April 14, 2023

Dear Mr. Langer:

The VanEck Order demonstrates that the Commission continues to arbitrarily treat proposed spot-bitcoin ETPs differently from bitcoin-futures ETPs. Nothing about that order justifies the agency’s arbitrary disapproval of the proposed spot-bitcoin ETP here.

First, the Commission points to evidence and reasoning in the VanEck Order, which is outside the record, to try to rationalize the Grayscale Order post hoc. That is impermissible. E.g., Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 419 (1971). And the Commission’s citation in a 28(j) letter of academic literature nowhere mentioned in the VanEck Order, Ltr. 1, or in the order under review here, is flatly improper.

Second, the VanEck Order, which observes that bitcoin spot and futures prices may have a “mixed” or “bi-directional” relationship, 88 Fed. Reg. at 16065 & n.125, in no way disproves the 99.9% correlation between spot and futures markets. Reply.Br.6. Nor does it
change anything about the “lead-lag” arguments already fully briefed in this case. Either CME surveillance is adequate to detect spot-market attempts to manipulate bitcoin-based ETPs, or CME surveillance is inadequate to detect spot-market attempts to manipulate bitcoin-based ETPs. Reply.Br.14-15; Oral.Arg.46:17-47:40. Either way, the Grayscale Order arbitrarily denied approval to the proposed spot-bitcoin ETP.

Third, the Commission failed to mention the VanEck Order was issued over two Commissioners’ dissent. See https://www.sec.gov/news/statement/peirce-uyeda-statement-vaneck-bitcoin-trust-031023. The dissenters explained that the Commission uses “a different set of goalposts” for proposed spot-bitcoin ETPs “from those it used—and still uses—for other types of commodity-based ETPs,” which are not required “to show that the ostensibly significant market relevant to each filing meets the two-part test [the Commission] applies to spot bitcoin ETPs.” Id. Moreover, the “Commission has explained neither why it departed from prior practice with respect to analyzing commodity-based ETP rule filings only when faced with spot bitcoin ETP filings, nor why that prior practice remains appropriate when assessing non-bitcoin commodity-based ETPs.” Id. “[T]he Commission’s decision to subject spot bitcoin-based ETPs to a bespoke standard that may be impossible for any product to meet has harmed investors” and stymied “easier, and potentially safer, retail investor access” to bitcoin markets. Id.

Very truly yours,

Donald B. Verrilli, Jr.