UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20650

In the Matter of

American CryptoFed DAO LLC,

    Respondent.

DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT'S MOTION FOR EXEMPTION FROM SECTION 12(g) OF THE SECURITIES EXCHANGE ACT OF 1934

The Division of Enforcement ("Division") of the U.S. Securities and Exchange

Commission ("Commission") respectfully submits this opposition to American

CryptoFed DAO LLC's ("Respondent" or "American CryptoFed") Motion for

Exemption from Section 12(g) of the Exchange Act of 1934 (the "Motion").

PRELIMINARY STATEMENT

The Motion should be denied because it is vague and does not state with

particularity the grounds for the relief sought. Assuming the Motion seeks an

exemption pursuant to either Section 12(h) or Section 36 of the Securities Exchange

Act of 1934 ("Exchange Act") it should be denied because this Administrative

Proceeding is not the appropriate forum to make an application for those

exemptions. And even if this Administrative Proceeding were the correct forum for

such an application, the Motion utterly fails to address the relevant standards or otherwise provide a basis for an exemption.

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.

RELEVANT BACKGROUND

On September 16, 2021, American CryptoFed filed a Form 10 seeking to register its Ducat and Locke tokens as classes of securities pursuant to Exchange Act Section 12(g). Between October 4 and October 29, 2021, staff in the Division and the Division of Corporation Finance ("Corporation Finance") communicated to American CryptoFed that its Form 10 was deficient. Staff explained that the Form 10 failed to comply with the Exchange Act and the rules thereunder because it omitted numerous required items, such as audited financial statements, and further contained materially misleading statements. American CryptoFed refused to withdraw its Form 10. American CryptoFed's subsequent October 6, 2021 filing did nothing to remedy the defects in its Form 10.

At no time did American CryptoFed: (a) submit an application to Corporation Finance for an exemption from registration under Section 12(h) of the Exchange Act or any other provision, (b) make an application for permission to provide alternative

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information in its Form 10 pursuant to Section 12(c) of the Exchange Act, or (c) submit a request for a no action letter to Corporation Finance regarding the Ducat and Locke tokens.

On November 10, 2021, before Respondent's Form 10 became effective, the Commission issued the Order Instituting Proceedings ("OIP") in this matter to resolve the following specific issues:

> (1) whether Respondent's Form 10 omitted information that was required to be included and also contained materially misleading statements, and
>
> (2) whether the Commission should deny or suspend the registration of each class of securities that Respondent sought to register pursuant to Section 12.

See OIP at Section III. Since being served with the OIP, Respondent has repeatedly sought to delay and obfuscate this proceeding by filing repetitive meritless motions.

ARGUMENT

I. The Motion Violates Rule 154 Because It Fails to State The Relief Sought and Grounds for That Relief.

Rule 154 requires that any motion filed with the Commission "shall state with particularity the grounds therefor [and] shall set forth the relief or order sought." 17 C.F.R. §201.154. The Motion is vague, difficult to decipher, and fails to identify in any readily understandable manner the precise relief sought or what the basis for that relief is. Respondent continues to ignore the Commission's Rules of Practice and file motions that are designed to "cause unnecessary delay or needless increase in the cost of adjudication" of this proceeding. Rule 153(b)(1)(iii), 17 C.F.R. §201.153(b)(1)(iii).

The Motion purports to seek an exemption from Section 12(g). Although Section 12(h) permits the Commission to grant exemptions from registration under Section 12, the Motion never cites, refers to, or quotes Section 12(h), making it far from certain that Respondent is seeking an exemption pursuant to that subsection. This is especially true as Respondent is demonstrably aware of Section 12(h), having previously filed a Motion regarding it. *See* 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 (filed December 18, 2021).[1]

Neither the Division nor the Commission should be forced to guess at what relief the Respondent seeks in the Motion. Accordingly, while the Division assumes for the purposes of Sections II and III below that the Motion is pursuant to Section 12(h), the Motion is so vague it should be summarily denied for failing to comply with Rule 154.

II. This Administrative Proceeding Is Not the Correct Forum to Decide an Application for Exemption.

The Commission instituted these proceedings to determine the answers to the specific questions outlined above:

(1) whether Respondent's Form 10 omitted information that was required to be included and also contained materially misleading statements, and

(2) whether the Commission should deny or suspend the registration of each class of securities that Respondent sought to register pursuant to Section 12.

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[1] This motion for judgment on the pleadings, which sought to "confirm the operation" of Section 12(h), was struck from the record by the Commission as procedurally deficient. *American CryptoFed DAO LLC*, Exchange Act Release No. 93905 (January 5, 2022).

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This narrow proceeding is focused on determining the answers to those questions and is not the forum for Respondent to file countless motions seeking answers to ancillary issues. Rather, if Respondent seeks affirmative relief beyond the scope of these proceedings, Respondent must affirmatively petition for that relief in the manner prescribed by the Commission's regulations.

Assuming the Motion seeks exemption under Section 12(h), the Commission has promulgated a regulation directing that the Director of Corporation Finance shall consider, in the first instance, such applications. *See* 17 C.F.R. §200.30-1(f) (reading in relevant part that the Director of the Division of Corporation Finance has the authority to "issue notices of applications for exemptions and to grant exemptions under section 12(h) of the [Exchange] Act."); *see also American CryptoFed DAO LLC*, Exchange Act Release No. 93905 at footnote 13 (January 5, 2022); *American CryptoFed DAO LLC*, Exchange Act Release No. 93922 at footnote 7 (January 6, 2022).[2]

Alternatively, if Respondent is seeking a general exemption pursuant to Exchange Act Section 36 (though the Motion makes no reference to this provision), the Commission has promulgated separate regulations regarding the procedures governing such applications. *See* 17 C.F.R. § 240.0-12; *see also Commission*

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[2] Applications for exemptions under Section 12(h) are typically made available for public comment before a decision is issued. *See, e.g., Order Granting an Application of BF Enterprises, Inc. under Section 12(h) of the Securities Exchange Act of 1934*, Exchange Act Release No. 66541, 2012 SEC LEXIS 751 at *4 (March 8, 2012) (noting that "the Commission issued a notice of the filing of the application to give any interested person an opportunity to 'submit to the Commission in writing its views on any substantial facts bearing on the application or the desirability of a hearing thereon.' The Commission received nine comment letters on the application.") (footnotes omitted).

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Procedures for Filing Applications for Orders for Exemptive Relief, Exchange Act

Release No. 39624, 63 Fed. Reg. 8101, 8101-02 & n.3 (Feb. 8, 1998); *American*

CryptoFed DAO LLC, Exchange Act Release No. 93905 at footnote 13 (January 5,

2022).[3]

Respondent provides no reasons nor cites any authority justifying its request

that an exemption should be made part of this administrative proceeding rather

than following the process set forth in the Commission's regulations. The fact that

American CryptoFed is a Respondent in this proceeding does not obligate the

Commission to issue rulings in this proceeding on every question of law, request for

exemption, or issue for which American CryptoFed might desire a response.

Moreover, the Motion is not an innocent procedural mistake by a respondent

unaware that there are separate procedures in place for applying for an exemption

under Section 12(h). The Division and American CryptoFed specifically discussed

this point during the prehearing conference, and the Division informed American

CryptoFed that a Section 12(h) application would be a separate process from this

proceeding. *See* Division of Enforcement's Statement Regarding Prehearing

Conference at 2-4.

Additionally, it is improper for American CryptoFed to contort statutory

language in an attempt to place the burden on the Division to prove that American

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[3] Applications for exemptions under Section 36 are also typically made available for public comment. *See, e.g., Notice of an Application of the New York Stock Exchange, Inc. for an Exemption Pursuant to Section 36 of the Securities Exchange Act of 1934 and Request for Comment*, Exchange Act Release No. 51998, 2005 SEC LEXIS 2801 at *1 (July 8, 2005).

CryptoFed is not entitled to an exemption, especially where American CryptoFed has not even made clear what kind of exemption it is seeking. To the extent that American CryptoFed wishes an exemption, American CryptoFed is the proponent of a proposed order granting the exemption, and therefore bears the burden of proving why it is entitled to it under 5 U.S.C. § 556.

If American CryptoFed actually desires an exemption, it should (1) properly apply for one through the process provided in the Commission's regulations, (2) specify the exemption that it believes applies, and (3) clearly state the reasons why it believes the Commission should grant the exemption.

III.   Respondent Has Provided No Reasons to Grant an Exemption.

Section 12(h) provides that the Commission can grant exemptions from registration under Section 12(g) "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." 15 U.S.C. §78l(h).

Similarly, Section 36 provides the Commission with general authority to exempt persons or securities from any provision of the Exchange Act "to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors." 15 U.S.C. §78mm(a)(1).

Respondent's motion does not address either standard, and therefore should be denied.

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The closest the Motion comes to providing a basis for an exemption is the statement: "Given that the Commission's OIP, if confirmed by the Commission's ruling, disables Respondent's capacity to file the Form 10, the OIP will actually serve as evidence exempting Respondent from the mandatory obligation to file Form 10 pursuant to Section 12(g) of Exchange Act." Motion at 3. This argument—that an issuer whose registration statement has been denied by the Commission is exempted from the applicable provisions of the federal securities laws by virtue of that denial—is self-evidently fallacious and merits no further discussion.

IV. Neither Compliance with, nor Exemption from, the Exchange Act Is a Substitute for Compliance with the Securities Act.

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.

But compliance with (or even exemption from) the requirements of the Exchange Act is no substitute for compliance with the separate requirements of the Securities Act. Regardless of the registration of a class of securities under the Exchange Act, the distribution of securities must either be governed by an effective Securities Act registration statement or covered by a Securities Act offering exemption. *See* 15 U.S.C. §77e; 15 U.S.C. §77d (providing exemptions).

If Respondent proceeds with a mass distribution of securities without a Securities Act registration statement being in effect, it is incumbent on the

Respondent to ensure that an exemption applies. Failure to do so may constitute a willful violation of Section 5 by American CryptoFed and all persons providing substantial assistance to American CryptoFed, which may result in criminal penalties. *See* Securities Act Section 24, 15 U.S.C. §77x.

CONCLUSION

For the reasons stated above, the Commission should deny Respondent's Motion for Exemption from Section 12(g) of the Securities Exchange Act of 1934.

Dated: January 6, 2022   Respectfully submitted,

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<u>CERTIFICATE OF SERVICE</u>

I hereby certify that I caused true copies of the Division of Enforcement's Opposition to Respondent's Motion for Exemption from Section 12(g) of the Securities Exchange Act of 1934 to be served on the following on January 6, 2022, in the manner indicated below:

By Email:

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