

# Road to Bitcoin Investment Cleared with SEC's Approval of 11 Spot Bitcoin ETFs

JANUARY 11, 2024

Yesterday marked a historic milestone in the history of bitcoin. On January 10, 2024, the U.S. Securities and Exchange Commission (SEC) declared effective the applications to list shares of the following 11 spot bitcoin exchange-traded products (spot bitcoin ETPs) and greenlighted the commencement of trading shares of the spot bitcoin ETPs beginning today.

<u>SPOT BITCOIN ETPS</u>	<u>TICKER</u>	<u>FEES</u>	<u>EXCHANGE</u>
ARK 21Shares Bitcoin ETF	ARKB	0.21%	CBOE
BitwiseBitcoinETF	BITB	0.20%	NYSE
Fidelity Wise Origin Bitcoin Fund	FBTC	0.40%	CBOE
Franklin BitcoinETF	EZBC	0.29%	CBOE
Grayscale Bitcoin Trust (BTC)	GBTC	1.50%	NYSE
Hashdex BitcoinETF	DEFI	0.90%	NYSE

Invesco Galaxy BitcoinETF	BTCO	0.39%	CBOE
iShares Bitcoin Trust	IBIT	0.25%	NYSE
Valkyrie Bitcoin Fund	BRRR	0.49%	Nasdaq
VanEck Bitcoin Trust	HODL	0.25%	CBOE
WisdomTree Bitcoin Fund	BTCW	0.30%	CBOE

## WHAT IS A SPOT BITCOIN ETP?

Spot bitcoin ETPs<sup>[1]</sup> are investment vehicles that are listed on a U.S. national securities exchange, can be bought and sold like a traditional stock, and provide investors exposure to the performance of bitcoin via traditional brokerage accounts. Each spot bitcoin ETP is registered with the SEC, is structured as a statutory trust, and issues shares which represent fractional, undivided beneficial interests in its net assets. An investment in shares of a spot bitcoin ETP is backed by its net assets, primarily bitcoin, held by a custodian on behalf of the trust.

Spot bitcoin ETPs provide many benefits to investors, including providing exposure to an asset class in a cost-effective manner, providing transparency as to the costs and risks associated with the investment and the exact assets held by the ETP, as well as the ability to quickly buy or sell the investment at any time during the trading day via a regulated securities exchange.

## THE LONG ROAD TO SPOT BITCOIN ETP APPROVAL

In 2013, the Winklevoss Bitcoin Trust filed the first bitcoin ETF registration statement with the SEC, which was later rejected by the SEC in 2017. Between 2018 and March 2023, the SEC “disapproved” more than 20 applications to list spot bitcoin ETPs on a national securities exchange on the grounds that the proposals did not meet anti-fraud and investor protection standards. However, the SEC did approve 2 ETFs holding bitcoin futures in 2022.

In August 2023, the U.S. Court of Appeals for the District of Columbia Circuit (the Court) vacated the SEC’s decision to reject the application by Grayscale Investments, LLC to convert the Grayscale Bitcoin Trust into a spot bitcoin ETF. 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. The Court’s decision required the SEC to revisit Grayscale’s application consistent with the Court’s analysis. Following the Court’s decision, many asset managers filed applications with the SEC to list similar spot bitcoin ETPs.

SEC Chair Gary Gensler mentioned the Grayscale case in his public statement released yesterday regarding the approval of spot bitcoin ETPs: “I feel the most sustainable path forward is to approve the listing and trading of these spot bitcoin ETP shares.” The result is that there are now bitcoin futures funds and bitcoin exchange-traded products that are subject to investor protection requirements.

## REGULATED ENTRY POINT FOR INVESTORS

Prior to January 10, 2024, the mechanism for gaining exposure to bitcoin was generally limited to buying and holding bitcoin directly or buying bitcoin futures. With the approval of the spot bitcoin ETPs, institutional investors, asset managers, and retail investors now have a familiar means of making an investment in bitcoin and an alternative

to investing directly into bitcoin via a physical, cold wallet device, peer to peer transactions, or digital asset platforms.<sup>[2]</sup>

Unlike purchasing bitcoin directly, the U.S. ETF marketplace is 30 years old and already has 86 commodity ETFs. With the approval of the spot bitcoin ETPs, investors and asset managers can now purchase and sell shares of the spot bitcoin ETPs through traditional securities brokerage accounts and avoid the complexities of handling bitcoin directly. In other words, investors may gain bitcoin exposure in the same way as gaining exposure to gold via a physically backed gold ETF which holds gold bars and coins in a vault on investors' behalf. Further, investors and asset managers will be provided with information such as a daily accounting of the trust's holdings, transparent procedures on pricing mechanisms, and an accurate accounting of fees and expenses associated with the trust.

## **NORMALIZING BITCOIN THROUGH THE INVOLVEMENT OF TRUSTED, WELL-RECOGNIZED, AND WELL-ESTABLISHED FIRMS**

In certain segments of the population, bitcoin and other digital assets have been unfairly stigmatized. The SEC's approval of the spot bitcoin ETPs is likely to do much to normalize bitcoin and reduce remaining stigma via the involvement of trusted, well-recognized, and well-established financial services firms.

The issuers of the spot bitcoin ETPs include some of the world's largest asset managers, such as BlackRock, which has approximately \$9 trillion in assets under management (AUM); Fidelity, with approximately \$11.5 trillion in AUM; Franklin Templeton, with approximately \$1.53 trillion in AUM; and WisdomTree, with approximately \$100 billion in AUM. In many ways, involvement by BlackRock, Fidelity, Franklin Templeton, and WisdomTree represents a maturing market for bitcoin. Further, several other traditional financial services players are involved in market-making and will provide custodial functions for the spot bitcoin ETPs including:

- JP Morgan Securities LLC<sup>[3]</sup>: authorized participant for BlackRock, Fidelity, and Invesco
- The Bank of New York Mellon: cash custodian for BlackRock, transfer agent for Grayscale and Franklin Templeton, and Administrator for Global X Bitcoin Trust
- Jane Street Capital, LLC: authorized participant for Fidelity, BlackRock, and Valkyrie.
- State Street Bank and Trust Company: cash custodian for Vaneck, and Transfer agent and cash custodian for Fidelity
- Macquarie Capital (USA) Inc.: authorized participant for BlackRock, Grayscale, Fidelity, WisdomTree, Ark21, and Bitwise
- ABN AMRO Clearing USA LLC: authorized participant for Grayscale and VanEck
- S. Bancorp Fund Services, LLC: transfer agent for Valkyrie

The SEC's approval of 11 spot bitcoin ETPs marks a historic milestone for bitcoin—the road to bitcoin investment has been cleared and trillions of retail and institutional dollars are now free to flow into bitcoin. Overall, the SEC's decision is likely to be seen as a positive for the digital assets industry as it removes certain regulatory barriers for institutional investment in bitcoin—and normalizes bitcoin through the involvement of trusted, well-recognized, and well-established firms. Some are speculating that these approvals may open the door for the approval of an ether ETP in the near future, which could clear up any regulatory uncertainty as to the SEC's view of whether or not ether is in fact a "security."

Winston & Strawn's multijurisdictional Digital Assets & Blockchain Technology Group will continue to monitor developments and provide clients and friends of the firm with updates as they become available.

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<sup>[2]</sup> Note that exchange-traded products (ETPs) are different than exchange-traded funds (ETFs). According to FINRA, most ETPs are structured as ETFs, which are registered with and regulated by the SEC as investment companies under the Investment Company Act of 1940. ETFs generally focus their investments in stocks or bonds and have diversification requirements. Alternatively, some ETPs, including the spot bitcoin ETPs, investing in commodities, currencies or commodity- or currency-based instruments such as futures are not registered under the Investment Company Act of 1940. Instead, the spot bitcoin ETPs are registered in accordance with section 8(a) of the Securities Act of 1933.

Using iShares Bitcoin Trust as an example: The Trust is a statutory trust that issues shares representing fractional undivided beneficial interests in its net assets. An investment in shares is (i) backed by bitcoin held by the bitcoin custodian on behalf of the Trust and (ii) as convenient and easy to make as any other investment in shares.

Note that JPM Securities and ABN AMRO's role as Authorized Participants would appear to confirm that U.S. banks are not barred from providing banking services to bitcoin companies which is in line with the Joint Statement issued by the Fed, OCC and FDIC on January 2023, that stated banks are neither prohibited nor discouraged from providing banking services to bitcoin companies, as permitted by law or regulation.

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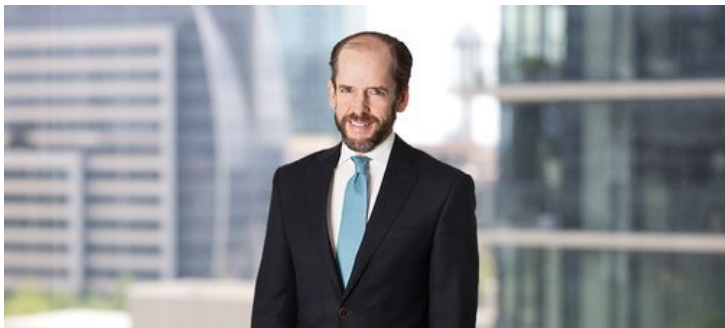
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