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September 12, 2017

Re: File No. SR-NYSEArca-2017-06

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Dear Mr. Fields:

We are writing on behalf of our client Grayscale Investments, LLC, sponsor of the Bitcoin Investment Trust. NYSE Arca, Inc. has filed the above-referenced proposed rule change relating to the listing and trading of shares of the Bitcoin Investment Trust, which proposed rule change is currently pending before the Commission.

In March 2017, the Commission, through authority delegated to the Division of Trading and Markets, disapproved proposed rule changes filed by Bats BZX Exchange, Inc. and NYSE Arca, Inc. relating to the listing and trading of shares of the Winklevoss Bitcoin Trust and the SolidX Bitcoin Trust, respectively.[1] If the Commission applies the same analysis to the proposed rule change relating to the Bitcoin Investment Trust, we believe it is likely that the Commission will also disapprove such proposed rule change.

The Winklevoss and SolidX disapproval orders each applied a test derived from a line of Commission orders developed primarily in the context of physical-commodity trust exchange-traded products ("ETPs"). Under this test,

> "an exchange that lists and trades shares of commodity-trust [ETPs] must, in addition to other applicable requirements, satisfy two requirements that are dispositive in this matter. First, the exchange must have surveillance-sharing agreements with significant markets for trading the underlying commodity or derivatives on that commodity. And second, those markets must be regulated."[2]

[1] See Exchange Act Rel. 34-80206 (Mar. 10, 2017) SR-BatsBZX-2016-30 (Winklevoss Bitcoin Trust) (the "Winklevoss disapproval order") and Exchange Act Rel. 34-80319 (Mar. 28, 2017) SR-NYSEArca-2016-101 (SolidX Bitcoin Trust) (the "SolidX disapproval order").

[2] Winklevoss disapproval order at p. 2.

After concluding on the basis of the record before it that "the significant markets for bitcoin are unregulated,"[3] and that the exchanges would therefore be unable to enter into surveillance-sharing agreements with significant regulated markets, the Commission determined that the proposed rule changes were not consistent with Section 6(b)(5) of the Securities Exchange Act of 1934, "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."[4]

The Commission's Section 6(b)(5) framework for analyzing physical-commodity ETPs shifts the focus from whether the listing exchange has rules to prevent fraudulent and manipulative acts and practices in the market for securities of the ETP, to whether another regulator has jurisdiction over and rules to prevent fraudulent and manipulative acts and practices in significant markets for the asset underlying the ETP. Although this framework may be a convenient regulatory solution for analyzing ETPs whose underlying assets (or derivatives thereon) trade in significant regulated markets, when applied to ETPs whose underlying assets (or derivatives) do not trade in significant regulated markets, this framework acts as a categorical bar to the listing of the ETP on a national securities exchange. As the Commission's concern is rooted in concerns over the sufficiency of regulation over the market for the underlying, non-security asset, a categorical bar appears vanishingly close to merit regulation of the securities of ETPs for that asset, which would of course not be consistent with the basic design of the federal securities laws.

In order to avoid this result, we believe it is necessary for the Commission to develop an alternative framework for ETPs for underlying assets that do not share the same trading characteristics as physical commodities. Otherwise, the physical-commodity Section 6(b)(5) test will result in a determination by the Commission that digital-currency ETPs, among others, should remain unavailable for investment by the public in the United States because they expose investors to the risks of an unregulated market. This determination will not of course prevent U.S. investors from investing directly in digital currencies or from investing in privately offered digital currency trusts – though it will prevent U.S. investors from investing in digital-currency ETPs with the full panoply of protections provided by the federal securities laws, including staff review of registration statements, the protections provided by Sections 11 and 12 of the Securities Act of 1933 against false or misleading disclosures, and the protections inherent in secondary-market trading of ETP shares on a registered national securities exchange. We therefore urge the Commission to revisit its analysis under Section 6(b)(5) for approving proposed rule changes relating to digital-currency ETPs.

We do not suggest that Section 6(b)(5) requires the Commission to approve an ETP for any type of underlying asset so long as the rules of the exchange are designed to prevent fraudulent and manipulative acts and practices in the market for securities of the ETP. For example, if an underlying asset were designed or used exclusively or overwhelmingly for fraudulent or illegal purposes, we think the Commission should be able to determine, consistently with Section 6(b)(5), that listing an ETP for that underlying asset would further, rather than prevent, fraudulent acts. But this is different from examining the broad market for the underlying asset and concluding, merely on the basis that it is unregulated, that an ETP for that asset exposes public investors to unacceptable risks that cannot be mitigated by the usual mechanisms of adequate disclosure and ongoing public reporting.

[3] Id.

[4] Id.

In fact, listing standards approved by the Commission routinely permit exchanges to list securities that present public investors with exposure to risks of unregulated markets, or to regulated markets where the Commission lacks surveillance-sharing agreements with the regulator. An example of the former would be a digital-advertiser stock which exposes investors to hacking and other cybersecurity risks. An example of the latter would be a health-insurer stock which exposes investors to financial risks from healthcare fraud, but where the Commission has never required exchanges to enter into surveillance-sharing agreements with federal health care or state insurance regulators. Rather than shield the public from investments in securities posing these risks, the federal securities laws require disclosure of the material risk exposures in the underlying markets, a requirement that would be equally applicable to publicly traded digital-currency ETPs.

When an asset underlying an ETP does not trade in a conventionally regulated market, in order to avoid merit regulation we believe the Commission should develop a framework tailored to the circumstances of the particular underlying asset. When bitcoin is the underlying asset, we believe such a framework could include:

- Examination of the underlying asset, in order to form a judgment as to whether or not the asset is designed or used exclusively or overwhelmingly for fraudulent or illegal purposes;

- Examination of the principal markets for the underlying asset, in order to determine whether they have been the subject of repeated criminal or civil fraud enforcement actions; and

- To the extent possible, surveillance-sharing agreements with selected trading markets for the asset, whether or not as significant as those for physical commodities, since anomalous trading activity in a market with a relatively small share of trading could nevertheless signal a need for heightened scrutiny of trading in the ETP securities.

We appreciate the Commission's consideration of our comments, and would be happy to discuss any of the foregoing in greater detail.

Very truly yours,

Joseph A. Hall

cc: Barry E. Silbert
Chief Executive Officer
Grayscale Investments, LLC