

July 27, 2023

Re: Ark 21Shares Bitcoin ETF, File No. SR-CboeBZX-2023-028  
Invesco Galaxy Bitcoin ETF, File No. SR-CboeBZX-2023-038  
iShares Bitcoin Trust, File No. SR-NASDAQ-2023-016  
Valkyrie Bitcoin Fund, File No. SR-NASDAQ-2023-019  
VanEck Bitcoin Trust, File No. SR-CboeBZX-2023-040  
WisdomTree Bitcoin Trust, File No. SR-CboeBZX-2023-042  
Wise Origin Bitcoin Trust, File No. SR-CboeBZX-2023-044

Vanessa Countryman  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Dear Ms. Countryman:

We are writing on behalf of our client Grayscale Investments, LLC (“Grayscale”), sponsor of the Grayscale Bitcoin Trust (the “Trust”). On June 29, 2022, the Securities and Exchange Commission disapproved a proposed rule change filed by NYSE Arca, Inc. pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (as amended, the “Exchange Act”) and Rule 19b-4 thereunder seeking to list and trade shares of the Trust.<sup>1</sup> Grayscale thereafter sought review of the Commission’s decision by the U.S. Court of Appeals for the District of Columbia Circuit, where the matter is currently pending.<sup>2</sup>

Proposed rule changes have recently been filed with the Commission pursuant to Section 19(b)(1) of the Exchange Act and Rule 19b-4 thereunder in respect of the above-referenced commodity-based exchange-traded products (“ETPs”), which, like the Trust, are designed to hold bitcoin. These proposed commodity-based ETPs are commonly known as “spot bitcoin” ETPs to distinguish them from commodity-based ETPs investing in bitcoin futures contracts traded on the Chicago Mercantile Exchange (“CME”), which are commonly known as “bitcoin futures” ETPs. Although the Commission has approved Rule 19b-4 filings for bitcoin futures ETPs,<sup>3</sup> the Commission has not yet approved a Rule 19b-4 filing for any spot bitcoin ETP.

Each of the above-referenced Rule 19b-4 filings discusses the relevant listing exchange’s intention to enter into a “surveillance-sharing agreement” with Coinbase, Inc., which operates a major U.S. spot bitcoin trading venue but—since bitcoin is not a security or commodity future—is not registered with the Commission as a national securities exchange or broker-dealer or with the Commodity Futures Trading Commission as a futures exchange. News of the proposed Coinbase surveillance-sharing agreements was greeted in some quarters as a breakthrough for the prospect of Commission approval of spot bitcoin ETPs,

<sup>1</sup> See Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade Shares of Grayscale Bitcoin Trust Under NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares), Exchange Act Release No. 95180 (June 29, 2022), 87 Fed. Reg. 40299 (July 6, 2022) (SR-NYSEArca-2021-90) (“Grayscale Order”).

<sup>2</sup> *Grayscale Invs., LLC v. SEC*, No. 22-1142 (D.C. Cir. argued Mar. 7, 2023).

<sup>3</sup> *E.g.*, 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), Exchange Act Release No. 94620 (Apr. 6, 2022), 87 Fed. Reg. 21676 (Apr. 12, 2022) (SR-NYSEArca-2021-53) (“Teucrium Order”).

with commenters asking whether the ETPs' sponsors had "[c]rack[ed] the SEC's [c]rypto [c]ode?"<sup>4</sup> and press reports stating, for example, that "[t]he surveillance-sharing agreement . . . has become an integral part of all [ETP] applications filed recently. The SEC has stated for years that these agreements are necessary to prevent market manipulation."<sup>5</sup> As another report explained, "[t]he surveillance sharing agreement is an important step towards gaining approval for [spot bitcoin ETPs], as the SEC has previously expressed concerns about the potential for market manipulation in the cryptocurrency space."<sup>6</sup>

But as the Commission knows, the possibility of a surveillance-sharing agreement between a listing exchange and a spot bitcoin trading venue is not a new idea. Indeed, Grayscale discussed the viability of this approach with Commission staff in 2019.<sup>7</sup> As explained in our pending action and in more detail below, the Commission is already in a position to approve spot bitcoin ETPs based on the standard it has previously articulated, though a surveillance-sharing agreement with a spot bitcoin trading venue in and of itself would neither satisfy nor be necessary under that standard.

Although Grayscale strongly supports a Commission approach that would facilitate approval of all spot bitcoin ETP proposals, approving *only* the above-referenced proposals would reflect a positive but sudden and significant change in the Commission's application of the relevant statutory standard, and as such would improperly grant an unfairly discriminatory and prejudicial first-mover advantage to these proposals. An approval that promotes investor protection and fairness for issuers should therefore be made simultaneously with approval of *all* proposed spot bitcoin ETPs, including those such as the Trust whose Rule 19b-4 filings were previously disapproved after lengthy Commission consideration.<sup>8</sup>

### The Commission's Section 6(b)(5) standard

In order to approve a national securities exchange's proposed rule change under a Rule 19b-4 filing, the Commission must conclude that the proposal is consistent with the requirements of Exchange Act § 6(b)(5), which requires that the rules of the exchange be "designed to prevent fraudulent and manipulative acts and practices" and "to protect investors and the public interest," and "not designed to permit unfair discrimination between . . . issuers."<sup>9</sup> The Commission has determined that an exchange that seeks to list bitcoin-based ETPs can meet its obligations under Section 6(b)(5) by demonstrating that the exchange has a "comprehensive surveillance-sharing agreement with a regulated market of significant size related to the underlying or reference bitcoin assets."<sup>10</sup> The Commission has explained that surveillance-sharing

<sup>4</sup> Web3Shinobi, *BlackRock's ETF Gamble*, MEDIUM (June 22, 2023), <https://medium.com/@web3shinobi/blackrocks-ett-gamble-54ddb46499d4>.

<sup>5</sup> Helene Braun, *Coinbase Soars After Reaching Cboe Surveillance Sharing Agreement for 5 Bitcoin ETF Applications*, COINDESK (July 11, 2023), <https://www.coindesk.com/business/2023/07/11/coinbase-soars-after-reaching-cboe-surveillance-sharing-agreement-for-5-bitcoin-etf-applications/>.

<sup>6</sup> Ronaldo Marquez, *BlackRock's Bitcoin ETF Refiled with Nasdaq, Coinbase Onboard for Surveillance*, BITCOINIST.COM (July 3, 2023), <https://bitcoinist.com/blackrock-bitcoin-btc-etf-refiled-nasdaq-coinbase/>.

<sup>7</sup> See Letter of Grayscale to the Div. of Trading & Mkts., SEC, at 33 (May 1, 2019):

"It is [Grayscale]'s understanding that certain of the U.S.-Compliant Exchanges the Index Provider considers for inclusion in the XBX Index have entered into, or have expressed willingness to enter into, surveillance sharing agreements with national securities exchanges. [Grayscale] believes that the other U.S.-Compliant Exchanges would be willing to enter into surveillance sharing agreements with national securities exchanges. Further, as previously discussed, it is our understanding that certain of the XBX Constituent Exchanges have or have begun to implement market surveillance infrastructure to further detect, prevent, and respond to fraud, attempted fraud, and similar wrongdoing, including market manipulation. This includes Bitstamp, which is working on integrating a well-known market surveillance technology called Irisium Market Surveillance, Coinbase Pro, which is building its own market surveillance infrastructure. This information has been further verified in the Bitwise Report."

<sup>8</sup> Other market participants agree that "all issuers should have the same timeline to a bitcoin spot ETF." Ben Strack, *SEC should 'stop picking winners': VanEck exec*, BLOCKWORKS (June 23, 2023), <https://blockworks.co/news/sec-stop-picking-winners>.

<sup>9</sup> 15 U.S.C. § 78f(b)(5).

<sup>10</sup> Grayscale Order, *supra* note 1, at 3-4. Any national securities exchange that is a member of the Intermarket Surveillance Group ("ISG"), such as NYSE Arca, and that proposes to list and trade a bitcoin-based ETP, is deemed to have a comprehensive surveillance-sharing agreement with CME by virtue of their common membership in the ISG. *Id.* at 44. Therefore, if the CME bitcoin futures market is a "market of significant size" in relation to spot bitcoin, then an ISG-member exchange's proposal to list a spot bitcoin ETP, such as the Trust, would meet the Commission's articulated criteria for satisfying Section 6(b)(5).

agreements “provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.”<sup>11</sup>

As explained in our briefs and argument in Grayscale’s pending case before the D.C. Circuit, and in our letters submitted in support of NYSE Arca’s related Rule 19b-4 filing,<sup>12</sup> Grayscale agrees with the reasoning in each of the above-referenced spot bitcoin ETP Rule 19b-4 filings that, having determined the CME bitcoin futures market meets the Commission’s stated criteria for a “market of significant size” in the context of bitcoin futures ETPs, the Commission is logically bound to reach the same conclusion in the context of the Trust and other spot bitcoin ETPs. This is because, as the Commission noted in April 2022 when approving a Rule 19b-4 filing relating to a bitcoin futures ETP,<sup>13</sup> “CME’s surveillance can reasonably be relied upon to capture the effects on the CME bitcoin futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME bitcoin futures contracts . . . indirectly by trading outside of the CME bitcoin futures market,”<sup>14</sup> making clear that the Commission recognizes that CME’s surveillance can capture the effects of trading on bitcoin spot markets.

Were the Commission to apply the logic of its April 2022 determination regarding bitcoin futures ETPs to spot bitcoin ETPs, the articulated basis on which the Commission disapproved the Rule 19b-4 filing relating to the Trust would be nullified,<sup>15</sup> and the path would be cleared for Commission approval of NYSE Arca’s proposal to list and trade shares of all its proposed spot bitcoin ETPs, including the Trust. But, despite the Commission’s decisions advantaging competing bitcoin futures ETPs, the Commission has to date not agreed that any exchange seeking to list a spot bitcoin ETP has demonstrated that the CME bitcoin futures market is “of significant size” for purposes of surveillance sharing over spot bitcoin.<sup>16</sup>

In view of the Commission’s position that the CME bitcoin futures market does not meet the significant-size standard in relation to spot bitcoin, the Commission has held out a theoretical possibility of alternative means by which an exchange could demonstrate that it is able to list a spot bitcoin ETP consistently with the requirements of Section 6(b)(5). The Commission has suggested that an alternative might be for a listing exchange to establish that the underlying bitcoin market “inherently possesses a unique resistance to manipulation beyond the protections that are utilized by traditional commodity or securities markets.”<sup>17</sup> The Commission has cautioned that “[s]uch resistance to fraud and manipulation, however, must be novel and beyond those protections that exist in traditional commodity markets or securities markets for which

<sup>11</sup> Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To List and Trade Shares of the Winklevoss Bitcoin Trust, Exchange Act Release No. 83723 (July 26, 2018), 83 Fed. Reg. 37579 (Aug. 1, 2018) (SR-BatsBZX-2016-30) (“Winklevoss Order”), at 5 (quoting Amendment to Rule Filing Requirements for Self-Regulatory Organizations Regarding New Derivative Securities Products, Exchange Act Release No. 40761 (Dec. 8, 1998), 63 Fed. Reg. 70952, 70954, 70959 (Dec. 22, 1998)).

<sup>12</sup> See Letter from Davis Polk & Wardwell LLP on behalf of Grayscale, submitted in connection with Exchange Act Release No. 93504 (Nov. 2, 2021), 86 Fed. Reg. 61804 (Nov. 8, 2021), to Vanessa Countryman, Sec’y, SEC (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, submitted in connection with Exchange Act Release No. 93504 (Nov. 2, 2021), 86 Fed. Reg. 61804 (Nov. 8, 2021), to Vanessa Countryman, Sec’y, SEC (Apr. 18, 2022), <https://www.sec.gov/comments/sr-nysearca-2021-90/srnysearca202190-20123987-280130.pdf>.

<sup>13</sup> See Teucrium Order, *supra* note 3.

<sup>14</sup> *Id.* at 12.

<sup>15</sup> In disapproving the Rule 19b-4 filing relating to the Trust, the Commission stated:

“Based on its analysis, the Commission concludes that NYSE Arca has not established that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with the detection and deterrence of fraud and manipulation provided by a comprehensive surveillance-sharing agreement with a regulated market of significant size related to spot bitcoin. The Commission further concludes that NYSE Arca has not established that it has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to spot bitcoin, the underlying bitcoin assets that would be held by the Trust. As a result, the Commission is unable to find that the proposed rule change is consistent with the statutory requirements of Exchange Act Section 6(b)(5).”

Grayscale Order, *supra* note 1, at 11.

<sup>16</sup> See *id.* at 2-3, 3 n.11.

<sup>17</sup> *Id.* at 9.

surveillance-sharing agreements in the context of listing derivative securities products have been consistently present.”<sup>18</sup>

Several listing exchanges have attempted to meet the Commission’s alternative standard of demonstrating that the underlying bitcoin market inherently possesses “unique resistance” to manipulation in a way that is “novel and beyond those protections that exist” in traditional markets. These exchanges have pointed out, for example, how difficult and costly it would be for a bad actor to successfully or meaningfully manipulate a continuously operating, globally fragmented market in the face of liquidity supplied by arbitrageurs who actively seek to eliminate cross-market pricing differences.<sup>19</sup> But the Commission has been unpersuaded that this inherent feature of the spot bitcoin market provides an alternative basis for satisfying Section 6(b)(5) in the absence of a surveillance-sharing agreement with a regulated market of significant size, and as a result the Commission has consistently disapproved Rule 19b-4 filings relating to spot bitcoin ETPs.<sup>20</sup>

### The proposed Coinbase surveillance-sharing agreements

In addition to explaining why the CME bitcoin futures market meets the significant-size threshold, each of the above-referenced spot bitcoin ETP Rule 19b-4 filings discusses the listing exchange’s plan to enter into a surveillance-sharing agreement with Coinbase. As one of the filings states, the Coinbase surveillance-sharing agreement “is expected to have the hallmarks of a surveillance-sharing agreement between two members of the ISG, which would give the Exchange supplemental access to data regarding spot Bitcoin trades on Coinbase where the Exchange determines it is necessary as part of its surveillance program for the [ETP’s] Shares.”<sup>21</sup>

But the Commission has previously questioned the relevance of pricing data produced by what it views as unregulated bitcoin trading venues, noting that “[t]here is no comprehensive and accurate regulatory data source reflecting bitcoin pricing or trading.”<sup>22</sup> In 2018, the Commission explicitly rejected the idea that a surveillance-sharing agreement with a spot bitcoin trading venue could provide an alternative basis for satisfying Section 6(b)(5),<sup>23</sup> noting, among other things, that the record before it did “not support a conclusion that the [relevant spot bitcoin trading venue] is a ‘regulated market’ comparable to a national securities exchange or to the futures exchanges that are associated with the underlying assets of the commodity-trust ETPs” previously approved.<sup>24</sup>

The 2022 order disapproving the Trust’s Rule 19b-4 filing demonstrated continuing Commission skepticism that it could give any weight to market data from a group of spot bitcoin trading venues including Coinbase, stating that neither the constituent group’s “adherence to the BitLicense program” administered by the New York State Department of Financial Services nor its “adoption of various surveillance, monitoring, and other measures to address potential manipulative or fraudulent trading activity on its trading platform, is material to the Commission’s analysis”<sup>25</sup> of whether to approve a spot bitcoin ETP Rule 19b-4 filing. Indeed, the Commission stressed in the Trust’s disapproval order that “[a]ny oversight afforded by FinCEN and NYDFS, including AML/KYC or BitLicense regulation, is not a substitute for a surveillance-sharing

<sup>18</sup> *Id.* at 9-10.

<sup>19</sup> Winklevoss Order, *supra* note 11, at 12-13.

<sup>20</sup> See Grayscale Order, *supra* note 1, at 2-3, n.11.

<sup>21</sup> Notice of Filing of Proposed Rule Change To List and Trade Shares of the iShares Bitcoin Trust Under Nasdaq Rule 5711(d), Commodity-Based Trust Shares, Exchange Act Release No. 97905 (July 13, 2023, 2023), 88 Fed. Reg. 46342 (July 19, 2023) (SR-NASDAQ-2023-016), at 31.

<sup>22</sup> Winklevoss Order, *supra* note 11, at 20-21.

<sup>23</sup> *Id.* at 67 (“[T]he Commission cannot conclude that the surveillance-sharing agreement between BZX and the Gemini Exchange, even in combination with the other means of detecting and deterring fraud and manipulation discussed above, is sufficient to find that the proposal is consistent with Exchange Act Section 6(b)(5).”).

<sup>24</sup> *Id.* at 64.

<sup>25</sup> Grayscale Order, *supra* note 1, at 37.

agreement between the Exchange and a regulated market of significant size related to the underlying bitcoin assets.”<sup>26</sup>

Therefore—and without disputing the usefulness of information obtainable under a surveillance-sharing agreement with a spot bitcoin trading venue—we believe the Commission’s prior decisions have already determined that such an agreement with a venue lacking compulsory investigative authority and oversight by a comprehensive market regulator does not satisfy Section 6(b)(5) in the absence of a surveillance-sharing agreement with a market of significant size that, like the CME bitcoin futures market, the Commission deems sufficiently “regulated.” And since the Commission’s prior bitcoin futures ETP approval orders make clear that a surveillance-sharing agreement with a regulated market of significant size is sufficient on its own to satisfy Section 6(b)(5), those orders do not also require the listing exchange to enter into an agreement with a spot bitcoin trading venue—even though manipulative activity in the spot market can impact the futures market.<sup>27</sup>

The Commission accordingly may not impose such an additional, new requirement on the above-referenced spot bitcoin ETPs or on other spot bitcoin ETPs, like the Trust, whose Rule 19b-4 filings were previously disapproved. Any such additional burden for spot bitcoin ETPs would unfairly discriminate between issuers, contrary to the mandate of Section 6(b)(5) and the Administrative Procedure Act.<sup>28</sup> Moreover, once a surveillance-sharing agreement with a regulated market of significant size is in place, requiring such an agreement with an additional unregulated market would run contrary to the Commission’s analysis in the Trust’s disapproval order, where it asked whether “other means to prevent fraud and manipulation . . . are sufficient to justify dispensing with”<sup>29</sup>—not supplementing—a surveillance-sharing agreement with a regulated market.

Having previously rejected the argument that a surveillance-sharing agreement with a spot bitcoin trading venue would, in whole or in part, satisfy the Commission’s requirements for approving a spot bitcoin ETP, if the Commission decides to change course and approve one or more of the above-referenced spot bitcoin ETPs on this basis, it must do so in a fair and orderly manner—a manner that prioritizes the interests of investors, in particular the nearly one million who currently hold shares in the Trust. Prior to any such approval, we believe that under both the Administrative Procedure Act and the Exchange Act, the Commission would be required to afford the listing exchange for the Trust (and all other spot bitcoin ETPs whose Rule 19b-4 filings were previously disapproved) the opportunity to amend their Rule 19b-4 filings, so that all of these spot bitcoin ETP proposals can be approved simultaneously. Principles of investor protection, administrative fairness, due process, reasoned decision-making, and avoiding unfair discrimination between issuers would require no less.

<sup>26</sup> *Id.* at 35.

<sup>27</sup> See Teucrium Order, *supra* note 3.

<sup>28</sup> See 15 U.S.C. § 78f(b)(5) (exchange rules must not be “designed to permit unfair discrimination between . . . issuers”); see also *id.* § 78c(f) (the Commission in reviewing rules of self-regulatory organizations, like exchanges, must consider “whether the action will promote . . . competition”); *Baltimore Gas & Elec. Co. v. Fed. Energy Regul. Comm’n*, 954 F.3d 279, 286 (D.C. Cir. 2020) (requiring that “an agency applying existing policy must explain how an outcome coheres with previous decisions” so as to “promote fair treatment” among applicants); *accord ANR Storage Co. v. Fed. Energy Regul. Comm’n*, 904 F.3d 1020, 1025-26 (D.C. Cir. 2018) (determining agency action to be arbitrary and capricious under Administrative Procedure Act where agency gave disparate treatment to two seemingly “indistinguishable . . . leading competitors” without “any reasonable justification”).

<sup>29</sup> *E.g.*, Grayscale Order, *supra* note 1, at 71 n.221. See also Winklevoss Order, *supra* note 11, at 26.

We welcome the opportunity to discuss the foregoing with the Commission or its staff.

Very truly yours,



Joseph A. Hall

cc: Grayscale Bitcoin Trust, File No. SR-NYSEArca-2021-90  
Michael Sonnenshein, Chief Executive Officer, Grayscale Investments, LLC  
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