



June 20, 2022

**Via Electronic Submission**

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

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

Dear Ms. Countryman:

Ribbit Capital appreciates the opportunity to provide comments to the Securities and Exchange Commission (the “Commission” or “SEC”) in support of the pending application by NYSE Arca Inc. (the “Application”), pursuant to Rule 19b-4 under the Securities Exchange Act of 1934 (as amended, the “Exchange Act”), to list and trade shares of the Grayscale Bitcoin Trust (“BTC”) under NYSE Arca Rule 8.201-E as an exchange-traded product (“ETP”).

Ribbit Capital is a global investment firm focused on the intersection of financial services and technology. Founded in 2012, Ribbit Capital’s mission is to change the world of finance by providing capital and guidance to visionary financial services entrepreneurs around the world. Ribbit Capital’s portfolio consists of more than 120 private and public company investments across six continents and a multitude of sectors within financial services, including payments, personal finance, investments and wealth, lending, insurance, cryptoassets, financial infrastructure, financial software, and home finance.

Ribbit Capital urges the Commission to approve the Application as it believes that approval will increase and diversify access to the burgeoning digital asset market in a manner that will better protect investors and markets. Approval would also be consistent with the Commission’s mandate to protect investors by ensuring access to, and transparency in, the equity markets.

**I. Approval of the Application will Provide Greater, More Diversified Access to Regulated Digital Asset Markets.**

Bitcoin is unquestionably the most popular, as well as the most valued cryptocurrency currently on the market, with a market capitalization around \$400 billion.<sup>1</sup> Over 25 million Americans are estimated to have an ownership interest in Bitcoin.<sup>2</sup> Given Bitcoin's unique investment qualities, many Americans are increasingly looking for opportunities to acquire some degree of exposure to Bitcoin in their investment portfolios. Despite this growing demand, certain factors – including the price of a single Bitcoin, and some investors' unfamiliarity with purchasing cryptocurrencies directly in the market – have stymied broader retail access and thereby denied many Americans the opportunity to invest in Bitcoin.

Investor choice is a fundamental pillar of U.S. markets.<sup>3</sup> To vindicate this principle, all Americans should have the freedom to invest their money in the products – Bitcoin-related and otherwise – that they desire. Ongoing digital asset and blockchain technology innovation portends an entirely new, more streamlined avenue to wealth generation and financial freedom for all Americans. Approving the Application would serve this end, whilst also ensuring risk transparency and investor protection.

The SEC has so far focused its attention and resources related to digital assets on rooting out fraud and other illicit activity through enforcement actions.<sup>4</sup> While disrupting illicit activity is a vital goal, these actions largely target individuals *ex post facto*. Approving a spot Bitcoin ETP, particularly through a trusted party, would enable the Commission to be far more proactive in protecting investors as it would authorize a regulated and supervised vehicle, with all the attendant protections typically associated with these types of regulated products. Specifically, it carves a secure avenue for all investors to gain access to Bitcoin without sacrificing regulatory oversight or choice. This accomplishes the Commission's goal of investor protection far better than simply enjoining such products while investors enter the spot markets regardless. The Commission should seize this timely opportunity to allow access to a desirable investment product that is subject to robust oversight, disclosure, and transparency requirements.

As it stands, without further Commission action, American investors seeking exposure to Bitcoin today have limited alternatives to purchasing Bitcoins or Bitcoin fractions directly on the spot market. While the proliferation of online digital asset exchanges has made purchases easier for some, this option, just like the direct purchase of more traditional commodities (e.g., gold), is

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<sup>1</sup> The CoinDesk 20, available at: <https://www.coindesk.com/coindesk20/>.

<sup>2</sup> *34 Million US adults own cryptocurrency*, Insider Intelligence (Apr. 20, 2022), available at: <https://www.insiderintelligence.com/insights/us-adults-cryptocurrency-ownership-stats/#:~:text=Bitcoin%2C%20the%20first%20cryptocurrency%20on,up%2016.7%25%20over%20last%20year>.

<sup>3</sup> SEC Chairman Jay Clayton, et. al., *Statement: Emerging Market Investments Entail Significant Disclosure, Financial Reporting and Other Risks; Remedies are Limited* (April 21, 2021) (noting that, “[i]nvestor choice has long been a core component of our capital markets regulatory framework...”), available at: <https://www.sec.gov/news/public-statement/emerging-market-investments-disclosure-reporting>.

<sup>4</sup> See, e.g., *SEC v. Crowd Machine, Inc.*, No. 5:22-cv-0076 (N.D. Cal. Jan. 6, 2022); *SEC v. Ginster*, No. 5:21-cv-1957 (C.D. Cal. Nov. 18, 2021); *SEC v. BitConnect*, No. 21-cv-7349 (JGK) (S.D.N.Y. Sept. 1, 2021).

not right for everyone. One alternative is participating in a so-called “private placement” under Regulation D of the Securities Act of 1933 (as amended, the “Securities Act”), through which certain investors can purchase shares of a spot Bitcoin ETP, like BTC. These private placements, however, are strictly limited to individuals who qualify as “accredited investors,” an unattainable status for most retail investors as it requires a significant net worth and annual salary.<sup>5</sup> Another shortcoming is that, given the restrictions in Regulation D, which prohibit continuous share redemption and creation, BTC shares trade at market prices that often diverge from the value of the Bitcoin held by BTC. This price divergence between BTC shares and BTC’s net asset value – which a spot Bitcoin ETP would not experience – results in significant “trapped” capital for BTC’s 850,000 U.S. account holders. In other words, billions of dollars that would otherwise go into U.S. investors’ pockets are left on the table. Notably, despite these imperfections, U.S. investors remain eager for ETP-type exposure to Bitcoin, particularly from a regulated, well-audited, and trusted actor, and continue to invest in the currently available option. Given this desire for investment through a trusted party, it is incumbent upon the Commission to take action that respects investor choice for access to the best regulated products.

A second alternative is for investors to place their funds in Bitcoin futures ETPs, the shares in three of which the Commission has recently permitted to be listed and traded. These products are valuable for some market participants, particularly those in need of a hedging mechanism, but Bitcoin futures ETPs present complexities and costs. Positions in Bitcoin futures ETPs, like those in other futures contracts, must be “rolled forward” each time the underlying contracts expire, periodically costing investors more. These costs are potentially as much as “an additional 5% to 10% per year,” depending on the timing of entry into a given contract.<sup>6</sup> These costs are likely a significant factor in Bitcoin futures ETPs underperforming Bitcoin by around 3% over the past six months and, again, result in reduced income for U.S. investors than otherwise may be available under the same circumstances, with a spot Bitcoin ETP.

## **II. There are No Meaningful Differences Between Bitcoin Spot and Futures ETPs with Respect to Fraud and Manipulation Concerns.**

The Commission has rejected past applications to list spot Bitcoin ETPs on the ground that the risks of fraud and manipulation in the Bitcoin spot market have not been sufficiently confronted by registered exchanges pursuant to Section 6(b)(5) of the Exchange Act. That provision, among other things, requires that exchanges design rules “to prevent fraudulent and manipulative acts and practices, [and] to promote just and equitable principles of trade,” as well as, “in general, to protect investors and the public interest.” With this language in mind, Ribbit Capital wishes to highlight the inconsistency in the Commission’s position in light of its recent approval of several Bitcoin futures ETPs. This disparate treatment is especially noteworthy due to the fact that the Commission

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<sup>5</sup> In 2016, according to the SEC, only approximately 13% of American households qualified for “accredited investor” status. *See*, Beyoud, Lydia, *SEC ‘Accredited Investor’ Definition Tweak Faces Equity Concerns*, Bloomberg Law (Feb. 23, 2022), available at: [https://www.bloomberglaw.com/bloomberglawnews/securities-law/XB357SBC00000?bna\\_news\\_filter=securities-law#cite](https://www.bloomberglaw.com/bloomberglawnews/securities-law/XB357SBC00000?bna_news_filter=securities-law#cite).

<sup>6</sup> Oosterbaan, Edward & Kaloudis, George, *Bitcoin ETFs Aren’t New. Here’s How They’ve Fared Outside the US*, Coindesk (Oct. 20, 2021), available at: <https://www.coindesk.com/markets/2021/10/20/bitcoin-etfs-arent-new-heres-how-theyve-fared-outside-the-us/>.

has not explained why potential fraud and manipulation in the underlying Bitcoin spot market would have a materially different impact on a spot Bitcoin ETP than on a Bitcoin futures ETP, an essential consideration.

An ostensible reason for this disparate treatment is that the approved Bitcoin futures ETPs are subject to registration, and thus regulation, under the Investment Company Act of 1940 (as amended, the “1940 Act”), as opposed to the Exchange Act.<sup>7</sup> Indeed, for a period of time, the Commission essentially applied this de facto standard for listing Bitcoin-based ETPs, despite the fact that no statutory provision supported, let alone required it. This de facto reliance on 1940 Act registration, however, has been followed by the Commission’s subsequent approval of NYSE Arca’s proposal to list and trade shares of the Teucrium Bitcoin Futures Fund on April 6, 2022,<sup>8</sup> and of Nasdaq’s proposal to list and trade shares of the Valkyrie XBTO Bitcoin Futures Fund on May 5, 2022.<sup>9</sup> Neither of these approvals is founded on registration under the 1940 Act. Rather, the Commission predicated the two approvals on its determination that those proposed Bitcoin futures ETPs satisfied Section 6(b)(5) because their exclusive non-cash holdings would be Chicago Mercantile Exchange, Inc. (“CME”) Bitcoin futures contracts.<sup>10</sup> And the Commission further determined that “the CME is a ‘significant market’ related to CME bitcoin futures contracts,” and that “[NYSE Arca] has entered into the requisite surveillance-sharing agreement [with CME].”<sup>11</sup> In the Valkyrie Order, the Commission noted that the listing exchange, Nasdaq, could “therefore, rely on this surveillance-sharing agreement to demonstrate that its proposal to list and trade the Shares is designed to prevent fraudulent and manipulative acts and practices, as required by Section 6(b)(5) of the Exchange Act.”

Given these recent approvals outside the 1940 Act, and the reasoning supporting them, the Commission cannot further justify treating a spot Bitcoin ETP any differently for purposes of Section 6(b)(5) than a Bitcoin futures ETP. To be sure, through the Teucrium Order, the Commission endeavored to draw a new line, suggesting that a surveillance-sharing agreement between a regulated market, like CME, and a *spot* Bitcoin ETP would not necessarily provide the same level of fraud and manipulation mitigation. According to the Commission, “because the assets held by a spot bitcoin ETP would not be traded on the CME ... there would be reason to question whether a surveillance-sharing agreement with the CME would, in fact, assist in detecting and deterring fraudulent and manipulative misconduct affecting the price of the spot bitcoin held

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<sup>7</sup> Chairman Gensler emphasized this apparent position, noting that “[w]hen combined with other federal securities laws, the ’40 Act provides significant investor protections.” Chair Gary Gensler, Speech: *Prepared Remarks Before The Future of Asset Management North America Conference* (Sept. 29, 2021), available at: <https://www.sec.gov/news/speech/gensler-famnac-2021-09-29>.

<sup>8</sup> 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), available at: <https://www.sec.gov/rules/sro/nysearca/2022/34-94620.pdf> (“Teucrium Order”).

<sup>9</sup> Order Granting Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, to List and Trade Shares of the Valkyrie XBTO Bitcoin Futures Fund under Nasdaq Rule 5711(g), available at: <https://www.sec.gov/rules/sro/nasdaq/2022/34-94853.pdf> (“Valkyrie Order”).

<sup>10</sup> Teucrium Order at 8; Valkyrie Order at 8.

<sup>11</sup> Teucrium Order at 22; Valkyrie Order at 21.

by that ETP.”<sup>12</sup> The Commission’s rationale omits the fact that the relevant market for fraud and manipulation concerns for both products is *the same*. As the Grayscale Letters aptly point out, “the reference rate for the CME Bitcoin futures market and the pricing indices that BTC and other spot Bitcoin products use to value their shares are based on the same data: trading prices reported on the same Bitcoin trading platforms.”<sup>13</sup> Any potential fraud and manipulation in the underlying Bitcoin spot market thus would threaten both futures and spot ETPs equally. That there could potentially be additional impacts in the Bitcoin futures market that could be policed by CME is not relevant to a spot Bitcoin ETP or to Section 6(b)(5) and, therefore, does not provide a valid basis for favoring Bitcoin futures ETPs over the pending Application.

Moreover, although the CFTC regulates futures products, including Bitcoin futures, the CFTC does not regulate the spot market for the underlying commodity. Where, as here, the SEC’s concern is about fraud or manipulation in the Bitcoin spot market, the CFTC’s regulatory jurisdiction over futures contracts is of no moment. For that reason, Bitcoin futures ETPs are no less exposed to the risks about which the SEC is concerned, than spot Bitcoin ETPs. Indeed, any possible manipulation of Bitcoin would have a similar impact on all the regulated products, be it a Bitcoin futures contract, a Bitcoin futures ETP, or a spot Bitcoin ETP, because all of these products derive their value from Bitcoin.

The Commission should also consider that it is not within its mandate to regulate the spot commodity markets upon which ETPs are based. The Commission’s position that many cryptocurrencies are unregistered securities does not change that calculation, particularly in this instance, given Bitcoin’s widely accepted status as a commodity.<sup>14</sup> The Commission’s appropriate focus is on the investment products at issue, ETPs, and the need for disclosures associated with them, rather than the threat of fraud or manipulation in the Bitcoin spot market. In fact, Section 6(b)(5) neither mentions underlying markets, nor an exchange’s obligations with respect to fraud within them. The Commission’s apparent position that an exchange must mitigate fraud and manipulation in an underlying market, or be prohibited from listing a product based on a commodity in an underlying market subject to fraud and manipulation not in the exchange’s control, stretches the Commission’s authority beyond existing statutory language. For comparison, the Commission would likewise not be in a position to oversee gold commodity markets, but any concerns about fraud or manipulation in the gold market has not prevented it from approving exchange-traded funds on gold.

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<sup>12</sup> *Supra* note 7.

<sup>13</sup> *Id.*

<sup>14</sup> Multiple current and former market regulators, both from the SEC, as well as from the CFTC, have acknowledged that Bitcoin is a commodity and, thus, trading on it should be regulated as such. Chairman Gensler has tacitly acknowledged this status, stating just last month before a congressional committee that “Bitcoin – maybe that’s a commodity token. That has a big market value, but that goes over there,” referring to the CFTC. *See* Pimentel, Benjamin, *Gensler: Bitcoin may be a commodity*, (May 23, 2022), available at: <https://www.protocol.com/fintech/gensler-sec-bitcoin-commodity>; *see also* CFTC, *Bitcoin Basics* (2020), available at: [https://www.cftc.gov/sites/default/files/2019-12/oceo\\_bitcoinbasics0218.pdf](https://www.cftc.gov/sites/default/files/2019-12/oceo_bitcoinbasics0218.pdf).

For all these reasons, the Commission’s disparate treatment of spot Bitcoin ETPs and Bitcoin futures ETPs unfairly discriminates among issuers in violation of Section 6(b)(5) of the Exchange Act and likely constitutes arbitrary and capricious action in violation of the Administrative Procedure Act. The Commission can avoid such violations – and support investors’ access to the burgeoning American digital asset markets – by approving the Application.

### **III. The Commission Should Use This Opportunity to Support American Digital Asset Innovation.**

One of Ribbit Capital’s core objectives – and the primary impetus for submitting this letter – is fostering American innovation and facilitating financial inclusion. In this regard, it is important to note that the Commission’s determination on the Application will have significant implications beyond the immediate parties involved. A denial of the Application would be a clear signal that U.S. fintech innovations and attempts to bring digital asset investment products to a broader category of American investors in a regulated manner will be met with regulatory roadblocks unsupported by a merits-based analysis. As a result, these entrepreneurs may take their innovations elsewhere.

The Application presents the Commission with an ideal opportunity to embrace financial innovation and regulatory adaptation. Other countries around the world already offer products similar to that proposed by the Application.<sup>15</sup> Unfounded fears and misconceptions that the risks associated with digital assets are insurmountable must not put the U.S. at a competitive disadvantage to its global competitors. Rather, the Commission should strive to approach fintech innovations with an open mind and bring responsible new entrants into the regulatory fold.

U.S. investors stand to gain the most from this forward-leaning approach, a stance that is in line with the principles set forth in the recent Digital Asset Executive Order. There, the President emphasizes that “we must reinforce United States leadership in the global financial system and in technological and economic competitiveness, including through the responsible development of payment innovations and digital assets” and that “[t]he United States has a strong interest in promoting responsible innovation that expands equitable access to financial services, particularly for those Americans underserved by the traditional banking system.”<sup>16</sup>

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<sup>15</sup> See *supra* note 4.

<sup>16</sup> The White House, *Executive Order on Ensuring Responsible Development of Digital Assets* (Mar. 9, 2022), available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets/>.

Vanessa Countryman

June 20, 2022

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Ribbit Capital urges the Commission to approve the Application and future similar qualified proposals to offer regulated spot Bitcoin ETPs. We greatly appreciate the opportunity to provide these comments and the Commission's attention to this important matter.

Sincerely,

Ribbit Capital

/s/ Sigal Mandelker

**Sigal Mandelker**

/s/ Jessi Brooks

**Jessi Brooks**