

## CAPITOL ACCOUNT

### Ex-Regulators, Business Groups Line Up to Back Grayscale in SEC Suit

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Leaving little to chance in its high-profile case against the SEC, Grayscale Investments' has been out drumming up support for its challenge to the agency's denial of its Bitcoin ETF application – and several former regulators, as well as crypto and business trade associations are answering the call.

The flurry of activity comes as so-called friend of the court briefs are due today in the D.C. Circuit. According to sources, emails and draft filings that are circulating among attorneys, Grayscale's backers include former SEC Commissioner **Joseph Grundfest**, ex-CFTC Commissioner (now with FTX) **Mark Wetjen**, and potentially, **Harvey Pitt**. The SEC chairman during the Bush administration hadn't officially agreed to sign on by late afternoon but was mulling it over.

The U.S. Chamber of Commerce and the Blockchain Association are also set to weigh in on the side of Grayscale with amicus briefs today, people familiar with their plans said.

Grayscale's chief legal officer, **Craig Salm**, has been closely involved in the search for supporters, according to emails. Last week Salm promoted a brief from a group of academics who are being represented by the Paul Hastings law firm; that's the one the former regulators subsequently agreed to join. Later, Salm passed along the blockchain group's brief as another that people could consider adding their names to.

In an interview, Salm says he was heartened that a number of people with different viewpoints had expressed interest in siding with the firm. He expects several to be filed with the court by the end of the day. “Folks from various backgrounds really support this,” Salm says. “This is not just a case about Bitcoin. There are consensus legal arguments here.”

Grayscale sued in June after the SEC denied the firm’s application to turn its Bitcoin Trust fund into an ETF. (It currently has \$12.4 billion in assets, and more than 850,000 investors.) Grayscale has hired **Donald Verrilli Jr.**, a former solicitor general, who last week filed the opening brief in the Washington federal appeals court. It argues that the SEC violated the Administrative Procedure Act when it allowed ETFs based on Bitcoin futures, but rejected the Grayscale fund, which holds actual Bitcoin.

The amicus brief set to be filed by the former regulators and academics takes a similar approach, saying that the futures ETFs are roughly the economic equivalent of ETFs that hold actual Bitcoin.

“The SEC has not approved a spot ETF despite the fact that a spot ETF provides robust investor protection, is more liquid than a futures ETF, is more transparent, and provides a lower cost [for] investors,” a draft copy of the brief notes. “This results in denying opportunities for average investors to diversify their portfolios, hedge against inflation, and face lower transaction costs for their investment through exposure to Bitcoin.”

In an interview, Paul Hastings’s **Nick Morgan**, who is spearheading the effort, says people have been eager to support Grayscale’s suit. Morgan runs the Investor Choice Advocates Network, a non-profit organization that provides pro bono help to entrepreneurs facing enforcement probes; it is also a party on the brief. “This is one of the seminal cases that involves the scope of the SEC’s authority in the digital assets space,” says Morgan.

In its brief that has been circulating, the Blockchain Association says that as an industry group, it “offers a unique and important perspective that the issuers, regulators, and others who intend to submit briefs in this case cannot provide.” The trade represents more than 100 crypto firms, investors and protocols, including Ripple, Genesis, Kraken, Uniswap and Grayscale.

Here's a quote from its draft filing:

“The commission has allowed several Bitcoin futures ETPs to list and trade on U.S. exchanges. The commission has, however, categorically denied every proposal to list a spot Bitcoin ETP – despite considerable investor demand for products that offer exposure to Bitcoin; despite the fact that the commission has allowed similar, and riskier, products to enter the market; and despite the fact that spot Bitcoin ETPs plainly satisfy regulatory requirements for listing on a national securities exchange. By universally declining to approve a spot Bitcoin ETP, the commission has unjustifiably limited investor choice; it has abandoned its investor protection mandate; and it has abused its discretion by engaging in an arbitrary and capricious practice of picking winners and losers among investment products.”

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