



February 28, 2024

Re: File No. SR-NYSEArca-2024-06

Release No. 34-99398
Notice of Filing of Proposed Rule Change to Amend Rule 5.3-O to Permit the Listing and Trading of Options on Commodity-Based Trust Shares (January 19, 2024)

File No. SR-NYSEAMER-2024-10

Release No. Release No. 34 99593
Notice of Filing of Proposed Change, as Modified by Amendment No. 2 to Amend Rule 915 to Permit the Listing and Trading of Options on the Bitwise Bitcoin ETF, the Grayscale Bitcoin Trust, and Any Trust That Holds Bitcoin (February 23, 2024)

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

Dear Ms. Countryman:

Grayscale Investments, LLC is the world's largest digital currency asset manager and the sponsor of the Grayscale Bitcoin Trust (BTC) ("GBTC"). We write in support of (i) the proposal by NYSE Arca Inc. (the "NYSE Arca")¹ pursuant to Rule 19b-4 under the Securities Exchange Act of 1934 (as amended, the "Exchange Act") to amend NYSE Arca Rule 5.3-O to permit the listing and trading of options on commodity-based trust shares and (ii) the proposal by NYSE American LLC ("NYSE American", together with NYSE Arca, the "Exchanges")² pursuant to Rule 19b-4 under the Exchange Act to amend NYSE American Rule 915 to permit the listing and trading of options on the Bitwise Bitcoin ETF, the Grayscale Bitcoin Trust, and any trust that holds Bitcoin (each a "Proposal" and together, the "Proposals").³

¹ Notice of Filing of a Proposed Rule Change to Amend Rule 5.3-O to Permit the Listing and Trading of Options on Commodity-Based Trust Shares, Securities Exchange Act Release No. 34-99399 (Jan. 19, 2024) (SR-NYSEARCA-2024-06).

² Notice of Filing of Proposed Change, as Modified by Amendment No. 2 to Amend Rule 915 to Permit the Listing and Trading of Options on the Bitwise Bitcoin ETF, the Grayscale Bitcoin Trust, and Any Trust That Holds Bitcoin, Securities Exchange Act Release No. 34-99593 (Feb. 23, 2024) (SR-NYSEARCA-2024-06).

³ The term "Commodity-Based Trust Shares" means a security (a) that is issued by a trust ("Trust") that holds (1) a specified commodity deposited with the Trust, or (2) a specified commodity and, in addition to such specified commodity, cash; (b) that is 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) that, 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. See NYSE Arca Rule 8.201-E (c)(1).

Our argument is straightforward: if investing in options for shares of products holding *derivatives* of an asset is acceptable for investors, investing in options for shares of products holding the asset itself should be as well. Having permitted the listing of options on Bitcoin futures ETFs and approved the listing of spot Bitcoin exchange-traded products on NYSE Arca and other Commission-regulated national securities exchanges, the Commission should approve the Exchanges' applications to list options on spot Bitcoin exchange-traded products ("ETPs"). In doing so, the Commission should also update its outdated historical patchwork approach to approval of options on spot commodity-based ETPs that are structured identically to those spot commodity-ETPs for which the listing and trading on a national securities exchange has been approved—including options on GBTC on the Exchanges—and permit national securities exchanges to update their rules to permit the deemed approval of the listing and trading of such options.⁴

* * *

GBTC holds Bitcoin valued at approximately \$23.2 billion⁵ as of February 22, 2024, representing approximately 2.3%⁶ of outstanding Bitcoin and making GBTC the largest Bitcoin ETP in the world. Since September 2013, GBTC has offered direct exposure to the spot Bitcoin market through a familiar and convenient product that does not burden investors with the risk and expense of direct digital asset custody and trading. On January 10, 2024, the SEC approved an application by NYSE Arca under Rule 19b-4 of the Exchange Act to list the shares of GBTC, along with shares of nine other spot Bitcoin ETPs, on various exchanges.⁷ Shares of GBTC began trading on the Exchange under the ticker "GBTC" on January 11, 2024. As of February 22, 2024, spot Bitcoin ETPs trading in the United States have approximately \$38 billion in assets under management. In under two months, these spot Bitcoin ETPs have experienced an average daily trading volume of \$1.75 billion, and the top three most actively traded spot Bitcoin ETPs have seen average bid-ask spreads of 0.037%. When compared to the leading Bitcoin futures ETF for which the listing of options has been permitted,⁸ which have experienced average daily trading volumes of \$416 million, and average bid-ask spreads of 0.047%⁹, these spot Bitcoin ETPs demonstrate a mature and robust market, even in their relative infancy.¹⁰ It stands to reason that, now that spot Bitcoin

⁴ We are not aware of any commodity-based ETP that has been approved, but a 19b-4 application that was filed for options overlaying the ETP was not approved.

⁵ Bloomberg, L.P. as of February 22, 2024.

⁶ Based on BTC circulating supply data provided by Coin Metrics.

⁷ See Order Granting Approval of a Proposed Rule Change To List and Trade Shares of Grayscale Bitcoin Trust, Bitwise Bitcoin ETF, Hashdex Bitcoin ETF, iShares Bitcoin Trust, Valkyrie Bitcoin Fund, ARK 21Shares Bitcoin ETF, Invesco Galaxy Bitcoin ETF, VanEck Bitcoin Trust, WisdomTree Bitcoin Fund, Fidelity Wise Origin Bitcoin Fund, and Franklin Bitcoin ETF, Securities Exchange Act Release No. 34-99306 (Jan. 10, 2024) (SR-NYSEARCA-2021-90; SR-NYSEARCA-2023-44; SRNYSEARCA-2023-58; SR-NASDAQ-2023-016; SR-NASDAQ-2023-019; SR-CboeBZX-2023-028; SR-CboeBZX-2023-038; SR-CboeBZX-2023-040; SR-CboeBZX-2023-042; SRCboeBZX-2023-044; SR-CboeBZX-2023-072) ("Spot Bitcoin ETF Approval Order").

⁸ See Bloomberg, L.P., based on open interest data that reflects activity in options in ProShares Bitcoin Strategy ETF (BITO) on Oct. 20, 2021; see also Prospectus of Roundhill Bitcoin Covered Call Strategy ETF, https://www.roundhillinvestments.com/assets/pdfs/ybtc_prospectus.pdf (Jan. 10, 2024) ("Currently, the Fund seeks to provide such exposure through options contracts that reference one or more ETFs that invest principally in bitcoin futures contracts").

⁹ Bloomberg, L.P. as of February 22, 2024.

¹⁰ For further comparison, the three largest physical Gold ETFs and two largest physical Silver ETFs have seen, over the same time period, average bid-ask spreads of approximately 0.019% and 0.047%, respectively. The top three Bitcoin ETPs are approaching – or in the case of Silver, have surpassed – the level of robustness of the most heavily traded spot commodity ETFs in terms of all-day spreads after just under two

ETPs have been approved for trading on NYSE Arca pursuant to the Rule 19b-4 process, the natural next step is the approval of options on spot Bitcoin ETPs—in the same manner that options on spot gold ETPs were approved for listing and trading pursuant to the Rule 19b-4 process after spot gold ETPs were first approved for listing and trading pursuant to the Rule 19b-4 process.

On January 19, 2024, NYSE Arca submitted a proposal pursuant to Rule 19b-4 under the Exchange Act to amend Rule 5.3-O to permit the listing and trading of options on commodity-based trust shares and on February 23, 2024, NYSE American submitted a proposal pursuant to Rule 19b-4 under the Exchange Act to amend 915 to permit the listing and trading of options on the Bitwise Bitcoin ETF, the Grayscale Bitcoin Trust, and any trust that holds Bitcoin. Because Bitcoin is not a “security” for purposes of the Investment Company Act of 1940 (as amended, the “1940 Act”), and GBTC only holds Bitcoin (and, in certain circumstances, cash), GBTC is neither required nor eligible to register as an investment company under the 1940 Act. Because the CFTC classifies Bitcoin underlying GBTC as a commodity,¹¹ shares of GBTC qualify as “commodity-based trust shares” to which such rule with respect to NYSE Arca, once amended pursuant to the NYSE Arca Proposal, would apply.

It is vital to the interests of GBTC and all spot Bitcoin ETP investors to access exchange-listed options on GBTC and other spot Bitcoin ETPs. Options would facilitate price discovery in the ETP’s shares, provide investors with greater choice and help investors navigate varying market conditions or achieve desired investment outcomes, such as generating income, hedging, or reducing volatility. In addition, approving the listing and trading of options on spot Bitcoin ETPs would further bring Bitcoin into the regulatory perimeter by allowing additional regulated market participants such as CFTC-regulated designated contract merchants and SEC-regulated broker-dealers to trade the products. Approval would serve as a boon to the commodity trust investor class and improve market efficiency.

* * *

The Commission’s approach to options on other Bitcoin-based investment products also favors approval of options on spot commodity-based ETPs like GBTC. Following the approval of the listing and trading of Bitcoin futures ETFs in October 2021,¹² the SEC permitted options on such ETFs to be listed and begin trading the very next day.¹³ Because options on 1940 Act ETFs, such as the Bitcoin futures ETFs, are already permitted by the existing listing rules under NYSE Arca Rule 5.3-O and NYSE American Rule 915¹⁴, the listing of such funds did not need to be explicitly approved by the SEC. However, because spot Bitcoin is a commodity, none of the approved spot Bitcoin ETPs are permitted to register under the 1940 Act, and each instead

months of trading, while the gold and silver products have traded since the mid-2000s. See Bloomberg, L.P. as of February 22, 2024; see also SPDR Gold Shares, iShares Gold Trust, SPDR Gold Minishares Trust, iShares Silver Trust, and abrdn Physical Silver Shares ETF.

¹¹ See CFTC, *What is a Bitcoin Futures ETF?*, <https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/BitcoinFuturesETF.html#:~:text=Bitcoin%20is%20considered%20a%20commodity,th e%20CFTC%20or%20the%20SEC>.

¹² ProShares Bitcoin Strategy ETF (BITO)

¹³ *Supra* note 5.

¹⁴ See NYSE Arca Rule 5.3-O, Criteria for Underlying Securities; NYSE American Rule 915 Criteria for Underlying Securities.

registered its shares under the Securities Act of 1933; therefore, the listing and trading of options on GBTC and such other spot Bitcoin ETPs requires approval from the Commission pursuant to NYSE Arca Rule 5.3-O and/or NYSE American Rule 915. The difference is a function of the different rules under which ETFs and spot commodity-based ETPs are registered rather than anything about the risks of options on those investment products, which leads to an outcome unrelated to the reality of the investment products. Nonetheless, based on the Commission permitting the listing and trading of options on shares of Bitcoin futures ETFs—and because the Bitcoin futures market is subject to the same risks as the spot Bitcoin market—the Commission should approve the listing and trading of options on spot Bitcoin ETPs.

In letters to the Commission dated November 29, 2021¹⁵ and April 18, 2022,¹⁶ Davis Polk & Wardwell LLP argued on our behalf that the Commission should approve the listing and trading of spot Bitcoin ETPs based in part on the Commission’s prior approval of the listing and trading of Bitcoin futures ETFs. That the Commission had demonstrated, we argued, comfort with the risks in the underlying Bitcoin market through its approval of Bitcoin futures ETFs, proved the Commission must necessarily be comfortable with the same risks in the spot Bitcoin market. In a subsequent letter, commentators noted a 99.9% correlation between the price of spot Bitcoin and Bitcoin futures.¹⁷ We believed these facts weighed strongly in favor of approval. The Commission disagreed and issued a denial order in June 2022 (the “Denial Order”). However, we challenged this denial in the United States Court of Appeals of the Columbia Circuit and prevailed in a unanimous decision.¹⁸ In *Grayscale v. SEC*, the Court held that Bitcoin futures and spot Bitcoin were “materially similar across relevant regulatory factors” and that the Commission had acted arbitrarily and capriciously in its denial of our application, and vacated the Denial Order.¹⁹ A similar set of circumstances that surrounded the GBTC listing application exists for the Exchanges’ applications present before you.

In particular, options on ETPs holding spot Bitcoin and options on ETFs holding Bitcoin futures are necessarily subject to the same risks—those present in the spot Bitcoin market. This is evident in the tight correlation between the spot Bitcoin and Bitcoin futures market prices. And where the Commission has accepted the market sophistication and investor interest for options on Bitcoin futures by permitting their trading, the market sophistication and investor interest for options in the spot Bitcoin market should be even greater: even in its infancy, the spot Bitcoin ETP market already serves more investors, enjoys tighter bid-ask spreads, and is far more

¹⁵ Letter from Davis Polk & Wardwell LLP on behalf of Grayscale Investments, LLC to Vanessa Countryman, Sec’y, SEC, at 1 (Nov. 29, 2021) (the “November 2021 letter”), <https://www.sec.gov/comments/sr-nysearca-2021-90/srnysearca202190-9410842-262990.pdf>.

¹⁶ Letter from Davis Polk & Wardwell LLP on behalf of Grayscale Investments, LLC, submitted in connection with Exchange Act Release No. 93504 (Nov. 2, 2021), 86 Fed. Reg. 61804 (Nov. 8, 2021), to Vanessa Countryman, Sec’y, SEC (Apr. 18, 2022), <https://www.sec.gov/comments/sr-nysearca-2021-90/srnysearca202190-20123987-280130.pdf>.

¹⁷ Letter from Robert E. Whaley, Professor of Management (Finance), Director, Financial Markets Research Center, Vanderbilt University Owen Graduate School of Management (dated May 25, 2022) (the “Whaley Letter”), <https://www.sec.gov/comments/sr-nysearca-2021-90/srnysearca202190-20130009-296497.pdf>.

¹⁸ *Grayscale Invs., LLC v. SEC*, No. 22-1142 (D.C. Cir. Aug. 29, 2023).

¹⁹ *Id.*

liquid than the Bitcoin futures ETF market.²⁰ Exposure to options derived from the spot Bitcoin ETP market should thus present even less of a risk of fraud and manipulation than exposure to options derived from the Bitcoin futures ETF market, while potentially benefiting a larger number of investors.

Through its approval of the listing and trading of spot Bitcoin ETPs, the Commission demonstrated that such products satisfy the requirements of Section 6(b)(5) of the Exchange Act, which requires, in relevant part, that the rules of a national securities exchange must be designed “to prevent fraudulent and manipulative acts.” Having shown comfort with the satisfaction of Section 6(b)(5) first in the context of Bitcoin futures ETFs, then for spot Bitcoin ETPs, it stands to reason that, having permitted the listing and trading of options on Bitcoin futures ETFs, the Commission should now approve the listing and trading of options on spot Bitcoin ETPs.

* * *

NYSE Arca’s application is for a rule change that would allow the listing and trading of options not only on shares for spot Bitcoin ETPs but for all commodity-based trusts that meet the qualifications described in the Exchange’s application. Approval here would end an expensive and time-consuming product-by-product approach to approval the Commission has relied on for over 15 years.²¹

Currently, Rule 5.3-O(g) deems appropriate the listing and trading of options on ETFs that are traded on a national securities exchange and that:

“... (iv) represent interests in the SPDR Gold Trust, or (v) represent interests in the iShares COMEX Gold Trust, or (vi) represent interests in the iShares Silver Trust, ... or, (viii) represents interest in the ETFS Silver Trust or the ETFS Gold Trust, or (ix) represents interests in the ETFS Palladium Trust or ETFS Platinum Trust.”²²

In its first approval of the listing and trading of options on a commodity-based trust, SPDR Gold Trust, in May 2008 (the “SPDR Gold Approval”), the Commission found that the “proposed rule changes are consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be designed 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 same is true for every spot commodity-based ETP with the same structure as SPDR Gold Trust that the Commission has approved for listing and trading on a national securities exchange, including the recently approved spot Bitcoin ETPs. However, rather than issue an approval for all

²⁰ *Supra* note 7.

²¹ See Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Listing and Trading on the Exchange of Options on the SPDR Gold Trust, Securities Exchange Act Release No. 34-57945, SR-NASDAQ-2008-051 (Jun. 10, 2008) (“For these reasons, the Commission designates the proposed rule change as operative upon filing”), <https://www.sec.gov/files/rules/sro/nasdaq/2008/34-57945>.

²² See Proposal at 3.

identically structured commodity-based trusts, the Commission issued an approval limited solely to SPDR Gold Trust shares. Since then, approvals have been issued ad-hoc, resulting in a patchwork rule wherein additional individual commodity-based ETPs are tacked on to NYSE Arca Rule 5.3-O(g) and NYSE American Rule 915, rather than being approved as a class. This is in sharp distinction from the balance of NYSE Arca Rule 5.3-O(g) and NYSE American Rule 915, which approves for options trading entire classes of investment products, such as open-end investment companies or unit investment trusts. We again note that GBTC and other spot Bitcoin ETPs are neither required, nor even eligible, to register as investment companies. The result is that, since the SPDR Gold Approval, individual issuers and their accompanying exchanges have been forced to pursue a time intensive and expensive application process individually to seek approval.²³

The present application would address and solve this problem by permitting the approval of the listing and trading of options on all similarly situated commodity-based trusts that meet the same standards mandated in the SPDR Gold Approval. As GBTC has a near identical structure as the SPDR Gold Trust, it is imperative that the Commission treats it, and other commodity-based trusts, alike.

* * *

It is of course foundational that the Commission—like any other federal regulatory agency—must treat like situations alike absent reasoned justification; indeed, this principle is reflected in the text of Section 6(b)(5) itself, which forbids exchanges from maintaining rules that unfairly discriminate between issuers. If the Commission were to approve the listing and trading of options on other commodity-based trusts—and permit the listing and trading of options on Bitcoin futures ETFs—but reject options on spot Bitcoin ETPs that are identical in all relevant respects, the Commission would be treating these like products differently. In view of this, we believe that rejecting the Exchanges' Rule 19b-4 application would unfairly discriminate against GBTC and its shareholders, who otherwise stand to benefit from enhanced price discovery and improved market efficiency.

We therefore respectfully urge the Commission to approve the Exchanges' Proposals to list and trade options on commodity-based trust shares such as GBTC.

Very truly yours,

Michael Sonnenshein

Michael Sonnenshein (Feb 29, 2024 12:49 EST)

Michael Sonnenshein

On behalf of
Grayscale Investments, LLC and GBTC Investors

²³ See NYSE Arca Rule 5.3-O(g)(iv) which permits the listing and trading of options on the SPDR Gold Trust; NYSE Arca Rule 5.3-O(g)(v) which permits the listing and trading of options on the iShares COMEX Gold Trust; NYSE Arca Rule 5.3-O(g)(vi) which permits the listing and trading of options on the iShares Silver Trust; NYSE Arca Rule 5.3-O(g)(viii) which permits the listing and trading of options on the ETFs Silver Trust or ETFs Gold Trust; and NYSE Arca Rule 5.3-O(g)(ix) which permits the listing and trading of options on the ETFs Palladium Trust or ETFs Platinum Trust.