reg. at 21,681.

Conclusion

We hope these comments are helpful as the Commission considers this matter.

Sincerely,



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