

# Congress of the United States

## Washington, DC 20510

March 26, 2024

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

Chair Gensler:

We write to express our concerns regarding Prometheus, Inc.'s (Prometheus) recent announcement that its subsidiary, Prometheus Ember Capital LLC (Prometheus Capital), a Financial Industry Regulatory Authority (FINRA) approved Special Purpose Broker-Dealer (SPBD), will provide custody services for Ethereum's token, Ether (ETH), later this month to institutional clients.<sup>1</sup> In particular, we are concerned by the lack of transparency in the Securities and Exchange Commission's (SEC) SPBD regime and the SEC's failure to address Prometheus's intent to custody an asset that the SEC and the Commodity Futures Trading Commission (CFTC) have recognized as a non-security digital asset. We urge you to clarify the SEC's position with respect to a SPBD's ability to custody non-securities, willingness to address SPBD non-compliance, regulatory classification of ETH, and position regarding Prometheus's announcement.

As you are aware, the agencies have an extensive public record identifying ETH as a non-security digital asset. There are multiple regulatory actions grounded in that position. Yet now, we are faced with an alarming scenario in which a SPBD has announced that it intends to offer custodial services for ETH under a regime that does not permit such activity. This action, if allowed to proceed, could have irreparable consequences for the digital asset markets.

### Lack of Clarity in Identifying Digital Asset Securities

Despite your insistence that most digital assets are "digital asset securities," that term continues to be undefined. Other regulators, intermediaries, and market participants disagree with your assertions, and have struggled to identify which digital assets are digital asset securities. Moreover, the SEC's failure to propose a rule or provide comprehensive guidance that provides clear rules for the digital asset marketplace regarding asset classification has only exacerbated the uncertainty in the digital asset ecosystem. Compounding the uncertainty, the SEC has

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<sup>1</sup> *Prometheus Announces Custodial Services for Ether (ETH), Opens Account Sign Up for Institutional Clients*, Business Wire (Feb. 7, 2024), <https://www.businesswire.com/news/home/20240207966185/en/Prometheus-Announces-Custodial-Services-for-Ether-ETH-Opens-Account-Sign-Up-For-Institutional-Clients>.

engaged in multiple enforcement actions, accusing certain digital asset trading platforms of failing to register as brokers, clearing agencies, and national securities exchanges (NSE) because they are transacting in digital asset securities.<sup>2</sup>

### Treatment of ETH

Both the SEC and the CFTC have long-recognized ETH as a non-security digital asset or digital commodity. In 2018, SEC staff announced that current offers and sales of ETH were not securities transactions.<sup>3</sup> In October 2023, the SEC approved nine exchange traded funds (ETF) that provide exposure to ETH through CFTC-regulated ETH commodity futures products.<sup>4</sup> Each of the SEC-approved ETFs approved reference ETH as a commodity.<sup>5</sup>

The CFTC permits CFTC registered commodity derivatives exchanges to list multiple ETH futures contracts and continues to pursue numerous enforcement actions involving the trading of ETH.<sup>6</sup> Additionally, Chairman Behnam has repeatedly articulated his position that ETH is a digital commodity subject to the jurisdiction of the CFTC. Based on the CFTC's and the SEC's actions regarding ETH, market participants have entered into ETH futures contracts on CFTC-registered commodity derivatives exchanges to hedge ETH risk or to gain exposure to ETH.<sup>7</sup>

Despite this history recognizing ETH as a non-security digital asset, you have consistently refused to acknowledge that ETH is not a security. In your March 2023 testimony before the House Committee on Financial Services you declined to answer multiple questions about whether ETH should be considered a commodity. Your unwillingness to clarify the treatment of ETH only exacerbates the confusion and uncertainty regarding ETH's classification as demonstrated by the Prometheus announcement.

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<sup>2</sup> The SEC has brought multiple enforcement actions against digital asset trading platforms, claiming they are operating as unregistered national securities exchanges, brokers, and clearing agencies. *See e.g.*, Compl., SEC v. Coinbase, Inc., No. 1:23-cv-04738 (S.D.N.Y. Jun. 6, 2023); *see also*, Compl., SEC v. Payward, Inc., No. 3:23-cv-06003 (N.D. Cal. Nov. 20, 2023). Available at: <https://www.sec.gov/spotlight/cybersecurity-enforcement-actions>.

<sup>3</sup> Former Director of the SEC Division of Corporation Finance William Hinman, *Digital Asset Transactions: When Howey Met Gary (Plastic)* (Jun. 14, 2018), <https://www.sec.gov/news/speech/speech-hinman-061418>.

<sup>4</sup> Lucy Brewster, *SEC Approve 9 Ether Futures ETFs*, ETF.com (Oct. 2, 2023), <https://www.etf.com/sections/news/sec-approves-9-ether-futures-etfs>.

<sup>5</sup> *See e.g.*, NASDAQ, *A proposal to list and trade the shares of the Hashdex Nasdaq Ethereum ETF under Nasdaq Rule 5711(d)* 4, 17 (Sep. 11, 2023), <https://listingcenter.nasdaq.com/assets/rulebook/nasdaq/filings/SR-NASDAQ-2023-035.pdf>. (“The Sponsor is registered as a commodity pool operator with the Commodity Futures Trading Commission.”; “CME began offering trading in Ether Futures Contracts in 2021, and each of the contract’s final cash settlement is based on the CME CF Ether Dollar Reference Rate. The contracts trade and settle like other cash-settled commodity futures contracts.”)

<sup>6</sup> *See e.g.*, Compl., *CFTC v. Ooki DAO*, No. 3:22-cv-5416 ¶ 52 (N.D. Cal. Sept. 9, 2022) (Virtual currencies such as ETH, DAI, and others traded on the Ooki Protocol are ‘commodities’ under the Act.”), Available at: <https://www.cftc.gov/media/7681/enfookicomplaint092222/download>.

<sup>7</sup> Press Release, Chicago Mercantile Exchange, *CME Group Announces Launch of ETH Futures* (Feb. 8, 2023), [https://www.cmegroup.com/media-room/press-releases/2021/2/08/cme\\_group\\_announceslaunchofetherfutures.html](https://www.cmegroup.com/media-room/press-releases/2021/2/08/cme_group_announceslaunchofetherfutures.html).

## SEC Digital Asset Security Approach

Your unwillingness to identify which digital assets are so-called digital asset securities has sown confusion even for SEC regulated entities. The SEC established temporary frameworks for broker-dealers to engage with digital asset securities both to facilitate trading as an alternative trading system (ATS) and to provide custodial services which were in place well before your arrival. In September 2020, the SEC’s Division of Trading and Markets issued a no-action letter (NAL) to FINRA establishing a framework for a registered broker-dealer to operate an ATS that trades digital asset securities, under certain conditions.<sup>8</sup>

In December 2020, the SEC issued a policy statement and requested comment regarding the custody of digital asset securities by broker-dealers (SPBD Statement).<sup>9</sup> The SPBD Statement provides SPBDs relief for five years from enforcement actions on the basis of violations of the SEC’s Customer Protection Rule with respect to their custody of digital asset securities, so long as certain conditions are met.<sup>10</sup> Importantly, the relief is conditioned specifically on the SPBD only custodial digital asset securities.<sup>11</sup> It does not allow a SPBD to custody non-security digital assets.

According to the SPBD Statement, SPBDs must establish, maintain, and enforce written policies and procedures.<sup>12</sup> These policies and procedures ensure that the SPBD’s business is limited to digital asset securities and that all such digital asset securities are transacted in compliance with the applicable securities laws. These written procedures are used to justify whether the digital asset security is “offered and sold pursuant to an effective registration statement or an available exemption from registration,” prior to conducting business in such digital asset security.<sup>13</sup>

## Prometheum

In October 2022, Prometheum’s ATS, Prometheum Ember ATS (Prometheum ATS), launched.<sup>14</sup> At the time, Prometheum ATS stated that it would provide trading for digital assets including Flow, Filecoin, The Graph, Compound, and Celo.<sup>15</sup>

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<sup>8</sup> Letter from Elizabeth Baird to Kris Dailey (Sep. 25, 2020). Available at: <https://www.sec.gov/divisions/marketreg/mr-noaction/2020/finra-ats-role-in-settlement-of-digital-asset-security-trades-09252020.pdf>.

<sup>9</sup> *Custody of Digital Asset Securities by Special Purpose Broker-Dealers*, 86 Fed. Reg. 11,627, 11,629 (Feb. 26, 2021). Available at: <https://www.federalregister.gov/documents/2021/02/26/2020-28847/custody-of-digital-asset-securities-by-special-purpose-broker-dealers>.

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

<sup>11</sup> *Id.* (“The broker-dealer limits its business to dealing in, effecting transactions in, maintaining custody of, and/or operating an alternative trading system for digital asset securities.”)

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Prometheum Launches SEC Registered Market for Digital Asset Securities*, Business Wire (Oct. 26, 2022), <https://www.businesswire.com/news/home/20221026005178/en/Prometheum-Launches-SEC-Registered-Market-for-Digital-Asset-Securities>.

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

In May 2023, Prometheus Capital obtained FINRA approval to act as a SPBD, becoming the first and still only FINRA approved SPBD.<sup>16</sup> As a SPBD, Prometheus Capital's activities are limited to digital asset securities. It is not authorized to custody traditional securities or non-security digital assets on behalf of customers.

In order for Prometheus Capital to make its announcement that it will custody ETH and remain in compliance with the SEC's SPBD regime, Prometheus Capital should have determined that ETH is a digital asset security and that the offer and sale of ETH is either registered as a security or qualifies for an exemption.<sup>17</sup> However, ETH has not been registered as a security with the SEC, nor has the SEC indicated that the offer or sale of ETH satisfies the requirements of any exemption. Thus, it remains unclear how Prometheus intends to offer certain digital assets through its ATS or to implement procedures congruent with the SPBD framework. To date, Prometheus Capital has not provided any SPBD custodial services nor has Prometheus ATS operated as an ATS.

### Implication to the Futures Markets

The regulatory treatment of ETH is not solely a matter of importance to the SEC, it directly implicates the CFTC and the commodity futures markets, as well. If the SEC determines that ETH is a digital asset security, CFTC registered commodity derivative exchanges may no longer be able to list and offer ETH Futures for trading as commodity futures products. The consequences of exchanges no longer offering ETH derivatives could have significant implications for existing ETH market participants. Not only would market participants lose access to an essential risk management tool, but such an action could also imperil the existing approved ETFs and result in significant price dislocation across the ETH market. More problematic, if the SEC determines ETH to be a digital asset security, then existing CFTC registered entities and registrants are potentially violating securities laws by offering security futures products absent registration pursuant to the security futures framework.

The negative repercussions of the SEC implicitly or directly classifying ETH as a digital asset security will cascade throughout the digital asset marketplace both in the short and long term. The immediate impact on the ETH commodity derivatives markets is apparent. However, the broader implications for the digital asset markets may be that absent legislation, there will never be regulatory certainty upon which one can offer digital asset derivatives in the United States. This would have a chilling effect on U.S. digital asset markets, to the detriment of Americans who benefit from the robust U.S. digital asset markets and federal regulation of those markets.

For the reasons stated above, please respond in writing to the following:

1. The SEC has used the following terms to describe digital assets: crypto tokens, crypto security tokens, crypto assets, crypto asset securities, digital asset securities, and digital asset securities that are investment contracts. Please provide definitions for each term

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<sup>16</sup> Yueqi Yang and Allyson Versprille, *Crypto Startup Says it Found Path to Register with SEC Under a Broker Rule*, Bloomberg (May 23, 2023), <https://www.bloomberg.com/news/articles/2023-05-23/prometheum-capital-sees-path-to-register-with-sec-as-special-purpose-broker?sref=qvWfRb7l>.

<sup>17</sup> See *infra* note 11.

and explain how they differ from one another.

2. Has the SEC engaged in any discussions with the CFTC regarding whether ETH is a digital asset security or the impact of ETH being considered a security on the commodity derivatives markets? Please provide the dates, the participants, and the substance of those discussions, and provide copies of any draft or final documents, including agenda, related to those discussions.
3. In a June 2022 interview, you reportedly announced that the SEC was working with the CFTC to establish a memorandum of understanding to create a “formal deal to ensure that trading in digital tokens had adequate safeguards and transparency.”<sup>18</sup> Please provide the dates, the participants, and the substance of those discussions, and provide copies of any draft or final agreement between the SEC and the CFTC.
4. Is ETH a digital asset security?
5. If ETH is a digital asset security, please answer the following additional questions:
  - a. How and when did the SEC determine that ETH was a digital asset security? Please provide a comprehensive analysis.
  - b. The SPBD regime requires an effective registration statement or an exemption from registration. Please explain how the SEC views ETH’s compliance with this requirement.
  - c. In addition to registration under Section 5 or qualifying for an exemption from registration, is ETH required to also be registered under Section 12(g) of the Securities Exchange Act of 1934?
  - d. Has the SEC determined that ETH can be resold pursuant to Rule 144? If so, please provide the analysis.
  - e. Does the SEC believe that CFTC-registered commodity derivatives exchanges and futures commission merchants are violating the federal securities laws by continuing to offer and facilitate trades in ETH derivatives? If so, has the SEC or the CFTC communicated this position to those entities?
  - f. A contract for the future delivery of a single security is a security future and subject to a joint SEC-CFTC oversight regime. Does the SEC believe that ETH is eligible to underly a security future? If so, will the SEC work with the CFTC to jointly designate ETH as a valid underlying security for a security futures contract prior to Prometheus Capital custodying the asset?
  - g. In recent enforcement actions against digital asset trading platforms that offer ETH for trading, the SEC has failed to identify ETH as a security. Please provide the rationale why the SEC has not referenced ETH in its complaints against those trading platforms. Does the SEC plan on amending its complaints in those actions to include allegations that the platforms offer trading of ETH in contravention of

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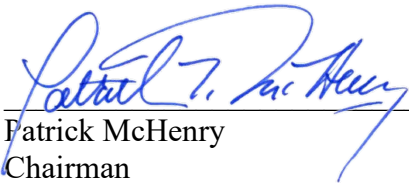
<sup>18</sup> Stefania Palma and Patrick Jenkins, *SEC chair urges ‘one rule book’ for crypto to avoid gaps in oversight*, Financial Times (Jun. 24, 2022), <https://www.ft.com/content/b9466a10-a2a6-412d-acf4-086609283df2>.

the securities laws?

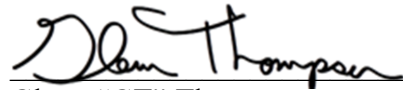
6. If ETH is not a digital asset security, please answer the following additional questions:
  - a. Has the SEC revised the SPBD Statement to permit the custody of non-security digital assets? If so, when and how was this information communicated to the public and Prometheus? Please provide a detailed analysis of how the SEC reached this conclusion.
  - b. If the SEC has not revised the SPBD Statement, will the Commission prohibit Prometheus Capital from providing custody of ETH, in violation of the SPBD Statement?

There are significant challenges for those navigating the digital asset regulatory regime. The current digital asset regulatory landscape presents various risks to consumers, investors, and market participants. Allowing one market participant and regulation by enforcement to dictate the future of digital asset regulation is unacceptable. This is precisely why Congress is working to set guidelines for firms that participate in the digital asset markets. We appreciate your attention to these critical matters and look forward to your response no later than April 9, 2024.

Sincerely,



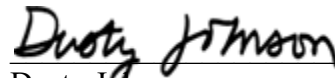
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Chairman  
House Committee on Financial Services



Glenn "GT" Thompson  
Chairman  
House Committee on Agriculture



French Hill  
Member of Congress



Dusty Johnson  
Member of Congress



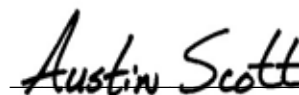
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Warren Davidson  
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Frank D. Lucas  
Member of Congress

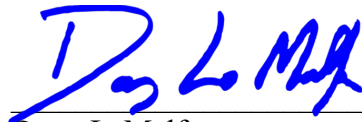


Austin Scott  
Member of Congress

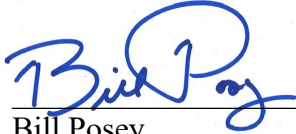




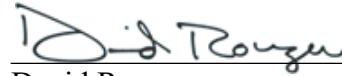
Pete Sessions  
Member of Congress



Doug LaMalfa  
Member of Congress



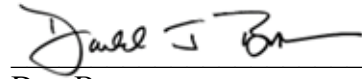
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Member of Congress



David Rouzer  
Member of Congress



Blaine Luetkemeyer  
Member of Congress



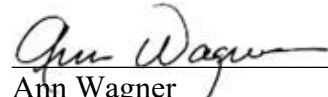
Don Bacon  
Member of Congress



Bill Huizenga  
Member of Congress



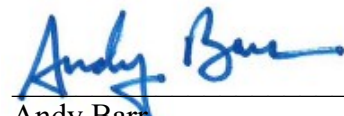
Mike Bost  
Member of Congress



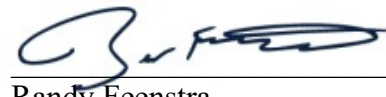
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Member of Congress



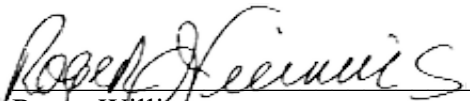
Tracey Mann  
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Andy Barr  
Member of Congress



Randy Feenstra  
Member of Congress



Roger Williams  
Member of Congress



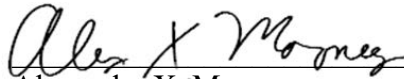
Barry Moore  
Member of Congress



Barry Loudermilk  
Member of Congress



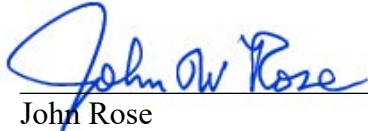
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Alexander X. Mooney  
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Brad Finstad  
Member of Congress



John Rose  
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Ronny L. Jackson  
Member of Congress



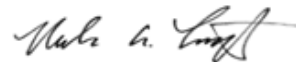
Bryan Steil  
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Marc Molinaro  
Member of Congress



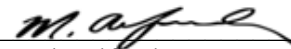
William Timmons  
Member of Congress



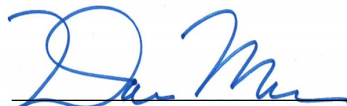
Nick Langworthy  
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Ralph Norman  
Member of Congress



Mark Alford  
Member of Congress



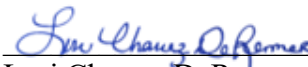
Dan Meuser  
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Derrick Van Orden  
Member of Congress



Scott Fitzgerald  
Member of Congress



Lori Chavez-DeRemer  
Member of Congress



Andrew R. Garbarino  
Member of Congress




Max Miller  
Member of Congress





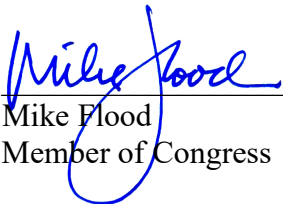
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Young Kim  
Member of Congress



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Byron Donalds  
Member of Congress



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Mike Flood  
Member of Congress



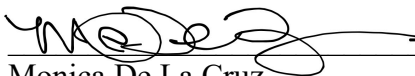
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Michael V. Lawler  
Member of Congress



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Zach Nunn  
Member of Congress



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Monica De La Cruz  
Member of Congress



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Erin Houchin  
Member of Congress



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Andy Ogles  
Member of Congress

cc: The Honorable Rostin Behnam, CFTC Chairman  
Robert W. Cook, President and CEO, Financial Industry Regulatory Authority  
Thomas W. Sexton, CEO, National Futures Association