

# Spot the Difference: Examining the SEC’s Treatment of Bitcoin Futures and Spot Exchange-Traded Funds

Jenny Hu\*

I. INTRODUCTION .....	1
A. A Brief History of ETFs .....	2
B. The Development of Bitcoin ETPs.....	3
C. The Legality of Spot Bitcoin ETFs .....	5
D. The Argument for Spot Bitcoin ETFs .....	7
E. The Argument Against Spot Bitcoin ETFs .....	8
II. ANALYSIS .....	9
III. EFFECTS .....	10
IV. CONCLUSION.....	11

## I. INTRODUCTION

The issue of Bitcoin exchange-traded products (ETPs) is not new, but it has only recently surged into the public consciousness with the SEC’s reluctant approval of spot Bitcoin exchange-traded funds (ETFs) in January 2024.<sup>1</sup> However, the general discourse surrounding these novel financial products is mixed: to some, they pose a threat to market stability and open a door for hefty investor losses; to others, they represent a crucial step in the greater legitimization of Bitcoin and other cryptocurrencies as viable assets.<sup>2</sup> Both sides—the SEC and its regulatory allies in one camp, the cryptocurrency industry and its enthusiasts in the other—agree that the decision’s ramifications stretch beyond the digital asset industry to touch the traditional market, whether for better or worse.<sup>3</sup> The discourse around Bitcoin ETFs finds its origins in the much larger ongoing conversation about cryptocurrencies’ emerging role in the American economy.<sup>4</sup> Who is in charge of them? Should

---

\* Brown University, Class of 2026. Thank you to Ari Gabinet, Senior Fellow in Brown University’s Watson Institute for International and Public Affairs, for his invaluable insights.

<sup>1</sup> Gary Gensler, *Statement on the Approval of Spot Bitcoin Exchange-Traded Products*, U.S. SEC. AND EXCH. COMM’N (Jan. 10, 2024).

<sup>2</sup> Jeff John Roberts, *Should I Buy a Bitcoin ETF? Pros and Cons of the Newest Way to Invest in the Cryptocurrency*, FORTUNE (May 14, 2024), <https://perma.cc/LA29-9PAH>.

<sup>3</sup> Elizabeth Howcroft & Hannah Lang, *US Bitcoin ETFs Raise Questions Over Broader Financial System Risks*, REUTERS (Jan. 31, 2024), <https://www.reuters.com/business/finance/us-bitcoin-etfs-raise-questions-over-broader-financial-system-risks-2024-01-31/>. See also Tyler Skelton, *What a US-Based Spot Bitcoin ETF Means for Finance and Crypto*, GEMINI (Nov. 14, 2023), <https://perma.cc/2JHV-Q6YZ>.

<sup>4</sup> Hester M. Peirce & Mark T. Uyeda, *On Today’s Episode of As the Crypto World Turns: Statement on ShapeShift AG*, U.S. SEC. AND EXCH. COMM’N (Mar. 5, 2024), <https://www.sec.gov/newsroom/speeches-statements/peirce-uyeda-statement-crypto-world-turns-03-06-24>.

they even exist? And perhaps the more important question: Why shouldn't they?

## A. A Brief History of ETFs

Exchange traded versions of conventional investment funds predate Bitcoin. A specific type of ETP, ETFs are open-ended funds that track the movement of securities, indexes, financial products, or baskets of assets and derive their share price from their underlying investments, like conventional regulated mutual funds.<sup>5</sup> However, unlike shares of conventional mutual funds, which are only priced once a day and must be bought from or sold to the fund itself, ETFs trade on exchanges similarly to stocks.<sup>6</sup>

ETFs resulted from the evolution of early index products. Wells Fargo created the first indexed portfolio in 1971, an idea they quickly expanded in the next few years to become commingled index funds, using the S&P 500 as their template for the combined trust account portfolios they managed.<sup>7</sup> This allowed institutional investors to capture the returns of the index by tracking its movements.<sup>8</sup> Then, in 1975, John Bogle at the Vanguard Group, Inc., made this innovation public with the first broad-market index fund available to retail investors.<sup>9</sup> Index funds reduce costs because the funds track an index, so they do not need expensive portfolio managers to pick their portfolio securities.<sup>10</sup>

Throughout the 1980s, due to high demand, various attempts were made to make this type of investment even more accessible to the general public through intraday trading on exchanges and sales through brokers.<sup>11</sup> Most ETFs are structured as corporations or trusts, and their shares are acknowledged to be securities even if the assets that they hold are not securities.<sup>12</sup> They require SEC exemption approval because they do not comply with all of the provisions of the Investment Company Act and the Securities Exchange Act.<sup>13</sup> Some early applications for approval of ETFs were quickly shot down after lawsuits from the CME and CFTC, such as Index Participation Shares (IPS), proxies for the S&P 500 that a federal court in Chicago found to

---

<sup>5</sup> Violeta Todorova, *What Is the Difference Between ETF and ETP?*, LEVERAGE SHARES (Aug. 31, 2023), <http://perma.cc/G7XN-D43Z>; *ETFs vs. Mutual Funds*, CHARLES SCHWAB, <https://perma.cc/HHY8-7V8K>.

<sup>6</sup> *Understanding how Mutual Funds, ETFs, and Stocks Trade*, FIDELITY LEARN, <https://perma.cc/Z7ZA-7QWF>.

<sup>7</sup> *MANAGING INVESTMENT PORTFOLIOS: A DYNAMIC PROCESS*, 412 (John L. Maginn et al. eds., 2007).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Stephen D. Simpson, *A Brief History of Exchange-Traded Funds*, INVESTOPEDIA (Jun. 7, 2024), <https://perma.cc/T48L-MZ29>. See also Laurent Deville, *Exchange Traded Funds: History, Trading and Research*, in *HANDBOOK OF FINANCIAL ENGINEERING* 69 (Constantin Zopounidis, Michael Doumpou & Panos M. Pardalos eds., 2008).

<sup>12</sup> GARY L. GASTINEAU, *THE EXCHANGE-TRADED FUNDS MANUAL* 49 (2010).

<sup>13</sup> *Id.* at 45, 49.

be illegal futures contracts.<sup>14</sup> Others, like Toronto Stock Exchange Index Participations (TIPs), were too costly for exchanges and members to maintain.<sup>15</sup> Finally, State Street got SEC approval to bring the first ETF to the market in January 1993, known as Standard & Poor's Depository Receipts (SPDRs).<sup>16</sup> Still traded widely today, SPDRs are shares of a unit trust holding an S&P 500 portfolio that change as the index changes, and its shares can be bought and sold throughout the day.<sup>17</sup>

Since their debut, ETFs have risen rapidly in popularity due to their lower cost, trading versatility, and tax efficiency compared to actively-managed mutual funds.<sup>18</sup> By the end of 2023, thirty years later, global ETFs had almost \$11 trillion in total assets under management (AUM).<sup>19</sup> At that point, they also accounted for a sizable 26% to 30% of the daily trading volume in the U.S.<sup>20</sup> Unlike mutual funds, ETFs boast relative flexibility due to increased liquidity, as they can be traded throughout the day like stocks.<sup>21</sup> However, for the same reason, they are often blamed for causing greater volatility in the market; the rapid arbitrage trades between ETFs and their underlying securities propagate the liquidity shocks in the ETF market to the prices of the stocks in their baskets.<sup>22</sup> Nevertheless, this criticism has not halted their growth as financial instruments, though it offers an example of an unintended consequence of financial innovation: new securities deriving value from existing assets run the risk of passing volatility down to the traditional market.<sup>23</sup>

## B. The Development of Bitcoin ETPs

The attempt to introduce an ETF offering exposure to Bitcoin in the 2010s prompted a reverse criticism—that the volatility of the underlying asset would carry over into the ETF market (the reverse of the criticism leveled at early ETFs—that arbitrage activity in the ETF would affect the market for the underlying securities).<sup>24</sup> Bitcoin itself, an infamously volatile asset, is not

---

<sup>14</sup> *Id.* at 25. See *Chicago Mercantile Exch. v. Phila. Stock Exch., Inc.*, 883 F.2d 537 (7th Cir. 1989). See also Deville, *supra* 11 at 69.

<sup>15</sup> *Id.* at 26.

<sup>16</sup> *Id.* at 27. See also Hortense Bioy, *US First and Largest ETF Celebrates 20th Anniversary*, MORNINGSTAR (Feb. 28, 2023), <https://perma.cc/PE7T-EHKR>.

<sup>17</sup> Emily Norris, *What Are SPDR ETFs?*, INVESTOPEDIA (Apr. 11, 2024), <https://perma.cc/YN82-5V9J>.

<sup>18</sup> Troy Segal, *Advantages and Disadvantages of ETFs*, INVESTOPEDIA (May 24, 2024), <https://perma.cc/3V8L-JJ5J>.

<sup>19</sup> James Chen, *Exchange-Traded Products (ETP): Definition, Types and Example*, INVESTOPEDIA (Feb. 11, 2024), <https://perma.cc/V9HY-QL4H>.

<sup>20</sup> Simpson, *supra* note 11.

<sup>21</sup> Segal, *supra* note 18.

<sup>22</sup> Itzhak Ben-David, Francesco Franzoni & Rabih Moussawi, *Do ETFs Increase Volatility?*, 73 J. OF FIN. 2471 (Dec. 2018).

<sup>23</sup> *Id.* at 2475.

<sup>24</sup> Dennis M. Kelleher, *SEC's Approval of a Bitcoin Crypto ETF Is an Historic Mistake That Will Harm Investors, Markets, and Financial Stability*, BETTER MARKETS (Jan. 10, 2024),

regulated by any federal agency; because it is not considered a security, it does not fall under the SEC’s jurisdiction.<sup>25</sup> This lack of oversight and the perceived anonymity of trading has made Bitcoin a favored currency for criminals and fraudsters; the purely speculative nature of Bitcoin as an investment product (its few practical use cases are in their infancy, and it has no underlying value proposition) gives rise to intense price fluctuation.<sup>26</sup>

Approved in October 2021, the first Bitcoin-related ETF to be available on the market was launched by ProShares: the Proshares Bitcoin Strategy ETF, which invests in Bitcoin futures contracts and does not hold spot Bitcoin itself.<sup>27</sup> Futures contracts are exchange traded, standardized investment contracts for the future delivery of an asset at a specified price at a specified date in the future. They derive their prices from the prices of the underlying assets. Bitcoin futures allow investors to speculate on the price trajectory of Bitcoin without actually holding Bitcoin itself.<sup>28</sup> Traded on both regulated and unregulated exchanges, Bitcoin futures are generally viewed as safer investments than Bitcoin because they have positions and price limits that allow investors to curtail their risk exposure.<sup>29</sup> Thus, Bitcoin futures ETFs access the price changes of the spot asset via the regulated futures market, whereas Bitcoin itself trades on an unregulated “spot” market.<sup>30</sup>

Bitcoin futures ETFs access the spot asset’s movements indirectly due to the barrier of the futures market between the ETF and Bitcoin itself.<sup>31</sup> Although Bitcoin futures derive their value from spot Bitcoin prices, ETFs that hold Bitcoin futures contracts have tracking error and basis risk, and therefore may offer less accurate price tracking (to the price of Bitcoin) than an ETF holding spot Bitcoin.<sup>32</sup> However, at the same time, ETFs holding Bitcoin futures contracts are a degree further from the volatile movements of the unregulated spot market, which may be affected by manipulative trading, criminal activity or market instability. Commodities Futures Trading

---

<https://perma.cc/9XQP-D94M>. See also Sanghamitra Saha, *Bitcoin ETFs: A Safe Haven or Volatile Asset?*, NASDAQ (Mar. 18, 2024), <https://perma.cc/V89C-Y45Z>.

<sup>25</sup> William Hinman, *Digital Asset Transactions: When Howey Met Gary (Plastic)*, U.S. SEC. AND EXCH. COMM’N (Jun. 14, 2018). Though the speech notes that Bitcoin is not a security, some other cryptocurrencies are considered securities, and spot and futures Bitcoin ETFs are securities.

<sup>26</sup> Denis Zinoviev, *Why is Bitcoin Volatile? An Overview of Bitcoin Price Fluxuations*, VANECK (Feb. 8, 2024), <https://perma.cc/55FL-SYRZ>.

<sup>27</sup> *ProShares to Launch the First U.S. Bitcoin-Linked ETF on October 19*, PROSHARES (Oct. 30, 2021), <https://perma.cc/3YG3-L5QT>.

<sup>28</sup> Prableen Bajpai, *Cryptocurrency Futures: Definition and How They Work on Exchanges*, INVESTOPEDIA (Jun. 5, 2024), <https://perma.cc/WS5J-XTX6>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Kent Thune, *Spot Bitcoin ETFs vs. Bitcoin Futures ETFs*, ETF.COM, <https://www.etf.com/sections/etf-basics/spot-bitcoin-etfs-vs-bitcoin-futures-etfs>.

<sup>32</sup> *Id.*

Commission (CFTC) regulation of the futures market gives futures ETFs added oversight and security.<sup>33</sup>

Although it approved the Bitcoin futures ETFs, the SEC remained steadfast in denying Bitcoin spot ETF applications.<sup>34</sup> The Grayscale Bitcoin Trust (GBTC), which launched in 2013 as an open-ended trust only for accredited investors, began seeking SEC approval to operate as a spot Bitcoin ETF in 2017; it was not until seven years later, and almost three years after the approval of the ProShares' Bitcoin futures ETF, that GBTC and other Bitcoin spot ETFs were approved to be listed on traditional exchanges after a long legal struggle with the SEC.<sup>35</sup>

### C. The Legality of Spot Bitcoin ETFs

The SEC's prolonged rejection of GBTC—and other spot Bitcoin ETFs—hinged on the argument that NYSE Arca, the listing exchange, had not fulfilled its obligations under the Exchange Act Section 6(b)(5) to demonstrate that it had entered a comprehensive surveillance-sharing agreement with a regulated market of significant size related to the underlying Bitcoin asset.<sup>36</sup> In October 2021, NYSE Arca filed a proposed rule change with the SEC, which would allow the listing and trading of GBTC; in June 2022, following numerous delays, the SEC officially disapproved the rule change, citing Section 6(b)(5) as its reasoning.<sup>37</sup>

The SEC asserts that any exchange proposing to list a Bitcoin-based ETF must enter a surveillance-sharing agreement, as such agreements have previously provided the analytical frameworks of obligations for exchanges that list commodity-trust ETPs.<sup>38</sup> The requirement of a surveillance-sharing agreement with a market of significant size assists the SEC in detecting and deterring fraud or manipulation in cases where the listing exchange is unable to demonstrate other existing measures preventing fraudulent or manipulative acts.<sup>39</sup> Because someone attempting to manipulate the price of an ETF would trade on the listing exchange and likely on a second “significant market” to induce price fluctuation, the SEC requires both to be monitored for potential misconduct.<sup>40</sup> To decide whether or not an exchange qualifies as a “significant

---

<sup>33</sup> *CME Group Rules and Regulation Overview*, CME GROUP, <https://perma.cc/6VW9-WQYL>.

<sup>34</sup> Hester M. Peirce & Mark T. Uyeda, *Statement Regarding the Commission's Disapproval of a Proposed Rule Change to List and Trade Shares of the VanEck Bitcoin Trust*, U.S. SEC. AND EXCH. COMM'N (Mar. 10, 2023).

<sup>35</sup> Nathan Reiff, *What Is the Grayscale Bitcoin Trust ETF?* INVESTOPEDIA (Feb. 08, 2024), <https://perma.cc/Y7B8-HQVR>.

<sup>36</sup> Order Disapproving a Proposed Rule Change, Exchange Act Release No. 34-95180, 87 Fed. Reg. 40299, 300 (June 29, 2022).

<sup>37</sup> *Id.* at 40299. See also Gensler, *supra* note 1.

<sup>38</sup> Order Disapproving a Proposed Rule Change, Exchange Act Release No. 34-95180, 87 Fed. Reg. 40299, 40300 (June 29, 2022).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

market,” the “significant market test” requires that (1) someone attempting to manipulate the price of the corresponding ETP would likely have to trade on that market in order to do so, and (2) trading of the ETP would be unlikely to be the predominant influence on prices in that market.<sup>41</sup>

In connection with the Grayscale spot ETF, NYSE Arca proposed to enter into a surveillance sharing agreement with the Chicago Mercantile Exchange (CME), on which Bitcoin futures trade, but not spot Bitcoin;<sup>42</sup> the SEC contended that the CME is not a “market of significant size” with relation to spot Bitcoin, the underlying asset at hand.<sup>43</sup> With regards to the first element of the test, the SEC decided that it was unlikely for a would-be manipulator to have to trade on the futures market in order to manipulate the proposed spot ETF.<sup>44</sup> Though NYSE Arca claimed a lead/lag relationship between the spot and the CME Bitcoin futures market, meaning that their trading prices would influence each other and fluctuation in one would induce the same in the other, the SEC established that the evidence for this relationship was insufficient.<sup>45</sup> Furthermore, the SEC denied NYSE Arca’s assertion that arbitrage between the spot and futures markets would counter any efforts to manipulate the spot market alone, as the presence of efficient arbitrage mechanisms does not counter the fact that a would-be manipulator could trade on any of the numerous unregulated futures markets instead of the CME.<sup>46</sup> Therefore, according to the SEC, it would be possible for (1) a manipulator acting in the spot market to influence the prices of the spot Bitcoin ETF without affecting the futures market or (2) a manipulator acting in the spot market to affect the prices of futures and the spot Bitcoin ETF without being detected by the surveillance of the futures market.

Secondly, the SEC ruled that insufficient information was provided to establish that trading of the spot Bitcoin ETF would not be the predominant influence on prices in the CME Bitcoin futures market, as GBTC’s trading volume from November 1, 2019 to August 31, 2021 was 23% of said market.<sup>47</sup>

Following the rejection of this rule change after nearly a year of deliberation, Grayscale petitioned the Court of Appeals for the District of Columbia for review of the SEC’s denial order on the grounds that its Bitcoin ETF was a similar product to Bitcoin futures ETFs—which had previously been approved by the SEC—and therefore should have been approved in a

---

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 40302.

<sup>43</sup> *Id.* at 40311.

<sup>44</sup> *Id.* at 40312.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 40313.

similar manner.<sup>48</sup> The SEC had denied a spot ETF despite approving futures ETFs trading contracts for the same spot product.

The DC Circuit Court of Appeals ruled in August 2023 that the SEC's denial of Grayscale's proposal was arbitrary and capricious because the SEC had not adequately explained why a Bitcoin futures ETF was acceptable but the spot Bitcoin ETF was not.<sup>49</sup> The court held that spot Bitcoin ETFs are materially similar to Bitcoin futures ETFs: both the spot ETF and the futures ETF ultimately track the spot market price, which shows a 99.9% correlation with CME futures contract pricing.<sup>50</sup> Judge Rao pointed out inconsistencies between the SEC's application of the significant market test to the spot and futures ETFs, demanding more evidence and holding Grayscale to a higher standard than it had Teucrium or Valkyrie, the Bitcoin futures ETFs discussed.<sup>51</sup> While the SEC had allowed Bitcoin futures ETFs to bypass the significant market test because their only holdings were securities traded directly on the surveilled exchange, it did not apply the same treatment to spot Bitcoin ETFs, despite the two financial products' material similarities.<sup>52</sup>

Even with the significant market test applied to spot Bitcoin ETFs, Judge Rao determined that the asset would still qualify for listing.<sup>53</sup> He notes that the SEC required NYSE Arca to demonstrate the lead/lag relationship between futures and spot markets but did not apply this same logic to the Bitcoin futures ETFs, once again exhibiting a discrepancy between treatments of like financial instruments.<sup>54</sup> Furthermore, although Grayscale's assets equaled almost a quarter of the CME futures market, it owned no futures contracts, and thus could only affect the futures market through the spot market, in which it only held 3.4% of outstanding Bitcoin.<sup>55</sup>

After its order was vacated by the Circuit Court of Appeals, the SEC overturned its previous rejections and approved a number of spot Bitcoin ETFs in January 2024.<sup>56</sup> This action, though reluctant, has opened the door for other cryptocurrency-based spot ETFs to follow.<sup>57</sup>

#### D. The Argument for Spot Bitcoin ETFs

The approval of spot ETFs presents a new investment vehicle for consumers, offering an opportunity for them to invest in the price movement of digital assets while trading on a traditional exchange. It gives them access

---

<sup>48</sup> Grayscale Invs., LLC v. SEC, 82 F.4th 1239, 1242 (D.C. Cir. 2023).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1246.

<sup>51</sup> *Id.* at 1247.

<sup>52</sup> *Id.* at 1248.

<sup>53</sup> *Id.* at 1248, 1251.

<sup>54</sup> *Id.* at 1249.

<sup>55</sup> *Id.* at 1250.

<sup>56</sup> Gensler, *supra* note 1.

<sup>57</sup> Will Schmitt, *SEC Approves Ether ETFs as Crypto Moves Closer to Mainstream*, FINANCIAL TIMES (Jul. 22, 2024), <https://perma.cc/FP6G-Y4FW>.

to the profits generated by Bitcoin without needing to hold it directly.<sup>58</sup> For those interested in profiting off of Bitcoin but prefer the safety and security of regulated exchanges, the spot ETF is an ideal option.<sup>59</sup>

Furthermore, the approval marks a step forward in the legitimization of cryptocurrency as assets with speculative—and perhaps, one day, consumptive—use. By integrating a cryptocurrency into the traditional market by deriving a traditional, regulated investment product from it, the SEC has unwillingly given a green flag to digital assets, recognizing them as legitimate and acknowledging their appeal to investors.<sup>60</sup> Accessing Bitcoin’s profits on a regulated exchange can lead to holding Bitcoin itself, just as the SEC’s ruling can be read as a step toward a blanket approval, despite Chair Gary Gensler’s careful efforts to clarify that it was not.<sup>61</sup>

#### E. The Argument Against Spot Bitcoin ETFs

Certain Commissioners and other proponents of tighter cryptocurrency regulation have expressed disapproval of the SEC’s rule change, citing spot Bitcoin ETFs as unsafe for investors due to the unregulated and volatile nature of the spot market.<sup>62</sup> Critics of cryptocurrency claim that the key difference between spot and futures ETFs is that while futures ETFs are supposedly shielded from the extreme fluctuations or manipulations of the spot market by the regulatory oversight of the CME, spot ETFs are directly exposed to the movements of the spot market.<sup>63</sup> Although digital asset exchanges such as Binance claim to have established trade surveillance and manipulation trading controls, the SEC has alleged that these mechanisms are insufficient in regulating the spot market of Bitcoin.<sup>64</sup> In fact, the lack of a primary regulator for these exchanges has led to pervasive wash trading, which makes up to 77.5% of the total trading volume on major unregulated exchanges.<sup>65</sup> The susceptibility of the Bitcoin spot market to fraud and manipulation raises a major red flag for critics of the SEC’s decision, who believe that the approval of the spot ETF will expose investors to a volatile and unstable financial instrument, as it relies on a volatile and unstable underlying asset.<sup>66</sup>

---

<sup>58</sup> Jacob Wade, *Spot Bitcoin ETFs: What Are They, And How Do They Work?*, FORBES (May 13, 2024), <https://perma.cc/59ZZ-BGD9>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Unraveling Bitcoin ETFs: A Gateway To Mainstream Crypto Investment*, BLOCKCHAIN TRAINING ALLIANCE (Feb. 28, 2024), <https://perma.cc/K4A7-37SK>; Gensler, *supra* note 1.

<sup>62</sup> Caroline A. Crenshaw, *Statement Dissenting from Approval of Proposed Rule Changes to List and Trade Spot Bitcoin Exchange-Traded Products*, U.S. SEC. AND EXCH. COMM’N (Jan. 10, 2024).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*



Furthermore, the argument has been made by Commissioner Caroline Crenshaw that by integrating digital assets into the existing traditional financial system, the spot ETF defeats the purpose of Bitcoin's own existence.<sup>67</sup> If Bitcoin was created with the intention of being a peer-to-peer network lacking government regulation or intermediary service providers, the creation of the spot ETF could be considered a step in the wrong direction, contradicting the asset's original purpose by subjecting itself to SEC oversight.<sup>68</sup> Even certain crypto industry leaders have conceded that the spot ETF sacrifices nearly all the benefits of Bitcoin that are derived from direct ownership, such as the self-sovereignty that comes with access to the Bitcoin ecosystem.<sup>69</sup>

## II. ANALYSIS

For crypto hardliners and anti-spot-ETF regulators alike, the inherent paradox of creating an intentionally-regulated financial instrument to track an intentionally-unregulated asset is unavoidable.<sup>70</sup> The unregulated nature of Bitcoin is a blessing and a curse: providing the financial democratization sought by libertarians, industry leaders, and others, while simultaneously offering a playground for criminals and fraudsters.<sup>71</sup> As both sides' arguments reflect, the volatility of Bitcoin and other cryptocurrencies poses high risks but also great opportunities for investors to profit. The spot Bitcoin ETF could be a way to mitigate this contradiction by providing some insulation via SEC regulation while still allowing easier access to Bitcoin's price movements than a Bitcoin futures ETF would.<sup>72</sup>

Likewise, despite the SEC's reluctance to approve Bitcoin-based financial instruments, the CFTC has granted registration to Bitcoin swaps execution facilities, meaning that they have already considered the issue of volatility and susceptibility to manipulation and determined that the underlying spot market is sufficiently safeguarded from manipulative and fraudulent actions.<sup>73</sup> The SEC's repeated refusal to approve the spot ETFs was thus undermined by its fellow agency's willingness to engage with the spot market.

As for the question of whether or not the SEC had the grounds to forbid the rule change for years—to which the DC Circuit Court of Appeals has firmly answered no—even Chair Gensler himself seems unable to offer a clear

---

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Eric Ervin, *When Bitcoin ETFs Are Right for Investors and When They're Not*, COINDESK (Feb. 21, 2024), <https://perma.cc/7D3X-6L53>.

<sup>70</sup> *Id.*; Crenshaw, *supra* note 63.

<sup>71</sup> Stephen Stonberg, *Cryptocurrencies are Democratizing the Financial World. Here's How*, WORLD ECONOMIC FORUM (Jan. 22, 2021), <https://www.weforum.org/agenda/2021/01/cryptocurrencies-are-democratising-the-financial-world-heres-how/>; Crenshaw, *supra* note 63.

<sup>72</sup> Adam Hayes, *Spot Bitcoin ETFs: Everything You Need to Know*, INVESTOPEDIA (May 27, 2024), <https://perma.cc/8ZV9-DX84>.

<sup>73</sup> James A. Overdahl, Comment Letter on Bats BZX Exchange Proposed Rule Change to List and Trade Shares Issued by Winklevoss Bitcoin Trust 2-3 (May 12, 2017).

response.<sup>74</sup> In his statement announcing the approval of the spot Bitcoin ETFs, he justifies the SEC’s sudden shift in position simply by stating, “Circumstances, however, have changed.”<sup>75</sup> Chair Gensler’s personal perspective on Bitcoin appears decidedly negative; he declares Bitcoin a “speculative, volatile asset that’s also used for illicit activity including ransomware, money laundering, sanction evasion, and terrorist financing,” despite prefacing this clear merit judgment with a disclaimer that the SEC is merit neutral.<sup>76</sup> This mindset toward the digital asset is more than apparent in his treatment of novel financial products that rely on it for price tracking.

While the quality of Bitcoin ETFs as a financial instrument is debatable, Chair Gensler himself admits that the SEC’s role is not to offer merit judgments on the securities it regulates.<sup>77</sup> In Commissioner Hester Peirce’s statement, she describes the entire approval process as an “unnecessary, but consequential, saga” that was only resolved due to the intervention of the “DC Circuit-ex-machina.”<sup>78</sup> Commissioner Peirce’s characterization of the SEC’s repeated denials as illogical further reinforces the notion that the SEC’s actions were driven by personal beliefs about digital assets, rather than by whether or not the proposed rule changes complied with the Exchange Act. This blatant disregard for the agency’s original purpose suggests that the SEC has overstepped its boundaries; its job is to protect investors from fraud and crime, not to protect them from what the SEC perceives are poor financial decisions, no matter how much Chair Gensler may want to.

### III. EFFECTS

Since its approval in January 2024, the spot Bitcoin ETF has caused an immense surge in the price of Bitcoin itself.<sup>79</sup> Like how traditional ETFs have at times been responsible for “leading” the markets of their underlying assets, the heightened liquidity from the ETF market has brought an influx of cash into the spot market.<sup>80</sup> However, Bitcoin’s speculative nature has made it even more susceptible to shocks from the ETF market; the huge consumer demand for the novel financial instruments has in turn driven investors toward the

---

<sup>74</sup> *Grayscale*, 82 F.4th at 1239; Gensler, *supra* note 1.

<sup>75</sup> Gensler, *supra* note 1.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Hester M. Peirce, *Out, Damned Spot! Out, I Say!: Statement on Omnibus Approval Order for List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units*, U.S. SEC. AND EXCH. COMM’N (Jan. 10, 2024).

<sup>79</sup> Hannah Lang & Suzanne McGee, *How ETFs and Institutions are Driving the Surge in Bitcoin Prices*, REUTERS (Mar. 6, 2024), <https://www.reuters.com/technology/institutional-investors-may-help-bitcoin-sustain-new-heights-2024-03-05/>.

<sup>80</sup> Ben-David, Franzoni, & Moussawi, *supra* note 16; Khristopher J. Brooks, *Bitcoin Hits Record High. Here's What's Driving Up the Price*, CBS MONEYWATCH (Mar. 5, 2024), <https://perma.cc/4WX3-EQ3T>.

spot asset itself.<sup>81</sup> While commodity ETFs for physical assets like gold typically track their spot prices closely, the spot Bitcoin ETF has instead been the primary driver of Bitcoin’s spot price since its launch.<sup>82</sup>

The rise in demand for Bitcoin following the spot ETF’s approval is indicative of the SEC’s unwilling legitimization of the product.<sup>83</sup> Although a purchase of the spot Bitcoin ETF does not directly impact the spot market the way a purchase of Bitcoin does, it does represent the buyer’s faith in the underlying asset’s ability to grow in value and generate profit.<sup>84</sup> The huge investor interest in the spot ETF upon its approval reveals the general public’s confidence in Bitcoin, especially following the SEC’s approval.<sup>85</sup> Chair Gensler’s warnings about the volatility of Bitcoin and its flimsiness as an asset appear to have had little to no effect—rather than warning investors away from Bitcoin, he has given a perceived green light to those interested in profiting off the asset’s astronomical rise.

Furthermore, recent studies have indicated that ETFs generally have taken over from futures in dominating price discovery, meaning that the spot ETF will only continue to be more impactful upon the spot market as it grows in popularity.<sup>86</sup> The effect of the spot ETF upon Bitcoin’s price is magnified as investor interest grows—as has been evident in months following its approval—and increases as the market matures further and gains a greater foothold among institutional investors.<sup>87</sup> The effect of approving the spot ETF is long-lasting and acts as a step toward the greater integration of cryptocurrency into the traditional financial system; though this may contradict the purpose of Bitcoin itself, it has been overwhelmingly positive for the original asset’s price.

#### IV. CONCLUSION

Whatever the SEC may believe about the viability of Bitcoin and Bitcoin-based financial products, it is undeniable that, several months into the approval of spot Bitcoin ETFs, their short-term impact has been ostensibly positive. From raising the price of Bitcoin to expanding access to the digital asset’s profitability, ETFs have provided momentum for the crypto industry and brought it closer to legitimate financial institutions with safeguards for

---

<sup>81</sup> *Id.*

<sup>82</sup> Emily Doak, *Commodity ETFs: It Pays to Do the Research*, CHARLES SCHWAB (Jan. 2, 2023), <https://perma.cc/788W-SC3R>; Brooks, *supra* note 80.

<sup>83</sup> Hayes, *supra* note 72.

<sup>84</sup> Wade, *supra* note 58.

<sup>85</sup> Charles Lloyd Bovaird II, *Bitcoin Prices Surge Past \$48,000 As ETF Demand Drives Gains*, FORBES (Feb. 9, 2024), <https://perma.cc/VM2P-N6Q6>.

<sup>86</sup> Mike Buckle, Jing Chen, Qian Guo & Chen Tong, *Do ETFs Lead the Price Moves? Evidence from the Major US Markets*, 58 *Int’l Rev. Fin. Analysis* 91 (2018).

<sup>87</sup> Tanaya Macheel, *ETFs Have Brought Big Price Swings Back to Bitcoin but Could Still Help Dampen Volatility in the Long Term*, CNBC (Mar. 11, 2024), <https://perma.cc/792W-K4XY>.

the investing public.<sup>88</sup> As to whether or not long-term dangers exist—for the buyer susceptible to volatile markets and fraud, or for the relevancy of cryptocurrency once Bitcoin loses its anti-mainstream appeal—only time can say.

Perhaps more significant are the larger consequences for the SEC’s role in market regulation as a whole, which oscillates between gross overextension and retraction upon confrontation. From arbitrarily and capriciously delaying and denying the spot Bitcoin ETF’s approval to issuing its landmark Climate Disclosure Rule and then staying it barely a month later,<sup>89</sup> the SEC’s recent actions reflect its own uncertainty about the validity of its regulatory measures.<sup>90</sup> As an agency designed through an extensive legal code to protect investors, encourage capital formation, and maintain orderly markets,<sup>91</sup> the SEC must adapt to contemporary issues—such as novel financial instruments—with the law and its mission in mind, rather than by making merit judgments about the securities it regulates or simply choosing inaction. The confusion prompted by changing markets is meant to be mitigated by the robust existing legal framework. Technology will only continue to grow; in order to regulate it effectively, the SEC must first allow it to.

---

<sup>88</sup> Hayes, *supra* note 72.

<sup>89</sup> *Executive Summary of the SEC’s Landmark Climate Disclosure Rule*, DELOITTE (Apr. 8, 2024), <https://perma.cc/W9D7-EH78>.

<sup>90</sup> Thomas Kingsley, *Overreach at the SEC*, AMERICAN ACTION FORUM (Sept. 26, 2023), <https://perma.cc/SA3W-GTVD>.

<sup>91</sup> *Role of the SEC*, U.S. SEC. AND EXCH. COMM’N, <https://perma.cc/DGS7-KMKU>.