American CryptoFed

April 18, 2024
Via Electronic Email and eFAP

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Re: Request for immediate action on American CryptoFed DAO's Motion
Filed on December 15, 2021 pursuant to Rule of Practice 250(a), 17 CFR § 201.250 (a)

Dear Chairman and Commissioners

This is **the fifth letter** about this matter. To date, we have not yet received any response to our original letter, except a form response from the Inspector General Office stating "We will evaluate the information provided and determine an appropriate action". Therefore, we will continue to cc the Commission's Inspector General Office in our communications. For your convenience, the original letter requesting immediate action dated December 16, 2023 is copied and pasted below, starting from page 3 of this correspondence. In addition to the original letter,

the second, the third and the fourth letters dated January 18, 2024, February 18, 2024 and March 18, 2024 respectively also included the following three paragraphs:

In accordance with the legal precedent discussed in the original letter, **a stay order has never existed for any not-yet-effective Form 10 registration statement, and under no circumstances, can the Securities and Exchange Commission legally issue a stay order to prevent a Form 10 registration statement from becoming effective if a token is security. Logically, once a stay order is issued to prevent a Form 10 registration statement from becoming effective, the token must be a non-security and outside the SEC's jurisdiction.**

On January 10, 2024, Commissioner Hester Peirce published a statement entitled **Out, Damned Spot! Out, I Say!: Statement on Omnibus Approval Order for List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units**[1]. We compiled a few sentences in Commissioner Peirce's statement into one paragraph below. It is evident that these sentences can be perfectly applied to American CryptoFed's situation if the original phrases (emphasis added in italics) were replaced by the bold phrases (American CryptoFed's edits) in parentheses.

"You need not be a seasoned securities lawyer to spot the difference in treatment of *bitcoin-related ETP* (**American CryptoFed's Form 10**) applications compared to the many other *ETP* (**Form 10**) applications that have been routinely filed and approved over the past decade." "First, our arbitrary and capricious treatment of applications in this area will continue to harm our reputation far beyond crypto. Diminished trust from the public will inhibit our ability to regulate the markets effectively." "Second, our disproportionate attention on these filings has diverted limited staff resources away from other mission critical work." "Third, our actions here

[1] https://www.sec.gov/news/statement/peirce-statement-spot-bitcoin-011023

have muddied people's understanding of what the SEC's role is. Congress did not authorize us to tell people whether a particular investment is right for them, but we have abused administrative procedures to withhold investments that we do not like from the public." "I commend *applicants' decade-long* (**American CryptoFed's two and half year**) persistence in the face of the Commission's obstruction."

For convenience, the full text of the original December 16, 2023 correspondence is included below.

We write to you regarding the Matter of American CryptoFed DAO, AP File No. 3-20650, requesting the immediate actions specified below. Such request is made because the Securities and Exchange Commission ("SEC" or "Commission"), i) has been in violation of its own Rule of Practice 250(a), 17 CFR § 201.250 (a) and the Fifth Amendment of the U.S. Constitution for more than two (2) years, and further, ii) has denied the request of American CryptoFed DAO ("American CryptoFed" or "Respondent") for appointment of an Administrative Law Judge (ALJ) in an order (Release No. 93806 / December 16, 2021)[2] at page 2 stating:

> First, Respondent requests that the Commission designate an Administrative Law Judge ("ALJ") as hearing officer to preside over this proceeding. Rule of Practice 110 provides that "[a]ll proceedings shall be presided over by the Commission" unless the Commission "so orders." **Here, the OIP set this matter "before the Commission," not an ALJ, and no subsequent order issued by the Commission in this proceeding has directed otherwise.** Respondent contends that the Commission made "a public promise to designate an administrative law judge as the Presiding officer" in a press release dated November 10, 2021. But a press release is not an "order" of the Commission, so it cannot supersede either Rule 110's default rule (i.e., that proceedings are presided over by the Commission) or the OIP itself. Further, the Commission retains at all times the authority

[2] https://www.sec.gov/files/litigation/opinions/2021/34-93806.pdf

> to designate or to re-designate the presiding officer in its administrative proceedings, and, as the Supreme Court stated in *Lucia v. SEC*, **"'[b]y law, the Commission itself may preside over' any administrative proceeding that it institutes."** (Emphasis added)

In addition to the request for immediate action by the Commission, American CryptoFed urges the Commission's Office of Inspector General to open an investigation into the impropriety by the Commission. This letter can provide an overview of the undisputable factual background and legal basis which raise significant concerns worthy of investigation.

I.
Rule of Practice 250(a), 17 CFR § 201.250 (a)

On June 7, 2023, the Commission issued an Order Denying Motion to Dismiss (Release No. 97659, "June 7, 2023 Order")[3], for which Commissioner Peirce and Commissioner Uyeda published a dissenting statement[4]. Footnote 13 of the June 7, 2023 Order at page 5 states:

> We have resolved the motion on the premise that Respondent's Form 10 is not yet effective. Here, the Commission instituted Section 12(j) proceedings before the registration statement automatically become effective 60 days after filing, and the OIP explicitly ordered that "the institution of these proceedings stays the effectiveness of the Respondent's Form 10." **Respondent's motion to lift the OIP's stay of effectiveness remains pending before the Commission.** This order should not be construed as expressing a view as to the disposition of that motion. (Emphasis added).

Because "The OIP explicitly ordered that 'the institution of these proceedings stays the effectiveness of the Respondent's Form 10,'" ("Stay Order"), American CryptoFed, pursuant to Rule of Practice 250 (a), 17 CFR § 201.250 (a) *Motion for a ruling on the pleadings* ("Rule 250

[3] https://www.sec.gov/files/litigation/opinions/2023/34-97659.pdf
[4] https://www.sec.gov/news/statement/peirce-uyeda-american-cryptofed-20230607

(a)")[5] timely filed the "Respondent's motion to lift the OIP's stay of effectiveness" ("Motion to Lift the Stay Order"),[6] on December 15, 2021, two (2) years ago. Rule 250 (a) states:

> (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).

The Rule 250 (a) requires the Commission to **"promptly grant or deny the motion"**, even allowing the Commission to accept all of the SEC Division of Enforcement's factual allegations as true and to draw all reasonable inferences in the Division of Enforcement's favor. However, the Commission has not made a decision on the Motion to Lift the Stay Order, as of today, two (2) years after the filing. As a result of this extended period of indecision and non-decision, the Commission is in violation of Rule 250 (a), because in no circumstance can a delay on a critical pending motion for more than two years be considered "prompt".

II.
The Fifth Amendment of the U.S. Constitution

The Fifth Amendment of the U.S. Constitution states, "No person shall…be deprived of life, liberty, or property, **without due process of law**…" (Emphasis added). Rule 250 (a) defines the "due process of law", requiring the Commission to "promptly grant or deny the motion". The Commission's inability to come to a decision on American CryptoFed's Motion to Lift the Stay Order not only violated Rule 250 (a), but also the Fifth Amendment of the U.S. Constitution.

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[5] https://www.govinfo.gov/content/pkg/CFR-2020-title17-vol3/pdf/CFR-2020-title17-vol3-sec201-250.pdf

[6] The Motion to Lift the Stay Order can be found in the SEC website link by filing date: https://www.sec.gov/litigation/apdocuments/3-20650

The Commission's indecision and non-decision create a vague situation lacking fair notice as to what American CryptoFed should do in order to comply with the securities law. The fair notice / void for vagueness doctrine upheld by the US Supreme Court's opinion in *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) at 2317 states:

> 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.** (Emphasis added).

As a result of the Commission's indecision and non-decision, the Commission is clearly unable to apply existing securities law to American CryptoFed by following the pre-determined due process of law which is Rule 250 (a), leading to an inevitable conclusion, from a legal perspective of as-applied constitutional challenges (not facial challenges), that the existing securities law does not apply to American CryptoFed and that the SEC does not have jurisdiction over American CryptoFed.

III.
Requirement for the Commission's Stay Order To Be Lawful.

The Commission's Stay Order can be lawful when, and only when, the Commission declares that American CryptoFed's Locke and Ducat tokens are not securities. The

Commission's June 7, 2023 Order has confirmed that a stay order has never existed for any not-yet-effective Exchange Act registration statement, by stating the following:

> Further, we are aware of **only one prior instance in which the Commission instituted a Section 12(j) proceeding as to a not-yet-effective Exchange Act registration statement**, but that proceeding settled shortly after **the Form 10 became automatically effective**, and there was no attempt to withdraw it. (Emphasis added, p.3).

This admission is pivotal, and affirms the legal path. **In the entire 89 years after the Exchange Act became law in 1934**, by the Commission's own admission, the Commission is aware of only **one case** "in which the Commission instituted a Section 12(j) proceeding as to a not-yet-effective Exchange Act registration statement", **but no Stay Order was included in the proceeding. By the Commission's own admission, "the Form 10 became automatically effective"** in accordance with Section 12 (g) of Exchange Act which states "Each such registration statement shall become effective sixty days after filing with the Commission or within such shorter period as the Commission may direct." Therefore, according to this legal precedent, American CryptoFed's Form 10 registration statement filed on September 16, 2021 would have become automatically effective on or before November 16, 2021, if American CryptoFed's Locke and Ducat tokens were, in truth, securities. Given that the Commission's Stay Order has prevented American CryptoFed's Form 10 registration statement from automatically becoming effective sixty (60) days after filing, the only legal justification for the Commission's Stay Order is that American CryptoFed's Locke and Ducat tokens are not securities. To this extent, the Commission's Stay Order amounts to proof that American CryptoFed's Locke and Ducat tokens are not securities.

IV
Conclusion

It is clear that the Commission stands in violation of both the Fifth Amendment of the U.S. Constitution and Rule of Practice 250 a), 17 CFR § 201.250 (a). For these reasons and that set forth in Section III above, American CryptoFed petitions the Commission for prompt action to declare that i) American CryptoFed's Locke and Ducat tokens are not securities; ii) no investment contract exists in the American CryptoFed business model, iii) the SEC does not have jurisdiction over American CryptoFed. In addition, American CryptoFed petitions the Commission's Office of Inspector General to open an investigation into the impropriety by the Commission and to include the result in its Semiannual Report to Congress.

We look forward to written responses from both the Commission and the Commission's Office of Inspector General respectively.

Sincerely,

/s/ Scott Moeller

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