



May 3, 2022

Re: File No. SR-NYSEArca-2021-90
Rel. No. 34-93504
Notice of Filing of Proposed Rule Change to List and Trade Shares of Grayscale Bitcoin Trust
(BTC) under NYSE Arca Rule 8.201-E
(November 2, 2021)

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

Dear Ms. Countryman:

I am Professor Carol R. Goforth, a University Professor and the Clayton N. Little Professor of Law at the University of Arkansas (Fayetteville) School of Law. I have no ownership interest or investment in or connection with Grayscale or its Bitcoin Trust or, to the best of my knowledge, any of its employees or associates. I write as an academic with a long-standing interest in crypto regulation, and as a taxpayer. I would hate to see the SEC take a position that I would regard as arbitrary and capricious, and which might lead to wasteful litigation. For that reason I am in favor of approving the Form 19b-4 that NYSE Arca filed with you to convert Grayscale® Bitcoin Trust (OTCQX: GBTC) into a Bitcoin Spot ETF.¹

In October of 2021 and earlier this year you approved several futures-based Bitcoin ETFs. This is significant because to the extent the SEC had previously expressed concern over fraud or manipulation in pricing of the underlying spot/cash Bitcoin markets, that concern would have to permeate both spot-based and futures-based ETFs regardless of the level of regulation to which the fund or its underlying assets (*i.e.*, bitcoin futures/bitcoin) are subject since both types of products are priced based on the underlying spot/cash Bitcoin markets. In fact, the futures and spot markets are so closely linked that there is no rational basis for concluding that one but not both of the markets are now sufficiently free from the risk of fraud or manipulation.

Even more importantly, in April of this year you approved a futures-based ETF regulated under the Securities Exchange Act of 1934 (the "Exchange Act"), the same regulation under which spot-based ETFs would be regulated, and the regulation pursuant to which the request to convert Grayscale® Bitcoin Trust (OTCQX: GBTC) into a Bitcoin Spot ETF has been made. Thus any argument that registration under

¹ In this letter, I use the generic term "ETF" to cover exchange-traded investment vehicles that are required to register under the Investment Company Act of 1940 (as amended, the "1940 Act"), also commonly referred to as "exchange-traded funds" or "ETFs," as well as those that would not be subject to the registration requirements of the 1940 Act.

the Investment Company Act of 1940 somehow conferred an extra measure of reliability or trustworthiness has been negated.

I fully acknowledge that the SEC has no call to “approve” of Bitcoin or any ETF based on it or any related product. Just as the SEC did when approving the Teucrium Bitcoin Futures ETF on April 6, 2022, I decline to provide any “evaluation of whether bitcoin ... has utility or value as an innovation or an investment.”² I do, however, firmly believe that it is not my place and not the place of the SEC to tell others that they are not entitled to make their own assessment of the merits of bitcoin. Once a decision is made that Bitcoin Futures ETFs are permissible and may be lawfully traded on regulated exchanges (which the SEC has now done on multiple occasions), there is no reasonable basis for concluding that investors should be denied the opportunity to participate in Bitcoin ETFs as well. To decline to approve the requested Grayscale conversion under these circumstances would be inconsistent with your recent approval of multiple Bitcoin Futures ETFs. Moreover, it would maintain an unlevel playing field for Bitcoin ETFs that you have created, in a manner that seems both arbitrary and capricious.

I have no desire to waste anyone’s time repeating legal arguments that are well-made elsewhere. Grayscale’s attorneys at Davis Polk have filed two letters in the context of this comment letter period explaining why the approval of Bitcoin Futures ETFs but not Bitcoin Spot ETFs is “arbitrary and capricious” and why it amounts to “unfair discrimination” and therefore a potential violation of the Administrative Procedure Act and Exchange Act.³ I strongly agree with these arguments, and particularly those emphasized in the more recent letter which followed approval of the Teucrium Bitcoin Futures ETF, as those positions are reflective of the new market dynamics that the SEC itself has helped to create.

In conclusion, it is my opinion that the SEC should approve GBTC for conversion to an ETF, avoid picking winners and losers and allow investors a choice over which product best meets their investment needs. To do otherwise would be inconsistent with the SEC’s core mission of protecting investors.⁴

Thank you for your time and consideration.

Sincerely,



Carol R. Goforth

University Professor and Clayton N. Little Professor of Law

² SEC, Release No. 34-94620; File No. SR-NYSEArca-2021-53 (April 6, 2022).

³ Letter from Davis Polk & Wardwell LLP, on behalf of Grayscale Investments, LLC, Re: File No. SR-NYSEArca-2021-90 (Nov. 29, 2021), <https://www.sec.gov/comments/sr-nysearca-2021-90/srnysearca202190-9410842-262990.pdf>; Letter from Davis Polk & Wardwell LLP, on behalf of Grayscale Investments, LLC, Re: File No. SR-NYSEArca-2021-90 (Apr. 18, 2022), <https://www.sec.gov/comments/sr-nysearca-2021-90/srnysearca202190-20123987-280130.pdf>.

⁴ Regarding the SEC’s February 4, 2022 Order Instituting 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, I believe that NYSE Arca has provided sufficient support in GBTC’s 19b-4 to allow for the SEC to approve GBTC.