

Appeals Court Reverses the SEC's Rejection of Grayscale's Spot Bitcoin ETF Proposal

AUGUST 30, 2023

Although the U.S. Securities and Exchange Commission (SEC or the "Commission") in 2022 approved two exchange-traded funds (ETF) holding bitcoin futures (contracts to buy or sell bitcoin at a predetermined price at a later date), the Commission has rejected several efforts to list bitcoin spot ETFs (where delivery of bitcoin is expected immediately). A spot bitcoin ETF would provide investors with exposure to the world's largest cryptocurrency by market capitalization without the need to own or custody the digital asset itself.

Crypto asset manager Grayscale Investments, LLC's ("Grayscale"), one of several entities whose application to list a spot bitcoin ETF was rejected by the SEC, challenged the Commission's rejection. On August 29, 2023, in a highly-anticipated decision, the U.S. Court of Appeals for the District of Columbia Circuit (the "Court") vacated the Commission's decision.¹ The three-judge panel unanimously concluded that the Commission failed to provide a "coherent explanation" as to why it approved bitcoin futures ETFs, but not the proposed bitcoin spot ETF, and therefore acted "arbitrarily and capriciously" and in violation of the Administrative Procedure Act.

In June 2022, the SEC had rejected Grayscale's application, filed in October of 2021, to convert its spot Grayscale Bitcoin Trust into an ETF, stating in its decision that the proposal did not meet anti-fraud and investor protection standards. Grayscale had argued that, because the SEC previously approved certain surveillance agreements to prevent fraud in bitcoin futures-based ETFs, the same manipulation safeguards should also be satisfactory for Grayscale's spot fund, since both spot and futures funds rely on bitcoin's price. Grayscale was just one of several asset managers, whose spot bitcoin ETF applications were rejected by the SEC on investor protection grounds.

The Court's decision grants Grayscale's petition for review and vacates the SEC's previous rejection order, meaning the SEC will have to revisit Grayscale's application consistent with the Court's analysis. While the decision does not necessarily mean that a spot bitcoin ETF is impending, the markets have reacted on the assumption that, in view of the Court's order, the SEC may find it more difficult to reject the application of Grayscale or other asset managers who are concurrently seeking approval of a bitcoin spot ETF.

The SEC has 45 days to seek an appeal of the Court's August 29 decision, either to the Supreme Court of the United States (if a certiorari petition is granted) or to an "en banc" panel of the Court for further review. If the SEC chooses not to appeal, the Court is expected to issue a mandate specifying how its decision should be executed,

which could include instructing the SEC to approve the application, or to revisit Grayscale’s application, in which case the SEC could still reject the proposal on other grounds.

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▮ The U.S. District of Columbia Court of Appeals’ order is available at: <https://storage.courtlistener.com/recap/gov.uscourts.cadc.38827/gov.uscourts.cadc.388271208547574.0.pdf>

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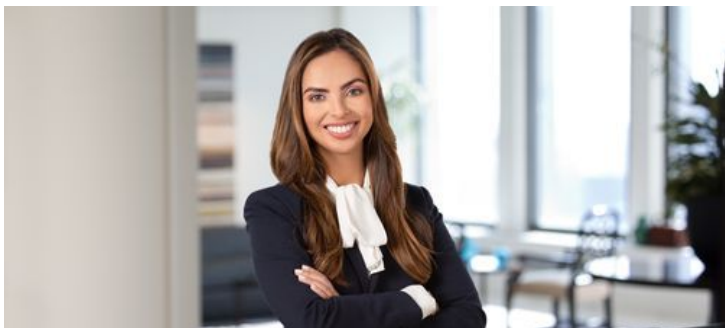
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