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'S OPPOSITION TO DIVISION OF ENFORCEMENT'S MOTION FOR A BRIEFING SCHEDULE AND INCORPORATED MEMORANDUM OF LAW.

American CryptoFed DAO LLC ("American CryptoFed" or "Respondent"), respectfully submits this opposition to the Division of Enforcement ("Division")'s Motion ("Motion") for a Briefing Schedule and Incorporated Memorandum of Law.

The Division's Motion states at p.1-2 the following:

The Commission issued the Order Instituting Proceedings ("OIP") in this matter on November 10, 2021. Respondent filed its Answer on December 3, 2021. Respondent has filed fifteen motions in a sixteen-day span from December 3, 2021 to December 19, 2021. This includes seven motions for a more definite statement, three motions to delay a prehearing conference, and three motions purporting to seek confirmation of statutory language. **Individually the motions are without merit. Collectively they are designed to "harass or to cause unnecessary delay or needless increase in the cost of adjudication" of this proceeding.** (Emphasis added).

The facts do not support the Division's statement. The merit and necessity of Respondent's motions are shown in the examples below.

1. Motions for a More Definite Statement Clarified the Time Span of the OIP's Allegations Which May Lead to an Efficient Conclusion of This Proceeding

Respondent appreciates that the Division of Enforcement ("Division") makes the time span of all of its allegations clear, as follows in the DIVISION OF ENFORCEMENT'S OMNIBUS MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTIONS FOR A MORE DEFINITE STATEMENT (p.10-11):

> 2) Response to Motion #2: the Allegations of the OIP Relate to American CryptoFed As It Presently Exists.
> … American CryptoFed admits it is not presently decentralized, stating that (1) "CryptoFed will be decentralized to the extent that a CEO is no longer needed within three years," and (2) MShift's powers and rights over CryptoFed "will completely and irreversibly become delegated" only after CryptoFed's S-1 registration statement is declared effective. These are admissions that American CryptoFed is not presently operating as a decentralized autonomous organization.

The clarification above generates an important positive result for this proceeding. There is no dispute regarding the time span of the OIP's allegations which is **"after Respondent's September 16, 2021 Form 10 becomes effective, and before the Commission declares Respondent's Form S-1 effective."** Furthermore, this shared time span of the OIP's allegations made Respondent's motion filed on December 20, 2021 possible.

RESPONDENT AMERICAN CRYPTOFED DAO LLC'S MOTION TO DISMISS THE ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934

If the motion to dismiss is granted, this proceeding can be ended quickly and efficiently. This example alone can demonstrate that Respondent's motions have merit and prove that the following statement of the Division is not supported by the facts:

Individually the motions are without merit. Collectively they are designed to "harass or to cause unnecessary delay or needless increase in the cost of adjudication" of this proceeding. (Emphasis added).

2. Motions regarding Prehearing Conference Preserved the Justice of Due Process

The Division has showed strong desire to file a motion for summary disposition even while Respondent's Motions for Definite Statement are still pending the Commission's ruling:

Moreover, the Division has informed American CryptoFed that it likely intends to move for summary disposition of this matter pursuant to Rule 250, and if the prehearing conference is not conducted by December 20, 2021, the Division reserves its right under Rule 250(b) to file a motion for summary disposition, even if the prehearing conference has not yet been held. The Division anticipates being able to file this motion before the end of the year. (Division of Enforcement's Response to Respondent's Motion for a Procedure of Determine the Date and Time for the Prehearing Conference, p.3-4)

The Division's action would have unfairly deprived Respondent of important procedural rights and would have subjected Respondent to the Division's systematic abuse of summary disposition, if Respondent had not filed motions regarding the prehearing conference. Fortunately, the Commission issued an order below regarding Respondent's three motions for prehearing conference, which confirmed due process to enable Respondent to file an effective opposition to the Division's summary disposition and thus, in advance prevent injustice from happening:

Nonetheless, under the facts and circumstances of this case, it appears appropriate to order that motions for summary disposition not be filed until after the Commission rules on the motions for a more definite statement. Rule of Practice 250(b) provides that summary disposition is appropriate if "there is no genuine issue with regard to any material fact and . . . the movant is entitled to summary disposition as a matter of law." **An opposition to a motion for summary disposition must precisely specify in the brief the basis for that opposition, identify with particularity the material factual issues in dispute, and address relevant Commission precedent**. Ordering that summary disposition briefing not take place until after the Commission rules on the motions for a more definite statement ensures that the briefing will squarely address the operative claims and defenses at issue in the proceeding. (Order of Release No. 93806 / December 16, 2021, p.3-4).(Emphasis added).

3. Misleading Allegations in the OIP Need Clarification and Specification by Motions for More Definite Statement

The misleading allegations by the Division in Paragraph 8 and 9 of the OIP are so obvious that, soon after issuance of the OIP, Mr. Keith Paul Bishop, a partner at Allen Matkins Leck Gamble Mallory & Natsis LLP, independent of Respondent, defined the Division's tactics handling American CryptoFed's case as "legerdemain" in his analysis published at The National Law Review, entitled "SEC Alleges Form 10 Was Misleading, But Is The SEC's Order Itself Misleading?":

The SEC's order substitutes "entities" for "persons" and adds the list of potential recipients to the registrant's statement. By this legerdemain, the SEC converts a statement that might be true in some cases into a statement that is false in all cases…. I believe that the SEC also has an obligation to be accurate in what it alleges and not manipulate the language in a filing to strengthen its case. When the SEC does so, it convicts itself of the very act that it accuses." (Emphasis added, Exhibit N to Respondent's Answer).

It is impossible for Respondent to prepare for an effective defense if misleading allegations are not clarified, because misleading allegations usually are false.

4. A Critical Omission of Statutory Language Must Be Corrected by a Motion

In the OIP's Paragraph 11, the Division asserts the following regarding Section 12(j) while omitting the specific phrase "on the record":

"Section 12(j) allows the Commission to deny, suspend the effective date of, suspend for a period not to exceed 12 months, or revoke the registration of a security if, after notice and opportunity for hearing, the Commission finds the issuer has failed to comply with the Exchange Act or its rules."

However, the relevant text of Section 12 (j) in the statute reads as follows:

"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).

The concept "on the record" is so important that the Supreme Court ruling in *Steadman v. SEC, 450 U.S. 91, 96 n.13 (1981)* at 97 and its note [14] below actually makes the Division's motion for summary disposition unlawful:

> The securities laws provide for judicial review of Commission disciplinary proceedings in the federal courts of appeals and specify the scope of such review. Because they do not indicate which standard of proof governs Commission adjudications, however, we turn to § 5 of the Administrative Procedure Act (APA), **5 U. S. C. § 554, which "applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing,"** except in instances not relevant here. **Section 5 (b), 5 U. S. C. § 554 (c) (2),** makes the provisions of § 7, 5 U. S. C. § 566, applicable to adjudicatory proceedings. (Emphasis added).
> **Section 5 (b), 5 U. S. C. § 554 (c) (2),** provides that "[t]he agency shall give all interested parties opportunity for . . . hearing and decision on notice and in accordance with **sections 556** and 557 of this title." (Emphasis added).

Thus, for a hearing "on the record" explicitly required by a statute such as Section 12(j), the Supreme Court in *Steadman v. SEC,* provides a chain of statutes from **5 U. S. C. § 554** to **5 U. S. C. § 556** which inevitably leads to cross-examination at an oral hearing, prohibiting summary disposition:

> **A party is entitled to present his case or defense** by oral or documentary evidence, to submit rebuttal evidence, and to conduct such **cross-examination** as may be required for a full and true disclosure of the facts (5 U. S. C. § 556(d)) (Emphasis added).

5. Settlement Solutions Should Be Explored through Creative Motions

There are scenarios for which information required by Exchange Act Section 12 (g), 12(b) and Form 10, does not and will not exist. The following example is a quote from a recent article, attached as Exhibit O to Respondent's Answer to the OIP, authored by two attorneys, Daniel L. McAvoy and Stephen A. Rutenberg of Polsinelli PC, and published in the National Law Review, Volume XI, Number 327, November 23, 2021, entitled "DAOsing Rods and the Power of Enforcement Prediction". The two authors' opinion echoes Respondent's view regarding the OIP's Paragraphs 5, 6, 16 and 17, asks for the Commission to consider a new regulatory

framework after they independently analyzed the American CryptoFed's case (All emphases in bold are added):

"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.**" (p.1)

"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.**" (p.1-2)

"**Maybe the SEC should also consider a framework under which a DAO or a supporting organization of a DAO can register securities,** particularly as the discussion regarding regulation of stablecoins and DeFi starts to heat up." (p.3).

Below is the relevant text of Exchange Act Section 12 (h). This statute anticipates the necessary actions to be taken by the Commission when facing a scenario as described by the two authors above. It is critical for Respondent to request the Commission via a motion to activate this Section 12(h) not only for this proceeding, but also for the entire Cryptocurrency industry.

(h) Exemption by rules and regulations from certain provisions of section
The Commission may by rules and regulations, or **upon application of an interested person, by order, after notice and opportunity for hearing, exempt in whole or in part any issuer or class of issuers from the provisions of subsection (g) of this section or from section 78m, 78n, or 78o(d) of this title or may exempt from section 78p of this title any officer, director, or beneficial owner of securities of any issuer, any security of which is required to be registered pursuant to subsection (g) hereof,** upon such terms and conditions and for such period as it deems necessary or appropriate, if the Commission finds, by reason of the number of public investors, amount of trading interest in the securities, the nature and extent of the activities of the issuer, income or assets of the issuer, or otherwise, that such action is not inconsistent with the public interest or the protection of investors. **The Commission may, for**

the purposes of any of the above-mentioned sections or subsections of this chapter, classify issuers and prescribe requirements appropriate for each such class. (15 U.S.C. § 78l(h))

6. Conclusion

The five examples above are sufficient to demonstrate that the Division's characterization of Respondent's motions is false, although Respondent can list more and more examples. In response to the unreasonable request by the Division to prematurely decide the briefing schedule, Respondent sent the Division a detailed letter on December 21, 2021(Exhibit 1 to the Division's Motion), in good faith, outlining why Respondent cannot agree to the Division's brief schedule and explaining why the parties should wait for the Commission's ruling on existing motions under Rule 220 (d) and Rule 250 (a).

A. Motions under Rule 220 (d)

The Commission may grant or deny Respondent's seven motions for a more definite statement. It is reasonable for Respondent to assume that i) the Commission may grant some of the motions in part or in whole, in one way or another; ii) thus, the Commission's ruling will direct the Division to further clarify and specify OIP's allegations, to which Respondent must submit answers; and iii) following the Commission's rulings, new motions may be needed for Respondent's effective defense, after the Division provides additional clarification and specification for the OIP's allegations.

B. Motions under Rule 250 (a)

The Commission may grant or deny Respondent's five motions for a ruling on the pleadings. According to Rule 250 (a), the hearing officer, e.g. the Commission in this case, "shall promptly grant or deny the motions." Therefore, there will be no "unnecessary delay" as the Division's Motion states (p.1). Each of the motions addresses a landmark issue not only for

American CryptoFed, but also for the cryptocurrency industry as a whole. It will be worth making our best efforts to seek the ruling from the Commission, and higher appeal court as needed.

i. RESPONDENT AMERICAN CRYPTOFED DAO LLC'S MOTION TO LIFT THE ORDER THAT STAYS THE EFFECTIVENESS OF RESPONDENT'S FORM 10.

The ruling will decide whether the Commission has authority to include a Stay Order in an order instituting administrative proceedings ("OIP").

ii. RESPONDENT AMERICAN CRYPTOFED DAO LLC'S MOTION TO CONFIRM THE TEXT OF SECTION 12(j) OF SECURITIES EXCHANGE ACT OF 1934 AND MANDATE PROCEDURE

The ruling will decide whether the Commission has the authority to issue an order without an opportunity for cross-examination at an oral hearing.

iii. RESPONDENT AMERICAN CRYPTOFED DAO LLC'S MOTION TO CONFIRM THE OPERATION OF FORM 10, SECTION 12(g), 12 (b) AND 12 (h) OF SECURITIES EXCHANGE ACT OF 1934.

The ruling will test whether the Commission has the willingness to activate Section 12(h) to accommodate a Wyoming DAO which, by design, does not and will not have information required by Form 10.

iv. RESPONDENT AMERICAN CRYPTOFED DAO LLC'S MOTION TO CONFIRM THE OPERATION OF FORM 10, RULE12b-20 AND SECTION 12 (c) OF SECURITIES EXCHANGE ACT OF 1934.

The ruling will test whether the Commission has the willingness to activate Section 12(c) to accommodate the emergence of the cryptocurrency industry, which has add on elements inconsistent with Form 10.

v. RESPONDENT AMERICAN CRYPTOFED DAO LLC'S MOTION TO DISMISS THE ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934.

The ruling will decide whether American CryptoFed must file a motion for summary disposition. There are no investors whatsoever, to be protected by the Division or the Commission. We believe there is no factual dispute between the Division and American CryptoFed regarding the fact that American CryptoFed only distributes restricted, untradeable and non-transferable Locke tokens, free of charge, before the SEC declares the Form S-1 as effective. It is possible for the Commission to grant this motion based on the facts provided by American CryptoFed DAO's Form 10 registration statement, American CryptoFed DAO Constitution attached to the Form 10 as Exhibit 1, and the American CryptoFed DAO's Ducat Economic Zone Plan attached to the Form 10 as Exhibit 2. Thus, this proceeding can be concluded far more efficient than the Division's Motion anticipated.

In summary, all Respondent's motions have merit. These motions, and the Commission's rulings on these motions will generate positive results for not only justice for Respondent, but also time and cost efficiency for the Commission and the Division. The Division's Motion will do more harm than good by prematurely determining a briefing schedule without opportunity to consider the Commission's rulings on existing motions and by precluding Respondent's opportunities to file timely, proper and creative motions to explore proposals for settlement

solution. Thus, the Division's Motion does not meet the requirements defined by 5 U.S. Code § 554 – Adjudications below:

(c)The agency shall give all interested parties opportunity for—
(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; …

For the reasons set forth above, Respondent respectfully requests that the Commission deny the Division's Motion for a Briefing Schedule and Incorporated Memorandum of Law.

Dated: December 27, 2021

Respectfully submitted,

DocuSigned by:
Marian Orr
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By /s/ Marian Orr

Marian Orr

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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 27th day of December 2021, in the manner indicated below:

By Email:

Christopher Bruckmann, Trial Counsel

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