

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

Administrative Proceedings Rulings  
Release No. 6844 / April 18, 2022

Administrative Proceeding  
File No. 3-20801

In the Matter of  
**DF Growth REIT II, LLC**

**Order Denying  
Respondent's Motion to  
Dismiss or for an Order  
Instituting Proceedings**

I deny Respondent's April 13, 2022, motion to dismiss, its alternative motion requiring dismissal after a fixed period if an order instituting proceedings (OIP) is not issued by the Securities and Exchange Commission, its alternative motion for a more definite statement, and its request to vacate my April 1 and April 12 scheduling orders. *See* Resp't's Mot. to Dismiss at 1, 20. Respondent's requests rest on the erroneous contention that no OIP has issued. But, as I have already ruled, the Commission's March 16 and 31 orders satisfy the requirements for an "order instituting proceedings." 17 C.F.R. §§ 201.101(a)(7), .200(a)–(b).

The Commission instituted this proceeding in the manner its regulations require. Rule 258 of Regulation A under the Securities Act of 1933 provides that the Commission may, at any time, enter an order temporarily suspending a Regulation A exemption if it has "reason to believe" that one of six enumerated factors are present. 17 C.F.R. § 230.258(a). Upon issuing the suspension, the Commission must give notice of the order to the issuer, and upon the issuer's written request within 30 days of the order, must set it for hearing. 17 C.F.R. § 230.258(b). This is precisely what the Commission did here—it notified Respondent of the temporary suspension on March 16 and ordered a hearing on March 31. Respondent asserts that it "has been unable to locate a single instance of the Commission instituting proceedings" in this manner, Mot. to Dismiss at 10, but an order temporarily suspending an exemption followed by an order directing a hearing is precisely the form the Commission's OIP takes in such a case. *Med-X, Inc.*, Admin. Proc. File No. 3-17551, 2016 SEC LEXIS 3517 (Sept. 16, 2016) (order temporarily suspending Regulation A exemption); *Med-X*, Securities Act Release No. 10235, 2016 SEC

LEXIS 3926 (Oct. 13, 2016) (order directing hearing); *Axum, Inc.*, Securities Act Release No. 8654, 2006 SEC LEXIS 146 (Jan. 24, 2006) (order temporarily suspending Regulation A exemption); *Axum, Inc.*, Securities Act Release No. 8662, 2006 SEC LEXIS 396 (Feb. 21, 2006) (order scheduling hearing).

As I explained in my April 12 order, the contents of the Commission's March 16 and 31 orders, taken together, satisfy all the Rules of Practice's requirements for an OIP. *See* 17 C.F.R. § 201.200(b). Below, I address some of Respondent's specific arguments.

Contrary to Respondent's claim that the Commission's March 16 order failed to state "the legal authority and jurisdiction giving rise to the matter," Mot. to Dismiss at 10, the Commission made it clear that Rule 258 granted it legal authority to issue a temporary suspension of a Regulation A exemption and further referenced Section 3(b) of the Securities Act, under which the Commission had promulgated the regulation. *DF Growth REIT II*, Securities Act Release No. 11040, 2022 SEC LEXIS 671, at \*1. Respondent also wrongly argues that the Commission failed to confer jurisdiction on me to decide the matter. Mot. to Dismiss at 11. In its March 31 order, the Commission expressly "ORDERED that this proceeding be set for a hearing before an administrative law judge in accordance with Rule 110 of the Commission's Rule of Practice" among other instructions, and referred to the March 16 order to indicate the issues of fact and law on which the judge would be expected to rule. *DF Growth REIT II*, Securities Act Release No. 11049, 2022 SEC LEXIS 876, at \*1. In complying with the Commission's order, I am acting squarely within my delegated authority.

Respondent further argues that it has been deprived of due process. Among other things, Respondent claims that the March 16 order "did not inform REIT II of a pend[ing] action—it merely afforded them notice of the *possibility* of an action." Mot. to Dismiss at 13. Yet, the order notified Respondent of a pending action: the permanent suspension of Respondent's Regulation A exemption if no hearing was requested within 30 days. *DF Growth REIT II*, 2022 SEC LEXIS 671, at \*4. Respondent was afforded process by being allowed to request, and now participate in, a hearing. Respondent's further assertions regarding due process have been considered and rejected.

Respondent finally argues that the allegations against it in the March 16 order "fail to provide adequate specificity," Mot. to Dismiss at 16, which it considers to be grounds to dismiss the proceeding, *see id.* at 10–11, 16, 19. But Respondent mistakenly relies on Rule 9(b) of the Federal Rules of Civil Procedure, Mot. to Dismiss at 16–18, which provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances

constituting fraud or mistake.” Fed. R. Civ. P. 9(b). That rule does not apply in Commission administrative proceedings.

Moreover, the Commission’s allegations are specific. Its March 16 order sets forth the bases for a temporary suspension under Rule 258, alleges that Respondent failed to comply with two requirements of Regulation A, and discusses in detail what it alleges to be materially misleading representations concerning the independence of REIT II from REIT I and whether investors would be charged management fees. *DF Growth REIT II*, 2022 SEC LEXIS 671 at \*2–4. Respondent’s claim, for example, that the March 16 order needed to allege that investors were actually misled or describe how the alleged misstatements could be misleading, Mot. to Dismiss at 19, appears to run afoul of the Commission’s maxim that “[t]he purpose of the OIP is to provide notice of *what* violations of the securities laws are alleged, not to explain *how* the Division will try to prove those violations.” *Am. CryptoFed DAO LLC*, Securities Exchange Act of 1934 Release No. 93971, 2022 SEC LEXIS 80, at \*3–4 (Jan. 12, 2022).

For the same reasons, I also reject Respondent’s request for a more definite statement. Mot. to Dismiss at 20; *see* 17 C.F.R. § 201.220(d). The March 16 order provides Respondent with sufficient notice to understand the factual and legal matters at issue and to defend itself “during the course of the proceedings.” *Am. CryptoFed*, 2022 SEC LEXIS 80, at \*4, \*12. At this stage, nothing more is required.

I ORDER that Respondent’s motion to dismiss, or in the alternative, for an order instituting proceedings, and all other requests therein, is hereby DENIED.<sup>1</sup>

I FURTHER ORDER that the parties should refrain from referencing any settlement activities or offers unless specifically directed.<sup>2</sup>

/s/ Jason S. Patil  
Administrative Law Judge

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<sup>1</sup> Because I have denied Respondent’s motion on the merits, I DENY the Division of Enforcement’s motion to strike.

<sup>2</sup> *See* Mot. to Dismiss at 3.