

United States: Grayscale Appeals to DC Circuit on SEC Denial of Bitcoin ETP

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On Thursday, Grayscale Investments, LLC (Grayscale) filed suit against the Securities Exchange Commission (SEC) in the D.C. Circuit asking the court to reconsider the agency's rejection of listing a spot Bitcoin ETP on the New York Stock Exchange (NYSE). In its appeal, Grayscale argued that the SEC's ruling regarding its spot Bitcoin ETP was "arbitrary and capricious," because it disregarded facts about the ETP and erroneously determined that listing the ETP would be in contravention of NYSE's duties under the Securities Exchange Act of 1934.

Previously, NYSE had filed an application for a proposed rule change with the SEC that would allow Grayscale to list its spot Bitcoin ETP on the exchange. The assets of the proposed ETP consist primarily of Bitcoin, the rights to acquire virtual currency tokens, virtual currency tokens, and the cash to cover ETP expenses. To date, no spot Bitcoin ETP has been permitted by the SEC to be listed on a registered securities exchange. A spot Bitcoin ETP would trade based on the price of Bitcoin, instead of the price of Bitcoin futures.

In denying NYSE's request to list Grayscale's spot Bitcoin ETP, the SEC stated that an exchange can meet its investor protection and anti-fraud and anti-manipulation requirements 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 asset" or by establishing that the Bitcoin market "inherently possesses a unique resistance to manipulation beyond the protections that are utilized by traditional commodity or securities markets." At the time, NYSE argued that it met its Exchange Act duties to "protect investors and the public interest" and that the exchange be

“designed to prevent fraudulent and manipulative acts and practices.” NYSE satisfied those requirements because Bitcoin offers “novel protections beyond those that exist in traditional commodity markets or equity markets” because of its fungibility, transportability, and exchange tradability. NYSE noted that Grayscale values its holdings based on an index comprised of spot Bitcoin trading platforms that are subject to anti-money laundering and know-your-customer regulations. Despite these protections, the SEC concluded that these means remain insufficient and inferior to the required comprehensive surveillance-sharing agreement with a regulated market of significant size related to Bitcoin.

Wiley Cole also contributed to this article.

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