

RONALD L. OLSON
ROBERT E. DENHAM
CARY B. LERMAN
GREGORY P. STONE
BRAD D. BRIAN
GEORGE M. GARVEY
WILLIAM D. TEMKO
JOHN W. SPIEGEL
DONALD B. VERRILLI, JR., P.C.*
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JOSEPH D. LEE
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MICHAEL E. SOLOFF
KATHLEEN M. M'DOWELL
GLENN D. POMERANTZ
THOMAS B. WALPER
HENRY WEISSMANN
KEVIN S. ALLRED
JEFFREY A. HEINTZ
JUDITH T. KITANO
TED DANE
STUART N. SENATOR
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DAVID H. FRY
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RICHARD ST. JOHN
ROHIT K. SINGLA
CAROLYN HOECKER LUEDTKE
C. DAVID LEE
BRETT J. RODDA P.C.*
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BLANCA FROMM YOUNG
SETH GOLDMAN
GRANT A. DAVIS-DENNY
JONATHAN H. BLAVIN
DANIEL B. LEVIN
MIRIAM KIM
HAILYN J. CHEN
BETHANY W. KRISTOVICH
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JEFFREY Y. WU
LAURA D. SMOLOWE
KYLE W. MACH
HEATHER E. TAKAHASHI
ERIN J. COX
BENJAMIN J. HORWICH
BRYAN H. HECKENLIVELY

ELAINE J. GOLDENBERG P.C.*
GINGER D. ANDERS P.C.*
MARGARET G. MARASCHINO
JOHN M. GILDERSLEEVE
ADAM B. WEISS
KELLY L. C. KRIEBS
JEREMY A. LAWRENCE
ACHYUT J. PHADKE
ZACHARY M. BRIERS
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KURUVILLA J. OLASA
JUSTIN P. RAPHAEL
ROSE LEDA EHILER
JOHN W. BERRY
ROBYN K. BACON
JORDAN D. SEGALL
JONATHAN KRAVIS P.C.*
JOHN L. SCHWAB
EMILY C. CURRAN-HUBERTY
MATTHEW S. SCHONHOLZ
L. ASHLEY AULL
WESLEY T.L. BURRELL
CRAIG JENNINGS LAVOIE
JENNIFER L. BRYANT
NICHOLAS D. FRAM
TYLER HILTON
VINCENT LING
LAUREN BELL P.C.
VICTORIA A. DEGYAREVA
JOHN B. MAJOR
RACHEL G. MILLER-ZIEGLER P.C.*
FAYE PAUL TELLER
JULIANA M. YEE
LAUREN C. BARNETT
NICK R. SIDNEY
SKYLAR B. GROVE
LAURA M. LOPEZ
COLIN A. DEVINE
DANE P. SHIKMAN
MAGGIE THOMPSON
ALLISON M. DAY
GIOVANNI S. SAARMAN GONZÁLEZ
STEPHANIE G. HERRERA
SARA A. MCDERMOTT
J. MAX ROSEN
ANNE K. CONLEY
DAVID W. MORGESHEAD
ANDRE W. BREWSTER III
ROWLEY J. RICE
DAHLIA MIGNOUNA*
BRANDON R. TEACHOUT

601 MASSACHUSETTS AVENUE NW
SUITE 500E
WASHINGTON, D.C. 20001-5369
TELEPHONE (202) 220-1100
FACSIMILE (202) 220-2300

350 SOUTH GRAND AVENUE
FIFTIETH FLOOR
LOS ANGELES, CALIFORNIA 90071-3426
TELEPHONE (213) 683-9100
FACSIMILE (213) 683-3702

560 MISSION STREET
TWENTY-SEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-3089
TELEPHONE (415) 512-4000
FACSIMILE (415) 512-4077

April 14, 2023

USHA CHILUKURI VANCE
ZARA BARI
BRENDAN B. GANTS*
LAUREN E. ROSS*
BENJAMIN G. BAROKH
ABE DYK
MICHELE C. NIELSEN
APRIL YOUNG-ROLL
MEGAN MCCREADIE
RAQUEL E. DOMINGUEZ
ARIEL TESHUVA
SHANNON GALVIN AMINIRAD
XIAONAN APRIL HU*
NATALIE KARL
ERINMA E. MAN
CARRIE C. LITTEN
RUBY J. GARRETT*
JAMES R. SALZMANN
SAMIR HALAWI
ROBIN S. GRAY
JOSEPH MOSES
MICHAEL I. SELVIN
HUNTER V. ARMOUR
NATHANIEL F. SUSSMAN
OLIVER BROWN
PAUL E. MARTIN
REBECCA L. SCIARRINO
CORY M. BATZA
BRIAN R. BOESSENECKER
AVI REJWANI OVED
ROBERT E. BOWEN
RICHARD T. JOHNSON
GRACE DAVIS FISHER
LAUREN N. BECK
CALEB W. PEIFFER
GREGORY T. S. BISCHOPING*
JAMIE B. LUGURI
STEVEN B. R. LEVICK
SARA H. WORTH
JANELLE KRUMMEN
WILLIAM M. ORR
GABRIEL M. BRONSHTEYN
JING JIN
ALEX C. WERNER
ROSIO FLORES
JESSICA O. LAIRD
ERICA C. TOOCH
EVELYN DANFORTH-SCOTT
SARAH E. WEINER*
LEONARDO MANGAT*
EVAN MANN

ANDREW T. NGUYEN
RACHEL M. SCHIFF
MIRANDA E. REHAUT
TIANA S. BAHERI
STEPHANY REAVES*
LAUREN E. KUHN
J. KAIN DAY
MINKEE K. SOHN
GARRETT SOLBERG
TED KANG
LEIGH E. KRAMER
ADAM W. KWON
H. JAVIER KORDI
JOSEPH N. GLYNN
JEFFREY VIDES
SIMON K. ZHEN
CARSON J. SCOTT
AVERY P. HITCHCOCK
ELISSA WALTER
MADELYN Y. CHEN
CHRISTOPHER B. CRUZ
JARED T. KOCH
JERRY YAN
NICHOLAS NEUTEUFEL
JIMMY BIBLARZ
ADEEL MOHAMMADI
TAYLOR L. BENNINGER
CLARE KANE
HELEN ELIZABETH WHITE*

OF COUNSEL
ROBERT K. JOHNSON
PATRICK J. CAFFERTY, JR.
PETER A. DETRE
BRADLEY R. SCHNEIDER
PETER E. GRATZINGER
JENNY H. HONG
KIMBERLY A. CHI
ADAM R. LAWTON
MICHAEL E. GREANEY
SARAH J. COLE

E. LEROY TOLLES
(1922-2008)
*ADMITTED IN DC,
ALL OTHERS ADMITTED IN CA

Writer's Direct Contact
(202) 220-1101
(213) 683-4007 FAX
Donald.Verrilli@mto.com

VIA ECF

Mr. Mark Langer
Clerk of Court

U.S. Court of Appeals for the District of Columbia Circuit
333 Constitution Avenue, NW
Washington, D.C. 20001-2866

Re: Response to Securities and Exchange Commission's Rule 28(j) Letter filed April 12, 2023, in *Grayscale Investments, LLC v. Securities and Exchange Commission*, No. 22-1142

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.

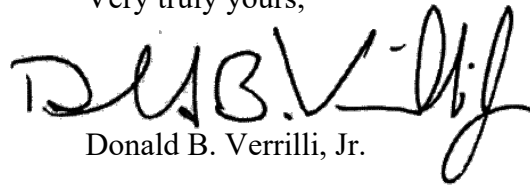
Second, the VanEck Order, which observes that bitcoin spot and futures prices may have a "mixed" or "bi-directional" relationship, 88 Fed. Reg. at 16065 & n.125, in no way disproves the 99.9% correlation between spot and futures markets. Reply.Br.6. Nor does it

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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.