

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 6860/August 1, 2022

ADMINISTRATIVE PROCEEDING

File No. 3-20801

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In the Matter of	>:	
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DF GROWTH REIT II, LLC	:	ORDER

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The Securities and Exchange Commission instituted this proceeding with an Order Temporarily Suspending Exemption Pursuant to Section 3(b) of the Securities Act of 1933 and Rule 258 of Regulation A<sup>1</sup> Thereunder and Notice of Opportunity for Hearing on March 16, 2022. Respondent DF Growth REIT II, LLC (Respondent or REIT II), requested a hearing, and, on March 31, 2022, the Commission ordered that the matter be heard by an Administrative Law Judge. On May 16, 2022, the proceeding was reassigned to the undersigned. In accordance with the procedural schedule adopted on May 26, 2022, the Division of Enforcement filed a Motion for Summary Disposition on June 3, 2022; Respondent, an Opposition on June 21, 2022; and the Division, a Reply on June 28, 2022.<sup>2</sup> On July 13, 2022, Respondent submitted its “Reply in Support of: (1) Its Suggestion of Mootness, and (2) its Motion for an Order Vacating the Temporary Suspension Order currently in Effect.” On July 18, 2022, the Division filed its “Notice . . . of [Its] Continued Objection to DF Growth REIT II, LLC’s Additional Filings,” in which it noted that Respondent’s filings after June 21 were outside the procedural schedule adopted on May 26.

Respondent has not filed a substantive opposition to the allegations in the Motion for Summary Disposition. Instead, it has argued that that the proceeding should be dismissed as moot and the temporary suspension vacated.

This Order concludes that the proceeding is not moot and that vacatur of the temporary suspension is inappropriate. To ensure fairness and for a complete and accurate record, Respondent will be allowed until August 15, 2022, to file a substantive response to the Motion for Summary Disposition.

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<sup>1</sup> Regulation A consists of Securities Act Rules: 17 C.F.R. §§ 230.251-263 (Rules 251-263).

<sup>2</sup> On July 12, 2022, the undersigned ruled on DF Growth’s July 7, 2022, Motion for an Order to Show Cause why the Division should not be sanctioned for “(Apparently) Failing to Serve Respondent . . . With its Response to Respondent’s June 21, 2022 Pleading” and responsive pleadings. *DF Growth REIT II LLC*, Admin. Proc. Rulings Release No. 6857, 2022 SEC LEXIS xxxx, (July 12, 2022).

### ***Allegations and Arguments of the Parties***

The Division alleges that DF Growth REIT II failed to comply with requirements of Regulation A by (1) engaging in a delayed offering, in violation of Rule 251(d), and (2) raising its maximum offering amount from \$50 million to \$75 million through filing an offering circular supplement rather than through a new offering statement or amendment, in violation of Rule 253(b). It further alleges that Respondent's offering statements and solicitation materials contained untrue or misleading statements of material facts relating to (1) the separation of "REIT II" from "REIT I," DiversyFund's previously-existing real estate investment fund, (2) the minimum cash amount needed for its business and the significant risk of loss to REIT II investors if REIT II were unable to raise sufficient capital in its Regulation A offering, and (3) the fees that investors would be charged.

Respondent states that it terminated the offering on June 17, 2022, and that its decision to terminate on that date was pursuant to the representation on the cover of its Offering Circular<sup>3</sup> that the offering would end on the earliest of three dates: (1) when it had raised \$50 million; (2) two years after the offering began; or (3) "the date we decide to end it." Thus, it argues, the proceeding is moot and should be dismissed and the temporary suspension vacated.

In reply, the Division notes that Respondent has not challenged any of what the Division characterizes as undisputed facts. Further, the Division alleges that DiversyFund has now established REIT III,<sup>4</sup> which is to be funded through the Crowdfunding exemption, and funds raised by the REIT II offering transferred to REIT III. The Division notes that the current temporary suspension has eliminated any ongoing financial harm that ending the offering would provide and suggests that Respondent is merely trying to avoid the "Bad Actor" disqualification that would prevent it from continuing to raise capital through a different affiliate. *See* 17 C.F.R. § 227.503(a)(7) (disqualifying from a Crowdfunding exemption any affiliate of an issuer involved in a Regulation A offering subject to a suspension order within the previous five years).

### ***Ruling***

Rule 152(d), 17 C.F.R. § 230.152(d), provides a "non-exclusive list of factors" in determining when an offering is deemed to be terminated or completed. These include the date after the third anniversary of the date the offering statement was initially qualified, "or any earlier date on which the offering terminates by its terms." Rule 152(d)(2)(iv). Respondent argues that the offering's "terms" include "the date we decide to end it." However, Rule 152(d), does not provide an absolute right to termination of a Regulation A offering and does not address the situation of an offering under a temporary suspension. In effect, Respondent seeks to withdraw the offering, which

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<sup>3</sup> The Offering Circular and other filings made by Respondent are found on EDGAR under DF Growth REIT II's CIK Number: 0001824154.

<sup>4</sup> The Offering Statement and other filings made by "Value Add Growth REIT III, LLC (REIT III), sponsored by DiversyFund, are found on EDGAR under REIT III's CIK Number: 0001931678. The Offering Statement represents that REIT III is to be funded through the Crowdfunding exemption, 17 C.F.R. §§ 227.100, .201-205, .300-306, .400-404, .501-503.

generally is not permitted to a respondent that is the subject of a Rule 258 proceeding. *See* Rule 259(a).

In addition to the regulation prohibiting withdrawal in these circumstances, which, in some form, has been part of the Commission's regulations since 1956,<sup>5</sup> the Commission has long held that the subject of an ongoing Rule 258 suspension proceeding does not have a right to withdraw a Regulation A offering; requests to withdraw by such a respondent are committed to the agency's discretion. *Aetna Oil Dev. Co.*, Securities Act Release No. 4398, 1961 SEC LEXIS 770, at \*2, \*11 (July 20, 1961); *Mut. Emps. Trademart, Inc.*, Securities Act Release No. 4252, 1960 SEC LEXIS 897, at \*2, \*5 (July 14, 1960); *see also Teletest Corp.*, Securities Act Release No. 6717, 1987 SEC LEXIS 4539, at \*3-4 (June 4, 1987) ("‘careful and honest preparation’ of a Regulation A filing ‘is ‘an absolute prerequisite’ for the exercise of our discretion in permitting the withdrawal of a deficient filing after the issuance of a temporary suspension order’"); *cf. Hart Oil Corp.*, Securities Act Release No. 4147, 1959 SEC LEXIS 33, at \*11 (Oct. 9, 1959) ("[T]here is no absolute right to terminate Regulation A suspension proceedings by filing amendments, and [the Commission] do[es] not consider it appropriate freely to accept amendments to Regulation A filings after the issuance of a temporary suspension order."). The Commission has said that "it would be inappropriate to allow such withdrawal prior to a determination of the facts" in a proceeding to determine whether to make permanent a temporary suspension order: "Serious questions regarding the adequacy of the notification and offering circular and the truthfulness of the representations therein have been raised which can be resolved only upon the basis of a record. To allow withdrawal in the face of such charges would encourage careless or fraudulent filings which would be withdrawn when deficiencies are discovered by [agency] staff." *Mut. Emps. Trademart, Inc.*, 1960 SEC LEXIS 897, at \*5-6.

In sum, a respondent cannot simply withdraw a Regulation A offering subject to a suspension and then create a new one. Rule 152(d)(2)(iv) is not an end run around Commission withdrawal regulations and enforcement against bad actors.<sup>6</sup>

### ***Conclusion***

It is concluded that the proceeding is not moot, and Respondent's request to dismiss it on that ground and to terminate the temporary suspension will be denied. Respondent will be allowed

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<sup>5</sup> The original wording of the regulation concerning withdrawal while under a temporary suspension order addressed circumstances akin to those alleged to be present here, providing that "[t]he withdrawal of a notification after the entry of an order pursuant to this section shall not operate to make an exemption hereunder available for any securities for which no exemption would be available in the absence of such withdrawal." 17 C.F.R. § 230.261(e) (1956); Regulation A; General Exemptions, 21 Fed. Reg. 5739, 5742 (Aug. 1, 1956). This provision was rescinded because the requirement that the Commission consent to withdrawal made it unnecessary. Miscellaneous Amendments, 23 Fed. Reg. 4454, 4455 (June 20, 1958).

<sup>6</sup> The existence of bad actor disqualifications for issuers and their affiliates subject to the suspension of a Regulation A exemption distinguishes this matter from a Securities Exchange Act of 1934 Section 12(j) proceeding, where, in limited circumstances, the proceeding can be effectively terminated by the respondent by the filing of a Form 15.

until August 15, 2022, to file a substantive response to the Division's Motion for Summary Disposition.

IT IS SO ORDERED.

/S/ Carol Fox Foelak  
Carol Fox Foelak  
Administrative Law Judge