UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 11134 / November 18, 2022

ADMINISTRATIVE PROCEEDING
File No. 3-21243

In the Matter of **The Registration Statement of American CryptoFed DAO LLC** **Respondent**	**RESPONDENT AMERICAN CRYPTOFED DAO LLC'S BRIEF IN SUPPORT OF PETITION FOR REVIEW OF INITIAL DECISION**

Table of Contents and Table of Authorities are 4 pages (i - iv) in total.

DocuSign signatures are at page 30, and Certificate of Service is at the bottom.

August 20, 2023

/s/ Scott Moeller
Scott Moeller, Organizer/President
American CryptoFed DAO LLC
1607 Capitol Ave Ste 327, Cheyenne, WY 82001
Phone (307) 206-4210
scott.moeller@americancryptofed.org

/s/ Xiaomeng Zhou
Xiaomeng Zhou, Organizer/COO
American CryptoFed DAO LLC
1607 Capitol Ave Ste 327, Cheyenne, WY 82001
Phone (307) 206-4210
zhouxm@americancryptofed.org

OS Received 08/21/2023

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Pursuant to Rule 450 of the Securities and Exchange Commission's ("Commission" or "SEC") Rules of Practice, American CryptoFed DAO LLC ("Respondent" or "Am. CryptoFed") respectfully submits this Brief ("Brief") in Support of Petition for Review of Initial Decision ("Initial Decision") issued by Administrative Law Judge Carol Fox Foelak ("ALJ Foelak") on May 17, 2023 in this stop order proceeding, which suspends the effectiveness of the Form S-1 registration statement of Am. CryptoFed filed on Sep. 17, 2021 ("Form S-1", Dx.1) [1].

1. PRELIMINARY STATEMENT

On Sep. 16, 2021, Am. CryptoFed filed a Form 10 registration statement with the Commission ("Form 10"), against which on Nov. 10, 2021, the Commission issued an Order Instituting Proceedings ("Form 10 OIP") pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"). The Form 10 OIP included an order staying the Form 10 ("Stay Order") which would have automatically become effective 60 days after filing. On Dec. 15, 2021, pursuant to 17 C.F.R. § 201.250 (a), the Commission's own Rule 250 (a), Am. CryptoFed timely filed a "Motion for a ruling on the pleadings" requesting the Commission to lift the Stay Order ("Motion to Lift Stay Order"). The Commission has not made a decision, although Rule 250 (a) mandates "The hearing officer shall promptly grant or deny the motion." The Commission's indecision and non-decisions amounted to a tacit admission that the Commission has no jurisdiction over Am. CryptoFed's business model, because if it had, it would have been possible for the Commission to make a prompt decision by "accepting all of the non-movant's factual allegations as true and drawing all reasonable inferences in the non-movant's favor" (*id*).

[1] "Findings and Brief" refers to the Division of Enforcement's Proposed Findings and Brief in Support of Issuing a Stop Order. "Opposition Brief" refers to Am. CryptoFed's Opposition to the Division's Findings and Brief. "Dx." refers to the Division's exhibits, and "Rx." Respondent's exhibits, admitted during the hearing. "Tr." refers to the transcript of the hearing.

Restrained by the Stay Order, facing the Commission's indecision and non-decisions which violated its own Rule 250 (a) mandating a prompt decision, Am. CryptoFed had no choice but to send a letter on May 30, 2022 (Dx. 13) requesting the Division of Enforcement ("Division") to provide a *Howey* Test Analysis or other legal justifications to prove that Locke and Ducat tokens are securities, while exploring a practical, feasible and compliant path to implement its business plan. In response, through a letter dated Jun. 3, 2022, the Division took the position that filing the registration statement with the Commission per se made Locke and Ducat tokens securities (Rx. 16 p.3) and extended its enforcement actions from the Form 10 to Form S-1, such as subpoena (Dx.3) based on a non-public examination order (Rx. 5) pursuant to Section 8(e) of Securities Act of 1933 ("Securities Act") which was surprisingly issued as early as Nov. 9, 2021, and not revealed to Am. CryptoFed for seven (7) months.

Again, Am. CryptoFed had no choice but to file a Form RW to withdraw the Form S-1 for the specific reason that "Locke token and Ducat token are not securities" (Rx.37 p.1). However, the Commission issued an Order denying the withdrawal request, Rel. No. 11074 / Jun. 17, 2022 ("Denial Order", Rx.20). As a result, the Division had the obligation to prove, with reasons other than filing the Form S-1 per se, that Locke and Ducat tokens are securities, in compliance with Administrative Procedure Act ("APA"), codified in 5 U.S. Code § 556 (d), stating "the proponent of a rule or order has the burden of proof." However, instead of fulfilling its APA obligation, the Division accelerated enforcement actions through subpoena and testimony (Dx.3, Dx.5, Dx.6), leading to the stop order proceeding by an Order Instituting Proceedings ("Form S-1 OIP") on Nov. 18, 2022 pursuant to Section 8(d) of the Securities Act. It is undisputed that the Form S-1 had a delaying Amendment from inception to incorporate comments by the Division of Corporation Finance ("CorpFin"). Furthermore, Am. CryptoFed

informed the Division on Oct. 27, 2022, Nov.1, 2022 and Nov. 6, 2022 (Dx.15, p. 13; Dx.16. p.6; Rx.19. p.15), also cited by the Division in their Findings and Brief (p. 9):

> Our approach is to do our best in good faith, to let the Division of Corporation Finance and/or the Division of Enforcement exhaust all possible legal arguments, while the delaying amendment is still in place. When, and only when both Divisions have no more legal arguments to further justify the need of the delaying amendment, will we remove the delaying amendment. We are close to that critical moment.

The fact that the delaying Amendment would not be removed unless the Division of Corporation Finance and/or the Division of Enforcement exhausted all possible legal arguments, was not interpreted correctly by the Initial Decision which stated (p.4) only a half-truth as below:

> The Form S-1 contains a so-called "delaying amendment." Div. Ex. 1. However, during the course of the Section 8(e) examination Respondent threatened to remove the delaying amendment, for example in an October 27, 2022, letter to Division counsel. Div. Ex. 15, at 13.

The Initial Decision's **Findings of Facts** contain many half-truths ("Half the Truth is often a great Lie" -- Benjamin Franklin), as demonstrated above, which in accordance with ALJ Foelak's Order, are "arguments that are more properly made before the Commission in a petition for review." (*American CryptoFed,* Rel. No. 6908/June 6, 2023). Additionally, without citing any binding precedents of case law, the Initial Decision (Emphasis in original, p.8) concluded:

> Respondent argues that Section 8(b) is a specific provision that must be given effect over Section 8(d) as a general provision. Respondent's argument is undercut by the text of the two sections, which is permissive and does not establish a priority: both provide *"the Commission may"* (emphasis added).

This conclusion contradicts a fundamental canon of statutory interpretation emphasized by the US Supreme Court in *Ginsberg & Sons v. Popkin*, 285 U. S. 204 (1932) at 208, "General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment" and repeatedly upheld in *MacEvoy Co. v. United States,* 322 U. S. 102 (1944) at 107, *Fourco Glass Co. v. Transmirra*

Products Corp., 353 U.S. 222 (1957) at 228-229, *Preiser v. Rodriguez*, 411 U. S. 475 (1973) at 489-490, and *Busic v. United States*, 446 U.S. 398 (1980) at 407.

The Initial Decision's **Conclusion of Law** contains many similar types of negligence, misapplication and misinterpretation of law as demonstrated above, including but not limited to, *SEC v. Howey Co.*, 328 US (1946) at 298, *FCC v. Fox Television Stations, Inc*.,567 US 239 at 2317, and *Red Bank Oil Co.*, Securities Act Rel. No. 3095, 1945 SEC LEXIS 204, 20 S.E.C. 863.

2. FACTUAL BACKGROUND

The currencies of monetary systems replacing sovereign currencies, are not securities, according to the SEC's former Chairman Jay Clayton's interview with CNBC on Jun. 6, 2018, "Cryptocurrencies: These are replacements for sovereign currencies, replace the dollar, the euro, the yen with bitcoin," and "That type of currency is not a security." (Rx.62). However, current Chairman Gary Gensler emphasized on Aug. 3, 2021 at the Aspen Security Forum "No single crypto asset, though, broadly fulfills all the functions of money." (Rx.57). These conflicting statements of the former and current Chairmen have caused confusion as to what crypto asset "broadly fulfills all the functions of money" as a replacement for "the dollar, the euro, the yen", which "is not a security". Chairman Gensler has made a variety of assertions through speeches and testimonies instilling fear and uncertainty across the crypto industry and general public in regard to cryptocurrencies. His public comments and actions attempt to imply that almost all crypto products and tokens are securities and should therefore register with the SEC, while also painting the crypto industry as composed of willful lawbreakers who actively chose not to follow simple rules.

Demonstrating good faith to comply with the Securities Act and Exchange Act, as no other form was prescribed, Am. CryptoFed had no choice but to file with the Commission Form 10 on Sep. 16, 2021, and subsequently Form S-1 on Sep.17, 2021, while emphasizing in both filings Am. CryptoFed's true belief that Locke and Ducat tokens are not securities. On Oct. 12, 2021, in a letter addressed to Chairman Gensler, the Commissioners and CorpFin ("October 12 Letter"), Am. CryptoFed explained the uncertainties and dilemma it faced as below (Dx.19, p.7):

> 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." (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.

During the hearing, ALJ Foelak summarized Am. CryptoFed's dilemma as below:

> JUDGE FOELAK: Right. I understand you had conversations and exchange of letters with him. And I -- and I -- and I understand that you don't really think these things are securities, **but you're registering them anyway because you don't want the government to come after you.** (Emphasis added, Tr.87:13-18).

The Form S-1 contained a delaying Amendment from inception (Dx. p.3) which was never removed. Am. CryptoFed notified the Division that the delaying Amendment would not be removed until the Division and/or CorpFin exhausted all their legal arguments (Dx.15, p. 13; Dx.16. p.6; Rx.19. p.15; Findings and Brief, p. 9). In addition, CorpFin had already identified serious deficiencies, material omissions and the lack of legality opinion of Form S-1 and Form 10, **on their face**, as early as Oct. 4, 2021 and Oct. 8, 2021, more than one month prior to a non-public Order issued on Nov. 9, 2021 pursuant to Section 8(e) ("Section 8(e) Examination Order", Rx.5) and thirteen (13) months prior to Form S-1 OIP, as the Initial Decision confirmed below:

> Justin Dobbie of the Commission's Division of Corporation Finance (CorpFin) is in charge of an office, staffed by attorneys and accountants, that reviews disclosure documents, including registration statements in the finance industry. Tr. 27-32. He

> participated in the review of the Form S-1. Tr. 32-33. He and his team identified a number of serious deficiencies, including a lack of financial statements, audited or unaudited; vague responses concerning the identity of management and beneficial owners and their compensation or valuation of their ownership stake; a vague, aspirational description of the business; and lack of a legality opinion. Tr. 38-56. They discussed the deficiencies in both the Form 10 and the Form S-1 in a telephone call with Respondent and followed up with October 8, 2021, letters to Respondent. Tr. 59-64; Div. Exs. 17, 18.11 The letters listed specific deficiencies, some of which were the alleged material omissions in the registration statement, and identified CorpFin's Erin Purnell as a contact. Exs. 17, 18. Respondent's October 12, 2021, letter, addressed to the five SEC Commissioners and Ms. Purnell, responded to CorpFin's October 8 letters. Div. Ex. 19... Mr. Dobbie attempted to arrange telephone calls with Respondent to discuss further the Forms 10 and S-1, but received an email from Respondent stating they would only correspond with the staff in writing. (Initial Decision, p.5-6).

However, CorpFin never responded, as ALJ Foelak confirmed during the hearing:

> JUDGE FOELAK: Yes, sir. Yes, sir. You're -- you're very -- your exchange of correspondence where you never got any reply, that is in evidence. It is -- there is -- **the evidence shows that you asked seven questions repeatedly and never got an answer.** (Emphasis added, Tr. 477:14 -19).
>
> JUDGE FOELAK: Sir, as I keep saying, **there is no doubt that you didn't get the answers to your -- the questions -- that -- the seven questions. So, you don't have to keep proving it**. (Emphasis added, Tr. 486:18 – 21).
>
> JUDGE FOELAK: Right. Right. And **I understand, for example, on your seven points -- seven questions, okay**. Do you have any more questions within that framework, Mr. Zhou?
>
> MR. ZHOU: So, Your Honor, **we already established the fact there are no response to our answers to their bullet points?**
>
> JUDGE FOELAK: **Correct**.
>
> MR. ZHOU: Okay. That fact is **established and admitted by Your Honor** we do not have more questions. (Emphasis added, Tr. 539:23-25 – 540:1-10).

Although the October 12, 2021 Letter remains unanswered, the Commission issued the Form 10 OIP as early as Nov. 10, 2021 to effectively turn a Filing Review Process (Rx.3) into a law enforcement process. The Form 10 OIP's Stay Order stayed the automatic effectiveness of the Form 10 for the first time in the 89-year history of the Commission. On Dec. 15, 2021, Am. CryptoFed filed a motion to lift the Stay Order ("Motion to Lift the Stay Order", Rx. 202) pursuant to Rule 250 (a) mandating a prompt decision. However, the Commission has not made a decision on the Motion to Lift the Stay Order which still "remains pending before the

Commission" (*American CryptoFed*, Rel. No. 97659 / Jun. 7, 2023, p. 5 footnote 13) as of today. On May 30, 2022, approximately 165 days after filing the Motion to Lift the Stay Order, Am. CryptoFed, realizing that the Stay Order could last forever, had no choice but to send a letter ("May 30, 2022 Letter", Dx. 13) to the Division to discover how to simultaneously achieve legal compliance and implement its business plan, while facing the Commission's indecision and non-decisions on the Motion to Lift the Stay Order, given that the information required for the Form S-1 and Form 10 was similar. However, the May 30, 2022 Letter only triggered a series of additional enforcement actions, the timeline of which is outlined below:

On May 30, 2022, Am. CryptoFed sent the Division a letter (Emphasis added, Dx. 13, p. 2-4) stating the following:

> 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**…
>
> …
>
> 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.**
>
> **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.**

On June 3, 2022, in response, the Division stated the following:

> 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. (Emphasis added, Rx.16 p.1).
>
> 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. (Emphasis added, Rx.16 p.2).
>
> 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, Rx.16 p.3).

On June 6, 2022, Am. CryptoFed filed Form RW to withdraw the Form S-1("Form S-1 Withdrawal Request") for the specific reason that "Locke token and Ducat token are not securities" (Rx.37 p.1), given that the Form S-1 filing per se was the only legal justification for the Division to classify Locke and Ducat tokens as securities, and resulted in the alleged Section 5 violation and the secret search of the Section 8(e) Examination Order.

On June 8, 2022, Am. CryptoFed requested the Division to provide substantive justification to classify Locke and Ducat tokens as Securities other than by Form 10 filing per se (Rx.21, p.4):

> 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).

On June 13, 2022, CorpFin sent a letter to request Am. CryptoFed to withdraw the Form RW voluntarily (Rx.18, p.3) stating:

If you do not withdraw the Form S-1 withdrawal request, we intend to recommend that the Commission deny the withdrawal request.

On June 13, 2022, the same day, Am. CryptoFed requested CorpFin to prove that Locke and Ducat tokens are securities, citing Administrative Procedure Act ("APA"), 5 U.S. Code § 556(d) regarding the burden of proof (Rx.18, p.1-2):

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….

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).

On June 15, 2022, the same day the subpoena (DX. 3) was served, Am. CryptoFed sent a letter to the Division to emphasize "the Section 8(e) Examination Order and the Subpoena pursuant to the order will be moot" as below**,** unless the Commission, the Division and CorpFin could prove that Locke and Ducat tokens are securities.

> However, regarding Form S-1, as we already notified you on June 6, 2022, we have filed the request for withdrawal. Unless Mr. Justin Dobbie at the Division of Corporation Finance or the Commission can apply a Howey Test analysis to prove that American CryptoFed's Locke and Ducat tokens are securities, **subject to the SEC's jurisdiction**, the request for withdrawal of Form S-1 should and will be granted. As a result, **the Section 8(e) Examination Order and the Subpoena pursuant to the order will be moot**. For your convenience, I attached the communications with Mr. Justin Dobbie who is also copied in the letter.
>
> In addition, back on January 23, 2022, American CryptoFed filed "RESPONDENT AMERICAN CRYPTOFED DAO LLC'S MOTION FOR LEAVE TO FILE A MOTION ("Motion for Leave to File A Motion"), whose purpose is also to ask the Division of Enforcement to apply a Howey Test Analysis or other legal justifications to prove that Locke token and Ducat token are securities, **subject to the SEC's jurisdiction**. This Motion for Leave to File A Motion is still pending. (emphasis added, Rx.97 p.1).

On June 17, 2022, the Commission issued an Order denying the Form S-1 Withdrawal Request ("Denial Order", Rx.20), although the only reason for the withdrawal request was that "Locke token and Ducat token are not securities" (Rx.37, p.1). The Commission, instead of fulfilling its obligation pursuant to APA, 5 U.S. Code § 556 (d), to prove that Locke token and Ducat token are securities, justified its order (Rx.20, Item 3) with a half-truth:

> On May 30, 2022, American CryptoFed informed Commission staff that in July 2022 it would "proceed with implementing its business plan as described in... the Form S1 [sic]" and begin distributing Locke tokens despite the Form S-1 not yet being effective.

The whole truth of the May 30, 2022 Letter was summarized by ALJ Foelak during the hearing:

> JUDGE FOELAK: That's a yes or no answer. Sir, I understand that you're referring to the Catch 22 situation where if you're a security you want to register and if you're not, you're going to move forward, but-- (Tr.815:19-23).

On June 21, 2022, in response to the Division's Jun. 15, 2022 subpoena, Am. CryptoFed further urged the Division to focus on its obligation to prove that Locke and Ducat tokens are securities and subject to the SEC's jurisdiction, instead of unlawful search:

> Except those documents which are already in the possession of the Division of Enforcement ("Division"), American CryptoFed objects to all the Subpoena's requests for **Documents to be Produced** on the grounds that these requests are not reasonably calculated to lead to the discovery of relevant, admissible evidence which can rebut American CryptoFed's assertion that American CryptoFed has **No Fund Raising, No Revenue, No**

> **Costs, No Profits and No Assets** and therefore there is no traditional balance sheet equation of **Assets = Liabilities + Shareholder's Equities** to generate securities **subject to the SEC's jurisdiction**…
>
> American CryptoFed has provided the Division with relevant and necessary documents which are sufficient to conclude that Locke token and Ducat token are not securities. American CryptoFed is ready to answer in writing all written questions related to the contents of these documents. (Dx.4 p.1-2).

Additionally, in the cover email, Am. CryptoFed emphasized the Denial Order violated the US Supreme Court ruling in *Jones v. SEC, 298 U.S. 1 (1936)* and was unlawful (Rx.100 p.1-2).

On July 6, 2022, one day before Mr. Moeller's testimony, Am. CryptoFed sent a letter to CorpFin, copying the Division, further emphasizing as below that the Denial Order and the investigations through subpoena and testimony were unlawful, while submitting a "Request for Withdrawal of Registration Statement on Form 10-12(g)" dated Jul. 5, 2022 via EDGAR ("Form 10 Withdrawal Request", Rx. 38).

> Therefore, as shown by the Supreme Court ruling in *Jones v. SEC*, the Commission, the Division of Enforcement and the Division of Corporation Finance should immediately lift the **unlawful Denial Order and unlawful investigations through subpoenas and testimonies under the guise of "the public interest and the protection of investors",** while simultaneously the Division of Enforcement initiated two Motions to Seal to hide their investigative actions from the general public.(Emphasis added, p.6 at Exhibit 8 of Rx.12).

On July 11, 2022, Am. CryptoFed sent a follow-up letter (Rx.103) to CorpFin requesting a meet and confer pursuant to the Commission's Jan. 6, 2022 Order (Rel. No. 93922), so that Am. CryptoFed could file a motion to lift the Denial Order on the grounds that the Denial Order violated the US Supreme Court opinion in *Jones v. SEC*, 298 U.S. 1 (1936). However, CorpFin never responded.

On July 15, 2022, Mr. Dobbie of CorpFin demonstrated that he did not object to Am. CryptoFed's Form 10 Withdrawal Request by stating in a secure email, "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." (Rx.25).

On July 22, 2022, Am. CryptoFed sent two letters (Rx.26 p.2 and Rx.27 p.2) to Mr. Dobbie at CorpFin, copying the Division, requesting the following:

> 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 S-1,… (Rx.27 p.2).

Both letters cited the order in *SEC v. Ripple Labs, et al.*, 20-cv-10832 (S.D.N.Y) issued by Judge Analisa Torres on Mar. 11, 2022 allowing Ripple Labs' fair notice defense (Rx.7 p.6-7):

> "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).

From July 31, 2022 through October 16, 2022, Am. CryptoFed sent five follow-up letters to Mr. Dobbie, copying the Division, emphasizing the lack of fair notice.

Jul. 31, 2022 follow-up letter (Rx.39 p.3) stated:

> 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 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 the Divisions of Corporation Finance and Enforcement "do not act in an arbitrary or discriminatory way." As of today, the Commission and the Divisions of Corporation Finance and Enforcement have failed in both dimensions.

Aug. 4, 2022 follow-up letter (Rx.30 p.3) stated:

> 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*.

After sending the fifth and sixth follow-up letters to Mr. Dobbie on Aug. 17, 2022 and Aug. 28, 2022 respectively (Rx.41, Rx.42), Am. CryptoFed sent the seventh follow-up letter (Rx.34 p.3) on Oct. 16, 2022, stating the following:

> To avoid any misunderstanding and further demonstrate American CryptoFed's good faith, before removing the Form S-1 delaying amendment, I hope that this letter can serve as the **seventh and last** letter which specifically requests you to provide American CryptoFed **with a proper mechanism**, on or before October 19th, 2022, so that American CryptoFed can **1) complete the initial registration Form S-1 filed with the SEC on September 17, 2021 and 2) continue to furnish accurate information for ongoing disclosures, when the information requested by the Form S-1 does not exist and shall never exist within the American CryptoFed DAO's structure.** The previous six letters were sent to your attention, on July 22, 2022 (two letters), July 31, 2022, August 4, 2022, August 17, 2022 and August 28, 2022.

On October 27, 2022, Am. CryptoFed sent a letter to the Division to emphasize that the delaying Amendment would not be removed unless the Division and/or CorpFin exhausted all possible legal arguments as below:

> Our approach is to do our best in good faith, to let the Division of Corporation Finance and/or the Division of Enforcement exhaust all possible legal arguments, while the delaying amendment is still in place. When, and only when both Divisions have no more legal arguments to further justify the need of the delaying amendment, will we remove the delaying amendment. We are close to that critical moment. (Dx.15, p. 13).

On November 1, 2022, Am. CryptoFed sent the second letter to the Division to emphasize that the delaying Amendment would not be removed unless the Division and/or CorpFin exhausted all possible legal arguments (Dx.16. p.6), the language of which was identical to the letter dated Oct. 27, 2022 above.

On November 6, 2022, Am. CryptoFed sent the third letter to the Division to emphasize that the delaying Amendment would not be removed unless the Division and/or CorpFin exhausted all possible legal arguments (Rx.19. p.15), the language of which was identical to the first letter dated Oct. 27, 2022, and the second letter dated Nov.1, 2022 above.

3. LEGAL ARGUMENT

3.1. The Initial Decision Misapplied the Law

3.1.1. The Requirements of Application of Section 8(b) of Securities Act

In *Red Bank Oil Co*. at 864, the Commission specifically emphasized two requirements for application of Section 8(b) of Securities Act ("Section 8(b)") with original underlines below:

> As will be noted from the following statutory excerpts Section 8 (d) provides for stop order proceedings at any time when it appears that a registration statement contains false material statements or material omissions; and proceedings to determine whether to refuse effectiveness to a registration statement under Section 8 (b) are provided for only when a registration statement is "on its face" materially [*3] incomplete or inaccurate.
>
> Section 8 of the Act provides in part:
>
> "(b) If it appears to the Commission that a registration statement is <u>on its face incomplete or inaccurate in any material respect</u>, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice not later than ten days after the filing of the registration statement, and opportunity for hearing (at a time fixed by the Commission) within ten days after such notice by personal service or the sending of such telegraphic notice, <u>issue an order prior to the effective date of registration refusing to permit such statement to become effective</u> until it has been amended in accordance with such order. When such statement has been amended in accordance with such order the Commission shall so declare and the registration shall become effective at the time provided in subsection (a) or upon the date of such declaration, whichever date is the later.
>
> ***
>
> "(d) <u>If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading</u>, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, <u>issue a stop order suspending</u> **[*4]** <u>the effectiveness of the registration statement</u>. When such statement has been amended in accordance with such stop order the Commission shall so declare and thereupon the stop order shall cease to be effective."

Therefore, there are two requirements for the Commission to issue an order refusing to permit a registration statement to become effective pursuant to Section 8(b) ("Section 8(b) Refusal Order"), which are i) **<u>"on its face incomplete or inaccurate in any material respect"</u>** and ii) **<u>"prior to the effective date of registration"</u>** ("Two Section 8 (b) Requirements"). The

requirement "**on its face incomplete or inaccurate in any material respect"** is so critical that the Commission underlined the following in *Red Bank Oil Co.* at 865 in the original text:

> It is clear from the Act that the procedure of Section 8 (b), to determine whether to issue an order refusing effectiveness to a statement, was intended to be used only when the inadequacy or incompleteness is plain on the "face" of the statement.

As a point of clarification, in *Red Bank Oil Co*., the Commission did not provide any requirements to apply Section 8(b) other than the Two Section 8 (b) Requirements above, although the Commission made the following statement at 866:

> If registrant is right the Commission would be required -- before commencing stop order proceedings -- to allow a false and misleading statement to become effective, placing the registrant in [*7] a position in which it could and perhaps would proceed to sell securities to the public; and this would result merely because a statement is not incomplete or inaccurate on its face although it might otherwise be completely false and misleading. We think it utterly repugnant to the objectives of the Act to interpret it to require us to sit by until a false and misleading registration statement becomes effective before commencing action under Section 8 (d).

The statement above was no more than a confirmation that, when the requirement **"on its face incomplete or inaccurate in any material respect"** is not satisfied, **"because a statement is not incomplete or inaccurate on its face although it might otherwise be completely false and misleading"**, Section (d) of Securities Act ("Section 8(d)") would be applied to "issue a stop order suspending the effectiveness of the registration statement ("Section (d) Stop Order"). To this extent, the following footnote 14 of the Initial Decision at p.7 citing the Commission's statement above, was misleading and incorrect.

> Prior to the hearing, Respondent moved for ruling on the pleadings under 17 C.F.R. § 201.250(a) on the basis that the Section 8(e) investigation and 8(d) stop order proceeding are unlawful because they apply only to registration statements that have become effective. This argument is foreclosed by Commission precedent, and the undersigned denied the motion on the record. Tr. 6, 167-68; *see Red Bank Oil Co*., Securities Act Release No. 3095, 1945 SEC LEXIS 204, at *7 (Oct. 11, 1945) ("We think it utterly repugnant to the objectives of the Act to interpret it to require us to sit by until a false and misleading registration statement becomes effective before commencing action under Section 8(d).").

In the case of Am. CryptoFed's Form S-1, there has been no such situation that required the Commission "to sit by until a false and misleading registration statement becomes effective". To the contrary, Am. CryptoFed sent multiple letters on Oct. 27, 2022, Nov. 1, 2022 and Nov. 6, 2022 respectively, to the Division, copying CorpFin, to repeatedly emphasize that the delaying Amendment would not be removed unless the Division and/or CorpFin exhausted all possible legal arguments (Dx.15, p. 13; Dx.16. p.6; Rx.19. p.15). Even if Am. CryptoFed, pursuant to 17 CFR § 230.473 (b), had filed an amendment to remove the delaying Amendment after repeatedly requesting the Division and/or CorpFin to exhaust all possible legal arguments, the Commission would still have had ten (10) days to issue a Section 8(b) Refusal Order, because an amendment filing to remove the delaying Amendment would have reset the clock in accordance with Section 8(a) of Securities Act stating "If any amendment to any such statement is filed prior to the effective date of such statement, the registration statement shall be deemed to have been filed when such amendment was filed".

3.1.2. No Factual Dispute for Application of Section 8(b)

There is no dispute regarding the facts that "Respondent's Registration Statement is pending and is not yet effective." (Form S-1 OIP, p.1); "The Registration Statement contained a delaying Amendment", and "The Registration Statement does not contain an opinion of counsel as to the legality of the securities being offered." (Findings and Brief, Item 9, p.4; Item 89, p.18). Further, Am. CryptoFed fully agrees with the facts found at Items 12, 14 and 16 of the Division's Findings and Brief (p.4-5), which were consistent with CorpFin's letter on Form S-1 below dated Oct. 8, 2021 ("October 8, 2021 Letter", Dx.18):

> Our **preliminary review** of your filing indicates that it fails to comply with the requirements of the Securities Act of 1933, the related rules and regulations, and the requirements of the form. Because of these **serious deficiencies**,…

We will not perform a detailed examination of the filing.…

The October 8, 2021 Letter reflected the Webex conversation that the Division correctly summarized below (Findings and Brief, Item 12, p.4-5):

> On October 4, 2021, Ms. Purnell and another member of Corporation Finance had a phone call with Mr. Moeller and Mr. Zhou that lasted nearly an hour. During that call, Ms. Purnell told Mr. Moeller and Mr. Zhou that both the Registration Statement and Form 10 were deficient for many reasons, including that they each lacked audited financial statements. She also informed them that Corporation Finance would not conduct any further review until American CryptoFed amended the Registration Statement and Form 10 to contain audited financial statements.

Therefore, the Form S-1 which "contained a delaying Amendment", "is pending and is not yet effective", "does not contain an opinion of counsel as to the legality of the securities being offered", with "serious deficiencies" found through a "preliminary review" without the need of "a detailed examination of the filing", perfectly satisfies the Two Section 8(b) Requirements.

In its section II. FINDINGS OF FACT on page 5-6, the Initial Order, as cited by this Brief within section **2. FACTUAL BACKGROUND,** confirmed these undisputed facts above that perfectly satisfied the Two Section 8 (b) Requirements which were i) **"on its face incomplete or inaccurate in any material respect"** and ii) **"prior to the effective date of registration"**.

3.1.3. The Section 8(b) as a Specific Provision Must Be Given Effect over Conflicting Section 8(d) as a General Provision.

The Initial Decision falsely concluded on p. 8 (Emphasis in original) "Respondent's argument is undercut by the text of the two sections, which is permissive and does not establish a priority: both provide 'the Commission *may*' (emphasis added)."

Not so.

The Initial Decision cited above contradicts US Supreme Court opinions which have repeatedly upheld the application of a canon of statutory interpretation that if there is a conflict between a general provision (statute) and a specific provision (statute), the specific provision

(statute) prevails. The US Supreme Court stated in *Ginsberg & Sons v. Popkin*, 285 U. S. 204 (1932) at 208:

> General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. *United States v. Chase*, 135 U.S. 255, 260. Specific terms prevail over the general in the same or another statute which otherwise might be controlling. *Kepner v. United States*, 195 U.S. 100, 125. In re *Hassenbusch*, 108 Fed. 38. *United States v. Peters*, 166 Fed. 613, 615. The construction contended for would violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute. *Market Co. v. Hoffman*, 101 U.S. 112, 115. *Ex parte Public National Bank*, 278 U.S. 101, 104.

Since then, the US Supreme Court has repeatedly confirmed the opinion above in *MacEvoy Co. v. United States*, 322 U. S. 102 (1944) at 107, in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957) at 229, in *Preiser v. Rodriguez*, 411 U. S. 475 (1973) at 489-490, and in *Busic v. United States*, 446 U.S. 398 (1980) at 407. For example, the U.S. Supreme Court's opinion in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957) at 229 confirmed the same canon of statutory interpretation as below:

> We think it is clear that § 1391 (c) is a **general** corporation venue statute, whereas § 1400 (b) is a **special** venue statute applicable, specifically, to all defendants in a particular type of actions, i. e., patent infringement actions. In these circumstances **the law is settled** that "**However inclusive may be the general language of a statute, it `will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling**.' *Ginsberg & Sons v. Popkin*, 285 U. S. 204, 208." *MacEvoy Co. v. United States*, 322 U. S. 102, 107.
>
> **We hold that 28 U. S. C. § 1400 (b) is the sole and exclusive provision controlling venue in patent infringement actions, and that it is not to be supplemented by the provisions of 28 U. S. C. § 1391 (c).** (Emphasis added).

Accordingly, however inclusive Section 8(d) and Section 8(e) of the Securities Act may be, they will not be held to apply to a matter specially dealt with in Section 8(b) of the same Securities Act. The specific language in Section 8(b) stating, i) **"on its face incomplete or inaccurate in any material respect"** and ii) **"prior to the effective date of registration",** left no room for Section 8(d) or Section 8(e) to be applied to Am. CryptoFed's Form S-1. Section

8(b) is **"the sole and exclusive provision controlling"** the situation that a Form S-1 registration statement is "**on its face incomplete or inaccurate in any material respect, …prior to the effective date of registration…".**

Furthermore, Section 8(b) does not grant the Commission and the Division with any statutory examination and investigation power, such as Section 8(e) examination power, because Section 8(b) is a **specific provision** which only controls the situation that a Form S-1 registration statement is "**on its face incomplete or inaccurate in any material respect, …prior to the effective date of registration…",** meaning that no examination power is needed to find additional information**.**

The Division tried to justify the Section 8(e) Examination Order with the US Supreme Court opinion in *United States v. Morton Salt Co.,* 338 U.S. 632 (1950), but the US Supreme Court opinion, as cited by the Division's Findings and Brief on p.31-32 below, explicitly requires statutory authorization.

> "When **investigative and accusatory duties are delegated by statute to an administrative body**, it, too, may take steps to inform itself as to whether there is probable violation of the law." (Emphasis added).

No "investigative and accusatory duties are delegated by statute to an administrative body" under Section (b) of the Securities Act, whatsoever. Therefore, the Supreme Court opinion in *United States v. Morton Salt Co*. does not support the Section 8(e) Examination Order.

Compared with Section 8(b), Section 8(d) is a more **general provision** designed for subject matters other than the situation "that a registration statement is **on its face incomplete or inaccurate in any material respect, …prior to the effective date of registration…"**.

Therefore, Section 8(e) titled "Examination for issuance of stop order", only empowers

the Commission "to make an examination in any case in order to determine whether a stop order should issue under subsection (d)", but not under Section 8(b).

Given that, without examination pursuant to Section 8(e), CorpFin had already reached its conclusion on Oct. 4, 2021 that, as the Division summarized in its Findings and Brief (p.4-5, Item 12), "the Registration Statement and Form 10 **were deficient for many reasons, including that they each lacked audited financial statements**…Corporation Finance **would not conduct any further review** until American CryptoFed amended the Registration Statement and Form 10 to contain audited financial statements", the application of Section 8(d) and Section 8(e) to Am. CryptoFed's Form S-1 should have been prohibited since Oct. 4, 2021, because in accordance with the U.S. Supreme Court's opinions in *Ginsberg & Sons v. Popkin, Fourco Glass Co. v. Transmirra Products Corp.*, *MacEvoy Co. v. United States*, , *Preiser v. Rodriguez,* , and in *Busic v. United States*, cited above, Section 8(b) should be **"the sole and exclusive provision controlling"** the situation that a Form S-1 registration statement is "**on its face incomplete or inaccurate in any material respect, …prior to the effective date of registration**…**"**.

As a result, both the non-public Section 8(e) Examination Order issued on Nov. 9, 2021, more than one month after the Oct. 4, 2021 WebEx conversation, and the Form S-1 OIP pursuant to Section 8(d) issued on Nov. 18, 2022, more than one year after Oct. 4, 2021, are unlawful. Both the Commission's own opinion in *Red Bank Oil Co.* and the US Supreme Court's opinions confirmed again and again in multiple cases, support Am. CryptoFed's legal position, which alone should be an independent ground to reverse the Initial Decision, that the applicable provision, for Am. CryptoFed's Form S-1, should be Section 8(b) rather than Section 8(d).

This Form S-1 OIP, while civil in form, is potentially criminal in nature due to unknown future developments, given the Division stated "your letter appears to announce a plan to

willfully violate Section 5 of the Securities Act" (Rx.16 p.1), "willful violations of the Securities Act can result in criminal penalties" (Rx.208, p.2) and "So, my first question, Mr. Moeller, is, isn't this paragraph describing the collapse of the ponzi scheme?" (Bruckmann, Tr.393:22-25). Therefore, all evidence derived from the unlawful Section 8(e) Examination Order, such as subpoena (Dx.3) and testimony (Dx.6), should be stricken pursuant to the exclusionary rule, as the US Supreme Court stated below in *Weeks v. United States*, 232 U.S. 383 (1914) at 393:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

3.2. The Initial Decision Ignored the Violations of Laws and Regulations by the Commission, the Division and CorpFin.

In its section II. FINDINGS OF FACT at p. 5-6, the Initial Decision correctly observed the following conclusion of Am. CryptoFed's October 12, 2021 Letter:

> In conclusion, the letter stated, "[i]f 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 [it]"; and asked that the SEC either allow the Form 10 to become effective, continue reviewing the Form S-1, or declare that CryptoFed is not subject to the SEC's jurisdiction.

3.2.1. The Commission, the Division and CorpFin Violated the Filing Review Process Supported by Office of Inspector General Report No. 542.

Although Am. CryptoFed specifically and repeatedly requested for a written response, CorpFin never complied with the SEC's Filing Review Process (Rx. 3) to provide a response to Am. CryptoFed's October 12, 2021 Letter above. The key rationale that Am. CryptoFed repeatedly sought written response, was because "examiners and reviewers inconsistently documented oral comments to companies", as the Commission's own Office of Inspector General stated (p.i, Executive Summary, Report No. 542, Evaluation of the Division of Corporation Finance's Disclosure Review and Comment Letter Process, September 13, 2017).

CorpFin's obligation should not be explained away by the Initial Decision's description at p. 6, "Mr. Dobbie attempted to arrange telephone calls with Respondent to discuss further the Forms 10 and S-1, but received an email from Respondent stating they would only correspond with the staff in writing." Despite the absence of CorpFin's response to Am. CryptoFed's October 12, 2021 Letter which was addressed to Chairman Gensler, all Commissioners and staff, the Commission issued the non-public Section 8(e) Examination Order (Rx.5) against the Form S-1 on Nov. 9, 2021, turning the SEC's Filing Review Process into a law enforcement process, which was prohibited by both the Commission's own opinion in *Red Bank Oil Co.* and the US Supreme Court's opinion in *Ginsberg & Sons v. Popkin* (confirmed again and again in multiple rulings by the US Supreme Court), as already proved in this Brief.

3.2.2. The Commission Violated 17 C.F.R. § 201.250 (a)

The following day, the Commission issued the Form 10 OIP with the Stay Order preventing Form 10 from automatically becoming effective 60 days after filing. However, the Commission was not able to make a decision on the Motion to Lift Stay Order timely filed by Am. CryptoFed on Dec. 15, 202 pursuant to 17 C.F.R. § 201.250(a), the Commission's own Rule 250 (a) mandating "The hearing officer shall promptly grant or deny the motion." The Exchange Act did not authorize the Commission to stay Form 10's automatic effectiveness 60 days after filing, given that i) the Commission could not make a decision pursuant to the Rule 250(a) mandating: "even accepting all of the non-movant's factual allegations as true and drawing all reasonable inferences in the non-movant's favor," and ii) the Commission could not identify any case law to support its Stay Order. **In the entire 89 years after the Exchange Act became law in 1934**, and by its own statement, 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" (*American CryptoFed,* Rel. No. 97659 / June 7, 2023, p.3). Therefore, Am. CryptoFed's Form 10 should have become automatically effective around Nov. 15, 2021, if the Rule of Law had prevailed.

Otherwise, the Commission should, following the request of Am. CryptoFed's October 12, 2021 Letter which was confirmed by the Initial Decision, "declare that CryptoFed is not subject to the SEC's jurisdiction." (Initial Decision, p.5-6). Given that, as of today, the Commission still has not made a decision on the Motion to Lift Stay Order, the only viable path to liberate the Commission from its continual and willful violation of 17 C.F.R. § 201.250(a), the Commission's own Rule 250 (a), is to "declare that CryptoFed is not subject to the SEC's jurisdiction."

3.2.3. The Commission Violated the Fair Notice Doctrine/the Void for Vagueness Doctrine Due to the Commission's Indecision and Non-decisions on the Motion to Lift Stay Order

The Commission's indecision and non-decisions have created an "impermissibly vague" situation that the US Supreme Court's opinion below in *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) at 2317 clearly does not allow:

> 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. (Emphasis added, Rx.6, p.253-254).

In a Mar. 11, 2022 Order in *SEC v. Ripple Labs*, Judge Analisa Torres of the Southern District of New York, United States District Court, citing the same US Supreme Court opinion above, allowed Ripple Labs' Fair Notice affirmative defense (Rx.7 p.6-7). In addition, Judge Analisa Torres stated the following (Rx.7 p.7-8):

> 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).

Like *SEC v. Ripple Labs* above, due to the Commission's indecision and non-decisions on the Motion to Lift Stay Order, among other things, in its Opposition Brief (p. 29 and 33), Am. CryptoFed brought an as-applied challenge to the statutes of the Securities Act and the Exchange Act (not a facial challenge) and argued that it was impossible to apply these Acts to the individual circumstances of Locke and Ducat tokens. The Initial Decision failed to address this as-applied challenge.

3.2.4. The Division Violated the US Supreme Court Opinion in *SEC v. Howey Co*., 328 US (1946)

Facing the "impermissibly vague" situation which was knowingly and willfully created by the Commission's indecision and non-decisions on the Motion to Lift Stay Order, Am. CryptoFed had no choice but to send the Division the May 30, 2022 Letter which requested a Cease-and-Desist Order including "a *Howey* Test Analysis or other legal justifications from the Division to prove that Locke token and Ducat token are securities", if the 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." (Dx. 13, p.2). During the hearing, ALJ Foelak confirmed Am. CryptoFed's rationale for the May 30, 2022 Letter "I understand that you're referring to the Catch 22 situation where if you're a security you want to register and if you're not, you're going to move forward." (Tr.815:19-23).

Tellingly, on Jun. 3, 2022, instead of providing a *Howey* Test Analysis or other legal justifications, the Division emphasized "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, Rx.16, p.3). This Division's legal position directly violated i) US Supreme Court opinion in *SEC v. Howey Co*., 328 U.S. 293 (1946) at 298 stating "Form was disregarded for substance and emphasis was placed upon economic reality", and ii) the Commission's own Apr. 3, 2019 [Framework for "Investment Contract" Analysis of Digital Assets] below (Rx.24, note 6):

> Rather, under the *Howey* test, **"form [is] disregarded for substance and the emphasis [is] on economic reality."** *Howey*, 328 U.S. at 298. (Emphasis added).

3.2.5. The Commission, the Division and CorpFin Violated the Fair Notice Doctrine/the Void for Vagueness Doctrine Due to Violation of *SEC v. Howey Co.,* 328 US (1946)

To the extent i) that the Division's legal position was that filing the registration statement **Form** with the Commission per se, rather than **Substance of Economic Reality**, made Locke

and Ducat tokens securities, and ii) that the Division failed to provide any substantive justification to prove Locke and Ducat tokens were securities, the Division knowingly and willfully created an inevitable situation that "men of common intelligence must necessarily guess at its meaning and differ as to its application," (*F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) at 2317), and as a result, violated the Fair Notice Doctrine/ the Void for Vagueness Doctrine. Facing this "impermissibly vague" situation, Am. CryptoFed, on Jun. 6, 2022, filed the Form S-1 Withdrawal Request for the specific reason that "Locke token and Ducat token are not securities" (Rx.37, p.1). However, CorpFin, on Jun. 13, 2022, requested Am. CryptoFed to withdraw the Form S-1 Withdrawal Request voluntarily (Rx.18, p.3). On the one hand, the Division insisted that filing a registration statement with the Commission per se made Locke and Ducat tokens securities, but on the other hand CorpFin stated, "If you do not withdraw the Form S-1 withdrawal request, we intend to recommend that the Commission deny the withdrawal request." (Rx.18, p.3).

The contradictions between the two subsidiaries of the Commission, the Division and CorpFin, demonstrate that the Commission "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." (*F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)). As experts, the Commission, the Division and CorpFin should know better than those "men of common intelligence" like Am. CryptoFed. The most important thing the Commission, the Division and CorpFin should have done was to fulfil their obligations under the *Howey* test and the Fair Notice Doctrine/ the Void for Vagueness Doctrine. However, they all consistently failed to do so.

3.2.6. The Commission, the Division and CorpFin Violated Administrative Procedure Act, 5 U.S. Code § 556 (d)

Given that Form 10 OIP was issued on Nov. 10, 2021, citing Administrative Procedure Act ("APA"), 5 U.S. Code § 556 (d), Am. CryptoFed, on Jun. 8, 2022, requested the Division to provide substantive legal justification to classify Locke and Ducat tokens as Securities, other than by filing a registration statement with the Commission per se (Rx.21, p.4). On Jun. 13, 2022, the same day CorpFin requested Am. CryptoFed to withdraw the Form S-1 Withdrawal Request voluntarily with the threat of the Denial Order, Am. CryptoFed, in response, requested CorpFin to prove that Locke and Ducat tokens are securities, emphasizing again the burden of proof of APA, 5 U.S. Code § 556 (d) (Rx.18, p.1-2): "Except as otherwise provided by statute, **the proponent of a rule or order has the burden of proof** " (Emphasis added)". However, both the Division and CorpFin have failed to fulfil the APA's obligation of **burden of proof**. In the FOREWORD for APA legislative history published on Jul. 26, 1946, Chairman Pat McCarran of the US Senate Committee on the Judiciary, emphasized APA's purpose as below:

> The Administrative Procedure Act is a strongly marked, long sought, and widely heralded advance in democratic government. It embarks upon a new field of legislation of broad application in the "administrative" area of government lying between the traditional legislative and fundamental judicial processes on the one hand and authorized executive functions on the other. Although it is brief, it is **a comprehensive charter of private liberty and a solemn under- taking of official fairness**. **It is intended as a guide to him who seeks fair play and equal rights under law, as well as to those invested with executive authority**. **It upholds law and yet lightens the burden of those on whom the law may impinge.** It enunciates and emphasizes the tripartite form of our democracy and **brings into relief the ever essential declaration that this is a government of law rather than of men.** (Emphasis added).

On Jun. 17, 2022, the Commission issued the Denial Order (Rx.20) which denied the Form S-1 Withdrawal Request without proving under the *Howey* test that Locke and Ducat tokens are securities.

All of the SEC's operations, including but not limited to administrative proceedings, such as the Form S-1 OIP, are governed by APA. The first sentence of APA, 5 U.S. Code § 556 (d)

(*Except as otherwise provided by statute*, ***the proponent of a rule or order has the burden of proof*** **(**emphasis added**)** have unmistakably created an absolute right to Am. CryptoFed to request the Commission to fulfil its **Burden of Proof** obligation. Once the Commission issued the Denial Order denying the Form S-1 Withdrawal Request, the Commission's obligation to prove that Locke and Ducat tokens are securities, was established, because the only reason for the Form S-1 Withdrawal Request was that "Locke token and Ducat token are not securities" (Rx.37, p.1). The Commission, the Division and CorpFin all failed to fulfil this **Burden of Proof** obligation mandated by APA, 5 U.S. Code § 556 (d), despite repeated requests (Rx.18 p.1-2, Rx.21 p.4).

3.2.7. The Commission, the Division and CorpFin Violated *Jones v. SEC*, 298 U.S. 1 (1936)

To the extent that the Commission, the Division and CorpFin, failed to fulfil their APA obligation to prove that Locke and Ducat token are securities, the Denial Order was unlawful. If the Denial Order had not been issued, the Form S-1 would have been withdrawn, and subsequently, the Form S-1 OIP seeking for a stop order would have been unnecessary. To the extent that the Commission, the Division and CorpFin failed to fulfil APA's **Burden of Proof** obligation, the issuance of Locke and Ducat tokens based on Am. CryptoFed's business model, even after Form S-1 were withdrawn, should not be considered as issuance of securities. Therefore, Am. CryptoFed's situation was perfectly identical to the registrant's situation confirmed by the US Supreme Court in *Jones v. SEC*, 298 U.S. 1 (1936) at 23 stating "Petitioner emphatically says that no steps had been taken looking to the issue of the securities; and this is not denied." Therefore, the Denial Order and the Initial Decision must be reversed, in compliance with the US Supreme Court opinion in *Jones v. SEC*, 298 U.S. 1 (1936) at 23-24 (Emphasis added) below:

In this proceeding, there being no adversary parties, the filing of the registration statement is in effect an ex parte application for a license to use the mails and the facilities of interstate commerce for the purposes recognized by the act. We are unable to see how any right of the general public can be affected by the withdrawal of such an application before it has gone into effect. **Petitioner emphatically says that no steps had been taken looking to the issue of the securities; and this is not denied.** So far as the record shows, there were no investors, existing or potential, to be affected. The conclusion seems inevitable that an abandonment of the application was of no concern to anyone except the registrant. The possibility of any other interest in the matter is so shadowy, indefinite, and equivocal that it must be put out of consideration as altogether unreal. Under these circumstances, the right of the registrant to withdraw his application would seem to be as absolute as the right of any person to withdraw an ungranted application for any other form of privilege in respect of which he is at the time alone concerned.

An additional reason why the action of the commission and of the court below cannot be sustained is that the commission itself had challenged the integrity of the registration statement and invited the registrant to show cause why its effectiveness should not be suspended. In the face of such an invitation, it is a strange conclusion that the registrant is powerless to elect to save himself the trouble and expense of a contest by withdrawing his application. Such a withdrawal accomplishes everything which a stop order would accomplish, as counsel for the commission expressly conceded at the bar. And, as the court below very properly recognized, **a withdrawal of the registration statement** "**would end the effect of filing it** and there is no authority under § 19 (b) to issue the Commission subpoena and it could not be enforced by order of the district court under § 22 (b)." 79 F. (2d) 619.

4. CONCLUSION

For the reasons set forth above, individually or collectively, Am. CryptoFed respectfully requests that the Commission reverse the Initial Decision in this matter and:

i) order the Division to fulfil the Commission's burden of proof mandated by APA, 5 U.S. Code § 556 (d), to prove that Locke and Ducat tokens are securities in Am. CryptoFed's business model on or before Apr. 5, 2024.

ii) order the Division to comply with the Fair Notice Doctrine/Void of Vagueness Doctrine mandated by the US Supreme Court in *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) to prove that Locke and Ducat tokens are securities in Am. CryptoFed's business model on or before Apr. 5, 2024.

OS Received 08/21/2023

iii) order CorpFin to declare in a written letter to Am. CryptoFed that Locke and Ducat tokens are not securities in Am. CryptoFed's business model on or before Apr. 5, 2024, if the Division fails to do i) and ii).

iv) reverse the Denial Order denying the Form S-1 Withdrawal Request.

v) declare that Section 8(e) Examination Order was unlawful.

vi) strike from the record evidence resultant from Section 8(e) Examination Order.

vii) order CorpFin to designate examiners and reviewers, on or before Apr. 5, 2024, specified in the SEC's Filing Review Process and in the Executive Summary of the Office of Inspector General Report No. 542 for Am. CryptoFed's Form S-1, if the Initial Decision will not be reversed.

viii) order the Division and CorpFin to allow Am. CryptoFed to remove the delaying Amendment so that the Form S-1 will become effective automatically, if CorpFin fails to timely do vii).

Dated: August 20, 2023 Respectfully submitted

/s/ Scott Moeller
[redacted]
Scott Moeller, Organizer/President
American CryptoFed DAO LLC
1607 Capitol Ave Ste 327, Cheyenne, WY 82001
Phone (307) 206-4210
scott.moeller@americancryptofed.org

/s/ Xiaomeng Zhou
[redacted]
Xiaomeng Zhou, Organizer/COO
American CryptoFed DAO LLC
1607 Capitol Ave Ste 327, Cheyenne, WY 82001
Phone (307) 206-4210
zhouxm@americancryptofed.org

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this, RESPONDENT AMERICAN CRYPTOFED DAO LLC'S BRIEF IN SUPPORT OF PETITION FOR REVIEW OF INITIAL DECISION, was filed by eFAP and was served on the following on this 20th day of August 2023, 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

[redacted]

Scott Moeller
President, American CryptoFed DAO LLC
1607 Capitol Ave Ste 327
Cheyenne, WY. 82001
Phone (307) 206-4210
scott.moeller@americancryptofed.org

OS Received 08/21/2023