Congress of the United States
Washington, DC 20515

November 3, 2021

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

Dear Chair Gensler:

Last month, the Securities and Exchange Commission (SEC) allowed trading to commence for two Bitcoin futures exchange-traded funds (ETF) that provide exposure to CME-traded Bitcoin futures. While this is a step forward for millions of Americans who are demanding access to simple ways to invest in Bitcoin, these products are potentially much more volatile than a Bitcoin spot ETF and may impose substantially higher fees on investors due the premium at which Bitcoin futures typically trade, as well as the cost of rolling futures contracts each month.

We question why, if you are comfortable allowing trading in an ETF based on derivatives contracts, you are not equally or more comfortable allowing trading to commence in ETFs based on spot Bitcoin. Bitcoin spot ETFs are based directly on the asset, which inherently provides more protection for investors.

It is our understanding that previously the SEC chose not to approve a Bitcoin futures ETF or a Bitcoin spot ETF due to concerns about the perceived potential for fraud and manipulation in the Bitcoin markets. In fact, the SEC clearly articulated that these concerns could be addressed by demonstrating the following: (1) that the underlying Bitcoin market is inherently resistant to fraud and manipulation (or that there are other means to prevent fraudulent and manipulative acts and practices); or (2) that a significant amount of trading took place on a regulated market (for instance, if the CME-traded Bitcoin futures market were to become the leading source of price discovery in the Bitcoin market). [i] Please note that neither of these requirements state a preference for Bitcoin spot ETFs or Bitcoin futures ETFs.

Furthermore, 90.47% of pricing of the CME CF Bitcoin Reference Rate (BRR), which is the pricing index that CME futures-based ETFs use, is made up of the spot Bitcoin exchanges: Coinbase, Kraken, and Bitstamp.[ii] Therefore, to the extent the SEC has been and is concerned about fraud and manipulation in pricing of the underlying spot Bitcoin markets, that concern would have to permeate across both spot-based and futures-based ETFs.

Since the SEC no longer has concerns with Bitcoin futures ETFs (given trading has begun for these products), then it presumably has changed its view about the underlying spot Bitcoin market because Bitcoin futures are, by definition, a derivative of the underlying Bitcoin spot market. For this reason, whether one, both, or none of these requirements has been met, the SEC should no longer have concerns with Bitcoin spot ETFs and should show a similar willingness to permit the trading of Bitcoin spot ETFs.

Spot-based ETFs have proven more efficient and are strongly preferred by investors, as evidenced by their commercial success; we believe the same will be true for Bitcoin exposure in an ETF wrapper. For example, today investors can gain exposure to gold through both the spot-based SPDR Gold Trust (GLD), which is registered under the Securities Act of 1933, or the futures-based Invesco DB Gold Fund (DGL), which is registered under the Investment Company Act of 1940. In its 15 years trading in the U.S. public markets, GLD, the largest of all the commodity-based ETFs, has not experienced any material investor protection issues and holds $55.5 *billion* in assets compared to DGL's $50.4 *million* (less than 1% as much).[iii] Investors clearly prefer spot-based commodity ETFs over ones that hold futures.

Lastly, during the period in which the SEC has blocked approval of any Bitcoin ETFs, numerous spot Bitcoin investment vehicles have been offered. These products have amassed more than $40 billion in assets under management and are held by hundreds of thousands of investors across the country.[iv] Some of these products are currently trading on OTC markets and have voluntarily registered under the Securities Exchange Act of 1934 to subject themselves to the same reporting standards as ETFs. However, because these products have been unable to register as ETFs with the SEC, public trading typically occurs at a value that is not equivalent to net asset value, and in fact, these products have recently been trading at steep discounts to their net asset value. Permitting futures-based ETFs while simultaneously continuing to deny spot-based ETFs would further perpetuate these discounts and clearly go against the SEC's core mission of protecting investors.

To be clear, we do not intend to say that one method of exposure is better than the other, but rather that unless there are clear and demonstrable investor protection advantages, investors should have a choice over which product is most suitable for them and their investment objectives. Considering the SEC's clear articulation of how the concerns over fraud and manipulation in the Bitcoin markets can be addressed, we do not understand the SEC's views around the perceived material difference in risk profiles, since both the futures and spot Bitcoin markets are inherently intertwined and bear the same risks regarding fraud and manipulation.

The SEC is in a position to approve Bitcoin futures ETFs, as reflected by the trading of these products, so it should also be in a position to approve Bitcoin spot ETFs. Thank you for your attention to this important matter. We look forward to your response.

Sincerely,

Tom Emmer
Member of Congress

Darren Soto
Member of Congress

[i] See 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, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (Aug. 1, 2018) (SR-BatsBZX-2016-30) (the "Winklevoss Order"); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the Bitwise Bitcoin ETF Trust Under NYSE Arca Rule 8.201-E, Securities Exchange Act Release No. 87267 (Oct. 9, 2019), 84 FR 55382 (Oct. 16, 2019) (SR-NYSEArca-2019-01) (the "Bitwise Order"); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to Amend NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares) and to List and Trade Shares of the United States Bitcoin and Treasury Investment Trust Under NYSE Arca Rule 8.201-E, Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR-NYSEArca-2019-39) (the "Wilshire Phoenix Order"); Order Disapproving a Proposed Rule Change to List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF, Securities Exchange Act Release No. 83904 (Aug. 22, 2018), 83 FR 43934 (Aug. 28, 2018) (SR-NYSEArca-2017-139) (the "ProShares Order"); Order Disapproving a Proposed Rule Change Relating to Listing and Trading of the Direxion Daily Bitcoin Bear 1X Shares, Direxion Daily Bitcoin 1.25X Bull Shares, Direxion Daily Bitcoin 1.5X Bull Shares, Direxion Daily Bitcoin 2X Bull Shares, and Direxion Daily Bitcoin 2X Bear Shares Under NYSE Arca Rule 8.200-E, Securities Exchange Act Release No. 83912 (Aug. 22, 2018), 83 FR 43912 (Aug. 28, 2018) (SR-NYSEArca-2018-02) (the "Direxion Order"); Order Disapproving a Proposed Rule Change to List and Trade the Shares of the GraniteShares Bitcoin ETF and the GraniteShares Short Bitcoin ETF, Securities Exchange Act Release No. 83913 (Aug. 22, 2018), 83 FR 43923 (Aug. 28, 2018) (SR-CboeBZX-2018-01) (the "GraniteShares Order").

[ii] CME CF Bitcoin Reference Rate (BRR) (i.e., pricing index for futures-based ETFs like Proshares), https://www.cfbenchmarks.com/indices/BRR.

[iii] Eric Balchunas and James Seyffart, "SEC Spurning Ethereum Bolsters Bitcoin Prospects", Bloomberg Intelligence (Aug. 24, 2021).

[iv] For example, according to a Broadridge Financial Solutions, Inc. share range analysis for Grayscale Bitcoin Trust (Symbol: GBTC), there were approximately 630k account holders as of September 30, 2021.