

Congress of the United States
Washington, DC 20515

April 18, 2023

The Honorable Gary Gensler
Chair
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Chair Gensler,

The Securities and Exchange Commission (“SEC”) has a responsibility to allow investors to choose the investment products that they invest in, as long as those products meet the applicable disclosure requirements for investor protection. In our view, the SEC is not a merit regulator and should not be in the business of picking winners and losers or selecting which products are appropriate for investors. Unfortunately, in the case of spot bitcoin exchange-traded products (“ETPs”), the SEC has done exactly that by exceeding its own statutory authority, while also denying U.S. investors access to a regulated product from which other investors across the globe are benefitting.

Over the past ten years, over twenty spot bitcoin ETP applications have been filed with the SEC, but none have been approved.¹ These products would provide investors with an opportunity to access bitcoin using a familiar, well understood product without owning the underlying asset itself. The only other option currently available to retail investors to gain exposure to the spot market for digital assets through an investment product is through bitcoin trusts that trade over-the-counter and have historically not tracked the price of their underlying assets. Unlike these bitcoin trusts, a spot bitcoin ETP would trade on a regulated U.S. national securities exchange and track prices on a real-time basis. Retail investors are currently losing over \$6.9 billion dollars in trapped value by being unable to trade in a product that tracks bitcoin in real-time.² Furthermore, many products on the market today are available to accredited investors but are not available to retail investors. Thus, the SEC’s current practice gives advantages to wealthy investors that are not available to everyday investors. While U.S. retail investors fall behind, retail investors in other countries are moving ahead. Canada, Switzerland, and Germany, among other countries, have all approved the trading of spot bitcoin ETPs in their markets.³

¹ See Commissioner Hester Peirce and Commissioner Mark Uyeda, *Statement Regarding the Commission’s Disapproval of a Proposed Rule Change to List and Trade Shares of the VanEck Bitcoin Trust*, SEC (Mar. 10, 2023), <https://www.sec.gov/news/statement/peirce-uyeda-statement-vaneck-bitcoin-trust-031023> (“Notwithstanding significant evolution of the bitcoin market, the Commission has continued to disapprove every [spot bitcoin ETP] filing that has come before it”).

² Grayscale Bitcoin Trust (last visited March 31, 2023), <https://grayscale.com/products/grayscale-bitcoin-trust/>; Osprey Bitcoin Trust (last visited March 31, 2023), <https://ospreyfund.io/products/obtc/>.

³ Edward Oosterbaan George Kaloudis, *Bitcoin ETFs Aren’t New. Here’s How They’ve Fared Outside the US*, CoinDesk (Oct. 20, 2021), <https://www.coindesk.com/markets/2021/10/20/bitcoin-etfs-arent-new-heres-how-theyve-fared-outside-the-us/>.

The SEC has approved futures bitcoin ETPs.⁴ However, there are certain features of the futures ETP model that make it a significantly less attractive vehicle for retail investors. Futures ETPs are more volatile and have higher fees than spot ETPs. Futures ETPs do not directly track the price of the underlying asset. Thus, futures bitcoin ETPs are not a substitute for spot bitcoin ETPs.

The SEC's decision to approve futures bitcoin ETPs raises serious questions about the legitimacy of its denial of spot bitcoin ETPs. First, futures bitcoin ETPs and spot bitcoin ETPs derive their pricing from the same underlying spot bitcoin markets, which is evidenced by the near perfect (99.9%) correlation between pricing in bitcoin futures and spot markets.⁵ This calls into question the legitimacy of the SEC's concerns around market manipulation and fraud in the spot bitcoin market, especially considering that the SEC did not assert the same concerns for a product that is based on the same markets. Second, you originally claimed that futures bitcoin ETPs were superior because they fall under the Investment Company Act of 1940, which includes an increased level of investor protections.⁶ However, the SEC later approved a futures bitcoin ETP that does not fall under the Investment Company Act,⁷ rendering this justification obsolete. Moreover, Commissioners Peirce and Uyeda have also questioned the inconsistency of your approach for approving bitcoin futures ETPs but denying spot bitcoin ETPs.⁸

You have consistently stated that digital asset firms should "come in and register" with the SEC.⁹ Through filing for applications for a regulated spot bitcoin ETP, market participants are seeking to do just that, but have been continually denied by your agency. A regulated spot bitcoin ETP would provide increased protection for investors by making access to bitcoin safer and more transparent. The regulatory framework provided by an exchange-listed security such as an ETP includes the implementation of multiple governance systems such as registration, exchange surveillance, and trading by regulated broker-dealers. Considering the tumultuous events that have occurred in the digital asset ecosystem throughout 2022, the importance of bringing digital asset products into the regulatory sphere is long overdue.

The SEC appears to be picking winners and losers based on factors that are not consistent. As such, the SEC is currently facing litigation based on these claims.¹⁰ We have a duty to ensure the SEC is approving market products in a manner that does not favor certain products over others.

⁴ ProShares Trust, *Registration Statement*, SEC (Oct. 18, 2021), <https://www.sec.gov/Archives/edgar/data/1174610/000168386321006052/f10028d1.htm>.

⁵ See Katherine Greifeld, *Father of VIX Wades Into Bitcoin ETF Battle to Back Grayscale Bid*, Bloomberg (June 1, 2022), <https://archive.is/wtyKc>.

⁶ Chair Gary Gensler, *Remarks Before the Aspen Security Forum*, SEC (Aug. 3, 2021), <https://www.sec.gov/news/speech/gensler-aspen-security-forum-2021-08-03>.

⁷ SEC, *Order Granting Approval of a Proposed Rule Change to List and Trade Shares of the Teucrium Bitcoin Futures Fund* (April 6, 2022), <https://www.sec.gov/rules/sro/nysearca/2022/34-94620.pdf>.

⁸ Peirce and Uyeda, *supra* note 1 ("In our view, the Commission is using a different set of goalposts from those it used—and still uses—for other types of commodity-based ETPs to keep these spot bitcoin ETPs off the exchanges we regulate").

⁹ Chair Gary Gensler, *Kennedy and Crypto*, SEC (Sept. 8, 2022), <https://www.sec.gov/news/speech/gensler-sec-speaks-090822>.

¹⁰ Petition for Review, *Grayscale Investments LLC v. SEC* (June 29, 2022), <https://grayscale.com/wp-content/uploads/2022/06/DC-Circuit-Petition-for-Review-as-filed.pdf>.

To that end, please explain: (1) the SEC's decision to deny every spot bitcoin ETP that has been proposed in light of the investor benefits, regulatory protection and over \$6.9 billion dollars in trapped value that these products bring; and (2) the SEC's justification for denying spot bitcoin ETP applications when the SEC has granted approval for several bitcoin ETPs that are based on the same underlying markets.

Please respond in writing as soon as possible, but no later than May 2, 2023. Thank you for your attention to this important matter. We look forward to your response.

Sincerely,



French Hill
Chairman
Subcommittee on Digital Assets,
Financial Technology, and Inclusion



Tom Emmer
House Majority Whip

cc:

The Honorable Hester M. Peirce, Commissioner, Securities and Exchange Commission
The Honorable Caroline A. Crenshaw, Commissioner, Securities and Exchange Commission
The Honorable Mark T. Uyeda, Commissioner, Securities and Exchange Commission
The Honorable Jaime Lizarraga, Commissioner, Securities and Exchange Commission
