

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING**  
**FILE No. 3-21243**

**In the Matter of**

**The Registration Statement of**

**American CryptoFed DAO LLC,**

**Respondent.**

**DIVISION OF ENFORCEMENT'S PROPOSED FINDINGS**  
**AND BRIEF IN SUPPORT OF ISSUING A STOP ORDER**

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February 17, 2023

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The Division of Enforcement (“Division”) respectfully submits these proposed findings of fact and brief in support of the Division’s request—under Section 8(d) of the Securities Act of 1933 (“Securities Act”)—for a stop order suspending the effectiveness of the September 17, 2021 Form S-1 registration statement (“Registration Statement”) that Respondent American CryptoFed DAO LLC (“Respondent” or “American CryptoFed”) filed with the Securities and Exchange Commission (“Commission”).

### **PRELIMINARY STATEMENT**

The Registration Statement seeks to register the distribution of two crypto assets—the Ducat and Locke tokens—as securities offerings. Based on the allegations in the Order Instituting Proceedings (“OIP”) and the exhibits and testimony presented at the hearing before Administrative Law Judge Carol Fox Foelak, a stop order suspending the Registration Statement’s effectiveness is appropriate. A stop order should issue because: (1) the Registration Statement omits material information required by applicable Commission rules and regulations; (2) the Registration Statement contains materially false and/or misleading statements regarding whether the Ducat and Locke tokens are securities; and (3) Respondent failed to cooperate with the Securities Act Section 8(e) examination (the “8(e) Examination”) that led to this proceeding. Indeed, Respondent admitted that the Registration Statement lacks audited financials and that it deliberately withheld—and continues to withhold—materials responsive to a subpoena issued during the 8(e) Examination.

### **PROCEDURAL BACKGROUND**

On November 9, 2021, the Commission issued a non-public Order Directing Examination and Designating Officers Pursuant to Section 8(e) of the Securities Act of 1933 (the “8(e) Order”) ordering the 8(e) Examination into Respondent’s Registration Statement.



Following the 8(e) Examination, on November 18, 2022, the Commission instituted this proceeding to determine whether a stop order should issue suspending the effectiveness of the Registration Statement.

On November 18, 2022, the Division served the OIP on Respondent by serving its President Scott Moeller and its Chief Operating Officer Xiaomeng Zhou.

On November 20, 2022, Mr. Moeller and Mr. Zhou entered appearances in the proceedings as representatives and officers of American CryptoFed.

On November 28, 2022, Respondent filed an Answer, which generally denied that Respondent had sufficient information to admit or deny the key allegations in the OIP.

The hearing in this matter commenced on December 1, 2022, and continued on December 2, 2022, December 6, 2022, January 18, 2023, and January 19, 2023. The Division called two witnesses, Justin Dobbie, Acting Office Chief in the Office of Finance within the Division of Corporation Finance (“Corporation Finance”), and Mr. Moeller. The Division also introduced 20 exhibits into evidence. Respondent called two witnesses, Erin Purnell, Branch Chief in Corporation Finance, and Mr. Zhou. Respondent also introduced more than 250 exhibits.<sup>1</sup>

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<sup>1</sup> The Division initially objected to many of Respondent’s exhibits as irrelevant or otherwise improper, but subsequently agreed for efficiency’s sake to allow the exhibits into evidence, with the Division’s objections going to their weight rather than admissibility.

## PROPOSED FINDINGS

### I. Factual Background

#### A. Respondent and Other Relevant Persons and Entities

1. Respondent American CryptoFed is a Wyoming decentralized autonomous organization limited liability company. (Dx. 1C).<sup>2</sup>

2. American CryptoFed's claimed mission is to create and maintain a monetary system with zero inflation, zero deflation and zero transaction costs. American CryptoFed seeks to use the Ducat token and Locke token to accomplish its mission. (Dx. 1 at 13).

3. Mr. Moeller is American CryptoFed's President and Chief Executive Officer and authorized to represent American CryptoFed for all matters and sign all documents. (Dx. 7; Tr. 171:18-172:3, 174:13-21 (Moeller)).

4. Mr. Zhou is American CryptoFed's Chief Operating Officer and authorized to represent American CryptoFed for all matters and sign all documents. (Dx. 7; Tr. 823:2-7 (Zhou)).

5. Marian Orr was American CryptoFed's Chief Executive Officer from at least September 15, 2021 until January 2022. (Dx. 1 at 36; Tr. 192:13-18 (Moeller)).

6. MShift, Inc. ("MShift") is a Delaware corporation and is the sole member of American CryptoFed. (Dx. 7, Dx. 1 at 32; Tr. 861:7-8 (Zhou)).

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<sup>2</sup> "Dx." refers to the Division's exhibits admitted during the hearing. "Rx." refers to Respondent's exhibits admitted during the hearing. "Tr." refers to the transcript of the hearing, and is followed by an indication of which witness's testimony is cited (unless already apparent).

## **B. Timeline of Key Events**

7. On September 16, 2021, Respondent filed a Form 10 registration statement (“Form 10”) with the Commission seeking to register the Ducat and Locke tokens as securities. (Dx. 2).<sup>3</sup>

8. Respondent’s Form 10 did not contain a delaying amendment and stated that as soon as the Form 10 was effective American CryptoFed would use a “Form S-8 filing [that] will enable [American CryptoFed] to grant restricted and untradeable Locke tokens to more than 500 persons.” (Dx. 2 at 6; *see also* Dx. 1A at 12-13).<sup>4</sup>

9. On September 17, 2021, Respondent filed the Form S-1 Registration Statement with the Commission seeking to register the offer and sale of the Ducat and Locke tokens under the Securities Act (Dx. 1). The Registration Statement contained a delaying Amendment. (Dx. 1 at 3).

10. Consistent with its usual practice, Corporation Finance assigned a team, including Ms. Purnell, to review the Form 10 and the Registration Statement. (Tr. 540:21-541:7 (Purnell))

11. Mr. Dobbie was the person in charge of the review team and had ultimate responsibility for reviewing the Form 10 and the Registration Statement. (Tr. 32:10-33:7 (Dobbie), 490:2-6, 541:4-7 (Purnell)).

12. 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

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<sup>3</sup> Although the content of the Form 10 is not at issue in this proceeding, certain events regarding the Form 10 are relevant to Respondent’s claim that it did not receive due process (Tr. 617:10-19 (Zhou)). In making this claim, Respondent inaccurately portrayed certain facts. Accordingly, the Division is including some information relating to the Form 10 here.

<sup>4</sup> Respondent’s proposed use of a Form S-8 (which is solely for employee benefit plans) was improper, but that issue need not be decided in this proceeding.

CryptoFed amended the Registration Statement and Form 10 to contain audited financial statements. (Tr. 504:10-505:1, 513:13-514:22, 541:8-14 (Purnell)).

13. During the October 4, 2021 telephone call, Ms. Purnell explained that even if American CryptoFed claimed it had no assets or liabilities, it would still need audited financial statements reflecting the lack of assets and liabilities. (Tr. 513:24-514:16 (Purnell)).

14. Also during the October 4, 2021 telephone call, Ms. Purnell explained that American CryptoFed needed to retain an attorney to, at a minimum, provide the required legal opinion before the Commission would declare the Registration Statement effective. (Tr. 514:17-22 (Purnell)).

15. On October 6, 2021, Respondent filed a purported amendment to its Form 10 that consists nearly entirely of legal arguments that the Ducat and Locke tokens are not securities. This amendment does not include any of the information that Corporation Finance had informed Respondent was missing from the Registration Statement. (Rx. 68).

16. On October 8, 2021, Corporation Finance sent two letters to Respondent reiterating that the Registration Statement and Form 10 were deficient, and itemizing the deficiencies in the Form 10, including that it lacked audited financial statements. (Dx. 17 and 18).<sup>5</sup>

17. On October 12, 2021, American CryptoFed sent a letter to the Chair, the Commissioners, and Ms. Purnell, in which American CryptoFed claimed to address the deficiencies in the Form 10 and Registration Statement. (Dx. 19).

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<sup>5</sup> Only the letter about the Form 10 included an itemized list of deficiencies, but Ms. Purnell testified that during the October 4, 2021 call she informed Mr. Moeller and Mr. Zhou that both forms had the same deficiencies. (Tr. at 541:15-542:13). Mr. Moeller and Mr. Zhou understood this as they later described their subsequent response to Ms. Purnell as applying to both documents: “Because the substance of the American CryptoFed Form S-1 filing and Form 10 filing were identical, American CryptoFed’s response focused primarily on the Form 10 filing. However, the conclusion below should apply equally to the Form S-1 filing.” (Dx. 11 at 9).

18. Corporation Finance staff subsequently attempted multiple times to have additional calls with American CryptoFed's representatives, but American CryptoFed's representatives refused to have telephone conversations and asked that all communication be in writing. (Tr. 68:20-69:9, 128:12-130:10 (Dobbie), 544:20-545:2, 546:7-13 (Purnell)).

19. On October 28, 2021, Division staff had a telephone call with Ms. Orr and other representatives from American CryptoFed. Later that day, Deborah Tarasevich, Assistant Director of the Division's Cyber Unit,<sup>6</sup> sent a letter to Ms. Orr (copying Mr. Moeller and Mr. Zhou), stating in part that:

We have read the Company's filings and subsequent correspondence purporting to respond to the identified deficiencies. ***Because the Company's Form 10 still contains material deficiencies***, and due to the upcoming effective date, we would like the Company to confirm by Monday, November 1, 2021, whether it will be withdrawing the Form 10.

(Dx. 20 (emphasis added)).

20. On October 29, 2021, Ms. Orr sent an email to Ms. Tarasevich claiming that the Form 10 was not deficient. (Rx. 13).

21. Later on October 29, 2021, Ms. Tarasevich emailed Ms. Orr (copying Mr. Moeller and Mr. Zhou) stating in part that:

The material deficiencies in American CryptoFed DAO LLC's Form 10 were spelled out, point-by-point, in the letter from Division of Corporation Finance staff, dated October 8, 2021, and discussed with you and other representatives from the Company on October 4, 2021. ***The Company's responses have not remedied the deficiencies in any way.***

(Rx. 14 at 2-3 (emphasis added)).

22. American CryptoFed sent additional letters reiterating its belief that its Form 10 and Registration Statement were not deficient. (Rx. 14 and 15).

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<sup>6</sup> Since renamed to the Crypto Assets and Cyber Unit.

23. None of Respondent’s communications from October 4, 2021 through November 3, 2021 contained audited financial statements, represented that Respondent was taking steps to compile audited financial statements, or sought to withdraw the Registration Statement or Form 10. (Dx. 19, Rx. 13, 14, 15).

24. On November 9, 2021, the Commission issued the non-public 8(e) Order regarding the Registration Statement. (Rx. 5).

25. On November 10, 2021, the Commission instituted proceedings regarding the Form 10 under Section 12(j) of the Securities Exchange Act of 1934 in *American CryptoFed DAO LLC*, AP File No. 3-20650 (“the 12(j) Proceeding”). (Rx. 187).

26. On November 22, 2021, the Division offered to work with American CryptoFed to seek to expedite the 12(j) Proceeding. (Rx. 52 at 3).

27. On November 26, 2021, American CryptoFed rejected any effort to expedite the 12(j) Proceeding, and Ms. Orr stated that “it would be inappropriate to ask ‘the Commission to take this matter under consideration on an expedited basis.’” (Rx. 205 at 19 (email from Ms. Orr)).

28. Subsequently, there was extensive motion practice in the 12(j) Proceeding. (*See* docket for that proceeding at <https://www.sec.gov/litigation/apdocuments/ap-3-20650.xml>).

29. On May 30, 2022, Mr. Moeller sent a letter to the Division stating that American CryptoFed would begin distributing the Locke token in “Q3 2022,” and asking the Division to send American CryptoFed a “Cease-and-Desist Order” if the Division believed American CryptoFed’s planned distribution violated the securities laws. (Dx. 13 at 1-2; *see also* Tr. 814:1-6 (Zhou)).

30. On June 3, 2022, the Division informed Respondent of the 8(e) Order. (Rx. 96 at 2).

31. On June 6, 2022, Respondent filed an application requesting to withdraw the Registration Statement. (Rx. 18).

32. On June 15, 2022, the Division sent a subpoena for documents to American CryptoFed pursuant to the 8(e) Order. (Dx. 3).

33. On June 17, 2022, the Commission issued an order denying withdrawal of Respondent's Registration Statement. (Rx. 20).

34. On June 21, 2022, American CryptoFed sent a letter in response to the June 15, 2022 subpoena but did not produce any documents. (Dx. 4.).

35. On July 7, 2022, Mr. Moeller provided limited sworn testimony in response to a subpoena issued pursuant to the 8(e) Order. (Dx. 5 and 6).

36. On August 4, 2022, the Division sent a letter to Respondent making clear the Division's position that Respondent had not cooperated with the Section 8(e) Examination. (Dx. 9).

37. On August 7, 2022, Respondent sent another letter regarding the subpoena, but still did not produce any documents. (Dx. 10).

38. On October 27, 2022 American CryptoFed threatened to pull the delaying amendment from the Registration Statement, stating in a letter that "American CryptoFed is planning to file the 'Amendment No. 1 to Form S-1' to remove the delaying amendment, right after we receive your response to this letter..." (Dx. 15 at 13).

39. On November 1, 2022, American CryptoFed sent a letter to the Division again threatening to pull the delaying amendment: "American CryptoFed is planning to file the "Amendment No.1 to Form S-1" to remove the Delaying Amendment, after we receive your responses (or non-responses) to this letter..." (Dx. 16 at 6).

40. On November 6, 2022, American CryptoFed sent a letter to the Division yet again threatening that American CryptoFed was close to removing the delaying Amendment from the Registration Statement because it disagreed with the Division's legal analysis:

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 (or refuse to provide 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. 11 at 15 (emphasis added)).

41. On November 18, 2022, the Commission issued the OIP in this proceeding.

## **II. Respondent's Form S-1 Registration Statement Is Materially Deficient.**

### **A. Respondent's Registration Statement Does Not Contain Audited Financial Statements.**

42. Form S-1 Item 11(e) requires a registrant to furnish all financial statements required by Regulation S-X. Regulation S-X Articles 3 and 8 require that a Form S-1 contain audited annual and unaudited interim financial statements. (Dx. 12 at 5; Tr. 38:6-15 (Dobbie); 17 C.F.R. § 210.3-01 *et seq.* and § 210.8-01 *et seq.*).

43. Respondent's Registration Statement does not contain any financial statements, audited or otherwise. (Dx. 14 at 2; Tr. 39:6-15 (Dobbie)).

44. Mr. Moeller admitted that the Registration Statement lacked audited financial statements. (Tr. 204:4-6).

45. Mr. Zhou admitted that the Registration Statement did not contain financial statements of any kind, audited or unaudited. (Tr. 645:21-646:2, 830:22-831:9).

46. Mr. Moeller claimed that Respondent could not provide audited financial statements because Respondent had no assets, liabilities, or revenue. But Mr. Moeller admitted he was not a Certified Public Accountant, had not taken an accounting class since his Management 1A class



more than 20 years ago, and was not familiar with the Financial Accounting Standards Board Accounting Standards Codifications regarding assets, liability, or revenue. (Tr. 218:11-221:6)

47. Similarly, Mr. Zhou claimed that Respondent did not have, and would never have assets, revenue, or liabilities, but admitted he is not an accountant and has not taken an accounting class in many years. (Tr. 663:19-20; 847:17-848:6)

48. Mr. Moeller and Mr. Zhou provided conflicting sworn testimony on Respondent's compliance with Generally Accepted Accounting Principles. Mr. Moeller insisted American CryptoFed does not comply with GAAP and Mr. Zhou claimed that it does. (Dx. 6 at 129:11-21; Tr. 850:11-21 (Zhou)).

49. Respondent spoke with an auditing firm about auditing American CryptoFed, and the auditing firm refused to provide services to American CryptoFed. (Dx. 6 at 137:3-12).

50. The Registration Statement does not disclose that the only auditing firm Respondent contacted refused to provide services. (Dx. 1).

51. Mr. Zhou offered on January 18, 2023 that Respondent would retain auditors, but admitted on January 19, 2023 that he had never made that offer before the previous day. (Tr. 663:4-9, 24; 822:17-823:1).<sup>7</sup>

52. Mr. Dobbie and Ms. Purnell testified that even new registrants who have no assets or revenue submit audited financials. (Tr. 42:11-43:2 (Dobbie), 513:24-514:16 (Purnell)).

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<sup>7</sup> This post-OIP offer to potentially amend the registration statement is too late and cannot be considered. *See* February 7, 2023 Order in this matter (AP Rulings Release No. 6897). Additionally, Respondent insists that the auditors will provide an audited statement that Respondent has no assets, revenue, or liabilities. *See* Tr. 663:4-9 (Zhou) "If the Division or the Commission agree we can continue to file zero filing, zero filing, because we do not have it, we can hire audit – CPA to audit all our process, all our finance, submit zero filing every year, every quarter." Respondent misunderstands the essential purpose of an audit. Auditors must be independent, and cannot be engaged only to certify a predetermined conclusion.

53. Respondent not only asserts that it has no assets, revenue, or liabilities, but also that it never will have assets, revenue, or liabilities: “On pages 23-25, Section 2.5 of Form 10 filing, we clearly explain CryptoFed does not have and will never have any revenue or costs.” (Dx. 19 at 3; *see also* Tr. 663:19-20 (Zhou)).

54. Undercutting Respondent’s assertion that it has no assets, revenue, or liabilities, the Registration Statement contains significant indications that Respondent has or will have assets, revenue, and liabilities. (Dx. 1).<sup>8</sup>

55. Respondent’s present assets likely include:

- a. the intellectual property it has licensed from MShift (Dx. 1 at 32 (Item 16)),
- b. the exclusive ability to mint Ducat tokens (Dx. 6 at 135:19-136:4);
- c. MShift’s permanent obligation to defend American CryptoFed’s intellectual property (Dx. 1 at 32); and
- d. the website Respondent uses to advertise Ducat and Locke and attract potential purchasers (Tr. 857:16-859:23 (Zhou)).

56. If American CryptoFed begins operating, it will potentially have a stablecoin reserve, another likely asset. (*See* Dx. 1 at 6 “After refund rights expire, the corresponding proceeds will be transferred to CryptoFed’s USD-pegged stablecoin reserve” and at 30 “Whenever the Locke’s price falls 30% below its previous price for a 24-hour period, CryptoFed has the authority to use all its CryptoFed USD-pegged stablecoin reserves to buy back Locke tokens.” *See also* Tr. 849:21-850:2 (Zhou) “Q: And so, if the – if the Locke token holders were to vote to do something with the \$5 million reserve that we just mentioned, would they be able to? A: Oh, yeah. You have a voting there. You can look at our constitution if you want to pull it up.”).

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<sup>8</sup> The Division need not prove that Respondent has (or will have) assets, revenue, or liabilities. Respondent must provide audited financial statements whether or not it has assets, revenue, or liabilities. But these indications of assets, revenue, and liabilities highlight the materiality of this requirement as applied to Respondent and underscore why Mr. Moeller and Mr. Zhou’s self-assessment of Respondent’s finances is no substitute for audited financials.

57. If American CryptoFed begins operating, it will have likely revenue from token sales. (See Dx. 1 at 3 referring to “the sale of Ducat tokens at higher market value than the original purchase price direct from CryptoFed” and at 5 “CryptoFed will only sell Ducat via crypto compliant exchanges for compliant USD-pegged stablecoins”).

58. Respondent’s liabilities (at the time the Registration Statement was filed, or in the period since) likely include:

- a. \$25,000 for the 2022 Mayors Business Council dues (Rx. 289);
- b. Orr’s \$150,000 salary (Dx. 1 at 31); and
- c. regulatory filing fees (Dx. 1 at 26).<sup>9</sup>

59. Respondent’s future liabilities likely include:

- a. fees to auditors that Respondent now claims it will hire (Tr. 822:17-22 (Zhou));
- b. the obligation to pay interest to Ducat holders (Dx. 1 at 25); and
- c. the obligation to send additional Ducat to merchants to attempt to protect them from loss (Tr. 776:18-777:8 (Zhou)).

**B. Respondent’s Registration Statement Does Not Contain Other Required Information.**

**1. The Registration Statement Omits a Management Discussion and Analysis of Financial Information.**

60. Form S-1 Item 11(h) requires a registrant to furnish the information required by Regulation S-K Item 303, which requires disclosure of management’s discussion and analysis of the registrant’s financial condition and results of operations. (Dx. 12 at 5; Tr. 39:17-40:11 (Dobbie); 17 C.F.R. § 229.303).

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<sup>9</sup> Mr. Zhou asserted that these are not liabilities because MShift pays them for American CryptoFed. (Tr. 861:1-17). Putting aside the illogical substance of the argument that a liability covered by another entity is not a liability, Mr. Zhou is neither an accountant nor independent of American CryptoFed. He cannot offer the necessary required independent accounting judgment regarding whether these are liabilities or not.

61. Respondent's Registration Statement has no substantive discussion of financial results and instead claims that no accounting or audit is needed because American CryptoFed does not have any revenue or costs. (Dx. 1 at 29; Tr. 40:12-42:10 (Dobbie)).

**2. The Registration Statement Lacks an Ownership Table.**

62. Form S-1 Item 11(m) requires the registrant to furnish the information required by Regulation S-K Item 403, which requires a tabular disclosure of security ownership of directors and executive officers and greater than 5% holders, including the total number of shares beneficially owned and the percentage of the class so owned for each such beneficial owner. (Dx. 12 at 5; Tr. 43:10-23 (Dobbie); 17 C.F.R. § 229.403).

63. Respondent's Registration Statement does not contain the table required by Item 403 nor does it contain the information required by Item 403. (Tr. 43:24-46:24 (Dobbie), 240:17-243:8 (Moeller)).

**3. The Registration Statement Lacks a Compensation Table and Compensation Information.**

64. Form S-1 Item 11(l) requires a registrant to furnish the information required by Regulation S-K Item 402, which requires a summary compensation table that quantifies the salary, bonus, stock, and option awards, non-equity incentive plan compensation and all other compensation paid to the registrant's named executive officers. (Dx. 12 at 5; Tr. 48:3-24 (Dobbie); 17 C.F.R. § 229.402).

65. Respondent's Registration Statement provides a brief reference to the salary and certain Locke tokens promised to Ms. Orr as compensation and a reference to Locke tokens to be granted to Mr. Moeller and Mr. Zhou. The Registration Statement does not contain compensation disclosure for Mr. Moeller and Mr. Zhou. Nor does it contain a table with any of the required information, such as the required quantification of the grant date fair value of any stock or option

awards, including any Locke tokens awarded as compensation to the named executive officers of American CryptoFed. (Dx. 1 at 31; Tr. 48:25-51:31 (Dobbie)).

66. Mr. Moeller admitted that the Registration Statement only provided incomplete information about the compensation to Ms. Orr. (Tr. 282:15-285:21 (Moeller))

**4. The Registration Statement Fails to Contain Key Elements in the Description of Business Section, and the Omitted Information Renders the Included Information Materially Misleading.**

67. Form S-1 Item 11(a) requires a registrant to furnish the information required by Regulation S-K Item 101, which requires a description of the general development of the business of the registrant. In particular, Item 101 requires the registrant to describe its principal products or services and their markets, the need for any government approval of principal products or services and the effect of existing or probable government regulations on the business. (Dx. 12 at 4; Tr. 51:8-18 (Dobbie); 17 C.F.R. § 229.101).

68. Additionally, development-stage issuers need to provide “a balanced discussion explaining to a reader what they have done to date, [and] what the current state of their operations are.” For any future business that they plan to conduct, an issuer must “provide a reader with an understanding of what – what it is that they intend to do or what the timeline would be for that, what the costs associated with developing the business would be so a reader can understand the prospects of the business.” (Tr. 51:19-52:19 (Dobbie)).

69. The “Business” section in the Registration Statement contains none of the disclosures required by Item 101, and instead refers to the business section in the Form 10. Respondent does not meet the eligibility requirements in General Instruction VII to Form S-1 to incorporate

required disclosure by reference to another filing made with the Commission.<sup>10</sup> Moreover, much of the business disclosure in the Form 10 consists of general discussions of inflation, deflation, and monetary policy copied from external sources. Overall, the disclosure in the Form 10 fails to provide a clear and complete discussion of the business of American CryptoFed. It does not sufficiently describe the current state of operations and the status of discussions with potential partners in the launch of the business plan, how the business intends to operate in the future, or the impact of existing or probable government regulation on the business. Thus, even if Respondent could incorporate the business disclosure by reference to the Form 10, the “Business” section does not contain key information, including the information discussed below. (Dx. 1 at 31; Dx 2 at 6-29; Tr. 52:20-55:16 (Dobbie)).

70. Mr. Moeller admitted that American CryptoFed’s business plan is entirely aspirational and that Respondent has no contracts with any potential partners. (Tr. 291:9-19).

71. Mr. Zhou provided further descriptions of Respondent’s planned business, including multiple aspects that Respondent did not disclose in the Registration Statement (or the other documents it filed). For example, he admitted that hypothetical contributors such merchants and banks will need to do essentially all of work to get American CryptoFed operational. He explained that they will need to come together, “cover the costs,” “set up a standard and develop software,” and “modify the [American CryptoFed] constitution.” (See Tr. at 764:9-25, 806:9-20).

72. Mr. Moeller admitted that not one entity has indicated that they might accept Ducat as payment in the next six months. (Tr. 293:2-6).

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<sup>10</sup> See Dx. 12 at 3, noting that one requirement to incorporate by reference is: “C. The registrant has filed an annual report required under Section 13(a) or Section 15(d) of the Exchange Act for its most recently completed fiscal year” and therefore making new filers such as Respondent ineligible to incorporate by reference.

73. Mr. Moeller denied that Respondent had contracts with potential partners or exchanges, and claimed that Respondent has not even spoken with exchanges about listing Ducat and Locke. (Tr. 312:19-315:9).

74. The Registration Statement repeatedly states that Ducat and Locke will be listed and sold on exchanges, but fails to inform potential purchasers that Respondent has not spoken with any exchanges about listing Ducat or Locke. (Dx. 1 at 5-7, 15-16, 18, and 24-25).

75. The Registration Statement fails to convey that the business is entirely aspirational, that Respondent has no contracts in place, and that no one has indicated that they might accept Ducat as payment in the next six months. (Dx. 1).

76. On June 21, 2022, Respondent sent a letter to the Division responding to the Section 8(e) subpoena. Mr. Moeller and Mr. Zhou signed the letter. Among other things, the letter stated that “what American CryptoFed can say is that the refundable auction plan is *still in the brainstorming stage*, and *nothing has been decided* except the principles of the refundable auction...” (Dx. 4 at 8 (emphasis added)).

77. Mr. Zhou similarly testified: “We may also consider Ethereum and for the Locke token, but *a lot of things are still in brainstorming*. We need to gather our community like – like we – a lot of the exhibit, we have so many community, people we need to gather, and we need to sit down and talk together and after this proceedings.” (Tr. 828:15-22 (emphasis added)).

78. The Registration Statement fails to convey that the auction is still in the brainstorming stage and that American CryptoFed has decided nothing except principles. Instead, the Registration Statement describes the auctions as though American CryptoFed already has a specific plan for them:

For Locke token’s price discovery purposes, CryptoFed may conduct refundable auctions from time to time on compliant crypto exchanges. Refundable auctions

will not start until the SEC declares this Form S-1 filing is effective. All proceeds in USD-pegged stablecoins from Locke token auction sales will be reserved in order to provide refunds upon purchaser request at the original purchase prices via smart contracts.

(Dx. 1 at 6).

79. Mr. Moeller admitted that Respondent had not written any of the new software that will be required for merchants to be able to accept Ducat for payment. (Tr. 297:13-299:2).

80. The Registration Statement fails to disclose that Respondent has not written any of the software required for merchants to accept Ducat as payment and instead describes the Ducat something that already exists and is functional: “Ducat *is* an inflation and deflation protected stable token with unlimited issuance, constrained by algorithms targeting zero inflation and zero deflation. Ducat *is used* to price goods and services, for daily transactions, accounting and as a store of value.” (Dx. 1 at 13 (emphasis added)).

81. Additionally, the description of American CryptoFed in the Registration Statement as a “Decentralized Autonomous Organization” is misleading. Mr. Moeller and Mr. Zhou, as American CryptoFed’s President and Chief Operating Officer respectively, maintain and exercise discretion over Respondent’s operations that contradict Respondent’s claim that it is decentralized (Dx. 7, Tr. 177:20-22, 178:23-180:16, 187:3-188:13 (Moeller); 843:15-18 (Zhou)).

82. Also, MShift has paid ongoing expenses on behalf of Respondent contrary to Respondent’s claim that it is decentralized. (Tr. 185:11-186:17 (Moeller); Rx. 289; Tr. 860:18-861:9 (Zhou)).

83. The Registration Statement states that Respondent is financially reliant on MShift. (Dx. 1 at 26).

84. MShift is presently in some degree of financial distress, no longer having any employees or generating any revenue. (See Tr. 194:5-10 (Moeller); 825:15-19 (Zhou)).



85. The Registration Statement fails to disclose that MShift no longer has any revenue or employees, or to disclose any of MShift's financial information, despite American CryptoFed being so reliant on MShift at present that Mr. Zhou described American CryptoFed as an unborn child within the belly of MShift. (Dx. 1, Tr. 872:20-873:2 (Zhou)).

**5. The Registration Statement Lacks Key Exhibits and the Required Opinion of Counsel.**

86. Form S-1 Item 16(a) requires a registrant to furnish the information required by Regulation S-K Item 601, which requires the registrant to file certain documents as exhibits to the registration statement. In particular, Item 601 requires the registrant to file as exhibits material contracts, such as any management contract or other compensatory plans, or other related party agreements. (Dx. 12 at 6; Tr. 55:22-56:12 (Dobbie); 17 C.F.R. § 229.601).

87. The Registration Statement lists three exhibits, but Respondent did not actually file those exhibits with the Registration Statement. The Registration Statement does not contain any material contracts, including any agreements between Respondent and MShift or other related party agreements which govern the tokens reserved for the American CryptoFed's organizers. (Dx. 1 at 34; Tr. 56:17-21 (Dobbie)).

88. In addition, Item 601 requires issuers to include an opinion of counsel as to the legality of the securities being registered. (Dx. 12 at 6; Tr. 56:13-16 (Dobbie); 17 C.F.R. § 229.601(b)(5)).

89. The Registration Statement does not contain an opinion of counsel as to the legality of the securities being offered. (Dx. 1; Tr. 56:22-25 (Dobbie)).

90. Mr. Moeller admitted that the Registration Statement did not contain an opinion of counsel. (Tr. 316:9-22). Mr. Moeller explained this by stating "There are no hired experts, accounting firms or law firms involved in this Form S-1 filing." (Tr. 316:15-17).

91. Mr. Moeller further admitted that he had not heard of the term “gatekeepers” in connection with securities offerings. (Tr. 318:17-319:1).

**C. Respondent’s Registration Statement Contains Contradictory Statements Regarding Whether the Tokens Are Securities.**

92. Respondent listed the Ducat and Locke tokens in the introductory pages of the Registration Statement under the heading “Title of Each Class of Securities to be Registered.” Respondent referred to the Ducat and Locke tokens as “securities” in other sections of the Registration Statement as well. (Dx. 1 at 3).

93. Later in the Registration Statement, Respondent stated that it “is registering both Locke and Ducat tokens with the SEC as utility tokens, not as securities,” even though the Form S-1 is a form to register only an offering of securities. (Dx. 1 at 4).

**D. Respondent Failed to Cooperate With the 8(e) Examination.**

94. On June 15, 2022, Commission staff issued a document subpoena to Respondent pursuant to the 8(e) Order. (Dx. 3).

95. The June 15, 2022 subpoena contained fifteen document requests seeking several categories of documents including: a) documents concerning the identification of and communications with several third parties who are or may be involved in the offering, including those described as “Contributors” in the Registration Statement; b) documents related to the mechanics of the offering, including the refundable auctions; c) documents related to the custody of assets; and d) communications with “crypto asset exchanges.” (Dx. 3 at 8-9).

96. Respondent did not produce any documents to Commission staff pursuant to the June 15, 2022 subpoena. (Dx. 4; Tr. 339:13-340:5; 372:17-374:7 (Moeller))

97. On June 21, 2022, Respondent sent a letter to the Commission staff via email. In that letter, Respondent objected to the June 15, 2022 subpoena on the basis that each request was:

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

(Dx. 4 at 2, 5-8, 10-15 (emphasis in original)).

98. The June 21, 2022 letter does not object to the legality of the subpoena, undercutting Respondent's post-hoc rationalization for failing to cooperate with the 8(e) Examination. (Dx. 4).

99. Respondent did provide a narrative response to twelve of the fifteen requests in the subpoena, but many of those narratives failed to address the subpoena's requests. (Dx. 4).

100. For instance, subpoena Requests 2 and 3 sought documents related to the identification of certain Contributors and communications with those Contributors. After objecting to the request, Respondent pointed to the Registration Statement and the Form 10 filed by Respondent as containing the relevant information. (Dx. 3 at 8, Dx. 4 at 5-6).

101. Neither the Registration Statement nor the Form 10 contain identifying information for Contributors, nor do the forms contain communications with those Contributors. (Dx. 1, Dx. 2).

102. Mr. Zhou confessed during the hearing that Respondent deliberately withheld documents in response to Request 2, and continued to refuse to provide information during the hearing: "Q: Mr. Zhou, at the time of the subpoena you didn't want to provide the names of the contributors, right? *A: No. We don't want at all.* Q: And you don't want to provide those names now, right? *A: Not now. After this proceeding we will disclose that.*" (Tr. 867:4-11 (emphasis added); *see also* Tr. 865:8-867:3)

103. Mr. Moeller claimed he could not even remember what search, if any, he conducted for documents responsive to the subpoena. (Tr. 346:18-347:23, 348:3-349:20).

104. On July 7, 2022, Division staff took testimony from Mr. Moeller pursuant to a June 28, 2022 subpoena issued pursuant to the 8(e) Order. During his testimony, Mr. Moeller objected to many of the staff's questions, including questions seeking to determine whether the Locke and Ducat tokens are securities, asserting lengthy objections similar to the to the objections raised in response to the requests in the June 15, 2022 subpoena. (Dx. 5, Dx. 6).

105. During his testimony, Mr. Moeller sometimes followed up with an answer notwithstanding this objection, though his answers frequently did not completely or directly answer the questions. For example, he pointed to the "principles" found in the Registration Statement rather than answer the specific question about how mechanically the Locke token refundable auctions might work. These references to the "principles" in the Registration Statement did not provide substantive responses to the questions asked. (Dx. 6 at 79:20-81:24).

106. During his testimony, Mr. Moeller refused to provide the names of the up to fifteen people to whom the Registration Statement states the Locke tokens have been granted or promised, stating that he would provide the names in response to a written request. (Dx. 6 at 182:12-184:20).

107. On August 4, 2022, Commission staff sent a letter to Mr. Moeller 1) expressing concern that Respondent and Mr. Moeller had failed to meet their obligations to respond fully and accurately to the subpoenas, 2) asking that he review the June 15, 2022 subpoena requests and provide all documents covered by the requests in the subpoena to the Commission staff, and 3) requesting that he provide to Commission staff the names of the up to fifteen people to whom Locke tokens have been granted or promised, as disclosed in the Registration Statement. (Dx. 9).

108. On August 8, 2022, Mr. Moeller responded to the Commission staff's August 4, 2022 letter. In that response, Mr. Moeller failed to provide the requested documents and information and

instead asserted for the first time that “The Subpoenas pursuant to the 8(e) Order Are Unlawful” and “The Order Denying American CryptoFed’s Form S-1 Withdrawal Is Unlawful.” (Dx. 10).

109. Other than the June 21, 2022 letter, Respondent did not produce any documents to the Division staff pursuant to the June 15, 2022 subpoena. (Tr. 340:2-5 (Moeller)).

## **BRIEF IN SUPPORT OF ISSUING A STOP ORDER**

### **I. Registration of Securities Offerings Under the Securities Act.**

A fundamental purpose of the securities laws is “to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*...” *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963). Accordingly, Securities Act Sections 5(a) and 5(c) prohibit the offer or sale, directly or indirectly, of securities in interstate commerce, unless a registration statement containing certain disclosures has been filed with the Commission and declared effective (unless certain exemptions apply). *SEC v. Cavanagh*, 445 F.3d 105, 111 n.13 (2d Cir. 2006); 15 U.S.C. § 77e(a) and (c).

“The purpose of the registration requirements is to ‘protect investors by promoting full disclosure of information thought necessary to informed investment decisions.’” *World Trade Fin. Corp.*, Rel. No. 34-66114, 2012 SEC LEXIS 56, at \*16 (Jan. 6, 2012) (quoting *SEC v. Ralston Purina*, 346 U.S. 119, 124 (1953)). Thus, “Securities Act Section 7(a) and Schedule A (25), (26) require a registration statement to contain an audited balance sheet and income statement.... Non-financial information furnished must comply with Regulation S-K (17 C.F.R. Part 229). Financial information must comply with Regulation S-X (17 C.F.R. Part 210).” *Reg. Statement of Electropremium*, Initial Dec. Rel. No. 1413, 2022 SEC LEXIS 3269 (Dec. 6, 2022).

To help enforce these investor protections, Securities Act Section 8(d) permits the Commission—after due notice to the issuer and the opportunity for a hearing—to suspend the

effectiveness of a registration statement containing materially false information or omissions. 15 U.S.C. § 77h(d).

For a stop order to issue, the omissions or misstatements must be material. “Rule 405 under the Securities Act defines ‘material’ in connection with the furnishing of information on registration forms as ‘those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered.’” *Advanced Chem. Corp.*, Rel. No. 33-6507 1984 SEC LEXIS 2246, at \*15 (Feb. 9, 1984); *see also Reg. Statement of Life Sci. Holdings Inc.*, Initial Dec. Rel. No. 1412, 2022 SEC LEXIS 434, at \*8 (Feb. 11, 2022) (quoting 17 C.F.R. § 230.405).

## **II. The Material Omissions in American CryptoFed’s Registration Statement Necessitate a Stop Order.**

### **A. Respondent’s Registration Statement Lacks Audited Financial Statements, Which Is a Material Omission.**

Since the Commission’s earliest days, a bedrock principle has been that registration statements must contain audited financial information. *See, e.g., Queensboro Gold Mines, Ltd.*, Rel. No. 33-1617, 2 S.E.C. 860, 862-863, 1937 SEC LEXIS 893, at \*2-3 (November 17, 1937) (suspending registration statement under Section 8(d) for failure to include fully audited financial information). The Commission also explained in *Cornucopia Gold Mines* the reasons that audited financial statements were essential to the registration process:

A certification [by an auditor] is a material fact. It signifies that the contents of the financial statements to which it is appended have been checked and verified within the limits stated in the certificate.... The insistence of the Act on a certification by an “independent” accountant signifies the real function which certification should perform. That function is the submission to an independent and impartial mind of the accounting practices and policies of registrants.... Accordingly, the certification gives a minimum of protection against untruths and half-truths which otherwise would more easily creep into financial statements.... It is a material fact, for it gives meaning and reliability to financial data and makes less likely misleading or untrue financial statements.

Rel. No. 33-720, 1936 SEC LEXIS 1018, at \*6-7 (March 28, 1936). This fundamental requirement to include audited financial statements in registration statements is codified in Regulation S-X Rules 3 and 8, 17 C.F.R. §§ 210.3-01 *et seq.* and 210.8-01 *et seq.*

Over the last several years, Commission ALJs have reiterated how important audited financial statements are to investors, finding that “the materiality of this type of information ‘relating to financial condition, solvency and profitability is not subject to serious challenge.’” *Reg. Statements of Crest Radius et al.*, Initial Dec. Rel. No. 1406, 2021 SEC LEXIS 42, at \*10 (Jan. 5, 2021) (issuing stop order under Securities Act Section 8(d) due in part to the fact that information required by under Regulation S-K and Regulation S-X was false) (quoting *SEC v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980); *see also Electropremium*, 2022 SEC LEXIS 3269; *Reg. Statement of Apollo Publ’n Corp.*, Initial Dec. Rel. No. 302, 2005 SEC LEXIS 3205, at \*10-11 (Dec. 7, 2005) (“[t]he Commission has long recognized the materiality of an audited balance sheet in compliance with the registration requirements of the Securities Act.”). Indeed “the lack of an audited balance sheet and income statement” can “necessitate a stop order” under Securities Act Section 8(d). *Apollo Publ’n*, 2005 SEC LEXIS 3205, at \*13; *see also Military Robot Corp.*, Rel. No. 33-6640, 1986 SEC LEXIS 2356, at \*3-4 (Apr. 15, 1986) (affirming issuance of order stopping effectiveness of registration statement, including because “[t]he financial statement contained in the registration statement is not audited, as required”).

The requirement of audited financial statements is not a mere technicality, and the expertise of independent and qualified auditors cannot be replaced by the amateur judgment of in-house non-accountants, as Respondent would seek to do here. In fact, “the federal securities laws make ‘independent auditors the “gatekeepers” to the public securities markets. This statutory framework gives auditors...an important public trust. Within this statutory framework,

the independence requirement is vital to our securities markets.” *KPMG Peat Markwick LLP*, Rel. No. 34-43862, 2001 SEC LEXIS 98, at \*36 n.54 (Jan. 19, 2001); *see also Marrie v. SEC*, 374 F.3d 1196, 1200-01 (D.C. Cir. 2004) (Noting the “the particularly important role played by accountants in preparing and certifying the accuracy of financial statements of public companies that are so heavily relied upon by the public in making investment decisions...”<sup>11</sup>).

Courts have also stressed how critical audited financials are. For example, in *SEC v. Diversified Growth Corp.*, the court found that the “failure to provide audited financials is so material that even if this were the only problem it would render the filings inadequate...” 595 F. Supp. 1159, 1166 (D.D.C. 1984). And even the Supreme Court has highlighted the importance of the Commission’s requirements for audited financial statements. In *United States v. Arthur Young & Co.*, the Court observed that “corporate financial statements are one of the primary sources of information available to guide the decisions of the investing public” and noted that the Commission requires that “the auditor...issues an opinion as to whether the financial statements, taken as a whole, fairly present the financial position and operations of the corporation for the relevant period.” 465 U.S. 805, 810-11 (1984) (cleaned up).

As described above, American CryptoFed’s Registration Statement fails to contain audited financial statements. This failure is material. Respondent has not put forth any valid explanation for its failure to include this information. Its claim in its October 12, 2021 letter (Dx. 19 at 3) that “we clearly explain CryptoFed does not have and will never have any revenue or costs” misses the point entirely and is not a valid response. A central reason audited financial

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<sup>11</sup> *See also* Chair Gensler, *Remarks Before the Healthy Markets Association Conference*, Dec. 9, 2021, discussing “...gatekeeper obligations. The third parties involved in the sale of the securities—such as auditors, brokers, and underwriters—should have to stand behind and be responsible for basic aspects of their work. Thus, gatekeepers provide an essential function to police fraud and ensure the accuracy of disclosure to investors.” Available at <https://www.sec.gov/news/speech/gensler-healthy-markets-association-conference-120921>



statements are required is for an independent professional, rather than the issuer's non-accountant President and COO, to render a judgment on financial claims made by an issuer.

This omission alone is sufficient basis to compel the issuance of a stop order. But there are many more material flaws.

**B. The Registration Statement's Description of American CryptoFed's Business Is Materially Deficient and Misleading.**

Similar to financial information, the materiality of a robust disclosure of an issuer's business plan is not subject to serious challenge. "Other than a corporation's financials, its leadership, the nature of its operations, and its plan for the future would seem to be *the most* important pieces of information available to an investor." *Crest Radius*, 2021 SEC LEXIS 42 at \*11 (quoting *SEC v. Husain*, No. 2:16-cv-3250, 2017 WL 810269, at \*8 (C.D. Cal. Mar. 1, 2017)) (emphasis in original).

Despite that, Respondent's description of its business, even if it were allowed to incorporate other documents by reference (and it is not), is inadequate. In sum, the Registration Statement presents the Ducat economy as something that will happen, without disclosing any specific plan for how it will happen, or sufficiently disclosing the extremely nascent and aspirational stage at which the business presently stands.

When registration statements have offered similarly vague descriptions of a business so that it is unclear what the issuer is offering, the Commission has issued stop orders: "It is not possible to determine either from the registration statement or the record in this proceeding what the precise legal or financial characteristics attaching to the shares might be, and the failure of the registrants adequately to define the interests proposed to be offered renders their statement materially misleading." *Northwest Petroleum*, Rel. No. 33-3393, 1950 SEC LEXIS 8, at \*8 (October 6, 1950) (granting stop order under Securities Act Section 8(d)); *see*

*also Augion-Unipolar Corp.*, Rel. No. 33-5161, 1971 SEC LEXIS 475, at \*3-\*9 (July 5, 1971) (granting stop order in part due to deficient description of business and use of proceeds).

**C. Respondent’s Failure to Include an Opinion of Counsel Is Another Material Omission.**

The opinion of counsel required by Item 601 is a material element of a registration statement. *See SEC v. Ramoil Mgmt., Ltd.*, 2007 U.S. Dist. LEXIS 79581, at \*20-21 (S.D.N.Y. Oct. 25, 2007) (finding the opinion to be material and noting that “the ‘opinion of counsel as to the legality of the securities being registered, indicating whether they will, when sold, be legally issued, fully paid and non-assessable’ is required when a company issues new shares.”); *see also SEC v. Blackburn*, No. 15-2451, 2020 U.S. Dist. LEXIS 18652, at \*27-28 (E.D. La. Feb. 5, 2020) (noting the “opinion of counsel” is required and finding that an attorney who issued false opinion letters was a “necessary participant and substantial factor” in a Section 5 violation.).

Like auditors, attorneys help safeguard investors during the securities registration process:

The role of attorneys in the disclosure process provided for in the Securities Act of 1933 is critical to the purposes of the Act. Since the Commission under the statutory scheme does not approve or pass upon the accuracy of the various statements and reports filed with it, it is particularly important that attorneys who prepare and verify these materials, such as the notification and offering circular involved in this proceeding, assume the obligation and responsibility of diligently verifying the accuracy and completeness of such documents.

*Germaise and Quinn*, AP File No. 3-2606, 1971 SEC LEXIS 3974, at \*32-33, (Oct. 29, 1971); *see also Carter and Johnson*, Rel. No. 34-17597, 1981 SEC LEXIS 1940, at \*8-9 (Feb. 28, 1981) (“The important role which professionals, particularly attorneys and accountants, play in assuring adherence to the federal securities laws has long been recognized.”). Thus, when Mr. Moeller defended the failure to include an opinion of counsel by stating that “[t]here are no hired experts, accounting firms or law firms involved in this Form S-1 filing” he missed the point

entirely. (Tr. 316:15-17). The Securities Act *requires* the involvement of certain gatekeepers, among them attorneys and accountants.

**D. Other Missing Material Information Compels the Issuance of a Stop Order.**

The other omitted information discussed above is both self-evidently the type of information a reasonable investor would want to know, and has been recognized as material by the Commission or courts. This is true for:

**Management discussion and analysis:** *See, e.g., Diversified Growth*, 595 F. Supp. at 1166-1167 (finding an issuer’s financial statements deficient because Regulation S-K 303 “calls for a thorough discussion and analysis of the results of operations, liquidity, and capital resources in the Management Discussion and Analysis Section, [but the] 10-Ks only provide one sentence expressing a decrease in general and administrative expenses.”); *Reg. Statement of Hiex Dev. USA, Inc.*, Rel. No. 34-26722, 1989 SEC LEXIS 1013, at \*10-12 (Apr. 13, 1989) (citing misstatements in the management discussion and analysis required by Regulation S-K 303 as one of the reasons a Form 10 was materially deficient and revoking registration under Exchange Act Section 12(j)).

**Beneficial Ownership Information:** *See SEC v. Honig*, 18-cv-8175 (ER), 2021 U.S. Dist. LEXIS 15587, at \*25-26 (S.D.N.Y. Jan. 27, 2021) (declining to find beneficial ownership misstatements immaterial, especially where they may conceal who actually controls an entity).

**Executive Compensation:** *See Polycom, Inc.*, Rel. No. 34-74613, 2015 SEC LEXIS 1168, at \*5-6 (Mar. 31, 2015) (settled case finding a proxy statement was materially misleading because it failed to properly disclose certain executive compensation as required by Item 402).

### **III. A Stop Order Is Appropriate Because the Registration Statement Makes Materially Misleading Statements Regarding Whether Ducat and Locke Are Securities.**

When there is a requirement to file a form with the Commission, it is self-evident that the form cannot contain materially misleading statements. *See SEC v. Kalvex*, 425 F. Supp. 310, 316 (S.D.N.Y. 1975) (“Clearly the requirement that an issuer file reports under Section 13(a) embodies the requirement that such reports be true and correct, and a failure to comply with such section would result in violations of the securities laws.”).

As described above, Respondent repeatedly described the Ducat and Locke tokens as securities in portions of its Registration Statement, but elsewhere in the Registration Statement claimed that Ducat and Locke were not securities. These statements inherently contradict each other, and one must be false. This is self-evidently material, as a reasonable investor would want to know whether the tokens they are buying are securities or not. It also highlights the materiality of the missing opinion of counsel as to the legality of the securities being offered.

### **IV. A Stop Order Is Appropriate Because Respondent Failed to Cooperate With the Section 8(e) Examination.**

Section 8(e) provides that “if the issuer...shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order.” 15 U.S.C. § 77h(e). The Commission and its ALJs have issued stop orders on this ground in multiple prior cases. *See, e.g., Crest Radius*, 2021 SEC LEXIS 42 at \*5-6, \*13 (finding a stop order was warranted because respondent’s incomplete responses to subpoenas constituted failure to cooperate and “Section 8(e) authorizes the Commission to issue a stop order if an issuer fails to cooperate with or obstructs the Commission’s examination into whether a stop order should issue under Section 8(d)”); *Augion-Unipolar Corp.*, 1971 SEC LEXIS 475 at \*10-12 (issuing stop order based in part on issuer’s failure to provide documents and testimony on the grounds of privilege).

Accordingly, issuing a stop order is also appropriate because American CryptoFed failed to cooperate with and obstructed the Section 8(e) Examination. American CryptoFed refused to provide any documents responsive to the requests contained in the June 15, 2022 subpoena, and Mr. Moeller refused to provide meaningful responses to multiple questions posed to him in testimony during the Section 8(e) Examination. Even worse, Mr. Zhou confessed during the hearing that American CryptoFed deliberately withheld materials regarding Contributors that the subpoena requested. This information is material because the described role of the Contributors makes them “promoters” within the definition of the securities laws.

Promoters include “[a]ny person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organizing the business or enterprise of an issuer.” 17 C.F.R. § 240.12b-2. That aligns with Mr. Zhou’s description of Contributors working to build American CryptoFed. (*See* Tr. 764:3 to 767:3, including the following):

American CryptoFed was on track to build up Ducat economic zone which consists of supporting entities, including, individuals, merchant, government, et cetera. The supporting entities cover all the costs. Not American CryptoFed. They will receive tokens of Locke, generate benefit of Ducat economic zone for each other and work together to set up a standard and develop software.... So, the Blockchain cannot operate until we have necessary people to produce block.... So, we need multiple, multiple peoples to join us using that software to produce block. And that software still needs to customize...

“Misrepresenting who is a promoter or control person or, as here, failing to disclose a promoter or control person, is material.” *Crest Radius*, 2021 SEC LEXIS 42 at \*11 (citing *SEC v. Fehn*, 97 F.3d 1276, 1290 (9th Cir. 1996); *Am. Fin. Co.*, Rel. No. 33-4465, 1962 SEC LEXIS 632, at \*2 (Mar. 19, 1962)).

The other documents requested from American CryptoFed and the questions that Mr. Moeller refused to Answer during his July 7, 2022 testimony are also material and well-within the

examination ordered by the 8(e) Order. The refusal of Respondent to provide the information and documents sought pursuant to the Division's subpoenas hampered the Division's ability to examine whether the Ducat and Locke tokens were securities.

Respondent's objections are not valid bases to refuse to provide the requested information.

Respondent's first objection was that the requests were

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

(Dx. 4 at 2). This objection is not valid. Commission subpoenas are valid so long as: (1) the inquiry has a legitimate purpose, (2) the subpoena was issued in accordance with the required administrative procedures, and (3) the information sought is reasonably relevant to some subject of the inquiry.) *United States v. Powell*, 379 U.S. 48, 57-58 (1964). Once these threshold criteria are met, the burden shifts to the party refusing to provide information to establish that the subpoena is unreasonable. *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973). The burden of showing unreasonableness "is not easily met." *Id.* Further, Congress gave the Commission authority to investigate "any facts, conditions, practices or matters" that, in its discretion, the Commission deems necessary or proper to aid in enforcing the federal securities laws. 15 U.S.C. § 78u(a)(1).

As the United States Supreme Court found in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), an agency can investigate upon mere suspicion that the law has been violated, without showing probable cause. The Court explained that:

[An agency] has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. 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.

*Id.* at 642-43. Consequently, the Commission is acting within the scope of its Congressionally granted authority even where it bases an examination on nothing more than official curiosity. *See, e.g., SEC v. Arthur Young*, 584 F.2d 1018, 1023-24 & n.45 (D.C. Cir. 1978) (recognizing that “even if one were to regard a request for information...as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and public interest” (quoting *Morton Salt*, 338 U.S. at 652)). Here, an examination of the Registration Statement was a legitimate inquiry and the information sought was well-within its ambit. Additionally, the Commission’s jurisdiction here was established when Respondent filed the Registration Statement with the Commission.

The Division explained this to Respondent by letter dated August 4, 2022, (Dx. 9) and Respondent still did not provide the requested documents, nor take any steps to supplement Mr. Moeller’s testimony. Instead, Respondent shifted its claimed objection, stating for the first time on August 7, 2022 that it believed the 8(e) Examination was illegal (though not on the basis that the Commission had to proceed under Securities Act Section 8(b) rather than Section 8(d) or (e), an argument that Respondent did not raise until much later). (Dx. 10).

In any event, Respondent’s legal position on Section 8(d) versus 8(b) is incorrect. *See Red Bank Oil Co.*, Rel. No. 33-3095, 1945 SEC LEXIS 204, at \*3-8 (Oct. 11, 1945); *see also Petrofab Int’l, Inc.*, Rel. No. 33-6769, 48 S.E.C. 998, 1988 SEC LEXIS 782, at \*17 (April 20, 1988) (issuing stop order regarding registration statement that had never become effective); 15 U.S.C. § 77e(c) (explicitly noting that registration statements can be subject to proceedings under Section 8 before becoming effective).

Therefore, Respondent had no valid basis to withhold the requested documents and information and its failure to cooperate with the 8(e) Examination is another basis for a stop order.

**V. Respondent Received Fair Notice.**

Respondent has complained that it did not get fair notice of what it needed to include in the Registration Statement. This claim is simply untrue. Respondent has been informed by regulations, Form S-1's instructions, telephone, and a letter that it needed to include audited financial statements and other information. "Not liking the message isn't the same thing as not receiving it."<sup>12</sup>

Respondent has received more than fair notice, as courts have found that the language of the statutes and rules, including their "common usage and understanding," can alone provide adequate certainty and clarity to a regulated party. *See Sproles v. Binford*, 286 U.S. 374, 393 (1932); *see also United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 221 (4th Cir. 1997) (in evaluating whether regulated person was on notice courts "begin with the plain language of the regulations."). The language of the relevant regulations is clear. *See, e.g.*, 17 C.F.R. § 210.3-01(a) ("There shall be filed, for the registrant and its subsidiaries consolidated, audited balance sheets as of the end of each of the two most recent fiscal years. If the registrant has been in existence for less than one fiscal year, there shall be filed an audited balance sheet as of a date within 135 days of the date of filing the registration statement."). Further, at least one Court has examined Regulation S-K and found that it "is unambiguous and provides [the defendant] with fair notice of what is required of him." *United States v. Yeaman*, 987 F. Supp. 373, 381 (E.D. Pa. 1997). Indeed, Respondent has not pointed to any language in Regulation S-X or Regulation S-

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<sup>12</sup> Chair Gensler, *Kennedy and Crypto*, Remarks at SEC Speaks, Sept. 8, 2022, available at <https://www.sec.gov/news/speech/gensler-sec-speaks-090822>



K, or in the instructions for Form S-1, that Respondent alleges is ambiguous or otherwise does not provide fair notice.

Respondent does not lack fair notice of what is required. Rather, Respondent's President and COO apparently do not understand how to provide the clearly required information, and seek to require the Commission staff to act as Respondent's attorneys and accountants. But that is not the role of the Commission's staff.

#### **VI. Neither Scienter nor Injury Are Required Before a Stop Order Issues.**

In Section 8(d) cases, the Division need not prove injury, or even that offers or sales have taken place. The material defects in the Registration Statement alone provide the basis for a stop order to issue. "We are not required to find injury to the public or offers or sales of securities before we can issue that order.... Such an order...is generally the most effective means of warning the investing public that unreliable statements have been filed and counteracting the false and misleading information publicized by the filings." *Petrofab*, 1988 SEC LEXIS 782 at \*18 (cleaned up). Similarly, Respondent's scienter and potential claims of good faith are immaterial. "If an untrue material fact is included in a registration statement or a material fact is omitted, the registrant's good faith or lack of scienter does not influence whether a stop order should issue." *Life Sci. Holdings*, 2022 SEC LEXIS 434 at \*8.

At no point in the hearing did Respondent make any serious showing that its Registration Statement contained the required information that the OIP alleged was missing. Respondent's arguments that such requirements should not apply to it because it claims to be decentralized or the type of security it wishes to distribute (crypto tokens) is different fall flat. If Respondent wishes exemptive relief from present regulations, the Commission informed Respondent that there is a separate process for that. *American CryptoFed*, Rel. No. 34-93905, 2022 SEC LEXIS

5, at n.13 (Jan. 5, 2022). No such exemptive relief has been sought—let alone granted—and a stop order must issue against Respondent’s misleading and fatally flawed Registration Statement.

### CONCLUSION

The Registration Statement lacks audited financial statements and other material required information. It also contains materially misleading statements regarding whether Ducat and Locke are securities. And Respondent failed to cooperate with the Section 8(e) Examination. For these reasons, a stop order must issue.

Dated: February 17, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was served on the following on this 17th day of February 2023, in the manner indicated below:

By Email:

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*/s/ Christopher Bruckmann*  
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