UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 93551 / November 10, 2021

ADMINISTRATIVE PROCEEDING
File No. 3-20650

In the Matter of **American CryptoFed DAO LLC,** **Respondent.**	**RESPONDENT AMERICAN CRYPTOFED DAO LLC'S OPPOSITION TO THE DIVISION OF ENFORCEMENT'S MOTION TO DISMISS WITH A FAIR NOTICE AFFIRMATIVE DEFENSE**

American CryptoFed DAO LLC ("Respondent" or "American CryptoFed") respectfully submits this opposition ("Opposition") to the Division of Enforcement's Motion to Dismiss ("Motion") the Order Instituting Proceedings ("OIP") issued on November 10, 2021 by the U.S. Securities and Exchange Commission ("SEC" or "Commission") with a Fair Notice Affirmative Defense.

On July 22, 2022, American CryptoFed requested the Division of Corporation Finance to reinstate its Form 10 filing ("July 22, 2022 Letter"), attached as **Exhibit A**, because American CryptoFed was misled to file the withdrawal of Form 10 by the Division of Enforcement's written statement below:

> We also remind you that you choose to register these tokens as securities by filing with the Commission a Form 10 which stated on the cover page that the Locke and Ducat tokens were "**Securities** to be registered pursuant to Section 12(g) of the Act" (emphasis in original, Exhibit A's referenced Exhibit 3, page 3).

On June 8, 2022, American CryptoFed asked a follow-up question below to which the Division of Enforcement never responded:

OS Received 08/10/2022

Does the Division have any legal justification to classify Locke and Ducat tokens as Securities other than by American CryptoFed's filing of a Form 10 with the Commission per se?

As a result, on July 6, 2022 (filed late night on July 5, 2022 PST), American CryptoFed filed the withdrawal of Form 10 with the specific reason, "CryptoFed's Locke token and Ducat token are not securities" (Exhibit 1 of the Division of Enforcement's Motion). Surprisingly, on July 15, 2022, the Division of Corporation Finance sent American CryptoFed the following statement contradicting the Division of Enforcement's statement above.

However, the withdrawal of the registration statement does not mean that the staff agrees with your assertion in the withdrawal request that the Locke token and Ducat token are not securities. (Exhibit 2 of the Division of Enforcement's Motion).

This contradiction and the inconsistency between the Division of Enforcement and the Division of Corporation Finance undisputedly proved that American CryptoFed lacks Constitutionally required Fair Notice. Therefore, for compliancy purposes, in the July 22, 2022 Letter, American CryptoFed had to request for reinstatement of the Form 10 filing, citing the order of Judge Analisa Torres of the Southern District of New York in *SEC v. Ripple Labs*. The order, citing *F.C.C. v. Fox Television Stations, Inc,* allows Ripple Labs' Fair Notice affirmative defense (Exhibit A, page 2, referenced its Exhibit 1, page 6-7). Pursuant to the Supreme Court opinions in *F.C.C. v. Fox Television Stations, Inc.* 567 U.S. 239, 253 (2012) below (emphasis added), American CryptoFed requested the Division of Corporation Finance provide the necessary "precision and guidance" required by the Supreme Court opinions, so that American CryptoFed can register American CryptoFed's Locke token and Ducat token, given that Mr. Dobbie, Acting Office Chief at the Division of Corporation Finance stated "the withdrawal of the registration statement does not mean that the staff agrees with your assertion in the withdrawal request that the Locke token and Ducat token are not securities."

A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); *Papachristou* v. *Jacksonville*, 405 U. S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids' " (quoting *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939); alteration in original)). **This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment**. See *United States* v. *Williams*, 553 U. S. 285, 304 (2008). It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Ibid.* As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See *id.,* at 306.

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: **first, that regulated parties should know what is required of them so they may act accordingly; second**, **precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way**. See *Grayned* v. *City of Rockford*, 408 U. S. 104, 108– 109 (1972). When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

Without receiving any response from the Division of Corporate Finance, on July 31, 2022, American CryptoFed requested a formal response again from the Division of Corporation Finance by outlining the detailed legal arguments of Fair Notice Affirmative Defense pursuant to the Supreme Court opinions in *F.C.C. v. Fox Television Stations, Inc.* 567 U.S. 239, 253 (2012) (Exhibit B). However, instead of complying with the Supreme Court opinions to provide American CryptoFed with necessary "precision and guidance" required, rather in his August 3, 2022 letter (Exhibit C), Mr. Dobbie, Acting Office Chief of the Division of Corporation Finance chose to direct American CryptoFed to the Division's October 8, 2021 letter sent to us by Ms. Purnell (Exhibit A's referenced Exhibit 6), while suggesting American CryptoFed seek legal advice from our own legal counsel. In our August 4, 2022 reply (Exhibit D) to Mr. Dobbie, American CryptoFed pointed out that

i. On October 12, 2021, American CryptoFed has already responded to the October 8, 2021 letter point by point, emphasizing that Ms. Purnell failed to identify and specify one single item of important information, which does exist, but we did not disclose, and that Ms. Purnell asked for information which does not exist (Exhibit D, page 2; Exhibit A's referenced Exhibit 7, page 7).

ii. Supreme Court's opinions on the **"void for vagueness doctrine"** in *F.C.C. v. Fox Television Stations, Inc.* 567 U.S. 239, 253 (2012) requires the laws or regulations or Federal agencies/Commissions to provide "a person of ordinary intelligence fair notice", not suggesting that a person should seek advice from their lawyers.

As of today, Mr. Dobbie has not yet responded to American CryptoFed's August 4, 2022 letter. Mr. Bruckmann and his team at Division of Enforcement were copied on all our communications with Mr. Dobbie. On August 1, 2022 and August 4, 2022, American CryptoFed specifically informed Mr. Bruckmann that i) American CryptoFed is discussing with Mr. Dobbie as to how to reinstate the Form 10 filing, and ii) the current OIP is still the best and proper forum to resolve the Fair Notice issue which is required by the Supreme Court opinions in *F.C.C. v. Fox Television Stations, Inc.* 567 U.S. 239, 253 (2012) (Exhibit E, Exhibit F).

As we explained in our October 12, 2021 letter to Ms. Purnell, the Chairman and all Commissioners of the SEC (Exhibit A's referenced Exhibit 7, page 2), American CryptoFed filed Form 10 in good faith to register its Locke token and Ducat token, in response to SEC Chairman Gary Gensler's speech on August 3, 2021 at the Aspen Security Forum "No single crypto asset, though, broadly fulfills all the functions of money." Chairman Gensler specifically stated in the speech "I believe we have a crypto market now where many tokens

may be unregistered securities, without required disclosures or market oversight." Please see the SEC website below:

https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03

However, the Divisions of Corporation Finance and Enforcement have refused to provide Constitutionally adequate Fair Notice so that American CryptoFed can complete its registration statements. American CryptoFed incorporates into this Opposition all the Fair Notice arguments in Exhibit A, B, D, E and F as an affirmative defense, as if these arguments were written in this Opposition. If the Division of Enforcement's Motion is granted, the Commission will irreversibly establish a historical precedent case that the Commission willfully and knowingly refused to provide American CryptoFed with Constitutionally required Fair Notice to complete registration statements, even upon specific and multiple requests, although Chairman Gensler has repeatedly and strongly called for the cryptocurrency industry to file registrations with the SEC since he was confirmed by the US Senate in April 2021.

For the reasons set forth above, the Commission should deny the Division of Enforcement's Motion to Dismiss so that American CryptoFed can reinstate the Form 10 filing and keep the dialogue active with the Divisions of Corporation Finance and Enforcement to resolve the Constitutionally required Fair Notice issue under the supervision of the Commission.

Dated: August 10, 2022

Respectfully submitted,

DocuSigned by:
Scott Moeller
A82E97EDD0C44FD...

By /s/ Scott Moeller
Scott Moeller
President, American CryptoFed DAO LLC
1607 Capitol Ave Ste 327
Cheyenne, WY. 82001

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Motion was filed by eFAP and was served on the following on this 10th day of August 2022, in the manner indicated below:

By Email:

Christopher Bruckmann, Trial Counsel

Division of Enforcement – Trial Unit
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-5949
202-551-5986
bruckmannc@sec.gov

By /s/ Scott Moeller

DocuSigned by:
Scott Moeller
A82E97EDD0C44FD...

Scott Moeller
President, American CryptoFed DAO LLC
1607 Capitol Ave Ste 327
Cheyenne, WY. 82001

Table of Exhibits

RESPONDENT

AMERICAN CRYPTOFED DAO LLC

EXHIBIT A

July 22, 2022

Via Electronic Email

Justin Dobbie, Acting Office Chief
Office of Finance, Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E., Washington, D.C. 20549
Phone (202) 551-3469, dobbiej@sec.gov

CC:
Christopher M. Bruckmann, Division of Enforcement, bruckmannc@sec.gov
Christopher Carney, Division of Enforcement, CarneyC@sec.gov
Martin Zerwitz, Division of Enforcement, ZerwitzM@sec.gov
Michael Baker, Division of Enforcement, BakerMic@sec.gov
John Lucas, Division of Enforcement, LucasJ@sec.gov

Re: American CryptoFed DAO LLC
Form 10 Withdrawal and Reinstatement
File No.: 000-56339

Dear Mr. Dobbie,

On July 15, 2022, you sent me the following statement via a secure email concerning American CryptoFed's request for the Form 10 Withdrawal.

We have received your request to withdraw the registration statement on Form 10 filed by American CryptoFed on September 16, 2021. The staff does not object to the withdrawal.

However, the withdrawal of the registration statement does not mean that the staff agrees with your assertion in the withdrawal request that the Locke token and Ducat token are not securities.

For compliance purposes, pursuant to the **fair notice requirement** cited below, please provide American CryptoFed with an explanation as to why Locke token and Ducat token are securities, as well as clear and practical guidance as to how to file the Form 10, given that (i) "the withdrawal of the registration statement does not mean that the staff agrees with your assertion in the withdrawal request that the Locke token and Ducat token are not securities", and (ii) Form 10 is a registration statement used to register a class of securities pursuant to Exchange Act Section 12 (g) for which no other form is prescribed.

In *SEC v. Ripple Labs,* on March 11, 2022, Judge Analisa Torres of the Southern District of New York issued an order allowing the fair notice defense, which stated the following (Exhibit 1, page 6-7, emphasis added):

"A fundamental principle in our legal system is that laws which regulate persons or entities must give **fair notice** of conduct that is forbidden or required." F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012). This clarity requirement is "essential to the protections provided by the **Due Process Clause of the Fifth Amendment**," and requires the invalidation of laws that are "impermissibly vague." Id. Laws fail to comport with due process when they "fail[] to provide a person of ordinary intelligence **fair notice** of what is prohibited," or when they are so standardless that they authorize or encourage "seriously discriminatory enforcement." Id. (citation omitted).

American CryptoFed repeatedly asked the Division of Enforcement to provide a Howey Test Analysis to prove that Locke token and Ducat token are securities. However, the Division of Enforcement failed to do so. On January 23, 2022, American CryptoFed had no choice but to file the RESPONDENT AMERICAN CRYPTOFED DAO LLC'S MOTION FOR LEAVE TO FILE A MOTION ("Motion for Leave to File a Motion"). The purpose is to compel the Division to provide a Howey Test Analysis or other legal justifications to prove that Locke token and Ducat token are securities. About six months have passed, yet the Commission has not made a decision on this pending Motion for Leave to File a Motion.

On May 30, 2022, American CryptoFed asked the Division of Enforcement to provide Howey Test Analysis again in a letter stating the following (Exhibit 2, page 2):

If the SEC Division of Enforcement ("Division") perceives any violations of related securities laws and wants to prohibit American CryptoFed from launching the Locke refundable auction, or distributing Locke tokens to contributors, please send CryptoFed a Cease-and-Desist Order within 30 business days, on or before June 30, 2022. This Cease-and-Desist Order should include a Howey Test Analysis or other legal justifications from the Division to prove that Locke token and Ducat token are securities.

However, again on June 3, 2022, the Division of Enforcement failed to provide a Howey Test Analysis and stated the following (Exhibit 3, page 3, Emphasis in Original):

Your letter again requests our internal work product and analysis regarding why the Locke and Ducat tokens are securities. As we have explained, repeatedly, this information is privileged and protected from disclosure. We decline to provide it. We also remind you that you choose to register these tokens as securities by filing with the Commission a Form 10 which stated on the cover page that the Locke and Ducat tokens were "**Securities** to be registered pursuant to Section 12(g) of the Act".

On June 8, 2022, American CryptoFed asked the Division of Enforcement the following key question (Exhibit 4, page 4), to which as of today, the Division of Enforcement has not yet responded:

Does the Division have any legal justification to classify Locke and Ducat tokens as Securities other than by American CryptoFed's filing of a Form 10 with the Commission per se?

On June 13, 2022, American CryptoFed also asked you the same question below (Exhibit 5, page 2), to which as of today you also have not yet answered.

Mr. Dobbie, as Acting Office Chief, does your Division or does the Commission have any legal justification to classify Locke and Ducat tokens as **Securities** other than by American CryptoFed's filing of a Form S-1 with the Commission per se?

In accordance with the plain text of 5 U.S. Code § 556 as shown below, your Division and the Commission have the burden of proof to show that Locke token and Ducat token are securities, given that you stated today in both voicemail and email formats that you will seek an order from the Commission to deny American CryptoFed's June 6 request for withdrawal of the Form S-1.

5 U.S. Code § 556 - Hearings; presiding employees; powers and duties; **burden of proof**; evidence; record as basis of decision

(d)Except as otherwise provided by statute, **the proponent of a rule or order has the burden of proof**. (Emphasis added).

As of today, other than by American CryptoFed's filing of a Form S-1 and Form 10 with the Commission per se, no Howey Test Analysis or other legal justification has been provided by

the Commission or the Division of Enforcement or the Division of Corporation Finance to prove that Locke and Ducat tokens are securities. Therefore, as long as American CryptoFed issues Locke and Ducat tokens after Form S-1 and Form 10 are withdrawn, these tokens should no longer be considered securities.

Given that you emphasized "the withdrawal of the registration statement does not mean that the staff agrees with your assertion in the withdrawal request that the Locke token and Ducat token are not securities", you should provide American CryptoFed with a Howey Test Analysis or other legal justification to prove that Locke and Ducat tokens are securities.

In addition, for compliance purposes, you also need to provide American CryptoFed with a clear guidance as to how to file the Form 10, given that American CryptoFed **by design, has No Employees, No Fund Raising, No Revenue, No Costs, No Profits and No Assets, No Traditional Balance Sheet Equation of Assets = Liabilities + Shareholder's Equities.**

On October 8, 2021, Ms. Erin Purnell, Acting Legal Branch Chief, Division of Corporation Finance, stated the following regarding our Form 10 filing (Exhibit 6, page 1), although American CryptoFed has provided all the information exists.

"Our initial review of your registration statement indicates that it fails in numerous material respects to comply with the requirements of the Securities Exchange Act of 1934, the rules and regulations thereunder and the requirements of the form."

On October 12, 2021, American CryptoFed responded to Ms. Erin Purnell's October 8th letter point by point with the following conclusion, to which she never responded (Exhibit 7, page 7).

Ms. Purnell failed to identify and specify one single item of important information, which does exist, but we did not disclose. Ms. Purnell concluded our Form 10 filing has "deficiencies" by asking us to provide information which does not exist. We believe that Ms. Purnell emphasizes form rather than substance.

Since October 2021, the Division of Corporation Finance has failed to satisfy the Clarity Requirement of Fair Notice "essential to the protections provided by the Due Process Clause of

the Fifth Amendment," as Judge Analisa Torres of the Southern District of New York emphasized in the order on March 11, 2022, in *SEC v. Ripple Labs.* (Exhibit 1, page 6). As such, given that you emphasized "the withdrawal of the registration statement does not mean that the staff agrees with your assertion in the withdrawal request that the Locke token and Ducat token are not securities", for compliance purposes, American CryptoFed requires you to provide clear guidance as to how to file the Form 10 to register American CryptoFed's Locke token and Ducat token in one week, on or by July 29, 2022. American CryptoFed is ready to follow your clear guidance to reinstate or refile the Form 10.

I look forward to your written response.

Sincerely,

DocuSigned by:
Scott Moeller
A82E97EDD0C44FD...

/s/ Scott Moeller
Scott Moeller
President, American CryptoFed DAO
scott.moeller@americancryptofed.org

Table of Exhibits

RESPONDENT

AMERICAN CRYPTOFED DAO LLC

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

RIPPLE LABS, INC., BRADLEY GARLINGHOUSE, and CHRISTIAN A. LARSEN,

Defendants.

20 Civ. 10832 (AT) (SN)

ORDER

ANALISA TORRES, District Judge:

Plaintiff, the United States Securities and Exchange Commission (the "SEC"), brings this action against Defendants Ripple Labs, Inc. ("Ripple"), and two of its senior leaders, Bradley Garlinghouse and Christian A. Larsen, alleging that Defendants engaged in the unlawful offer and sale of securities in violation of Section 5 of the Securities Act of 1933 ("Section 5"), 15 U.S.C. §§ 77e(a) and (c). Amend. Compl. ¶ 9, ECF No. 46. Ripple asserts, as an affirmative defense, that it lacked "fair notice that its conduct was in violation of law, in contravention of Ripple's due process rights." Answer, Affirmative Defenses at 97–99, ECF No. 51. The SEC moves to strike Ripple's fair notice defense under Federal Rule of Civil Procedure 12(f). SEC Mot., ECF No. 128. For the reasons stated below, the SEC's motion is DENIED.

BACKGROUND

The following facts are taken from Ripple's answer and are presumed to be true solely for the purpose of considering the motion to strike. *See Tradeshift, Inc. v. Smucker Servs. Co.*, No. 20 Civ. 3661, 2021 WL 4463109, at *4 (S.D.N.Y. Sept. 29, 2021).

Ripple was founded in 2012 as a "privately-held payments technology company that uses blockchain innovation . . . to allow money to be sent around the world instantly, reliably, and more cheaply than traditional avenues of money transmission." Answer, Preliminary Statement

¶ 6 (footnote omitted). Ripple holds a large percentage of XRP, *id.* ¶ 11, "a fast, efficient and scalable digital asset" that "is transacted on the cryptographic XRP Ledger," *id.* ¶ 7. XRP has a "fully functional ecosystem and [has] utility as a bridge currency" and other types of currency uses. *Id.* ¶ 13. XRP's price is not and has not been determined by Ripple's activities. *Id.* Rather, the market prices XRP in correlation with other virtual currencies, including bitcoin and ether. *Id.* Ripple has not filed a registration statement for XRP with the SEC. Answer, Response ¶ 1.

In February and October 2012, at Ripple's request, a law firm provided two legal memoranda assessing the potential legal risks involved with Ripple's then-proposed business plans, including risks related to banking and money transmission laws, securities laws, commodities laws, gambling laws, consumer protection laws, copyright laws, criminal laws, and tax laws. *See id.* ¶ 51.

Ripple has sold XRP in exchange for fiat or other currencies. *Id.* ¶ 1. To effectuate those sales, Ripple worked with third-party companies known as "market makers" that buy and sell XRP "on-ledger and on exchanges through blind bid/ask transactions." *Id.* ¶ 93. At times, Ripple has included on its website a list of third-party digital asset exchanges that listed XRP. *Id.* ¶ 97. Ripple concedes that Ripple employees at times observed the trading price and volume of XRP. *Id.* ¶ 193. Ripple also admits that proceeds from Ripple's sales of XRP were used to support Ripple's operations, *id.* ¶ 294, but maintains that its sales of XRP consistently constituted a small portion of XRP trading volume, *id.* ¶ 99. In addition to selling XRP, Ripple has also made certain payments in XRP as a virtual currency substituting for fiat currency. *Id.* ¶¶ 83, 127.

Ripple claims that it has not sold XRP as an investment. Answer, Preliminary Statement ¶ 9. XRP holders do not acquire any claim to the assets of Ripple, hold any ownership interest in Ripple, or have any entitlement to share in Ripple's future profits. *Id*. Ripple did not hold an "initial coin offering" ("ICO")[1]; "offer[] or contract[] to sell future tokens as a way to raise money to build an ecosystem;" or promise profits to any XRP holder. *Id.* Ripple also has no relationship with the majority of XRP holders, nearly all of whom purchased XRP from third parties on the open market. *Id*. Moreover, Ripple has no obligation to any counterparty to expend efforts on their behalf, and does not pool proceeds of XRP sales in a "common enterprise." *Id*. ¶ 10. Indeed, "Ripple has its own equity shareholders who purchased shares in traditional venture capital funding rounds and who . . . did contribute capital to fund Ripple's operations, do have a claim on its future profits, and obtained their shares through a lawful (and unchallenged) exempt private offering." *Id*. ¶ 13. Ripple claims that if it ceased to function tomorrow, XRP "would continue to survive and trade in its fully developed ecosystem." *Id*. ¶ 10.

Ripple states that it has "worked to develop products that utilize XRP to allow financial institutions to effect currency transfers." Answer, Response ¶ 67. One of those products is "On-Demand Liquidity" ("ODL"), which is intended to effect cross-border payments. *Id*. ¶ 131. Ripple asserts that it has made certain payments in XRP as a virtual currency in connection with ODL, "in accordance with standard market practices in connection with new products and markets." *Id*.

[1] Ripple states that an ICO "commonly describes a fundraising mechanism where an entity sells directly to investors a digital asset that has no functionality or utility yet, as a means of raising funds for the operations of the entity." Answer, Preliminary Statement ¶ 9 n.4. An ICO "typically involves the release of a white paper by the token issuer to prospective investors describing, among other issues, how the token and the system would function in the future; how the funds raised will be allocated; and what future efforts will be undertaken by the issuer to develop the system and drive returns on the token's price." *Id*.

XRP II, LLC ("XRP II") is a wholly-owned subsidiary of Ripple. *Id.* ¶ 19. XRP II is registered as a money service business with the Financial Crimes Enforcement Network ("FinCEN") and is licensed by the New York Department of Financial Services to conduct certain virtual currency business activities. *Id.* In May 2015, Ripple and XRP II entered into a settlement agreement with the Department of Justice and FinCEN, which refers to XRP as a "convertible virtual currency." *Id.* ¶ 379.

On May 16, 2017, Ripple announced that "it would place 55 billion XRP into an escrow on the XRP Ledger, and thereafter implemented the escrow of that XRP." *Id.* ¶ 191.

In June 2018, the SEC's then-Director of Corporate Finance stated that the SEC did not consider the virtual currencies bitcoin or ether to be securities, and that it would "put[] aside the fundraising that accompanied the creation of [e]ther" and look instead at the "present state of [e]ther." Answer, Affirmative Defenses at 98 (alterations in original). And, in 2019, SEC staff met with a digital asset platform that was considering listing XRP. *Id.* That platform sought guidance on whether the SEC considered XRP a security. *Id.* During the meeting, the SEC did not say that it considered XRP to be a security. *Id.* The platform then proceeded to list XRP. *Id.* SEC officials have also stated publicly that digital assets may be considered securities under certain circumstances.[2]

Before the SEC filed the complaint in this action, "XRP was listed on over 200 exchanges, billions of dollars in XRP was bought and sold each month, numerous market makers engaged in daily XRP transactions, Ripple's ODL product was used by many customers, and

[2] *See*, *e.g.*, SEC, No. 81207, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO (2017), https://www.sec.gov/litigation/investreport/34-81207.pdf; SEC Chairman Jay Clayton, Statement on Cryptocurrencies and Initial Coin Offerings (Dec. 11, 2017), https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11; Jay Clayton & J. Christopher Giancarlo, *Regulators are Looking at Cryptocurrency*, WALL ST. J. (Jan. 24, 2018), https://www.wsj.com/articles/regulators-are-looking-at-cryptocurrency-1516836363. The Court shall consider these statements only to the extent they establish that SEC leadership and employees made certain statements. *See United States v. Strock*, 982 F.3d 51, 63 (2d Cir. 2020).

XRP was used in third-party products, many of which were developed independently of Ripple." *Id*. at 96.[3]

ANALYSIS

I. Legal Standard

Under Federal Rule of Civil Procedure 12(f), a court may strike from a pleading any "insufficient defense." Fed. R. Civ. P. 12(f). Motions to strike an affirmative defense are disfavored and should generally not be granted. *SEC v. Thrasher*, No. 92 Civ. 6987, 1995 WL 456402, at *5 (S.D.N.Y. Aug. 2, 1995); *see also SEC v. Honig*, No. 18 Civ. 8175, 2021 WL 5630804, at *4 (S.D.N.Y. Nov. 30, 2021). In ruling on such a motion, courts "deem the non-moving party's well-pleaded facts to be admitted, draw all reasonable inferences in the pleader's favor, and resolve all doubts in favor of denying the motion to strike." *Tradeshift*, 2021 WL 4463109, at *4 (citation omitted).

To succeed on a motion to strike an affirmative defense, the SEC must "show that: (1) there is no question of fact which might allow the defense to succeed; (2) there is no question of

[3] The SEC asks the Court to take judicial notice of 72 SEC enforcement actions enumerated in an appendix to a report created by a private entity (the "Report"). *See* SEC Reply Mem. at 4–5 & n.2, ECF No. 205; *see also* Report at 12–18, ECF 205-1. The SEC argues that the Court may take judicial notice of the complaints and charging documents listed in the appendix because they are public records. *See* SEC Reply Mem. at 5 n.2. The Court agrees that it may take judicial notice of these filings to the extent that they "establish the fact of such litigation and related filings." *Glob. Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006) (citation omitted). But here, the SEC appears to argue that the Court should accept that these enforcement actions "related to digital assets," and that a subset of these actions "alleged an unregistered securities offering in violation of Section 5." SEC Reply Mem. at 4–5. The SEC also asks the Court to accept that "each of these actions was premised on the allegation that the investment product at issue was a 'security' subject to the provisions of the federal securities laws." *Id*. at 5. To the extent that the SEC urges the Court to adopt this characterization of these enforcement actions, the Court rejects such a suggestion because the Report's analysis and conclusions with respect to these actions are not proper subjects for judicial notice. *See Abraham v. Town of Huntington*, No. 17 Civ. 3616, 2018 WL 2304779, at *9 (E.D.N.Y. May 21, 2018). Moreover, to the extent that the SEC requests that the Court parse each of these filings to determine the underlying facts and legal basis for the enforcement actions and draw conclusions that they are similar to the enforcement action taken against Ripple, the Court declines to do so. Ripple disputes the SEC's interpretation of these filings, *see* Ripple Sur-Reply at 5–6, at ECF No. 423; *cf. White Plains Hous. Auth. v. Getty Properties Corp.*, No. 13 Civ. 6282, 2014 WL 7183991, at *3 (S.D.N.Y. Dec. 16, 2014), and the Court finds that such an assessment would be improper in resolving a motion to strike, *cf. Glob. Network Commc'ns*, 458 F.3d at 157.

law which might allow the defense to succeed; and (3) the plaintiff would be prejudiced by inclusion of the defense." *Town & Country Linen Corp. v. Ingenious Designs LLC*, No. 18 Civ. 5075, 2020 WL 3472597, at *5 (S.D.N.Y. June 25, 2020) (quoting *GEOMC Co. v. Calmare Therapeutics Inc.*, 918 F.3d 92, 96 (2d Cir. 2019)).

With respect to the first factor, "the plausibility standard of *Twombly* applies to determining the sufficiency of all pleadings, including the pleading of an affirmative defense." *GEOMC*, 918 F.3d at 98 (discussing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Therefore, the pleading party, here Ripple, must support its defenses with enough factual allegations to make them plausible. *Id.* at 99. That said, courts generally apply a lower plausibility threshold when evaluating motions to strike affirmative defenses as opposed to motions to dismiss because the pleader has less time to gather facts and craft a response. *See id.* at 98. As to the second factor, "an affirmative defense is improper and should be stricken if it is a legally insufficient basis for precluding a plaintiff from prevailing on its claims." *Id.* Furthermore, in considering the third factor, courts generally look to when the defense was presented. *Id.* "A factually sufficient and legally valid defense should always be allowed if timely filed even if it will prejudice the plaintiff by expanding the scope of the litigation" because "[a] defendant with such a defense is entitled to a full opportunity to assert it and have it adjudicated before a plaintiff may impose liability." *Id.*

II. Application

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). This clarity requirement is "essential to the protections provided by the Due Process Clause of the Fifth Amendment," and requires the invalidation of

laws that are "impermissibly vague." *Id*. Laws fail to comport with due process when they "fail[] to provide a person of ordinary intelligence fair notice of what is prohibited," or when they are so standardless that they authorize or encourage "seriously discriminatory enforcement." *Id*. (citation omitted). But, "the degree of vagueness that the Constitution tolerates" often depends, at least in part, on the type of law at issue. *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982). Courts, therefore, find that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Id*. (footnotes omitted). The Supreme Court has also expressed greater tolerance of enactments with civil penalties because "the consequences of imprecision are qualitatively less severe." *Id*. at 498–99.

As an affirmative defense, Ripple pleads that it lacked, and the SEC failed to provide, "fair notice that its conduct was in violation of law, in contravention of Ripple's due process rights." Answer, Affirmative Defenses at 97. The SEC argues that the Court should strike this defense at the pleadings stage because it is a "legally insufficient defense on which Ripple cannot prevail as a matter of law." SEC Mem. at 16, ECF No. 132. The SEC also contends that it would be prejudiced by Ripple's defense because the defense would lead Ripple to seek intrusive discovery. *Id*. at 30. After considering the SEC's arguments, the Court holds that the SEC has not met its burden of showing that Ripple's fair notice defense should be stricken at this time.

The parties agree that Ripple is not bringing a facial challenge to the statute. *See* SEC Mem. at 16; Ripple Mem. at 15, ECF No. 172. Because the Court is reviewing an "as applied" challenge, the Court shall consider "the application of the challenged statute to the person

challenging the statute based on the charged conduct." *United States v. Smith*, 985 F. Supp. 2d 547, 592–93 (S.D.N.Y. 2014), *aff'd sub nom. United States v. Halloran*, 664 F. App'x 23 (2d Cir. 2016). Such a consideration requires the Court to evaluate whether a law can be constitutionally applied to the challenger's individual circumstances. *Copeland v. Vance*, 893 F.3d 101, 110 (2d Cir. 2018). This assessment cannot be conducted in the abstract; rather, the Court must consider whether the party claiming a lack of notice has shown "that the statute in question provided insufficient notice that his or her behavior at issue . . . was prohibited." *Id*. at 117 (quotation marks omitted). Therefore, the Court must first determine what Ripple *did* before assessing whether the statute fairly apprised Ripple that its conduct was prohibited. *Cf. id.*

At the pleading stage, the Court's examination of Ripple's conduct is limited to facts pleaded in Ripple's answer, the undisputed facts in the amended complaint, and any fact of which the Court may properly take judicial notice. As discussed above, Ripple states that XRP's price bears no relation to Ripple's activities. Answer, Preliminary Statement ¶ 13. It also asserts that it has not sold XRP as an investment, and that it has no relationship with the vast majority of XRP holders. *Id*. ¶ 9. At the very least, these facts, if true, would raise legal questions as to whether Ripple had fair notice that the term "investment contract" covered its distribution of XRP, and the Court may need to consider these questions more deeply. *Cf. SEC v. W.J. Howey Co.*, 328 U.S. 293, 299, 301 (1946). Thus, accepting all of Ripple's pleaded facts as true and drawing all reasonable inferences in Ripple's favor, as the Court must do at this stage, it concludes that the SEC has not met its burden of demonstrating that there are no questions of fact or law that might allow the defense to succeed. *See Town & Country Linen*, 2020 WL 3472597, at *5; *see also GEOMC*, 918 F.3d at 96–99.

None of the cases cited by the SEC support a contrary result. In some of these cases, the courts assessing a fair notice defense did so when ruling on a motion to dismiss, where the court was obligated to draw presumptions and inferences in favor of the SEC. *See United States v. Zaslavskiy*, No. 17 Cr. 647, 2018 WL 4346339, at *8 (E.D.N.Y. Sept. 11, 2018); *SEC v. Fife*, No. 20 Civ. 5227, 2021 WL 5998525, at *7 (N.D. Ill. Dec. 20, 2021); *United States v. Bowdoin*, 770 F. Supp. 2d 142, 146–49 (D.D.C. 2011). Other courts analyzed this issue in ruling on motions for summary judgment, with the benefit of a fully developed factual record. *See SEC v. Keener*, No. 20 Civ. 21254, 2022 WL 196283, at *13–14 (S.D. Fla. Jan. 21, 2022); *SEC v. Kik Interactive Inc.*, 492 F. Supp. 3d 169, 182–84 (S.D.N.Y. 2020). And, a couple of courts addressed facial challenges to the term "investment contract," where the courts' analysis did not depend on the particular facts of the case. *See SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1052 n.6 (2d Cir. 1973)[4]; *Bowdoin*, 770 F. Supp. 2d at 149. Moreover, the cases cited by the SEC in which courts did strike affirmative defenses at the pleadings stage dealt with equitable defenses that generally cannot be brought against the SEC. *See* SEC Reply Mem. at 7–8, ECF No. 205; *see also*, *e.g.*, *SEC v. KPMG LLP*, No. 03 Civ. 671, 2003 WL 21976733, at *2–4 (S.D.N.Y. Aug. 20, 2003) (striking estoppel, waiver, and unclean hands defenses); *SEC v. McCaskey*, 56 F. Supp. 2d 323, 327 (S.D.N.Y. 1999) (striking laches defense). In short, the SEC

[4] The SEC appears to contend that the statements in *Brigadoon* were made during the Second Circuit's assessment of an as-applied challenge, and that the Second Circuit, therefore, made a broad statement prohibiting a party from ever being able to bring a vagueness challenge to the term "investment contract." *See* SEC Mem. at 24. The Court does not find that *Brigadoon* stands for that proposition. Because of the procedural posture of the case—an appeal from decisions granting and denying enforcement of subpoenas—the Second Circuit specifically disclaimed any assessment of the regulated parties' activities. *See Brigadoon*, 480 F.2d at 1052. And, the Second Circuit characterizes the regulated parties' challenge to the term "investment contract" as an argument that the term "is void for vagueness," without any reference to their conduct. *See id*. at 1052 n.6.

has cited no caselaw where a court has stricken a fair notice affirmative defense at the pleadings stage, and the Court is not persuaded that doing so is appropriate here.[5]

Moreover, the SEC has not shown that it will suffer undue prejudice as a result of the continuation of Ripple's fair notice defense. An increase in the time, expense and complexity of a trial may constitute sufficient prejudice to warrant granting a plaintiff's motion to strike. *Thrasher*, 1995 WL 456402, at *5. However, a sufficiently pleaded defense "should always be allowed if timely filed even if it will prejudice the [SEC] by expanding the scope of the litigation." *GEOMC*, 918 F.3d at 98. The SEC does not contend that Ripple's affirmative defense is untimely, and the Court shall not conclude, at this early stage of the case, that Ripple's defense is invalid.

Accordingly, the SEC's motion to strike Ripple's fair notice affirmative defense is DENIED.

CONCLUSION

For the foregoing reasons, the SEC's motion is DENIED. The Clerk of Court is directed to terminate the motion at ECF No. 128.

SO ORDERED.

Dated: March 11, 2022
New York, New York

ANALISA TORRES
United States District Judge

[5] Because these factual and legal questions are relevant to any form of as-applied fair notice- or vagueness-based legal challenge, this result would be the same under both sides' proposed articulation of the fair notice test. The Court, therefore, need not reach the issue of how Ripple's fair notice defense should be assessed at a later stage in the litigation. The Court, however, notes that the evaluation of any fair notice defense is objective—it does not require inquiry into "whether a particular [party] actually received a warning that alerted him or her to the danger of being held to account for the behavior in question." *Smith*, 985 F. Supp. 2d at 587.

RESPONDENT

AMERICAN CRYPTOFED DAO LLC

EXHIBIT 2

American CryptoFed

May 30, 2022
Via Electronic Email

Christopher M. Bruckmann, Trial Counsel, Trial Unit
Division of Enforcement, U.S. Securities and Exchange Commission
100 F Street, N.E., Washington, D.C. 20549-5949
Phone 202-551-5986, Email: bruckmannc@sec.gov

Cc:
Martin Zerwitz, Division of Enforcement, ZerwitzM@sec.gov
Michael Baker, Division of Enforcement, BakerMic@sec.gov
Christopher Carney, Division of Enforcement, CarneyC@sec.gov

Re: In the Matter of American CryptoFed, AP File No. 3-20650:
Cease and Desist Order Request

Dear Mr. Bruckmann,

While waiting for the Securities and Exchange Commission ("SEC", "Commission") to rule on the three pending motions below, American CryptoFed DAO LLC ("American CryptoFed") will proceed with implementing its business plan as described in the Form 10 and the Form S1 filed with the SEC on September 16 and 17, 2021 respectively. Starting from Q3 2022, we will distribute to contributors, in paper contracts, free of charge, Locke governance tokens which are restricted, untradeable and non-transferable. Starting from Q3, 2022 through December 31, 2022, we will conduct Locke token refundable auctions. The winning bidders are required to demonstrate the funds are available in their designated wallets without actually moving funds. They will receive NFT certificates which are not allowed to trade. The NFT certificates will lose eligibility to exchange for fungible Locke tokens, if they are transferred out of the original designated wallets. The holders of NFT certificates may exchange them for fungible and tradable Locke tokens on or after January 1, 2023, transferring the bidding tokens (proceeds) to a CryptoFed trustee or trustless account. The proceeds will be used in accordance with the following description in the Form 10 filing.

"Proceeds from these token sales are reserved in order to allow purchasers to request full refunds at the original purchase prices via smart contracts. Purchasers refund rights expire if: a) Locke's price surpasses five (5) times the original purchase price, or b) the original Locke tokens are sold, or c) Three (3) years pass from the original time of purchase, whichever comes first. After refund rights expire, the corresponding proceeds will be transferred to CryptoFed's USD-

pegged stablecoin reserve for Locke buyback. No proceeds can be used for other purposes" (Section 2.4.1.1.6. Page 22).

If the SEC Division of Enforcement ("Division") perceives any violations of related securities laws and wants to prohibit American CryptoFed from launching the Locke refundable auction, or distributing Locke tokens to contributors, please send CryptoFed a Cease-and-Desist Order within 30 business days, on or before June 30, 2022. This Cease-and-Desist Order should include a Howey Test Analysis or other legal justifications from the Division to prove that Locke token and Ducat token are securities. Even after the Locke refundable auction starts in Q3 2022, the Division will still have at least 3 months until December 31, 2022 to send American CryptoFed the Cease-and-Desist Order, before the Locke tokens are allowed to trade.

1. **Motion to Lift the Stay Order:**
   RESPONDENT AMERICAN CRYPTOFED DAO LLC'S MOTION TO LIFT THE ORDER THAT STAYS THE EFFECTIVENESS OF RESPONDENT'S FORM 10.

On November 10, 2021, the SEC issued an order instituting administrative proceedings ("OIP") against American CryptoFed pursuant to Section 12(j) of the Securities Exchange Act of 1934. The OIP's Section IV included an order stating, "IT IS FURTHER ORDERED that the institution of these proceedings stays the effectiveness of the Respondent's Form 10 filed on September 16, 2021" ("Stay Order").

The motion filed on December 15, 2021 requests the Commission to lift the Stay Order. The Stay Order is unlawful because it prohibits American CryptoFed from fulfilling its legal disclosure obligations required by the Securities Exchange Act of 1934, if the SEC perceives Locke token and Ducat token are securities. When and only when the SEC had made decision that Locke token and Ducat token are not securities and are outside the SEC's jurisdiction, could the Stay Order be lawful. Otherwise, The OIP and the Stay Order are equivalent to an order which exempts American CryptoFed from fulfilling its legal disclosure obligations required by the Securities Exchange Act of 1934.

2. **Exemption Motion:**
   RESPONDENT AMERICAN CRYPTOFED DAO LLC'S MOTION FOR EXEMPTION FROM SECTION 12(g) OF THE SECURITIES EXCHANGE ACT OF 1934.

This "Exemption Motion" filed on January 4, 2022, requests the Commission to confirm the fact that the OIP and its Stay Order are equivalent to an order which exempts American CryptoFed from fulfilling its legal disclosure obligations required by the Securities Exchange Act of 1934. However, in the Division's Opposition, the Division made the following serious allegations.

"Finally, to the extent Respondent plans a distribution of securities for which there is no registration statement in effect, the Division asserts that Respondent, and all persons directly or indirectly offering or selling such securities, must comply with Section 5 of the Securities Act of 1933 ("Securities Act"), and notes that willful violations of the Securities Act can result in criminal penalties. See Securities Act Section 24, 15 U.S.C. §77x." (p.2)

"Finally, the Motion appears to suggest that American CryptoFed, Marian Orr, Scott Moeller, and/or Xiaomeng Zhou intend to willfully violate Section 5 of the Securities Act by asserting that "Respondent has the rights [sic] to issue restricted, untradeable, and non- transferable tokens to more than 500 persons" as long as Respondent subsequently files a Form 10." (p.8).

Without the opportunity to see how the Division applies the Howey Test to Locke and Ducat, American CryptoFed had to apply a preliminary defense in its reply to Division's Opposition, explaining why an investment contract does not exist in the case of Locke and Ducat.

3. **Motion for Leave to File A Motion:**
   RESPONDENT AMERICAN CRYPTOFED DAO LLC'S MOTION FOR LEAVE TO FILE A MOTION.

Facing serious allegations without legal justifications from Division, American CryptoFed repeatedly asked the Division to provide American CryptoFed with a Howey Test analysis to prove that Locke token and Ducat token are securities. However, the Division refused to do so. On January 23, 2022, American CryptoFed had no choice but to file this "Motion for Leave to File A Motion". The purpose is to compel the Division to provide a Howey Test Analysis or other legal justifications to prove that Locke token and Ducat token are securities.

4. **Conclusion: Execution of American CryptoFed Business Plan**

Through the Form 10 filed on September 16, 2021 and the Form S1 filed on September 17, 2021 with the SEC, by motions, numerous emails and letters, American CryptoFed has done its best to comply with the securities related laws and regulations and will continue doing so. Upon the receipt of the Commission's order instituting administrative proceedings ("OIP") on November 10, 2021, American CryptoFed filed its answer timely on December 6, 2021. In

addition, American CryptoFed filed the Motion to Lift the Stay Order on December 15, 2021, pursuant to **Rule 250. Dispositive motions** stating the following:

(a) Motion for a ruling on the pleadings. No later than 14 days after a respondent's answer has been filed, any party may move for a ruling on the pleadings on one or more claims or defenses, asserting that, even accepting all of the non-movant's factual allegations as true and drawing all reasonable inferences in the non-movant's favor, the movant is entitled to a ruling as a matter of law. **The hearing officer shall promptly grant or deny the motion (emphasis added).**

More than 5 months has passed, and the Commission has not yet made a decision regarding this Motion to Lift the Stay Order. Without complaining about the Commission's nondecision and indecision, American CryptoFed will continue waiting for the Commission's ruling with patience. However, American CryptoFed has a critical mission to accomplish. American CryptoFed has no choice but to move forwards to execute its business plan described in its Form 10 and Form S1 filing. The Locke token distribution to the contributors will be granted in paper contracts, free of charge. Locke token refundable auction will be conducted without moving funds. If the Division sends a Cease-and-Desist Order with a Howey Test analysis justification, all transactions can be reversed easily and timely without causing any damages to anyone. American CryptoFed is entitled to see the Division's Howey Test analysis so that we can make an effective defense and rebut the possible Cease-and-Desist Order, if any. The Fifth Amendment of the U.S. Constitution guarantees due process when someone is denied "life, liberty, or property."

Through the Form 10 filing, the Form S1 filing, answers, responses, replies, motions, letters, emails, conference calls, and other numerous communications with both the Division and the Commission, American CryptoFed consistently and repeatedly explained as to why Locke and Ducat are NOT securities. American CryptoFed had to apply a preliminary defense in its reply to the Division's Opposition to American CryptoFed's Exemption Motion, explaining why an investment contract does not exist in the case of Locke and Ducat. The quote below is from an article authored by two attorneys, Daniel L. McAvoy and Stephen A. Rutenberg of Polsinelli PC, which was published in the National Law Review, Volume XI, Number 327, Tuesday, November 23, 2021 and was entitled "DAOsing Rods and the Power of Enforcement Prediction".

https://www.natlawreview.com/article/daosing-rods-and-power-enforcement-prediction

The two authors' opinion echoes American CryptoFed's view in analyzing the SEC's action against American CryptoFed and can serve as a perfect conclusion to this request letter.

"On November 10, 2021 the US Securities and Exchange Commission (the SEC) announced that it had halted **the first ever attempt to register digital tokens issued by a decentralized autonomous organization (DAO) under the US federal securities laws**. American CryptoFed – **also the first DAO to take advantage of Wyoming's new "DAO Law"** that attempts to give DAOs legal status – filed Form 10 and subsequently filed a Form S-1 in an effort to register its digitals assets in the form of two coins designed to operate in tandem issued under the names Locke and Ducat.

In the SEC's announcement, they alleged that the registration statement filed by American CryptoFed contained a number of deficiencies, including purportedly misleading statements such as claims that the tokens were not intended to be securities and may be distributed on the form of registration statement used for registration of securities under an employee benefit plan. Perhaps just as importantly, the registration statement failed to provide substantive information about the issuer as is required to be disclosed in the form, such as information regarding its business, management, and financial condition. **One telling example of the deficient information concerns the issuer's ownership structure, which a pure DAO would be unable to produce by its very nature of being a DAO.**

A DAO is an organization encoded as a transparent computer program, controlled by the organization members and not by a central corporate entity, often through a governance token utilized on a blockchain….

This highlights several issues with being able to register DAO-issued tokens under the current regulatory framework. The SEC disclosure forms rightly require financial statements and business information regarding the issuer. That said, a DAO is not really an entity. There often is a supporting entity in place alongside a DAO, and in some instances an organization that isn't really decentralized may be mislabeled as a DAO, **but the DAO itself in almost all circumstances would not be able to produce financial statements prepared in accordance with generally accepted accounting principles. If the DAO does not have a definable business and truly is decentralized, then there may not be a management structure for which information can be provided.** Further, depending on the circumstances, the financial condition of a DAO may be of limited relevance to holders of the tokens, particularly if there truly is a level of decentralization that would allow the project to move forward even if the 'entity' sponsoring the token were to collapse (or the financial statements of the issuer could be looking at the wrong thing if the treasury of the DAO is not housed in that entity). **Simply put, this action implies that it will be difficult if not impossible for a true DAO to register its tokens under the current regulatory framework, even if it sets itself up in a way to attempt robust compliance.**" (All emphases in bold are added.)

Sincerely,

DocuSigned by:
Scott Moeller
A82E97EDD0C44FD...

Scott Moeller

President, American CryptoFed DAO

RESPONDENT

AMERICAN CRYPTOFED DAO LLC

EXHIBIT 3

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
ENFORCEMENT

June 3, 2022

BY EMAIL & UPS

Scott Moeller
CEO, American CryptoFed DAO
1607 Capitol Ave, Ste 327
Cheyenne, WY 82001
scott.moeller@americancryptofed.org

Re: *In the Matter of American CryptoFed DAO LLC*
AP File No. 3-20650

Dear Mr. Moeller:

I write to respond to your letter dated May 30, 2022. That letter described American CryptoFed DAO LLC's ("American CryptoFed") plan to "proceed with implementing its business plan as described in the Form 10 and Form S1" that American CryptoFed had previously filed with the Securities and Exchange Commission ("SEC" or "Commission").

Planned Distribution of Locke Tokens

Under Section 5 of the Securities Act of 1933 ("Securities Act"), any offering of securities needs to be registered or exempt from registration. If neither is true, the offering is illegal. There is no registration statement in effect for any offering of the Locke or Ducat tokens, and you have not identified any exemption which you assert applies to their distribution. Accordingly, your letter appears to announce a plan to willfully violate Section 5 of the Securities Act, and possibly other provisions of the federal securities laws, by offering and/or selling Locke tokens to investors without an effective registration statement, even though you have applied to register these same tokens as securities with the SEC. Violations of the provisions of the Securities Act can have serious consequences.

Your letter asserts that the distribution will be "as described in the Form 10 and Form S1." But the effectiveness of the Form 10 was stayed by the Commission's November 10, 2021 Order Instituting Proceedings. Even if the

Form 10 was effective (which it isn't), the distribution would still need to be pursuant to either the Form S-1 or another Securities Act registration statement, or pursuant to an exemption from registration. The Form S-1 is not yet effective as it contains a delaying amendment.[1] Moreover, the Commission, on November 9, 2021, issued an Order Directing Examination and Designating Officers Pursuant to Section 8(e) of the Securities Act of 1933 ("8(e) Examination Order"), which we are serving on you today along with this letter.

Please note that while Securities Act Section 5(a) prohibits the sale of securities unless there is a registration statement in effect (or an exemption applies), Securities Act Section 5(c) prohibits either the offer or sale of any security "while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title." 15 U.S.C. §77e(c). Thus, American CryptoFed can neither offer nor sell the Locke tokens pursuant to the Form S-1 while the 8(e) Examination Order is in effect.

You can expect to hear from us in the near future with requests pursuant to the 8(e) Examination Order, including requests to provide documents and testimony.

Request for a Cease-and-Desist Order

Your letter requests, without citing any provision of law, that the Division of Enforcement issue a Cease-and-Desist order. We believe you are again conflating the role of the Division of Enforcement and the Commission in this proceeding. The Division of Enforcement does not issue orders, that is the role of the Commission. Additionally, while some Commission administrative proceedings are captioned as "Cease and Desist" proceedings (*see, e.g.*, 15 U.S.C. §77h-1), there is no requirement that proceedings take that precise form in order to halt conduct. Here, the Commission's November 10, 2021 Order Instituting Proceedings stays the effectiveness of American CryptoFed's Form 10. At the conclusion of this proceeding, the Division of Enforcement may seek, and the Commission may enter, an order denying or revoking the

[1] The Form S-1 states in relevant part: "The registrant hereby amends this registration statement on such date or dates as may be necessary to delay its effective date until the registrant shall file a further amendment which specifically states that this registration statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act or until the registration statement shall become effective on such date as the Securities and Exchange Commission, acting pursuant to said Section 8(a), may determine.

registration of that Form 10. Neither the Commission nor the Division of Enforcement needs to use the phrase "Cease and Desist" in taking this step.

If you proceed with your announced plan to distribute the Locke tokens despite the November 9, 2021 8(e) Examination Order and the November 10, 2021 Order Instituting Proceedings, we reserve the right to take any and all appropriate steps.

Timing of This Proceeding

Your letter appears to complain about the length of time certain motions have been pending. We remind you that, at the outset of this proceeding, we suggested that we jointly ask the Commission to expedite this matter and you responded that "it would be inappropriate to ask 'the Commission to take this matter under consideration on an expedited basis.'" (Nov. 26, 2021 email from Marian Orr to Christopher Bruckmann). You then filed more than a dozen meritless motions that were so frivolous that the Commission instituted special procedures governing the filing of motions in this matter. You have opposed every effort we have made to move this case forward expeditiously, including through seeking a briefing schedule, and in response to our most recent attempt to obtain a briefing schedule requested that the Commission sanction the Division of Enforcement merely for seeking a briefing schedule. Thus, to the extent that the Commission has not acted as quickly as you now appear to want it to have acted, it is largely, if not entirely, because of your actions. We continue to believe that requesting an expedited briefing schedule is the appropriate course of action in this matter and suggest we meet and confer to discuss a joint motion requesting an expedited briefing schedule. Please let us know your availability for a meet-and-confer session.

Request for Howey Analysis

Your letter again requests our internal work product and analysis regarding why the Locke and Ducat tokens are securities. As we have explained, repeatedly, this information is privileged and protected from disclosure. We decline to provide it. We also remind you that you choose to register these tokens as securities by filing with the Commission a Form 10 which stated on the cover page that the Locke and Ducat tokens were "***Securities*** to be registered pursuant to Section 12(g) of the Act" (emphasis added).

Materially Misleading Statements in American CryptoFed's Filings with the Commission.

In addition to Securities Act Section 5's restrictions on unregistered offerings of securities, the federal securities laws contain prohibitions against materially misleading statements and omissions in connection with the offer and sale of securities. *See generally* 15 U.S.C. § 77q; 15 U.S.C. § 78j; 17 C.F.R. §240.10b-5. As we, and the Division of Corporation Finance, have repeatedly informed you, American CryptoFed's Form 10 appears to contain numerous materially misleading statements. *See, e.g.,* Division of Enforcement's Omnibus Memorandum in Opposition to Respondent's Motions for a More Definite Statement at 6-8 (and documents cited therein).

Your planned distribution, as described in your May 30, 2022 letter, appears to compound these problems. The letter outlines a plan to introduce Non-Fungible Token (or "NFT") certificates into the offering process. Neither American CryptoFed's Form 10, nor its Form S-1 contain any disclosures regarding the use of NFT certificates as part of the offering process. Based on your description of this process it certainly appears that this is material information that a reasonable investor would want to know, and its omission from both the Form 10 and Form S-1 raises questions as to whether American CryptoFed offering or selling the Locke or Ducat tokens in this manner would violate the antifraud provisions of the federal securities laws. *See, e.g.,* 17 C.F.R. §240.10b-5 ("It shall be unlawful for any person . . . to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security).

Please feel free to contact us to further discuss any of these issues.

Regards,

/s/ Christopher M. Bruckmann
Christopher M. Bruckmann

cc: Xiaomeng Zhou (by email to zhouxm@americancryptofed.org)

Encl: 8(e) Examination Order

RESPONDENT

AMERICAN CRYPTOFED DAO LLC

EXHIBIT 4

American CryptoFed

June 8, 2022
Via Electronic Email

Christopher M. Bruckmann, Trial Counsel, Trial Unit
Division of Enforcement, U.S. Securities and Exchange Commission
100 F Street, N.E., Washington, D.C. 20549-5949
Phone 202-551-5986, Email: bruckmannc@sec.gov

Cc:
Martin Zerwitz, Division of Enforcement, ZerwitzM@sec.gov
Michael Baker, Division of Enforcement, BakerMic@sec.gov
Christopher Carney, Division of Enforcement, CarneyC@sec.gov

Re: In the Matter of American CryptoFed, AP File No. 3-20650:
Cease and Desist Order Request

Dear Mr. Bruckmann,

Thank you for your June 3, 2022, letter responding to my Cease-and-Desist Order Request. I would like to reply to your letter to increase our mutual understanding and explore possible solutions, including but not limited to, your request in this letter for a meet-and-confer session.

A. 8(e) Examination Order

In your June 3, 2022, letter at page 2, you stated the following:

> The Form S-1 is not yet effective as it contains a delaying amendment. Moreover, the Commission, on November 9, 2021, issued an Order Directing Examination and Designating Officers Pursuant to Section 8(e) of the Securities Act of 1933 ("8(e) Examination Order"), which we are serving on you today along with this letter.

Is there any provision of law which allows the Division of Enforcement ("Division") to delay the service to American CryptoFed for approximately 174 days?

We were surprised by this order. We were ambushed by the Division's opaque tactic. The delay significantly damages our capacity to construe our defense strategy. If the order was served timely on us, we would have taken a different defense strategy. We believe this order should be nulled as if it were not issued.

B. Meet-and-Confer Session

In your June 3, 2022, letter at page 3, you stated the following:

> We continue to believe that requesting an expedited briefing schedule is the appropriate course of action in this matter and suggest we meet and confer to discuss a joint motion requesting an expedited briefing schedule. Please let us know your availability for a meet-and-confer session.

On December 15, 2021, over five months ago, American CryptoFed filed the Motion to Lift the Stay Order below pursuant to **Rule 250. Dispositive motions.**

> RESPONDENT AMERICAN CRYPTOFED DAO LLC'S MOTION TO LIFT THE ORDER THAT STAYS THE EFFECTIVENESS OF RESPONDENT'S FORM 10 ("Motion to Lift the Stay Order")

Rule 250 states the following:

(a) Motion for a ruling on the pleadings. No later than 14 days after a respondent's answer has been filed, any party may move for a ruling on the pleadings on one or more claims or defenses, asserting that, **even accepting all of the non-movant's factual allegations as true and drawing all reasonable inferences in the non-movant's favor, the movant is entitled to a ruling as a matter of law. The hearing officer shall promptly grant or deny the motion (emphasis added).**

According to Rule 250, American CryptoFed is entitled to a prompt "ruling as a matter of law" under the condition of "even accepting all of the non-movant's factual allegations as true and drawing all reasonable inferences in the non-movant's favor". American CryptoFed's Motion to Lift the Stay Order is a **dispositive motion**. "The hearing officer shall promptly grant or deny the motion", Rule 250 above mandates. Therefore, "a joint motion requesting an expedited briefing schedule" as you suggested above is not needed. What the Division and American CryptoFed should do jointly is to urge the Securities and Exchange Commission ("Commission") to comply with Rule 250 and to promptly make a ruling on American CryptoFed's Motion to Lift the Stay Order. If the Motion to Lift the Stay Order is granted, the implication is that the Division does not have a valid case, even under the condition of accepting all of the Division's factual allegations as true and drawing all reasonable inference in the Division's favor.

We suggest we have a meet-and-confer session to jointly file a motion, pursuant to Rule 250, to request the Commission to make a ruling on the Motion to Lift the Stay Order to which

American CryptoFed is entitled. It is overdue. Please let us know your availability for a meet-and-confer session for this purpose.

C. Non-Fungible Token ("NFT") Certificates

In your June 3, 2022, letter at page 4, you stated the following:

Your planned distribution, as described in your May 30, 2022 letter, appears to compound these problems. The letter outlines a plan to introduce Non-Fungible Token (or "NFT") certificates into the offering process. Neither American CryptoFed's Form 10, nor its Form S-1 contain any disclosures regarding the use of NFT certificates as part of the offering process. Based on your description of this process it certainly appears that this is material information that a reasonable investor would want to know, and its omission from both the Form 10 and Form S-1 raises questions as to whether American CryptoFed offering or selling the Locke or Ducat tokens in this manner would violate the antifraud provisions of the federal securities laws.

We only use the NFT certificates as a method of delivery, not as a product. The purpose is to avoid delivering a tradable and fungible Locke token. Once we finalize the design, we will file an amendment to the Form 10 filing to disclose the NFT process. We proactively disclosed our activities via EDGAR until the Commission issued the Stay Order on November 10, 2021, which stopped our Form 10 filing. We would like to ask the Commission to grant our Motion to Lift the Stay Order as soon as possible, so that we can constantly and proactively disclose our activities. To be clear, it is the Division and the Commission that stopped our efforts to timely disclose our activities by issuing the Stay Order on American CryptoFed's Form 10 filing which states the following:

CryptoFed is registering Locke and Ducat tokens with the SEC as utility tokens, not as securities, **for the purpose of disclosure**. Form 10 allows CryptoFed to voluntarily become a reporting company **for ongoing disclosure purposes** and becomes effective sixty (60) days after the initial filing date regardless of whether there are outstanding SEC comments. **Filing Form 10 does not mean CryptoFed concedes that Locke and Ducat tokens are securities** (emphasis added, page 5).

We may be able to find better method than NFT certificates for delivery. Then, we will not need to use the NFT certificate method.

D. Howey Test

In your June 3, 2022, letter at page 3, you stated the following:

Request for Howey Analysis

Your letter again requests our internal work product and analysis regarding why the Locke and Ducat tokens are securities. As we have explained, repeatedly, this information is privileged and protected from disclosure. We decline to provide it. We also remind you that you choose to register these tokens as securities by filing with the Commission a Form 10 which stated on the cover page that the Locke and Ducat tokens were "**Securities** to be registered pursuant to Section 12(g) of the Act" (emphasis added).

Does the Division have any legal justification to classify Locke and Ducat tokens as **Securities** other than by American CryptoFed's filing of a Form 10 with the Commission per se? There are only two possible scenarios for this answer.

i) If your answer is "No", American CryptoFed can just withdraw the Form 10 filing, because the Division cannot prove the Locke and Ducat tokens are securities. The Commission no longer has jurisdiction over Locke token and Ducat token and American CryptoFed no longer needs to register the two tokens with the Commission. American CryptoFed withdrew its Form S1 filing on June 6, 2022 for the reason that the Locke and Ducat tokens are not securities.

ii) If the Answer is "Yes", the Division is then obligated to provide us with a Howey Test to substantiate its "Yes" answer and justify the November 10, 2021 Order Instituting Proceedings. To be clear, this request is not and has never been a request for the Division's internal work product and analysis, whatsoever. As of today, the Division has failed to provide any substantive analysis in support of its position that the Locke and Ducat tokens are securities. In accordance with the plain text of 5 U.S. Code § 556 as shown below, the Division has the burden of proof to show that Locke token and Ducat token are securities, given that the Commission issued the November 10, 2021 Order Instituting Proceedings.

5 U.S. Code § 556 - Hearings; presiding employees; powers and duties; **burden of proof**; evidence; record as basis of decision
(d)Except as otherwise provided by statute, **the proponent of a rule or order has the burden of proof**. (Emphasis added).

The Supreme Court ruling in SEC v. W.J. Howey Co., 328 U.S. 293 (1946) stated the following:

The term "investment contract" is undefined by the Securities Act or by relevant legislative reports. But the term was common in many state "blue sky" laws in existence prior to the adoption of the federal statute and, although the term was also undefined by the state laws, it had been broadly construed by state courts so as to afford the investing public a full measure of protection. **Form was disregarded for substance and emphasis was placed upon economic reality.** An investment contract thus came to mean a contract or scheme for "the placing of capital or laying out of money in a way intended to secure income or profit from its employment." State v. Gopher Tire & Rubber Co., 146 Minn. 52, 56, 177 N.W. 937, 938. This definition was uniformly applied by state courts to a variety of situations where individuals were led **to invest money in a common enterprise** with the expectation that they would earn a profit solely through the efforts of the promoter or of some one other than themselves. *SEC v. W.J. Howey Co., 328 U.S. 293 (1946)* at 298. (Emphasis added).

The Division is aware of the Supreme Court ruling above, because on April 3, 2019, the Commission published on its website, [Framework for "Investment Contract" Analysis of Digital Assets], states the following at Note 6:

Whether a contract, scheme, or transaction is an investment contract is a matter of federal, not state, law and does not turn on whether there is a formal contract between parties. Rather, under the **Howey test**, "**form [is] disregarded for substance and the emphasis [is] on economic reality.**" Howey, 328 U.S. at 298. The Supreme Court has further explained that that the term security **"embodies a flexible rather than a static principle"** in order to meet the "variable schemes devised by those who seek the use of the money of others on the promise of profits." Id. at 299. (Emphasis added).

Furthermore, Chair Gary Gensler has repeatedly emphasized that the Commission complies with the Supreme Court's Howey Test to make judgements. There is no legal basis that the Division can carry out enforcement without providing a Howey Test analysis. Below are just three examples of Chair Gary Gensler's policy remarks with which the Division should be well aware.

On May 11, 2022:

My predecessor Jay Clayton said it, and I will reiterate it: Without prejudging any one token, most crypto tokens are investment contracts under the Supreme Court's Howey Test. https://www.sec.gov/news/speech/gensler-remarks-swaps-and-derivatives-association-annual-meeting-051122

On April 4, 2022:

The Supreme Court's 1946 Howey Test, which was about orange groves, says that an investment contract exists when there is the investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others.
https://www.sec.gov/news/speech/gensler-remarks-crypto-markets-040422

On Aug. 3, 2021:

The following decade, the Supreme Court took up the definition of an investment contract. This case said an investment contract exists when "a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." The Supreme Court has repeatedly reaffirmed this Howey Test.
https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03

E. Request for a Cease-and-Desist Order

In your June 3, 2022, letter at page 2 - 3, you stated the following:

The Division of Enforcement does not issue orders, that is the role of the Commission. Additionally, while some Commission administrative proceedings are captioned as "Cease and Desist" proceedings (*see, e.g.*, 15 U.S.C. §77h-1), there is no requirement that proceedings take that precise form in order to halt conduct. Here, the Commission's November 10, 2021 Order Instituting Proceedings stays the effectiveness of American CryptoFed's Form 10. At the conclusion of this proceeding, the Division of Enforcement may seek, and the Commission may enter, an order denying or revoking the registration of that Form 10. Neither the Commission nor the Division of Enforcement needs to use the phrase "Cease and Desist" in taking this step.

Given that the Division has failed to provide any substantive analysis in support of its position, we have concluded that the Division is unable to prove that Locke token and Ducat Token are securities. The logical implication is that the Division and the Commission have no jurisdiction over Locke and Ducat tokens. As a result, American CryptoFed should withdraw its Form 10 filing for the reason that the Locke and Ducat tokens are not securities, as we already did for the Form S1 filing.

Please let us know whether the Division agrees with our conclusion that the Division is unable to prove that Locke token and Ducat Token are securities in one week, on or before June 15, 2022. Once we receive the Division's agreement, we will file a Request for Withdrawal of Registration Statement on Form 10. After the withdrawal of both the Form 10 and Form S1 filing becomes effective, American CryptoFed will proceed with implementing its business plan exactly as described in the Form 10 and the Form S1. According to the Division, it is the Form

10 filing and the Form S1 filing that make Locke token and Ducat token securities, not the substance of the business plan itself.

However, if the Division does not agree with our conclusion that the Division is unable to prove that Locke token and Ducat token are securities, and if the Division perceives any violations of related securities laws and wants to prohibit American CryptoFed from implementing the business plan, please seek authorization from the Commission to issue a Cease-and-Desist Order within 30 calendar days, on or before July 8, 2022, as the Division did for the November 10, 2021, Order Instituting Proceedings and the 8(e) Examination Order.

If we do not receive a Cease-and-Desist order by July 8, 2022, including a Howey Test analysis or other legal justifications, we will assume that the Commission and the Division has no intention or authority to stop the implementation of business plan, because the Division is unable to prove that Locke token and Ducat token are securities. American CryptoFed has a critical mission to accomplish and has no choice now but to implement its business plan, while waiting for the Commission's ruling on all the pending motions with patience. We do not complain about the Commission's nondecision and indecision. However, we cannot afford to be left in limbo for any longer. The time is short, but the stakes are high. The Locke token distribution to the contributors will be granted in paper contracts, free of charge. The Locke token refundable auction will be conducted without moving funds. Even after we start the implementation on or after July 8, 2022, Locke tokens will not be allowed to trade until January 1, 2023. Therefore, the Commission can still send a Cease-and-Desist Order with a Howey Test analysis justification by December 31, 2022. All transactions can be reversed easily and timely without causing any inconvenience and damages to anyone. We intentionally allow sufficient time to reverse all the transactions, in case that the Commission decides to send us a Cease-and-Desist order including a Howey Test analysis justifying the Division's position.

Sincerely,

DocuSigned by:
Scott Moeller
A82E97EDD0C44FD...

Scott Moeller

President, American CryptoFed DAO

RESPONDENT

AMERICAN CRYPTOFED DAO LLC

EXHIBIT 5

American CryptoFed

June 13, 2022
Via Electronic Email

Justin Dobbie, Acting Office Chief
Office of Finance, Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E., Washington, D.C. 20549
Phone (202) 551-3469, dobbiej@sec.gov

Re: American CryptoFed DAO LLC
Request for Withdrawal of Registration Statement on Form S-1
File No.: 333-259603

Dear Mr. Dobbie,

Thank you for your email dated on June 13, 2022, requesting American CryptoFed "to file a Form RW WD to voluntarily withdraw the June 6 request for withdrawal of the Form S-1" which was filed with Securities and Exchange Commission ("SEC" or "Commission") on September 17, 2021. I also received your voice mail.

American CryptoFed seeks withdrawal of the Form S-1, because, as we have attested in the S-1, CryptoFed's Locke token and Ducat token are not securities. We will seriously consider your request for withdrawing "the June 6 request for withdrawal of the Form S-1", if you can apply the Howey Test to American CryptoFed's Locke and Ducat tokens to prove that Locke and Ducat are securities, and subject to the SEC's jurisdiction. As of today, the Division of Enforcement is still unable or unwilling to apply a Howey Test analysis to prove that American CryptoFed's Locke and Ducat tokens are securities (Exhibit 2, page 3) as shown below. For your background, I've included the most recent communications with the Division of Enforcement attached to this email as Exhibit 1 through 3.

Your letter again requests our internal work product and analysis regarding why the Locke and Ducat tokens are securities. As we have explained, repeatedly, this information is privileged and protected from disclosure. We decline to provide it. We also remind you that you choose to register these tokens as securities by filing with the Commission a Form 10 which stated on the cover page that the Locke and Ducat tokens were "Securities to be registered pursuant to Section 12(g) of the Act" (emphasis added).

Mr. Dobbie, as Acting Office Chief, does your Division or does the Commission have any legal justification to classify Locke and Ducat tokens as **Securities** other than by American CryptoFed's filing of a Form S-1 with the Commission per se?

In accordance with the plain text of 5 U.S. Code § 556 as shown below, your Division and the Commission have the burden of proof to show that Locke token and Ducat token are securities, given that you stated today in both voicemail and email formats that you will seek an order from the Commission to deny American CryptoFed's June 6 request for withdrawal of the Form S-1.

5 U.S. Code § 556 - Hearings; presiding employees; powers and duties; **burden of proof**; evidence; record as basis of decision
(d)Except as otherwise provided by statute, **the proponent of a rule or order has the burden of proof**. (Emphasis added).

To avoid any misunderstandings and to comply with the SEC's spirit of disclosure, I have copied your secure email sent to me, under my signature, which we will post on the American CryptoFed DAO website together with this email response.

I look forward to your written reply.

Sincerely,

DocuSigned by:
Scott Moeller
A82E97EDD0C44FD...

/s/ Scott Moeller

Scott Moeller
President, American CryptoFed DAO
scott.moeller@americancryptofed.org

OS Received 08/10/2022

American CryptoFed

--- Originally sent by dobbiej@sec.gov on Jun 13, 2022 10:09 AM ---

Mr. Moeller,

I am following up by email on my recent voicemail regarding American CryptoFed.

We have received your request to withdraw your pending Form S-1 that was filed on Form RW on June 6th. As I mentioned in my voicemail, we request that you file a Form RW WD to voluntarily withdraw the June 6 request for withdrawal of the Form S-1. If you do not withdraw the Form S-1 withdrawal request, we intend to recommend that the Commission deny the withdrawal request. If that occurs, any denial order would be publicly available.

You may reach me at (202) 551-3469 with any questions.

Sincerely,

Justin Dobbie

Acting Office Chief

Office of Finance, Division of Corporation Finance

RESPONDENT

AMERICAN CRYPTOFED DAO LLC

EXHIBIT 6

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

October 8, 2021

Marian Orr
Chief Executive Officer
American CryptoFed DAO LLC
1607 Capitol Avenue Suite 327
Cheyenne, WY 82001

Re: American CryptoFed DAO LLC
Registration Statement on Form 10
Filed September 16, 2021
File No. 000-56339

Dear Ms. Orr:

Our initial review of your registration statement indicates that it fails in numerous material respects to comply with the requirements of the Securities Exchange Act of 1934, the rules and regulations thereunder and the requirements of the form. More specifically,

- you have not included the financial information required by Items 303 and 305 of Regulation S-K and audited and interim financial statements required by Article 3 or Article 8 of Regulation S-X, as applicable;
- your disclosure on pages 6-29 does not present a clear and complete description of the general development of the business of the registrant or the terms, rights and obligations of the securities to be registered, as required by Items 101 and 202 of Regulation S-K, respectively;
- your registration statement does not include numerous other disclosure items that are required by Form 10, such as a beneficial ownership table that complies with Item 403 of Regulation S-K, an executive compensation table that complies with Item 402 of Regulation S-K, and exhibits that are required to be filed by Item 601 of Regulation S-K;
- you state your intention to file a Form S-8 upon the effectiveness of the Form 10 in 60 days, but you do not appear eligible to conduct the distributions you describe on such form; and
- you state throughout the registration statement that the Ducat and Locke tokens are not securities, which is inconsistent with your statement on the cover page and your use of this Form 10 to register the tokens as securities under Section 12(g) of the Exchange Act.

OS Received 08/10/2022

This registration statement will become effective on November 15, 2021. If the registration statement were to become effective in its present form, we would be required to consider what recommendation, if any, we should make to the Commission. We suggest that you consider filing a substantive amendment correcting the deficiencies or a request for withdrawal of the registration statement before it becomes effective.

Please contact Erin Purnell, Acting Legal Branch Chief, at (202) 551-3454 with any questions.

Sincerely,

Division of Corporation Finance
Office of Finance

RESPONDENT

AMERICAN CRYPTOFED DAO LLC

EXHIBIT 7

October 12, 2021

Via Electronic Submission and Email

Chairman and Commissioners
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Gary Gensler, 202-551-2100, Chair@sec.gov
Allison Herren Lee, (202) 551-2800, CommissionerLee@sec.gov
Hester M. Peirce, (202) 551-5080, CommissionerPeirce@sec.gov
Elad L. Roisman, (202) 551-2700, CommissionerRoisman@sec.gov
Caroline A. Crenshaw, (202) 551-5070, CommissionerCrenshaw@sec.gov
and
Erin Purnell, Acting Legal Branch Chief, Division of Finance,
(202) 551-3454, PurnellE@sec.gov

Re: American CryptoFed DAO LLC
Form 10 Filing No. 000-56339
Form S-1 Filing No. 333-259603

Dear SEC Commissioners and Staff,

My name is Marian Orr, and I serve as the CEO of American CryptoFed DAO (CryptoFed). Prior to CryptoFed, I was the mayor of Cheyenne, Wyoming (January 2017- January 2021).

On October 8, 2021, Ms. Purnell sent us two letters entitled "American CryptoFed DAO LLC Registration Statement on Form S-1" attached to this correspondence as **Exhibit B** and "American CryptoFed DAO LLC Registration Statement on Form 10" attached as **Exhibit C**, following our letter to Commissioner Peirce one day prior entitled "American CryptoFed DAO's

Filings of Form 10 and Form S-1" attached as **Exhibit A.** These three letters can provide you the basic background as to why I am writing to you now to request your assistance.

Chair Gensler stated on August 3, 2021 at the Aspen Security Forum:
"We already live in an age of digital public monies — the dollar, euro, sterling, yen, yuan. If that wasn't obvious before the pandemic, it has become eminently clear over the last year that we increasingly transact online.
Such public fiat monies fulfill the three functions of money: a store of value, unit of account, and medium of exchange.
No single crypto asset, though, broadly fulfills all the functions of money."[1] (Emphasis added).

However, after CryptoFed's Form 10 filing on September 16, 2021, and Form S-1 on the September 16, 2021, **Chairman Gensler's statement above is no longer true.**

The dollar, the euro, the pound and the yen have all failed to create effective demand for more than a decade, even at negative real interest rates per their central banks' monetary policies. At the same time, when those governments recently started deploying fiscal policies in an attempt to stimulate their economies, their central banks no longer have the capacity to raise interest rates to deter and cure inflation without risking derailing their economies which are already heavily burdened by huge debt accumulation. The existing monetary system of the Federal Reserve, combining money supply function, lending function and fractional reserve banking, has reached its limits and is unable to fulfil its dual mandate of price stability and maximum employment. The existing monetary systems of central banks based on fractional reserve banking have not only ended in a liquidity trap, but also a debt trap, from which they have no way out.

In our Form 10 and Form S-1 filings, with a point-by-point comparison to the Fed, we have systematically and scientifically presented how CryptoFed, as a decentralized autonomous blockchain-based monetary system, can solve the institutional and functional flaws plaguing all existing monetary systems of major central banks which Chairman Gensler enumerated as "digital public monies — the dollar, euro, sterling, yen, yuan" above.

[1] https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03

If Ms. Purnell was guided by Chairman Gensler's statement "No single crypto asset, though, broadly fulfills all the functions of money", we understand why she would have concluded that our Form 10 and Form S-1 filing has "deficiencies".

However, if Ms. Purnell compares our Form 10 and Form S-1 filing to the "digital public monies — the dollar, euro, sterling, yen, yuan" Chairman Gensler listed above, the "deficiencies" she referred to, would disappear immediately. This is because the "deficiencies" she referred to were the lack of attributes inherent to securities. These are attributes that the two tokens (Locke and Ducat) of a decentralized blockchain-based CryptoFed monetary system will never have.

In her letter regarding Form S-1 (Exhibit B), Ms. Purnell did not provide specific arguments to support her position. Let me then focus on rebutting her written arguments point by point regarding Form 10 (Exhibit C) to further illustrate my explanation.

1. *"...you have not included the financial information required by Items 303 and 305 of Regulation S-K and audited and interim financial statements required by Article 3 or Article 8 of Regulation S-X, as applicable;"*

On pages 23-25, Section 2.5 of Form 10 filing, we clearly explain CryptoFed does not have and will never have any revenue or costs. As Bitcoin uses its own native token BTC to reward miners for doing work to maintain its network, so does CryptoFed. From the perspective of both the Bitcoin network and the CryptoFed network, there is no revenue or costs borne by the networks. The revenue and costs are on the recipient side of token rewards, not on the side of the Bitcoin or CryptoFed networks. For both Bitcoin and CryptoFed there are no financial information or statement to be provided or audited.

2. *"...your disclosure on pages 6-29 does not present a clear and complete description of the general development of the business of the registrant or the terms, rights and obligations of the securities to be registered, as required by Items 101 and 202 of Regulation S-K, respectively;"*

Marian Orr, CEO
1607 Capitol Ave., Suite 327, Cheyenne, WY 82001
Phone: (307) 206 - 4210 | Email: marian.orr@americancryptofed.org

On page 10, we state "To the extent that no entity has a similar mission, CryptoFed does not have direct competition. Central banks, including the Federal Reserve System, are close competitors, but CryptoFed fundamentally differentiates from central banks in the following aspects outlined below." Then, we compare CryptoFed with the Fed point by point in detail in all the major aspects of a monetary system: **Inflation Target, Fiscal Policy Tools, Money Supply Mechanism, Monetary Policy Tools, Inflation Control for Stable Price Mandate, Effective Demand for Maximum Employment, Boom and Bust Business Cycles (Economic Expansion and Contraction), Money Supply Automation and Open Market Operations.**

As a matter of fact, the CryptoFed money supply mechanism is akin to "The Chicago Plan" which was proposed and supported by a large number of leading U.S. macroeconomists, including professor Henry Simons of the University of Chicago and Irving Fisher of Yale University, following the Great Depression in the 1930's. The primary difference is that CryptoFed pursues a denationalization of its money supply mechanism, while The Chicago Plan pursues the nationalization of a money supply mechanism, just not through banks. The "The Chicago Plan" was revisited by IMF after the housing bubble collapse in 2008. In 2012, IMF published a paper entitled "The Chicago Plan Revisited" which validates CryptoFed's 100% reserve banking model for decoupling money supply function from bank lending function. [2]

We have provided all these detailed descriptions with academic supporting papers in our Form 10 filing. Ms. Purnell failed to specify what is missing in order to "present a clear and complete description of the general development of the business of the registrant" as a monetary system.

The CryptoFed Constitution attached as Exhibit 1 of the Form 10 filing, is specially mentioned four times (page 8, 10, 18 and 21) outlining the rights and obligations of Locke and Ducat. Furthermore, on page 31, Section 6, [Item 4: Security Ownership of Certain Beneficial Owners and Management], we clearly state "As the founding organization, MShift is the sole member of

[2] Jaromir Benes and Michael Kumhof, 2012, page 4 - 5, The Chicago Plan Revisited, IMF Working Paper, https://www.imf.org/external/pubs/ft/wp/2012/wp12202.pdf

CryptoFed whose powers and rights will completely and irreversibly become delegated to Locke token holders as defined in the CryptoFed Constitution."

Ms. Purnell did not identify what specific rights and obligations are missing. We should have freedom to define the rights and obligations of tokens via the CryptoFed Constitution. By providing the CryptoFed Constitution, we should meet the disclosure purpose of Form 10 filing.

3. *"...your registration statement does not include numerous other disclosure items that are required by Form 10, such as a beneficial ownership table that complies with Item 403 of Regulation S-K, an executive compensation table that complies with Item 402 of Regulation S-K, and exhibits that are required to be filed by Item 601 of Regulation S-K;"*

The facts do not support Ms. Purnell's statement. From page 31-33, we disclose:

i. Executive Compensation Table

We disclosed that I am the only executive, and my compensation is disclosed on page 32, Form 10, Section 8. Item 6: Executive Compensation and on page 3-4, Section 4.4, the CryptoFed Constitution (Exhibit 1).

As a DAO (Decentralized Autonomous Organization), by design, there is no hierarchy, such as an executive branch, board of directors, or advisory board at CryptoFed. For the time being, the current Chief Executive Officer (CEO) is the only executive, a symbolic position held by me, to communicate with regulators, together with MShift, because regulators, such as SEC, may still require contact people and the founding company to be responsible for document filings.

ii. Beneficial Ownership Table

We disclosed that MShift Inc is the sole Beneficial Owner as of the time of filing on page 31, Form 10, Section 6. Item 4: Security Ownership of Certain Beneficial

Owners and Management. and on page 3, Section 4.1, the CryptoFed Constitution (Exhibit 1).

CryptoFed is a Wyoming DAO LLC and does not issue any securities. As the founding organization, MShift is the sole member of CryptoFed whose powers and rights will completely and irreversibly become delegated to Locke token holders as defined in the CryptoFed Constitution. However, the delegation of powers and rights will become automatically effective after CryptoFed completes its Form S-1 filing with the SEC for Locke and Ducat token registration. MShift has not formally started executing the initial allocation plan for the Locke token discussed in Item1: Business yet.

iii. Exhibits Required by Item 601 of Regulation S-K

We filed Exhibit 1 the CryptoFed Constitution (Bylaws), Exhibit 3 Articles of Organization and Exhibit 2 the Ducat Economic Zone which is a material contract which we will discuss with important partners, such as merchants, banks, compliant exchanges, and local governments.

4. *"...you state your intention to file a Form S-8 upon the effectiveness of the Form 10 in 60 days, but you do not appear eligible to conduct the distributions you describe on such form;"*

Ms. Purnell did not provide any supporting legal arguments as to why CryptoFed is not eligible to file a Form S-8 upon the effectiveness of the Form 10, although we have disclosed on page 12-13, Section 14.6, of the CryptoFed Constitution as below:

"This Constitution will serve as the Equity Incentive Plan for CryptoFed to issue non-qualified stock options and incentive stock options (ISO) to service providers defined as directors, employees, and consultants pursuant to related laws and regulations." After the Form 10 filing becomes effective, all stock options will be subject to laws and regulations regarding equity incentive plans for a public company. Within one week after the Form 10

Marian Orr, CEO
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Phone: (307) 206 - 4210 | Email: marian.orr@americancryptofed.org

filing, CryptoFed will file Form S-8 and thereby extend the equity incentive plan to service providers beyond 500-person threshold limitation of related securities laws."

5. *"...you state throughout the registration statement that the Ducat and Locke tokens are not securities, which is inconsistent with your statement on the cover page and your use of this Form 10 to register the tokens as securities under Section 12(g) of the Exchange Act."*

Currently, SEC does not provide a better form than the Form 10 for CryptoFed to disclose information to the SEC and the general public. If we had not filed Form 10 for disclosure, the SEC could possibly prosecute CryptoFed under the leadership of Chairman Gensler who publicly stated on August 3, 2021 "**No single crypto asset**, though, broadly fulfills all the functions of money."[3] (Emphasis added). In other words, it is apparent that Chairman Gensler believes that every single asset is subject to the SEC's jurisdiction.

CryptoFed had no choice but to file Form 10 to avoid prosecution.

Ms. Purnell failed to identify and specify one single item of important information, which does exist, but we did not disclose. Ms. Purnell concluded our Form 10 filing has "deficiencies" by asking us to provide information which does not exist. We believe that Ms. Purnell emphasizes form rather than substance. If she followed the SEC's own [Framework for "Investment Contract" Analysis of Digital Assets], Note 6 below to first find out whether the information does exist, but we have failed to provide, and then analyze whether there are deficiencies, she would agree with us that we have met all the disclosure requirements.

[Rather, under the Howey test, **"form [is] disregarded for substance and the emphasis [is] on economic reality."** Howey, 328 U.S. at 298. The Supreme Court has further explained that that the term security **"embodies a flexible rather than a static principle"**…...][4] (emphasis added).

[3] https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03
[4] https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets

From the perspective of disclosing all existing material and substantial information, CryptoFed has met the disclosure requirements. If we are asked to disclose information which does not exist and will never exist, it is highly possible that the Securities Laws were not designed for the CryptoFed monetary system and should not apply to CryptoFed.

If the SEC is not ready to make a declaration that CryptoFed is out of the SEC's jurisdiction, to meet the spirit of Securities Laws' transparency and disclosure, please allow our Form 10 filing to become effective in time so that we can continue disclosing material and substantial information to related parties and the general public. If SEC identifies any material and substantial information which does exist, but we have failed to disclose, please do not hesitate to let us know exactly what it is. We fully intend to comply with the SEC's requirements. What we are unable to do is to disclose information to the SEC and the general public, which does not exist and will never exist. Also, for the same reason, we believe that the SEC should continue reviewing our Form S-1 and declare its effectiveness without unreasonable delay.

I look forward to hearing from you.

Sincerely yours,

DocuSigned by:
Marian Orr
AE52AD38E6AC4EC...

Marian Orr
CEO, American CryptoFed DAO

RESPONDENT

AMERICAN CRYPTOFED DAO LLC

EXHIBIT B

July 31, 2022

Via Electronic Email

Justin Dobbie, Acting Office Chief,
Office of Finance, Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E., Washington, D.C. 20549
Phone (202) 551-3469, dobbiej@sec.gov

CC:
Christopher M. Bruckmann, Division of Enforcement, bruckmannc@sec.gov
Christopher Carney, Division of Enforcement, CarneyC@sec.gov
Martin Zerwitz, Division of Enforcement, ZerwitzM@sec.gov
Michael Baker, Division of Enforcement, BakerMic@sec.gov
John Lucas, Division of Enforcement, LucasJ@sec.gov

Re: American CryptoFed DAO LLC's Fair Notice Affirmative Defense
Form 10 File No.: 000-56339 and Form S-1 File No.: 333-259603

Dear Mr. Dobbie,

On July 22, 2022, I sent you two letters requesting you to provide clear guidance as to how to file the Form 10 (July 22, 2022 Form 10 Letter) and Form S-1 (July 22, 2022 Form S-1 Letter) respectively to register American CryptoFed's Locke token and Ducat token. As of today, I have not yet received your response. Therefore, this electronic communication is the follow-up letter to urge you to respond to my earlier July 22, 2022 letters.

In the two July 22, 2022 letters addressed to you as the Acting Office Chief of the Division of Corporation Finance and cc'd to individuals in the Commission's Division of Enforcement, I outlined the facts supporting American CryptoFed's assertion that American CryptoFed has lacked Constitutionally adequate fair notice from the Securities and Exchange Commission ("Commission") as well as from its Divisions of Corporation Finance and

Enforcement in particular. In the two July 22, 2022 letters, I cited the order in *SEC v. Ripple Labs* issued by Judge Analisa Torres of the Southern District of New York on March 11, 2022. ("Judge Analisa Torres's Order"). In the order, Judge Torres cited *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) to allow Ripple's fair notice affirmative defense. Please see the following link at page 6.

https://www.nysd.uscourts.gov/sites/default/files/2022-03/Ripple%20Strike%20Order.pdf

It is worth emphasizing that in *F.C.C. v. Fox Television Stations, Inc.,* 567 U.S. 239, 253 (2012), in addition to requiring clarity of the compliance requirements, the Supreme Court also expressly required clear guidance as described below as a essential component of fair notice (emphasis added):

A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); *Papachristou* v. *Jacksonville*, 405 U. S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids' " (quoting *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939); alteration in original)). **This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment**. See *United States* v. *Williams*, 553 U. S. 285, 304 (2008). It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Ibid.* As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See *id.,* at 306.

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: **first, that regulated parties should know what is required of them so they may act accordingly; second**, **precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way**. See *Grayned* v. *City of Rockford*, 408 U. S. 104, 108– 109 (1972). When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

I

Supreme Court Opinion in *F.C.C. v. Fox Television Stations, Inc* Requires:
"first, that regulated parties should know
what is required of them so they may act accordingly"

In accordance with the Supreme Court' opinions in *F.C.C. v. Fox Television Stations, Inc,* the Commission and its Divisions of Corporation Finance and Enforcement must not only prove to the American CryptoFed that the Locke and Ducat tokens are securities so that American CryptoFed "may act accordingly", but also provide American CryptoFed with "precision and guidance" so that the Commission and its Divisions of Corporation Finance and Enforcement "do not act in an arbitrary or discriminatory way." As of today, the Commission as a whole and its Divisions of Corporation Finance and Enforcement in particular have failed in both dimensions.

To the extent that:

i) the Commission and its Divisions of Corporation Finance and Enforcement could not provide American CryptoFed with a Howey Test Analysis or any other legal justification to prove that the Locke and Ducat tokens are securities,

ii) the Division of Corporation Finance (which stated "the withdrawal of the registration statement does not mean that the staff agrees with your assertion in the withdrawal request that the Locke token and Ducat token are not securities"), contradicts the Division of Enforcement (which stated "you choose to register these tokens as securities by filing with the Commission a Form 10 which stated on the cover page that the Locke and Ducat tokens were "Securities to be registered pursuant to Section 12(g) of the Act"), and

iii) the Division of Corporation Finance and the Division of Enforcement, despite multiple requests, did not answer American CryptoFed's question "Does the Division have any legal justification to classify Locke and Ducat tokens as Securities other than by American CryptoFed's filing of a Form 10 with the Commission per se?"

it is clear that the Commission as a whole and its Divisions of Corporation Finance and Enforcement in particular have failed to provide American CryptoFed, as the regulated party, with "what is required of them so they may act accordingly". (for factual background citations, please see July 22, 2022 Form 10 Letter and July 22, 2022 Form S-1 Letter).

II
Supreme Court Opinion in *F.C.C. v. Fox Television Stations, Inc* requires: "second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."

To the extent that, despite multiple requests, Ms. Purnell at the Division of Corporation Finance did not respond to American CryptoFed's October 12, 2021 letter (which asserted "Ms. Purnell failed to identify and specify one single item of important information, which does exist, but we did not disclose. Ms. Purnell concluded our Form 10 filing has "deficiencies" by asking us to provide information which does not exist)". Under your supervision, the Division of Corporation Finance has violated the Supreme Court's opinion stating "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." (for the factual background citation, please see July 22, 2022 Form 10 Letter and July 22, 2022 Form S-1 Letter). As a matter of fact, rather than providing American CryptoFed with the necessary "precision and guidance", the Commission and its Divisions of Corporation Finance and Enforcement issued the Order Instituting Administrative Proceedings (OIP) instead to stop American CryptoFed's efforts to complete the Form 10 registration statement for compliance and disclosure purposes. What the Commission and its Divisions of Corporation Finance and Enforcement have effectively done, is the polar opposite to the Supreme Court' opinions in *F.C.C. v. Fox Television Stations, Inc.*. Together, the Commission and its Divisions of Corporation Finance and Enforcement have jointly and willfully abused the OIP process for the sole purpose of obstructing American CryptoFed's consistent efforts to comply with the related securities laws, while American CryptoFed has received no clarity from the Commission and its Divisions of Corporation Finance and Enforcement to know whether or not these securities laws are applicable to American CryptoFed DAO's business model. This obstruction was vividly demonstrated by the fact that the Commission violated Section 12(j) of the Securities Exchange Act of 1934 by including a Stay Order in the OIP, although the plain text of the statue below

explicitly prohibits the Commission from issuing such a Stay Order without a hearing conducted "on the record."

The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, **to suspend the effective date of**, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, **on the record after notice and opportunity for hearing,** that the issuer, of such security has failed to comply with any provision of this chapter or the rules and regulations thereunder." (15 U.S.C. § 78l(j)) (Emphases added).

Although more than seven (7) months has passed since American CryptoFed filed on December 15, 2021, a motion for a ruling on the pleadings to Lift the Stay Order pursuant to Rule 250 (a) below, which has a specific mandate "[t]he is hearing officer shall promptly grant or deny the motion, the Commission has not yet made any decision on the motion.

Rule 250. Dispositive motions. (a) Motion for a ruling on the pleadings. No later than 14 days after a respondent's answer has been filed, any party may move for a ruling on the pleadings on one or more claims or defenses, asserting that, even accepting all of the non-movant's factual allegations as true and drawing all reasonable inferences in the non-movant's favor, the movant is entitled to a ruling as a matter of law. **The hearing officer shall promptly grant or deny the motion** (emphasis added).

Therefore, it is fair to say that the Commission and its Divisions of Corporation Finance and Enforcement have knowingly and willfully violated not only Section 12(j) of the Securities Exchange Act of 1934, but also the Commission's own Rule 250 (a). The actions of the Commission and its Divisions of Corporation Finance and Enforcement are antithetical to the "precision and guidance" required by the Supreme Court's opinion in *F.C.C. v. Fox Television Stations, Inc.*

III
As-applied Challenge via Summary Judgment (Disposition): American CryptoFed Is Entitled to Fair Notice Affirmative Defense

In accordance with the Supreme Court's opinion in *F.C.C. v. Fox Television Stations, Inc* (which stated "**first, that regulated parties should know what is required of them so they may act accordingly; second**, **precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way**."), American CryptoFed through this

follow-up letter requests **once again** that the Division of Corporation Finance provides American CryptoFed with, i) a Howey Test Analysis or other legal justification to prove that the Locke and Ducat tokens are securities, and ii) the "precision and guidance" as to how to complete the registration filings of Locke token and Ducat token with the Commission. Please let us know in one week, on or by August 7, 2022, what information the Division of Corporation Finance still needs, in addition to the information which American CryptoFed has already furnished or promised to furnish to the Commission via the filings of Form 10 and Form S-1, both of which were filed in September 2021, more than ten (10) months ago. As long as the information does exist or will exist, American CryptoFed will furnish the information under the penalty of perjury. If you need more time to provide me with the list of information you need, please let me know with a written request. American CryptoFed is very flexible.

However, if you continue to fail to provide American CryptoFed with the "precision and guidance" as required by the Supreme Court opinions above as to how to complete the registration filings of Locke token and Ducat token with the Commission, American CryptoFed will be entitled to assert the following affirmative defenses as needed after launching its Locke and Ducat tokens in the near future:

- Locke token and Ducat Token are not securities.
- There is no violation.
- There is a lack of due process and fair notice.

As described in Judge Analisa Torres's Order below in *SEC v. Ripple Labs*, American CryptoFed will bring an "as applied" challenge, not a facial challenge to the statutes and regulations.

The parties agree that Ripple is not bringing a facial challenge to the statute. See SEC Mem. at 16; Ripple Mem. at 15, ECF No. 172. Because the Court is reviewing **an "as applied" challenge**, the Court shall consider "the application of the challenged statute to the person challenging the statute based on the charged conduct." United States v. Smith, 985 F. Supp. 2d 547, 592–93 (S.D.N.Y. 2014), aff'd sub nom. United States v. Halloran, 664 F. App'x 23 (2d Cir. 2016). **Such a consideration requires the Court to evaluate whether a law can be constitutionally applied to the challenger's individual circumstances**. Copeland v. Vance, 893 F.3d 101, 110 (2d Cir. 2018). This assessment cannot be conducted in the abstract; rather, the Court must

consider whether the party claiming a lack of notice has shown "that the statute in question provided insufficient notice that his or her behavior at issue . . . was prohibited." Id. at 117 (quotation marks omitted). Therefore, the Court must first determine what Ripple did before assessing whether the statute fairly apprised Ripple that its conduct was prohibited. Cf. id. (Judge Analisa Torres's Order. Page 8, emphasis added).

Today, American CryptoFed already has more than enough undisputed evidence to allege, assert, and attest via Summary Judgment (Disposition) that the Commission and its Divisions of Corporation Finance and Enforcement in particular, i) have failed to provide fair notice, by refusing multiple requests from American CryptoFed for a Howey Test Analysis, as to whether American CryptoFed's business model is prohibited or not, and ii) have failed to provide fair notice of "precision and guidance" as to how American CryptoFed can file proper forms with the Commission, including but not limited to Form 10 and Form S-1(when the requested information by the Form 10 and S-1 does not exist and never shall exist within the American CryptoFed DAO's structure), to complete a required registration statement for compliance purposes. If Form 10 and Form S-1 are **NOT** the proper forms, **you must provide a proper mechanism** so that American CryptoFed can complete the initial registration statements and furnish information for ongoing disclosures. The two July 22, 2022 letters addressed to your attention and this follow-up letter are to provide the Commission and its Divisions of Corporation Finance and Enforcement in particular with additional opportunities to cure their willful ongoing violation of the Supreme Court's opinions in *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) which was cited in Judge Torres's Order described in *SEC v. Ripple Labs*.

I look forward to your written response.

Sincerely,

DocuSigned by:
Scott Moeller
A82E97EDD0C44FD...

/s/ Scott Moeller
Scott Moeller
President, American CryptoFed DAO
scott.moeller@americancryptofed.org

RESPONDENT

AMERICAN CRYPTOFED DAO LLC

EXHIBIT C

Received: Aug 3, 2022 9:40 AM
Expires: Nov 1, 2022 9:40 AM
From: dobbiej@sec.gov
To: scott.moeller@americancryptofed.org
Cc: bruckmannc@sec.gov
Subject: smail American CryptoFed

Mr. Moeller,

We have received your two emails dated July 22, 2022 and your email dated August 1, 2022. In our letters dated October 8, 2021 regarding the registration statements on Forms 10 and S-1, we communicated that each such filing failed to comply with the requirements of the Securities Act of 1933, the Securities Exchange Act of 1934, the related rules and regulations, and the requirements of the forms, as applicable. We note that you did not file a substantive amendment in either instance to correct the deficiencies.

We remind you that the company and its management are responsible for the accuracy and adequacy of their disclosures, notwithstanding any review, comments, action or absence of action by the staff. To the extent that you are requesting guidance on the legal, accounting and disclosure requirements of Form 10 for the registration of a class or classes of securities and Form S-1 for a registered public offering of securities, in each case as applicable to American CryptoFed, please consult with your legal and accounting advisors.

Sincerely,

Justin Dobbie

OS Received 08/10/2022

RESPONDENT

AMERICAN CRYPTOFED DAO LLC

EXHIBIT D

American CryptoFed

August 4, 2022

Via Electronic Email

Justin Dobbie, Acting Office Chief,
Office of Finance, Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E., Washington, D.C. 20549
Phone (202) 551-3469, dobbiej@sec.gov

CC:
Christopher M. Bruckmann, Division of Enforcement, bruckmannc@sec.gov
Christopher Carney, Division of Enforcement, CarneyC@sec.gov
Martin Zerwitz, Division of Enforcement, ZerwitzM@sec.gov
Michael Baker, Division of Enforcement, BakerMic@sec.gov
John Lucas, Division of Enforcement, LucasJ@sec.gov

Re: American CryptoFed DAO LLC's Fair Notice Affirmative Defense
Form 10 File No.: 000-56339 and Form S-1 File No.: 333-259603

Dear Mr. Dobbie,

Thank you for your secure email yesterday stating the following.

We have received your two emails dated July 22, 2022 and your email dated August 1, 2022. In our letters dated October 8, 2021 regarding the registration statements on Forms 10 and S-1, we communicated that each such filing failed to comply with the requirements of the Securities Act of 1933, the Securities Exchange Act of 1934, the related rules and regulations, and the requirements of the forms, as applicable. We note that you did not file a substantive amendment in either instance to correct the deficiencies.

We remind you that the company and its management are responsible for the accuracy and adequacy of their disclosures, notwithstanding any review, comments, action or absence of action by the staff. To the extent that you are requesting guidance on the legal, accounting and disclosure requirements of Form 10 for the registration of a class or classes of securities and Form S-1 for a registered public offering of securities, in each case as applicable to American CryptoFed, please consult with your legal and accounting advisors.

I
October 8, 2021 Letters from the Division of Corporation Finance & American CryptoFed DAO's October 12, 2021 Response

On October 12, 2021, American CryptoFed had already responded to the two October 8, 2021 letters sent to us by Ms. Erin Purnell, Acting Legal Branch Chief of the Division of

Corporation Finance. Please see Exhibit 7 of my July 22, 2022 letter on Form 10 as well as Exhibit 8 of my July 22, 2022 letter on Form S-1. For your convenience, I've also attached the October 12, 2021 Letter to this email communication. In this October 12, 2021 Letter, after addressing and rebutting point by point all the so called "deficiencies" raised by Ms. Purnell, we concluded the following at page 7-8:

Ms. Purnell failed to identify and specify one single item of important information, which does exist, but we did not disclose. Ms. Purnell concluded our Form 10 filing has "deficiencies" by asking us to provide information which does not exist…

From the perspective of disclosing all existing material and substantial information, CryptoFed has met the disclosure requirements. If we are asked to disclose information which does not exist and will never exist, it is highly possible that the Securities Laws were not designed for the CryptoFed monetary system and should not apply to CryptoFed…

If SEC identifies any material and substantial information which does exist, but we have failed to disclose, please do not hesitate to let us know exactly what it is. We fully intend to comply with the SEC's requirements. What we are unable to do is to disclose information to the SEC and the general public, which does not exist and will never exist.

As I emphasized to you in my two July 22, 2022 letters, Ms. Purnell never responded to our October 12, 2021 Letter.

Mr. Dobbie, the same issue remains unanswered. Can you respond to our October 12, 2021 Letter so that American CryptoFed clearly understand how to disclose information which does not exist and will never exist, given that in your reply yesterday, you emphasized that by Ms. Purnell's October 8, 2022 letter, "we communicated that each such filing failed to comply with the requirements of the Securities Act of 1933, the Securities Exchange Act of 1934, the related rules and regulations, and the requirements of the forms, as applicable"?

II
Supreme Court Opinions in *F.C.C. v. Fox Television Stations, Inc*

We are requesting from you answers and clear guidance pursuant to the Supreme Court's opinions in *F.C.C. v. Fox Television Stations, Inc.,* 567 U.S. 239, 253 (2012) (emphasis added):

A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See Connally v. General Constr. Co., 269 U. S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that **men of common intelligence** must necessarily guess at its meaning

and differ as to its application, violates the first essential of due process of law"); Papachristou v. Jacksonville, 405 U. S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that **'[all persons] are entitled to be informed as to what the State commands or forbids'** " (quoting Lanzetta v. New Jersey, 306 U. S. 451, 453 (1939); alteration in original)). **This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment.** See United States v. Williams, 553 U. S. 285, 304 (2008). It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide **a person of ordinary intelligence** fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." Ibid. As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See id., at 306.

Even when speech is not at issue, the **void for vagueness doctrine** addresses at least two connected but discrete due process concerns: **first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.** See Grayned v. City of Rockford, 408 U. S. 104, 108– 109 (1972). When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

We belong to the group of "men of common intelligence" and "a person of ordinary intelligence" to whom your Division of Corporation Finance is required by the Supreme Court's opinions above to provide the necessary "precision and guidance". If you cannot do so, you should clearly let us know that the SEC's Form 10 and Form S-1 do not apply to American CryptoFed pursuant to "the void for vagueness doctrine" held by the Supreme Court in *F.C.C. v. Fox Television Stations, Inc*.

III
Sophisticated Lawyers' Opinions

Neither is it possible for "a person of ordinary intelligence" like American CryptoFed to know how to disclose information which does not exist and will never exist, nor do sophisticated cryptocurrency lawyers know. The quote below is from an article authored by two attorneys, Daniel L. McAvoy and Stephen A. Rutenberg of Polsinelli PC, which was published in the National Law Review, Volume XI, Number 327, on Tuesday, November 23, 2021 and was entitled "DAOsing Rods and the Power of Enforcement Prediction". The two authors' opinion below, which was also included as Exhibit 2 at page 5 in my July 22, 2022 letter to you

regarding the Form 10 filing, echoes American CryptoFed's view in analyzing the SEC's action against American CryptoFed.

https://www.natlawreview.com/article/daosing-rods-and-power-enforcement-prediction

On November 10, 2021 the US Securities and Exchange Commission (the SEC) announced that it had halted **the first ever attempt to register digital tokens issued by a decentralized autonomous organization (DAO) under the US federal securities laws**. American CryptoFed – **also the first DAO to take advantage of Wyoming's new "DAO Law"** that attempts to give DAOs legal status – filed Form 10 and subsequently filed a Form S-1 in an effort to register its digitals assets in the form of two coins designed to operate in tandem issued under the names Locke and Ducat.

In the SEC's announcement, they alleged that the registration statement filed by American CryptoFed contained a number of deficiencies, including purportedly misleading statements such as claims that the tokens were not intended to be securities and may be distributed on the form of registration statement used for registration of securities under an employee benefit plan. Perhaps just as importantly, the registration statement failed to provide substantive information about the issuer as is required to be disclosed in the form, such as information regarding its business, management, and financial condition. **One telling example of the deficient information concerns the issuer's ownership structure, which a pure DAO would be unable to produce by its very nature of being a DAO.**

A DAO is an organization encoded as a transparent computer program, controlled by the organization members and not by a central corporate entity, often through a governance token utilized on a blockchain....

This highlights several issues with being able to register DAO-issued tokens under the current regulatory framework. The SEC disclosure forms rightly require financial statements and business information regarding the issuer. That said, a DAO is not really an entity. There often is a supporting entity in place alongside a DAO, and in some instances an organization that isn't really decentralized may be mislabeled as a DAO, **but the DAO itself in almost all circumstances would not be able to produce financial statements prepared in accordance with generally accepted accounting principles. If the DAO does not have a definable business and truly is decentralized, then there may not be a management structure for which information can be provided.** Further, depending on the circumstances, the financial condition of a DAO may be of limited relevance to holders of the tokens, particularly if there truly is a level of decentralization that would allow the project to move forward even if the 'entity' sponsoring the token were to collapse (or the financial statements of the issuer could be looking at the wrong thing if the treasury of the DAO is not housed in that entity). **Simply put, this action implies that it will be difficult if not impossible for a true DAO to register its tokens under the current regulatory framework, even if it sets itself up in a way to attempt robust compliance.** (All emphases in bold are added.)

When your Division of Corporation Finance and Mr. Bruckmann (including lawyers at his team) at the Division of Enforcement applied the securities related laws and regulations to American CryptoFed's case, the securities related laws and regulations are "so standardless that

it authorizes or encourages seriously discriminatory enforcement." Your statement ("the withdrawal of the registration statement does not mean that the staff agrees with your assertion in the withdrawal request that the Locke token and Ducat token are not securities") contradicts Mr. Bruckmann's statement ("you choose to register these tokens as securities by filing with the Commission a Form 10 which stated on the cover page that the Locke and Ducat tokens were "Securities to be registered pursuant to Section 12(g) of the Act"). We followed Mr. Bruckmann's statement and withdrew the Form 10. However, you still insisted that "the withdrawal of the registration statement does not mean that the staff agrees with your assertion in the withdrawal request that the Locke token and Ducat token are not securities". By your statement, you created confusion rather than the necessary "precision and guidance" required by the Supreme Court's opinions in *F.C.C. v. Fox Television Stations, Inc.* Therefore, even sophisticated lawyers of the Divisions of Corporation Finance and Enforcement lack the fair notice from the securities related laws and regulations as to how to apply them to the American CryptoFed.

IV
Willful Ongoing Violation of the Supreme Court's Opinions in *F.C.C. v. Fox Television Stations, Inc.*

As I stated to you, Mr. Bruckmann and others cc'd in my previous letter, as of today, American CryptoFed already has more than enough evidence to allege, assert, and attest that the Commission and its Divisions of Corporation Finance and Enforcement in particular, i) have failed to provide fair notice, by refusing multiple requests from American CryptoFed for a Howey Test Analysis, as to whether American CryptoFed's business model is prohibited or not, and ii) have failed to provide fair notice of "precision and guidance" as to how American CryptoFed can file proper forms with the Commission, including but not limited to Form 10 and Form S-1(when the requested information by the Form 10 and S-1 does not exist and never shall exist within the American CryptoFed DAO's structure), in order to complete a required registration statement for compliance purposes. If Form 10 and Form S-1 are **Not** the proper forms, you must provide **a proper mechanism** so that American CryptoFed can complete the initial registration statements and furnish information for ongoing disclosures.

To the extent that you stated the following in your email to me yesterday, my understanding is that by your response, you either refused to comply with the Supreme Court's Opinions in *F.C.C. v. Fox Television Stations, Inc.* or you lack the fair notice from the securities related laws and regulations as to what you should tell us how to disclose information which does not exist and will never exist.

To the extent that you are requesting guidance on the legal, accounting and disclosure requirements of Form 10 for the registration of a class or classes of securities and Form S-1 for a registered public offering of securities, in each case as applicable to American CryptoFed, please consult with your legal and accounting advisors.

Mr. Dobbie, please let me know

i) whether my understanding is correct,

ii) whether you will provide American CryptoFed with a Howey Test Analysis, given that you emphasized "the withdrawal of the registration statement does not mean that the staff agrees with your assertion in the withdrawal request that the Locke token and Ducat token are not securities", and

iii) whether you will provide **a proper mechanism** so that American CryptoFed can complete the initial registration statements and furnish information for ongoing disclosures, when the requested information by the Form 10 and S-1 does not exist and never shall exist within the American CryptoFed DAO's structure.

I look forward to your written response.

Sincerely,

DocuSigned by:
Scott Moeller
A82E97EDD0C44FD...

/s/ Scott Moeller
Scott Moeller
President, American CryptoFed DAO
scott.moeller@americancryptofed.org

RESPONDENT

AMERICAN CRYPTOFED DAO LLC

EXHIBIT E

American CryptoFed

August 1, 2022

Via Electronic Email

Christopher M. Bruckmann, Trial Counsel, Trial Unit
Division of Enforcement, U.S. Securities and Exchange Commission
100 F Street, N.E., Washington, D.C. 20549-5949
Phone 202-551-5986, Email: bruckmannc@sec.gov

CC:
Christopher Carney, Division of Enforcement, CarneyC@sec.gov
Martin Zerwitz, Division of Enforcement, ZerwitzM@sec.gov
Michael Baker, Division of Enforcement, BakerMic@sec.gov
John Lucas, Division of Enforcement, LucasJ@sec.gov
Justin Dobbie, Division of Corporation Finance, dobbiej@sec.gov

Re: In the Matter of American CryptoFed, AP File No. 3-20650:

Dear Mr. Bruckmann,

Thank you for your email today stating the following.

The sole issue in the Section 12(j) administrative proceeding, In the Matter of American CryptoFed DAO LLC, AP File No. 3-20650, is whether the Commission should deny or suspend the effectiveness of the Form 10 filed by American CryptoFed on September 16, 2021. As American CryptoFed has now withdrawn that Form 10, we believe that this proceeding is moot. We therefore intend to file a motion to dismiss the Section 12(j) proceeding. This would have no effect on the separate Order of Examination under Section 8(e) regarding the Form S-1, which remains ongoing. We are reaching out to see what your position is regarding our planned motion to dismiss, and whether you believe there is anything to discuss at a meet and confer session regarding that motion.

Please let us know your position.

Currently, American CryptoFed is requesting Mr. Dobbie at the Division of Corporation Finance to reinstate or refile Form 10. We have sent two letters to Mr. Dobbie and copied you, as well as other individuals in your Division.

In the attached July 22, 2022 letter, I stated the following request at page 4-5 (emphasis added):

Since October 2021, the Division of Corporation Finance has failed to satisfy the Clarity Requirement of Fair Notice "essential to the protections provided by the Due Process Clause of the Fifth Amendment," as Judge Analisa Torres of the Southern District of New York emphasized in the order on March 11, 2022, in SEC v. Ripple Labs. (Exhibit 1, page 6). As such, given that you emphasized "the withdrawal of the registration statement does not mean that the staff agrees with your assertion in the withdrawal request that the Locke token and Ducat token are not securities", **for compliance purposes, American CryptoFed requires you to provide clear guidance as to how to file the Form 10 to register American CryptoFed's Locke token and Ducat token in one week, on or by July 29, 2022. American CryptoFed is ready to follow your clear guidance to reinstate or refile the Form 10.**

In the attached July 31, 2022 letter, I stated the following request at page 7 (emphasis added):

Today, American CryptoFed already has more than enough undisputed evidence to allege, assert, and attest via Summary Judgment (Disposition) that the Commission and its Divisions of Corporation Finance and Enforcement in particular, i) have failed to provide fair notice, by refusing multiple requests from American CryptoFed for a Howey Test Analysis, as to whether American CryptoFed's business model is prohibited or not, and ii) have failed to provide fair notice of "precision and guidance" as to how American CryptoFed can file proper forms with the Commission, including but not limited to Form 10 and Form S-1(when the requested information by the Form 10 and S-1 does not exist and never shall exist within the American CryptoFed DAO's structure), to complete a required registration statement for compliance purposes. If Form 10 and Form S-1 are NOT the proper forms, you must provide a proper mechanism so that American CryptoFed can complete the initial registration statements and furnish information for ongoing disclosures. **The two July 22, 2022 letters addressed to your attention and this follow-up letter are to provide the Commission and its Divisions of Corporation Finance and Enforcement in particular with additional opportunities to cure their willful ongoing violation of the Supreme Court's opinions in F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012) which was cited in Judge Torres's Order described in SEC v. Ripple Labs.**

I requested Mr. Dobbie to respond to my July 31, 2022 letter on or by August 7, 2022. If I do not receive his response by then, American CryptoFed will reinstate the Form 10 registration statement via a refiling in August 2022. Then, the reinstated Form 10 will become effective automatically, if "the Section 12(j) administrative proceeding, In the Matter of American CryptoFed DAO LLC, AP File No. 3-20650" is dismissed by the motion you intend to file.

If your intent is to allow the reinstated Form 10 of American CryptoFed to become effective automatically, American CryptoFed will agree with you to "file a motion to dismiss the Section 12(j) proceeding." American CryptoFed will see this dismissal as a good faith action by

the Commission and its Divisions of Corporation Finance and Enforcement to cure the ongoing violation of the Supreme Court's opinions in *F.C.C. v. Fox Television Stations, Inc*., 567 U.S. 239, 253 (2012) which was cited in Judge Torres's Order described in SEC v. Ripple Labs.

If you plan to initiate another Section 12(j) administrative proceeding again to stop or stay the reinstated Form 10 of American CryptoFed (to be filed in August 2022) after dismissing the existing Section 12(j) administrative proceeding, please explain why you "intend to file a motion to dismiss the Section 12(j) proceeding" now when you will knowingly duplicate the same process later again, which will definely waste taxpayer's money, the SEC's resources and our own time and money. After receiving your explanation, American CryptoFed will let you know our position accordingly. Please remember that the fundamental reason that American CryptoFed withdrew the Form 10 was because you made a clear but misleading guidance statement below on June 3, 2022 below (see July 22, 2022 Letter, Exhibit 3, page 3, Emphasis in Original). Your guidance statement below was so misleading that Mr. Dobbie told us the polar opposite right after we withdrew the Form 10.

Your letter again requests our internal work product and analysis regarding why the Locke and Ducat tokens are securities. As we have explained, repeatedly, this information is privileged and protected from disclosure. We decline to provide it. We also remind you that you choose to register these tokens as securities by filing with the Commission a Form 10 which stated on the cover page that the Locke and Ducat tokens were "**Securities** to be registered pursuant to Section 12(g) of the Act".

I look forward to your written response.

Sincerely,

DocuSigned by:
Scott Moeller
A82E97EDD0C44FD...

/s/ Scott Moeller

Scott Moeller

President, American CryptoFed DAO

scott.moeller@americancryptofed.org

RESPONDENT

AMERICAN CRYPTOFED DAO LLC

EXHIBIT F

American CryptoFed

August 4, 2022

Via Electronic Email

Christopher M. Bruckmann, Trial Counsel, Trial Unit
Division of Enforcement, U.S. Securities and Exchange Commission
100 F Street, N.E., Washington, D.C. 20549-5949
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Michael Baker, Division of Enforcement, BakerMic@sec.gov
John Lucas, Division of Enforcement, LucasJ@sec.gov
Justin Dobbie, Division of Corporation Finance, dobbiej@sec.gov

Re: In the Matter of American CryptoFed, AP File No. 3-20650:

Dear Mr. Bruckmann,

Thank you for your email sent to my attention yesterday, stating the following.

Should American CryptoFed re-file its Form 10 with the SEC, or file any other Form 10 or other documents with the SEC that seek to register tokens with the Commission as securities while denying that they are securities, the Division of Enforcement will take any and all appropriate steps necessary to halt that. This includes, but is not limited to, recommending that the Commission institute a new 12(j) proceeding, institute administrative proceedings seeking civil money penalties and other relief from anyone who signs such a filing with the SEC, and/or seek relief in federal court.

Additionally, while we cannot speak for Mr. Dobbie or the Division of Corporation Finance, to the extent that you are seeking the have the Division of Enforcement tell you how to file a Form 10 regarding the Ducat or Locke tokens, we again remind you that we are neither required nor permitted to provide you with legal advice. If you want legal advice regarding American CryptoFed's filings with the SEC, we suggest that you consider whether or not to retain counsel to provide that advice.

We still plan to seek dismissal of the current 12(j) proceeding. Please let us know your position regarding that.

To be clear, American CryptoFed does not seek from the Commission and its Divisions of Corporation Finance and Enforcement any legal advice. Instead, we are requesting **Fair**

Notice pursuant to the Supreme Court's opinions in *F.C.C. v. Fox Television Stations, Inc.,* 567 U.S. 239, 253 (2012) (emphasis added).

A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See Connally v. General Constr. Co., 269 U. S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that **men of common intelligence** must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); Papachristou v. Jacksonville, 405 U. S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids' " (quoting Lanzetta v. New Jersey, 306 U. S. 451, 453 (1939); alteration in original)). **This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment.** See United States v. Williams, 553 U. S. 285, 304 (2008). It requires the invalidation of laws that are impermissibly vague. **A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."** Ibid. As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See id., at 306.

Even when speech is not at issue, the **void for vagueness doctrine** addresses at least two connected but discrete due process concerns: **first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.** See Grayned v. City of Rockford, 408 U. S. 104, 108– 109 (1972). When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

We belong to the group of "men of common intelligence" and "a person of ordinary intelligence" to whom the Commission and its Divisions of Corporation Finance and Enforcement are required by the Supreme Court's opinions above to provide the necessary "precision and guidance". If you cannot do so, you should clearly let us know that the SEC's Form 10 and Form S-1 does not apply to American CryptoFed pursuant to "the void for vagueness doctrine" held by the Supreme Court in *F.C.C. v. Fox Television Stations, Inc*. However, instead of complying with the "precision and guidance" as required by Supreme Court opinions, your email yesterday threatens American CryptoFed with "recommending that the Commission institute a new 12(j) proceeding, institute administrative proceedings seeking civil money penalties and other relief from anyone who signs such a filing with the SEC, and/or seek relief in federal court". Again, your threat willfully violates the Supreme Court's Opinions above.

Through a series of letters dated July 22, July 31, and August 4, 2022 addressed to Mr. Dobbie at the Commission's Division of Corporation Finance which were also cc'd you and your team at the Division of Enforcement, I clearly demonstrated that American CryptoFed already has more than enough undisputed evidence to allege, assert, and attest via Summary Judgment (Disposition) that the Commission and its Divisions of Corporation Finance and Enforcement in particular, i) have failed to provide fair notice, by their documented refusal of multiple requests from American CryptoFed for a Howey Test Analysis, as to whether American CryptoFed's business model is prohibited or not, and ii) have failed to provide fair notice with sufficient "precision and guidance" as to how American CryptoFed can file proper forms with the Commission, including but not limited to Form 10 and Form S-1(when the requested information by the Form 10 and S-1 does not exist and never shall exist within the American CryptoFed DAO's structure), to complete a required registration statement for compliance purposes.

One of the major Fair Notice issues, Mr. Bruckmann, is the contradiction between Mr. Dobbie and you. When both of you applied the securities related laws and regulations to American CryptoFed's case, the securities related laws and regulations are "so standardless that it authorizes or encourages seriously discriminatory enforcement." Mr. Dobbie's statement, ("the withdrawal of the registration statement does not mean that the staff agrees with your assertion in the withdrawal request that the Locke token and Ducat token are not securities") contradicts your statement ("you choose to register these tokens as securities by filing with the Commission a Form 10 which stated on the cover page that the Locke and Ducat tokens were "Securities to be registered pursuant to Section 12(g) of the Act"). We followed your statement and withdrew the Form 10. However, Mr. Dobbie still insisted that "the withdrawal of the registration statement does not mean that the staff agrees with your assertion in the withdrawal request that the Locke token and Ducat token are not securities". The inconsistency and contradiction between the Mr. Dobbie's Division of Corporation Finance and your Division of Enforcement when the securities related laws and regulations are applied to American CryptoFed, created confusion rather than the necessary "precision and guidance" required by the Supreme Court's opinions in *F.C.C. v. Fox Television Stations, Inc.,* which presents a perfect Fair Notice case for the Commission to make decision.

"We still plan to seek dismissal of the current 12(j) proceeding. Please let us know your position regarding that." you stated in your email yesterday. It may be premature "to

seek dismissal of the current 12(j) proceeding" before we successfully resolve the inconsistency and contradiction between the Division of Corporation Finance and the Division of Enforcement when the securities related laws and regulations are applied to American CryptoFed. The current 12(j) proceeding is still the best and proper forum for us to resolve this Fair Notice issue, given that both parties have established threads of documents, evidence and background knowledge via the current 12(j) proceeding. It will waste not only American CryptoFed's time and money, but also huge taxpayer's money and the SEC's resource, if you choose to redo the exercise at a different legal forum and a different time.

Earlier today, I sent a letter to Mr. Dobbie and cc'd you and your team, with the hope that Mr. Dobbie, as Acting Office Chief of the Division of Corporation Finance can provide **a proper mechanism** so that American CryptoFed can complete the initial registration statements and furnish information for ongoing disclosures, when the requested information by the Form 10 and S-1 does not exist and never shall exist within the American CryptoFed DAO's structure. After we receive Mr. Dobbie's response to my latest letter, American CryptoFed will let you know our position accordingly regarding the "dismissal of the current 12(j) proceeding".

I look forward to your written response.

Sincerely,

DocuSigned by:
Scott Moeller
A82E97EDD0C44FD...

/s/ Scott Moeller

Scott Moeller

President, American CryptoFed DAO

scott.moeller@americancryptofed.org