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Securities and Exchange Commission
100 F St. NW
Washington, DC 20549-9303
Rule-comments@sec.gov

Re: Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to List and Trade Shares of the Grayscale Ethereum Trust under NYSE Arca Rule 8.201-E(Commodity-Based Trust Shares)
File No. SR-NYSEArca-2023-70

Dear SEC:

[1] All opinions are strictly my own and do not necessarily represent those of Georgetown University or anyone else. I am very grateful to Georgetown University for financial support. Over the years I have served as a Visiting Academic Fellow at the NASD (predecessor to FINRA), served on the boards of the EDGX and EDGA stock exchanges, served as Chair of the Nasdaq Economic Advisory Board, and performed consulting work for brokerage firms, stock exchanges, other self-regulatory organizations, government agencies, market makers, industry associations, and law firms. I am the academic director for the FINRA Certified Regulatory and Compliance Professional (CRCP®) program at Georgetown University. I've also visited over 85 licensed stock and derivative exchanges around the world. As a finance professor, I practice what I preach in terms of diversification and own modest and well-diversified holdings in most public companies, including brokers, asset managers, market makers, and exchanges.

Summary:

- Unlike Bitcoin 1.0, Ethereum is actually useful.
- Deliberations over whether Ethereum is a security or commodity should not delay approval.
- Don't repeat the debacle of the Bitcoin ETP horse race.
- Delay only embarrasses the SEC and raises the likelihood of adverse Congressional actions.
- The best way to protect investors is to drive as much crypto as possible onto properly regulated platforms and strictly enforce customer protection rules.

Introduction

Grayscale is proposing to convert its existing OTC-traded Grayscale Ethereum Trust into an exchange-traded product (ETP). Futures-based ETPs on Ethereum are already listed and traded on our exchanges. Yet, for some inexplicable reason, the SEC is delaying Grayscale's request.

This case is almost a carbon copy of the case of the spot-Bitcoin ETPs: In the case of the spot-Bitcoin ETPs, the SEC approved a futures-based product, but then balked at approving a nearly identical spot-based product. Alas, the SEC's earlier decision to permit Bitcoin-futures-based ETPs (as well as *leveraged* Bitcoin-futures-based ETPs) was the crack in the dam.

The SEC's argument for rejecting spot-based products was that the spot markets were subject to manipulation while the futures markets were not. This argument made no sense to anyone outside of 100 F Street NW: Spot and futures markets for Bitcoin are joined at the hip through arbitrage. It was quite painful to watch the SEC's valiant attorneys attempt to defend such a weak case. The DC Circuit rightly overruled the SEC, and the SEC then had the good sense to cut its losses. It held its nose and let a plethora of spot-Bitcoin ETPs trade all starting on the same day. The dam has burst. We now have a tsunami of spot-Bitcoin-based ETPs.

One would think that the Commission would learn from this experience, but apparently it has not. Unless the SEC wants to damage its reputation even more and suffer yet another humiliating loss in the DC Circuit, it should again cut its losses and let the Ethereum ETPs trade promptly and without fanfare.

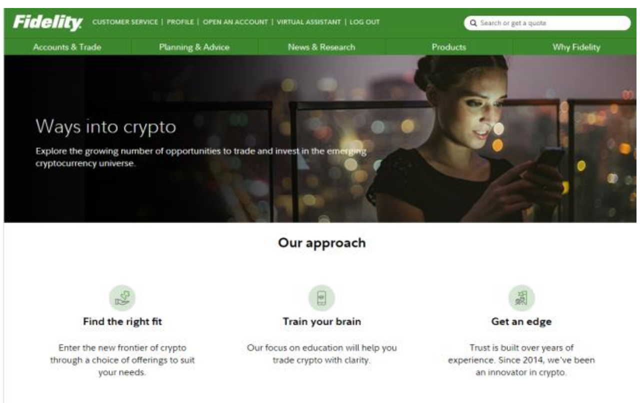
The SEC cannot put the crypto genie back into the bottle, and must now fulfill its statutory mission of investor protection, fair, orderly, efficient markets, and capital formation. The best way to do that is to push as much crypto activity as possible into the regulated sphere while strictly enforcing customer protection rules such as Regulation Best Interest.

<u>Don't repeat the debacle of the Bitcoin ETP horse race.</u>

The SEC decided to approve all of the spot Bitcoin ETPs at the same time, creating a horse race between the ETP sponsors. Firms that had not invested years of effort and large legal expenses were allowed to offer Bitcoin ETPs on the same date as the innovators. This action was perceived by many observers to be a petulant act by a regulatory agency designed to punish Grayscale for having the temerity to sue it and win.

This horse race also unleashed the full marketing might of Wall Street to push these products. With nearly a dozen firms offering a nearly identical product, there is a marketing scramble to grab assets under management. This gives every ETP sponsor a huge incentive to market market market their products as much as possible. What could possibly go wrong?

The SEC could not have designed a more dramatic way to push Bitcoin if it had tried. Indeed, if the SEC had quietly allowed spot-Bitcoin ETPs when they were first proposed, there would not have been such a marketing rush.



Looking for spot Bitcoin ETFs? Schwab clients can find them in the Morningstar category "Digital Assets" using Schwab's Fund Finder tool. Go to Fund Finder ›

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The fanfare and marketing buzz over the launch of the Bitcoin ETPs pushed up the price of Bitcoin to record levels, creating more buzz and attracting momentum and FOMO traders.

The SEC should not make the same mistake twice. It should NOT artificially hold a horse race where all of the Ethereum ETPs start on the same date. It should allow the innovators who have invested years of commercial and regulatory investment to launch without delay. The SEC should not delay the innovators in order to allow free-riding copycats a free hand. Unless, of course, it WANTS to again unleash the full marketing might of Wall Street on even more crypto assets.

Unlike Bitcoin 1.0, Ethereum is actually useful.

I can well understand the SEC's hesitation over allowing retail speculation in Bitcoin-related products. Bitcoin's murky origins, quirky governance, uncertain future, high volatility, and dreadful environmental footprint should give anyone pause. Of course, there are serious differences of opinion on the likely future of

Bitcoin 1.0, including many "Bitcoin maxis" who think the price will go to infinity and beyond.

The financial markets treat Bitcoin like a volatile tech stock. It has a positive correlation with other volatile tech stocks with uncertain futures. Our markets trade many financial assets with uncertain futures such as options with potential for high returns along with a high likelihood of going to zero. We let investors make their own decisions. As Chair Gensler recently remarked,

> "Our federal securities laws lay out a basic bargain. Investors get to decide which risks they want to take so long as companies raising money from the public make what President Franklin Roosevelt called "complete and truthful disclosure."'[2]

Ethereum is actually an extremely useful platform for smart contracts with real-world uses. The native Ether token is the "gas" that pays for the execution of smart contracts on its platform. The Ethereum network has functional governance processes, as demonstrated by its successes in dealing with the DAO hack and in upgrading from proof-of-work to the much more environmentally friendly proof-of-stake method of validating transactions.[3]

Ethereum has many advantages over Bitcoin 1.0:

1) Ethereum has many useful applications. Paul Brody's excellent book, *Ethereum for Business*, has an excellent description. These include:
    - Tokenization
    - Notarization
    - Product traceability
    - Supply chain management
    - Procurement
    - Trade finance
    - Emissions tracking
    - Stablecoins
    - Exchanges
    - Decentralized Autonomous Organizations

2) Ethereum's origins are well known. There is no mystery as to who created it.

[2] https://www.sec.gov/news/statement/gensler-statement-mandatory-climate-risk-disclosures-030624
[3] See https://ethereum.org/en/governance/

3) Ethereum has a clear governance process.[4]

4) Ethereum has a much lower carbon footprint than Bitcoin 1.0. Ethereum uses a proof-of-stake protocol for validating transactions that is much more energy efficient than Bitcoin's proof of work.[5]

For the record, my appreciation for the utility of Ethereum should not be construed as recommending the purchase or sale of Ether tokens. I am expressing no opinion on their current or future prices. My expectation is that there will be more applications built on Ethereum and similar smart-contract networks over time, pushing demand up, while the march of technology should push the cost of processing transactions down, not up, over time. If the cost of executing smart contracts on the Ethereum network is too high, then competition from other networks will result in price compression. Ether's price will be driven by the use of applications on its network, general enthusiasm over crypto, and competition from other smart-contract platforms. My crystal ball is in the repair shop, so I am unable at this time to forecast the price one way or the other.

<u>Deliberations over whether Ethereum is a security should not delay approval.</u>

Media chatter indicates that the SEC is considering whether or not to classify the Ether token as a security. Apparently, the Hinman Proclamation, that Ether was no longer a security, may not necessarily reflect current SEC thinking.[6] This uncertainty should not be used as a fig-leaf excuse to delay approval of a spot-Ethereum ETF. The SEC does not have to declare whether or not Ethereum is a security in order to permit a spot Ethereum ETP to trade. There are ETPs that hold securities and ETPs that hold other assets. The courts will eventually decide whether Ethereum is or is not a "security." If the SEC has not made up its mind, it should still approve the ETP but also include a disclaimer that the SEC is not stating an opinion through the approval.

[4] https://ethereum.org/en/governance/
[5] The Cambridge Centre for Alternative Finance estimates as of this writing that Bitcoin mining is consuming about 19 GW of electricity, around the clock. This is approximately the same as 19 Chernobyl sized nuclear reactors. https://ccaf.io/cbnsi/cbeci
[6] https://www.sec.gov/news/speech/speech-hinman-061418

If Ethereum is not classified as a security, then it is not clear what, if any, regulatory powers the SEC has over those who issue, promote, custody, or trade the token. Whether or not Ethereum is a "security," an ETP based on Ethereum is certainly a security. This means that the SEC's Regulation Best Interest clearly applies, along with all of the other consumer protections built into our securities laws. For this reason and others, investors are clearly better protected if they are holding their exposure to Ethereum in an ETP rather than through spot holdings.

Delay only embarrasses the SEC and raises the likelihood of adverse Congressional actions.

The SEC has better things to do with its time than to needlessly draw out proceedings like this one. The SEC has an important mission, and not enough resources to do the job properly. Futures-based Ethereum products already trade, so approving a nearly identical spot-based product should be a no-brainer that can be done in a very short time.

When the SEC squanders scarce staff resources on pointless regulatory proceedings, it damages its reputation as an intelligent and capable regulatory agency. It is hard to justify additional resources for an agency that cannot demonstrate efficient use of the resources it already has. Bad regulatory decisions increase the momentum for adverse Congressional actions.

The best way to protect investors is to drive cryptos onto properly regulated platforms.

Whatever the courts decide about the status of a particular crypto asset, the reality is that these are financial products and American citizens deserve basic consumer protection:

- We need to make sure we are not sold fraudulent products.
- We need to make sure we have full and fair disclosure about the matters affecting the value of our assets.
- We need to make sure that the intermediaries we trust do not collapse and take our assets with them.
- We need to make sure that recommendations are in the best interest of investors.

- We need to make sure that the markets for our assets are not manipulated.
- We need businesses to be able to raise capital to grow the economy.
- We need to make sure that the economy won't collapse.

The best way to achieve these objectives is to drive as much crypto activity as possible onto properly regulated platforms. Intermediaries including brokers and exchanges should be limited to only trafficking in cryptos for which appropriate 15c2-11 style information is available. The registration process for crypto assets – like the process for traditional assets - should be streamlined so that the regulatory burden does not inhibit innovation. The SEC should focus its scarce resources to fighting serious fraud and enforcing Regulation Best Interest and the Customer Protection Rule with respect to cryptos.

Respectfully submitted,

James J. Angel,

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