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

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

Contents are 45 pages permitted by Judge Carol Foelak during the hearing. (Transcript 717:23-25 & 718:1-7).

Certificate of Service is at the bottom.

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Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Respondent American CryptoFed DAO LLC ("Respondent" or "American CryptoFed") respectfully submits this Opposition ("Opposition") to the DIVISION OF ENFORCEMENT'S PROPOSED FINDINGS AND BRIEF IN SUPPORT OF ISSUING A STOP ORDER ("Brief")[1] under Section 8(d) ("Section 8(d)") of the Securities Act of 1933 ("Securities Act").

1. PRELIMINARY STATEMENT

The Brief shows that the Division of Enforcement ("Division") is surprisingly ignorant about the mechanism of the Federal Reserve, US dollar currency and DAO. This ignorance makes it impossible for the Division to correctly understand American CryptoFed's business model.

Section 8(b) (15 U.S. Code § 77h(b), "Section 8(b)") of the Securities Act should be the sole and exclusive provision controlling American CryptoFed's Form S-1 registration statement ("Registration Statement") that **"is on its face incomplete or inaccurate in any material respect, …prior to the effective date of registration…"** To the extent that the Securities Act does not confer upon the Securities and Exchange Commission ("Commission" or "SEC") any arbitrary power to apply Section 8(d) to the Registration Statement, the Order Instituting Proceedings ("OIP") pursuant to Section (d) to issue a stop order ("Section 8(d) Stop Order") is unlawful. To the extent that the Section 8(e) of the Securities Act ("Section 8(e)") is "to make an examination… **under subsection (d)**", the non-public Order issued pursuant to Section 8(e) ("Section 8(e) Examination Order", Rx.5), was also unlawful.

To the extent that the Commission issued an Order (Release No. 11074 / June 17, 2022, Rx.20, "Denial Order") denying American CryptoFed's withdrawal request (Rx.37, p.1) of the

[1] "Brief" refers to the Division of Enforcement's Proposed Findings and Brief in Support of Issuing a Stop Order. "Dx." refers to the Division's exhibits, and "Rx." Respondent's exhibits, admitted during the hearing. "Tr." refers to the transcript of the hearing, with an indication of which witness's testimony is cited (unless already apparent).

Registration Statement, the Division has the obligation to prove, with reasons other than the filing of the Registration Statement per se, that Locke and Ducat tokens were securities, in accordance with 5 U.S. Code § 556 (d) stating "the proponent of a rule or order has the burden of proof", because the only reason for the withdrawal request was that "Locke token and Ducat token are not securities." To the extent that the Division failed to do so, i) the Denial Order and the Section 8(e) Examination Order are unlawful due to violation of the US Supreme Court opinion in *Jones v. SEC, 298 U.S. 1 (1936),* ii) the OIP would have been unnecessary if the unlawful Denial Order had not been issued, and iii) the OIP, as the application of the Securities Act and related regulations to the Registration Statement, is deemed invalid (as-applied constitutional challenges, not facial challenges), due to the lack of fair notice and "the void for vagueness doctrine", because it is still vague whether Locke and Ducat tokens are securities from the statutory and regulatory perspective, in accordance with the US Supreme Court's opinion in *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

One of the fundamental due process protections guaranteed by the US Constitution is that government agencies cannot condemn conduct as a violation of law without providing fair notice that the conduct is illegal. As the US Supreme Court has stated, the fair notice doctrine is intended to ensure that regulated parties "know what is required of them so they may act accordingly," and furnish "precision and guidance" "so that those enforcing the law do not act in an arbitrary or discriminatory way." *Ibid*. The OIP and Section 8(e) Examination Order ring hollow when American CryptoFed lacks clarity on even the most basic of points, like whether Locke and Ducat tokens are securities, let alone all of these details as to how Locke and Ducat, if they were treated as securities, could possibly conform to the securities regulations to complete the registration process and furnish information for ongoing disclosure.

2. THE DIVISION'S IGNORANCE OF CURRENCY AND DAO

The Division lacks even the basic knowledge about the mechanism of US dollar currency and monetary system, because it asked the wrong question below (Bruckmann, Tr. p.392:3-12).

> Mr. Moeller, let me stop you right there, all right.
> Do you understand that the U.S. dollar is backed by the full faith and credit of the United States government which includes assets such as publicly owned land, mineral rights, the gold stored in Fort Knocks and has the ability to levy taxes on income and customs duties on imports among other ways that it can raise revenue and grow its assets?

The Division's assertion in their question is false. The Fed has made it clear that a) most of the US dollar is not a US government liability, but a liability of commercial banks, b) the US dollar is not backed by gold, and c) the Federal Reserve Banks are private corporations.

> While Americans have long held money predominantly in digital form—for example in bank accounts, payment apps or through online transactions—a CBDC would differ from existing digital money available to the general public because a CBDC would be a liability of the Federal Reserve, not of a commercial bank. (Rx.274).
> At one time or another, many of the major countries around the world had monetary systems based on a gold standard—currency that could be redeemed, at least in part, for gold. But not a single country does so today. The U.S. and many other economies abandoned the gold standard more than 40 years ago. (Rx.275).
> While the Board of Governors is an independent government agency, the Federal Reserve Banks are set up like private corporations. Member banks hold stock in the Federal Reserve Banks and earn dividends (Rx.59).

The US dollar is a liability of commercial banks, although the US government accepts it for tax payments. The US government's tax revenue, for decades, even cannot cover its own expenses and must borrow money by selling government bonds. None of the US government assets and revenues, whatsoever, including gold, land and tax, are used to back up the US dollar. Despite the ignorance of the US dollar currency system, after adding Ponzi scheme to its allegations by a question, "Can you explain to me how that doesn't describe a Ponzi scheme?" (Bruckmann, Tr. p.391:20-21), the Division asked the following ignorant questions (Tr. p.392:14-15, 19, 22-23):

> Q So, let me ask you, does American CryptoFed own any gold?
> Q Does American CryptoFed own any land?

Q And does the American CryptoFed have the ability to levy taxes?

The Division's allegations remind of Pope Clement VIII's Roman Inquisition of the seven-year trial (1593 through 1600), by which Giordano Bruno was sentenced to death and burned alive. The Division's ignorance led to their false conclusion "**The Registration Statement Fails to Contain Key Elements in the Description of Business Section, and the Omitted Information Renders the Included Information Materially Misleading**." (Brief, #4 p.14). However, the September 2021 Registration Statement, outlining through a side-by-side comparison of the Federal Reserve and American CryptoFed as to how American CryptoFed will have capacity to cure the inherent flaws of the Federal Reserve System (Dx.1,19-22), has capacity of correctly projecting the economic crisis which is now transmitting from banking industry to non-financial sectors, following the expected interest rate-hike path:

> Currently, to reduce the repayment costs of debt accumulation in the USD economy, the Fed must keep the Federal Funds Rate close to zero by buying more and more government securities, which will end up financing more and more government debt, leading to inflation. However, the Fed cannot raise interest rates to curb inflation, because higher interest rates will bankrupt many existing borrowers, leading to a financial crisis. The Fed has entered into a self-destructive cycle and has no way out. The money supply mechanism through lending has failed to establish a virtuous cycle between lending and loan repayments to perpetuate the Federal Reserve System. (Dx.1 p.21).

This plague of ignorance similarly about DAO mechanisms in general and American CryptoFed DAO in particular permeates the entire Brief. The Division even does not know i) the decentralization of American CryptoFed cannot begin prior to Locke token distribution (Brief, Item 81 through 83, p.17) which in turn depends on the SEC's approval of the Registration Statement defined in American CryptoFed's Constitution (Dx.1A, Section 4.1, p.3), ii) American CryptoFed Blockchain cannot be finalized without the mutual consent among participating contributors (Brief, Item 71 p.15, Item 80, p.17) who are broadly defined (Dx.1 p.26), and iii) American CryptoFed's planned ongoing Form 8-K filing disclosure, such as the disclosure of

contributors (Dx.1 Item 23 p.33, Dx.2 Item 12 p.33) has been disrupted by the SEC's Order Instituting Proceedings ("Form 10 OIP", Brief, Item 100 through 103, p.20) issued on November 10, 2021 pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"). Therefore, except as expressly agreed to in this Opposition, American CryptoFed objects to all characterizations of the Division's Proposed Findings of its Brief from page 2 through 22.

3. THE OIP AND SECTION 8(e) EXAMINATION ORDER ARE UNLAWFUL DUE TO MISAPPLICATION OF LAW

3.1. The Two Statutory Requirements of Section 8(b)

Section 8 (b) provides in part:

> If it appears to the Commission that a registration statement is **on its face incomplete or inaccurate in any material respect**, the Commission may,… issue an order **prior to the effective date of registration** refusing to permit such statement to become effective until it has been amended in accordance with such order….

The two requirements ("Two Section 8 (b) Requirements") are i) **"on its face incomplete or inaccurate in any material respect"**, and ii) **"prior to the effective date of registration",** which must be simultaneously met.

3.2. No Factual Disputes for Application of Section 8(b)

There is no dispute regarding the facts that "The Registration Statement contained a delaying Amendment" (Brief, Item 9, p.4), "Respondent's Registration Statement is pending and is not yet effective." (OIP p.1), and "The Registration Statement does not contain an opinion of counsel as to the legality of the securities being offered." (Brief, Item 89, p.18). Further, American CryptoFed fully agrees with the facts found at Items 12, 14 and 16 of Division's Brief

(p.4-5), which were consistent with a letter below dated October 8, 2021 ("October 8, 2021 Letter", Dx.18)[2] from the Division of Corporation Finance ("Corporation Finance").

> 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**.…

Therefore, the Registration Statement 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. The October 8, 2021 Letter reflected the Webex conversation that the Division correctly summarized below (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.

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

In an email sent to American CryptoFed dated November 3, 2022, the Division stated the following legal position ("Legal Position", Dx.11, p.19):

> Second, we reject your characterization of the Section 8(e) Examination as illegal. Section 8(d) allows the Commission to bring a stop order **"at any time."** Section 8(e) allows the Commission to institute an examination **"in any case."** Nothing in either section limits them to the timing and circumstances you propose. You provide no authority that actually supports your strained interpretation of Section 8.

[2] On October 8, 2021, Corporation Finance sent two letters to Respondent reiterating that the Registration Statement and Form 10 filing were deficient. (Dx.17 and 18). In a response letter dated October 12, 2021, American CryptoFed admitted that the required information was not provided, but there were no deficiencies, to the extent that **the required information did not and will never exist** (Dx.19). This topic will be further discussed under the context that no Fair Notice was given to American CryptoFed.

However, the Division's Legal Position above directly violates the U.S. Supreme Court's opinion in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957) at 229 stating the following:

> 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 the 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) and Section 8(e) to be applied to the Registration Statement. Section 8(b) is **"the sole and exclusive provision controlling"** the situation "that a 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 authorize the Commission and the Division 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 no examination power is needed to find additional information, and "that a registration statement is **on its face incomplete or inaccurate in any material respect, …prior to the effective date of registration…".** The Division tried to justify the Section 8(e) Examination Order with United

States Supreme Court opinion in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), but the Supreme Court opinion, as cited by the Division's Brief (Brief, 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 Division's Legal Position.

Compared with Section 8(b), the 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) entitled "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), Corporation Finance had already reached its conclusion on October 4, 2021 that, as the Division summarized in its Brief's Factual Background section (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 the Registration Statement should have been prohibited since October 4, 2021, because in accordance with the U.S. Supreme Court's opinion in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228

(1957) cited above, Section 8(b) should be **"the sole and exclusive provision controlling"** the situation "that a 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 November 9, 2021, more than one month after October 4, 2021, and the OIP pursuant to Section 8(d) issued on November 18, 2022, more than one year after October 4, 2021, are unlawful.

3.4. Neither Case Law nor Statute Supports the Division's Legal Position

In its Brief (p.32), the Division cited two cases *Red Bank Oil Co.*, Rel. No. 33-3095, 1945 SEC LEXIS 204, (Oct.11, 1945) and *Petrofab Int'l, Inc.,* Rel. No. 33-6769, 1988 SEC LEXIS 782, (April 20, 1988), but neither of these cases supports its Legal Position to apply Section 8(d) rather than Section 8(b) to the Registration Statement.

In *Red Bank Oil Co.,* (p.1), the Commission concluded "About 90 deficiencies are alleged, most of them dealing with material aspects of the history, business, accounts and control of the registrant, **only few of them apparent from the face of the statement**." In *Petrofab Int'l, Inc*., (p.6) the Commission, after a lengthy discussion to resolve the dispute as to which accounting standards were applicable to the R&D arrangements, concluded "The **failure of the registration statement to disclose the auditors' limitation on the use of their opinion**, standing alone, justifies our issuance of a stop order." Both cases did not simultaneously meet the Two Section 8(b) Requirements i) "**on its face incomplete or inaccurate in any material respect",** and ii) **"prior to the effective date of registration"**. Both cases only met the requirement "**prior to the effective date of registration",** but failed to meet the requirement "**on its face incomplete or inaccurate in any material respect**". However, the requirement "**on its**

face incomplete or inaccurate in any material respect" is so critical that the Commission did point out the following in *Red Bank Oil Co.*(p.2 underline emphasis in original).

> 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.

The Commission's opinion above in *Red Bank Oil Co.* supports American CryptoFed's legal position that the applicable provision, for the Registration Statement, should be Section 8(b) rather than Section 8(d). In addition, in *Petrofab Int'l, Inc*., Section 8(b) was not considered, because Section 8(b) was not raised by the parties. To this extent, the Commission's decision in *Petrofab Int'l, Inc*., cannot be regarded as probative into the issue as to whether the Section 8(d), instead of Section 8(b), should be applied.

The Division also cited 15 U.S. Code § 77e(c) and stated it is "explicitly noting that registration statements can be subject to proceedings under Section 8 before becoming effective". However, the proceedings to which 15 U.S. Code § 77e(c) refers, can be either under Section 8(d), such as *Red Bank Oil Co.,* or under Section 8(b). In either situation, 15 U.S. Code § 77e (c) does not challenge Section 8(b) which is **"the sole and exclusive provision controlling"** the situation "that a registration statement is "**on its face incomplete or inaccurate in any material respect, …prior to the effective date of registration…".**

3.5. The Division's Legal Position Violates the SEC's Filing Review Process and the Fair Notice Doctrine

The SEC's Filing Review Process governed by Section 8(b) and Section 8(a) of Securities Act assigns no functions to the Division. Under the condition that the Registration Statement already included a Delaying Amendment at its initial filing for the purposes of incorporating the comments from Corporation Finance, nowhere was the Division authorized by the SEC's Filing

Review Process to start an enforcement process. The SEC's Filing Review Process of which the Corporation Finance is in charge, states the following for transparency and disclosure (Rx.3 p.3):

> To increase the transparency of the review process, the Division makes its comment letters and company responses to those comment letters public on the SEC's EDGAR system no sooner than 20 business days after it has completed its review of a periodic or current report or declared a registration statement effective.

The transparency requirement of the SEC's Filing Review Process completely denies these secrete practices of the Division which relies on the non-public Section 8(e) Examination Order and filed two motions to seal all the related information of the inquisitorial investigations. American CryptoFed had to strongly oppose the Division's Motions to Seal documented by the Commission's Order (*American CryptoFed*, Release No. 95812 / September 16, 2022, Rx.180).

Furthermore, the Division was not even aware of the **individual examiner** defined and specified in the SEC's Filing Review Process as below (Rx.3 p.2-3).

> If a company does not understand a comment or the staff's purpose in issuing it, it should seek clarification from **the examiner** before it responds. If the company does not understand the comment after discussing it with **the examiner**, it may wish to speak with the staff member who approved the comment. **To make it easier for a company to identify the appropriate people to contact about a filing review,** the Division includes the name of the office conducting the review as well as the names and phone numbers of the staff members involved in that review in each of its comment letters…
>
> …A company should direct a reconsideration request to the **Chief of the office** conducting the filing review. The company or its representatives should **feel free to involve the Disclosure Program Director, the Division's Deputy Director or Director** at any stage in the filing review process.

During the hearing, the Division stated the opposite as below:

> **Q Okay. So, Mr. Purnell, who is our case examiner?**
>
> MR. BRUCKMANN: Objection. They haven't established there's a single examiner or what the term examiner means. Mr. Dobbie didn't testify about any examiners. He testified about teams of attorneys and accounts. Teams. Plural. Multiple people. (Tr.488:10-17).

The SEC's Filing Review Process above encourages dialogue between American CryptoFed and the SEC staff to complete the Registration Statement, which meets the spirit of Fair Notice

requirements upheld by the US Supreme Court in *F.C.C. v. Fox Television Stations, Inc*. 567 U.S. 239, 253 (2012): "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". The Division's Legal Position violates this Fair Notice spirit, as American CryptoFed pointed out below (Emphasis added, Rx.36 p.5):

> Given that American CryptoFed's Form S-1 has already included a delaying amendment in order to intentionally accommodate the comments and inputs from the Division of Corporation Finance, there is no risk that the Form S-1 registration statement could become effective without the permission of the Division of Corporation Finance. Therefore, the non-public 8(e) Order that was issued solely "to determine whether a stop order should be issued under Section 8(d) of the Securities Act" was not necessary and cannot be justified. To the extent that the sole purpose of the 8(e) Order is to issue a Stop Order, not to provide American CryptoFed with Fair Notice for compliance, for which American CryptoFed has repeatedly requested, specially under the condition that Form S-1 has already included a delaying amendment, the non-public 8(e) Order willfully violated Supreme Court opinions in *F.C.C. v. Fox Television Stations, In*c. cited above. In the September 2, 2022 Letter, October 13, 2022 Letter and October 23, 2022 Letter, all addressed to your attention, we repeatedly asked you the following question (first to Mr. Michael Baker on August 7, 2022 and later to you), in our communications. Yet to date, neither you nor Mr. Baker have responded to this specific question:
>
> *As Mr. Baker has not been able to respond, Mr. Bruckmann, can you respond to my August 7, 2022 Letter on or before September 12th, 2022 and clearly explain why the 8 (e) Order does not violate Supreme Court Opinions in F.C.C. v. Fox Television Stations, Inc, given that you still use the 8 (e) Order to justify your argument above, including the unlawful subpoena pursuant to the 8 (e) Order?*

The Division not only failed to understand and comport with the SEC's Filing Review Process, but also destroyed its integrity by turning a transparent Filing Reviewing Process into a process of secret investigation. The Division, acting against the disclosure spirit of the Securities Act and Exchange Act, effectively deterred, stopped, obstructed and discouraged the disclosure of American CryptoFed, under the watch and with the assistance of Corporation Finance.

4. THE OIP AND SECTION 8(e) EXAMINATION ORDER ARE UNLAWFUL DUE TO VIOLATION OF 5 U.S. CODE § 556 (d) AND *JONES V. SEC*, 298 U.S. 1 (1936)

4.1. Factual Background

On May 30, 2022, American CryptoFed sent the Division a letter 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.** (Emphasis added, Dx.13, p.2).

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, by one business day, American CryptoFed filed Form RW to withdraw the Registration Statement for the specific reason that "Locke token and Ducat token are not securities" (Rx.37 p.1), given that the Registration Statement 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 Section 8(e) Examination Order.

On June 8, 2022, American CryptoFed requested as below the Division to provide substantive legal 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, Corporation Finance, sent a letter to request American CryptoFed to withdraw the Form RW voluntarily (Rx.18, p.3 at the bottom) 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, in response, American CryptoFed requested as below the Corporation Finance to prove that Locke and Ducat tokens were securities, citing 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.

On June 15, 2022, the same day the subpoena was served, American 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 Corporation Finance could prove that Locke token and Ducat token were 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 withdrawal request of the Registration Statement ("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 5 U.S. Code § 556 (d), to prove that Locke token and Ducat token were securities, cited the following irrelevant and out of context excuse to justify its order (Rx.20, Item 3).

> 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 actual context of the May 30, 2022 letter cited by the Commission above was summarized by Judge Foelak very well 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 June 15, 2022 Subpoena, American CryptoFed further urged the Division to focus on its obligation to prove that Locke and Ducat tokens were securities and subject to the SEC's jurisdiction, rather than 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, American 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, American CryptoFed sent the first letter to Corporation Finance, copying the Division, further emphasized that the Denial Order, investigations through subpoenas and testimonies were unlawful (P.6 at Exhibit 8 of Rx.12).

> 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.

On July 11, 2022, American CryptoFed sent the second letter (Rx.103) to Corporation Finance requesting a meet and confer pursuant to the Commission's January 6, 2022 Order (Release No. 93922), so that American CryptoFed could file a motion to lift the Denial Order on

the legal basis that the Denial Order violated the US Supreme Court opinion in *Jones v. SEC*, 298 U.S. 1 (1936). However, Corporation Finance never responded.

4.2. The OIP Would Have Been Unnecessary If the Unlawful Denial Order Had Not Been Issued

The SEC administrative proceedings are governed by the Administrative Procedure Act (APA) coded as 5 U.S. Code § 556. The first sentence of 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 American CryptoFed to request the Commission to fulfil its Burden of Proof obligation. Once the Commission issued the Order denying the withdrawal request of the Registration Statement, the Commission's obligation to prove that Locke and Ducat tokens were securities, was established, because the only reason for the withdrawal request was that "Locke token and Ducat token are not securities" (Rx.37, p.1). As of today, the Division and Corporation Finance failed to fulfil this obligation mandated by 5 U.S. Code § 556 (d), despite repeated requests (Rx.18 p.1-2, Rx.21 p.4). Therefore, the Denial Order was unlawful. If the Denial Order had not been issued, the Registration Statement would have been withdrawn. Then, the OIP seeking for a stop order would have been unnecessary, as the US Supreme Court opinion pointed out below:

> 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. at 27, *Jones v. SEC*, 298 U.S. 1 (1936) (emphasis added).

4.3. Section 8 (e) Examination Order Are Unlawful Searches and Seizures

The Division stated "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" (Brief p.20, Item 98). However, the facts do not support Division's statement, because American CryptoFed clearly pointed out the illegality before, in and after the June 21, 2022 letter. Upon receiving service of the non-public Section 8 (e) Examination Order on Friday, June 3, 2022, together with the Division's letter stating its legal position that the Registration Statement filing per se made Locke and Ducat tokens securities (Rx.16 p.2 & 3), within one business day, by Monday, on June 6, 2022, American CryptoFed filed Form RW to withdraw the Registration Statement for the specific reason that "Locke token and Ducat token are not securities" (Rx.37, p.1). Upon receiving the request from Corporation Finance on June 13, 2022 for withdrawal of the Form RW (Rx.18, p.3), on the same day, American CryptoFed requested Corporation Finance to prove that Locke and Ducat tokens were securities, citing 5 U.S. Code § 556 (d) regarding the burden of proof (Rx.18, p.1-2). Upon receiving the subpoena from the Division on June 15, 2022, American CryptoFed, on the same day, sent the Division a letter that emphasized the withdrawal of the Registration Statement should be granted, and the Section 8(e) Examination Order and the Subpoena should be moot, unless Corporation Finance could prove that Locke and Ducat tokens were securities and subject to the SEC's jurisdiction (Rx.97 p.1). After the Commission, which failed to fulfill its obligations mandated by 5 U.S. Code § 556 (d) to prove that Locke and Ducat tokens were securities, issued the Denial Order (Rx.20) on June 17, 2022, American CryptoFed stated on June 21, 2022 in the cover email in response to the Division's subpoena, "We believe the order does not comply with the US Supreme Court ruling in *Jones v. SEC, 298 U.S. 1 (1936)* below, given that both the Division of Enforcement and the Division of Corporate Finance never provided any Howey Test analysis to prove that Locke

token and Ducat token are securities…other than American CryptoFed's Form 10 filing per se." (Rx.100 p.1-2).

> 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.** At 23, *Jones v. SEC*, 298 U.S. 1 (1936) (Emphasis added).

Given that the Division and Corporation Finance failed to prove Locke and Ducat were securities other than by the Registration Statement filing per se, American CryptoFed met all the conditions specified by US Supreme Court opinion above in *Jones v. SEC, 298 U.S. 1 (1936),* including "Petitioner emphatically says that no steps had been taken looking to the issue of the securities; and this is not denied." On July 6, 2022, after outlining legal and factual basis in detail, in accordance with the Commission's January 6, 2022 Order, American CryptoFed requested Corporation Finance to meet and confer for a motion to lift the Denial Order (P.1 at Exhibit 8 of Rx.12). On July 11, 2022, American CryptoFed sent a follow-up letter to Corporation Finance (Rx.103). Both letters were copied to the Division. Corporation Finance failed to respond to these two letters which also cited US Supreme Court opinion below in *Jones v. SEC, 298 U.S. 1 (1936)* (emphasis added).

> **Since here the only disclosed purpose for which the investigation was undertaken had ceased to be legitimate when the registrant rightfully withdrew his statement, the power of the commission to proceed with the inquiry necessarily came to an end.** *Jones v. SEC*, 298 U.S. 1 (1936) at 26.

> **An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact. Such an investigation, or such a search, is unlawful in its inception and cannot be made lawful by what it may bring, or by what it actually succeeds in bringing, to light.** Cf. *Byars v. United States*, 273 U.S. 28, 29, and cases cited…
>
> No one can read these two great opinions, and the opinions in the Pacific Ry. Comm'n case…without perceiving how closely allied in principle are the three protective rights of the individual — **that against compulsory self-accusation, that against unlawful searches and seizures, and that against unlawful inquisitorial investigations**. They were among those intolerable abuses of the **Star Chamber... Even the shortest step in the direction of curtailing one of these rights must be halted *in limine*, lest it serve as a precedent for further advances in the same direction, or for wrongful invasions of the others.** at 28 *Jones v. SEC*, 298 U.S. 1 (1936).
>
> Judge Sawyer, in the course of his opinion (at p. 263), after observing that a bill in equity seeking **a discovery upon general, loose and vague allegations** is styled "a fishing bill," and will, at once, be dismissed on that ground (Story, Eq. Pl. § 325), said: **"A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing, where the practice under it would end."** at 27, *Jones v. SEC*, 298 U.S. 1 (1936).

This OIP while civil in form is potentially criminal in nature due to unknown future developments, given that 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 the evidence resulted from Section 8(e) Examination Order, including the subpoena (Dx.3) and testimony (Dx.6), should be stricken in accordance with 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.

4.4. The Division Has Obligation to Prove Locke and Ducat Are Securities from the Perspective of GAAP

Given that the Commission issued the Order denying American CryptoFed's withdrawal of the Registration Statement, in accordance with 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**)**, the Division has the obligation to prove that Locke and Ducat tokens were securities, because the only reason for the withdrawal request was that "Locke token and Ducat token are not securities" (Rx.37 p.1). Thus, the Division's statement below (Brief p.11, footnote 8) is false.

> 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.

American CryptoFed does agrees with the Division's statements in its Brief specified below:

> 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)). (Brief, Item 53 p.10)

> Since the Commission's earliest days, a bedrock principle has been that registration statements must contain audited financial information….The Commission also explained in *Cornucopia Gold Mines* the reasons that audited financial statements were essential to the registration process (Brief p.23).

> 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.'" (Brief p.24).

Financial information is so critical, fundamental, and essential as the characteristics of securities that the permanence of non-existence of the financial information is equal to the permanence of non-existence of securities. Thus, in order to prove Locke and Ducat tokens are securities, the Division can either use Howey Test analysis or alternatively demonstrate that American CryptoFed has assets, revenues, costs and liabilities from the GAAP perspective. Fundamentally, both methodologies are the same. They all come down to assets, revenues, costs and liabilities. Although the Division provided some "significant indications" at Items 54 through 59 (Brief

p.11-12), the indications were not based on GAAP with which the Division must comply. To rebut the Division's erroneous indications and show good faith, American CryptoFed created the preliminary GAAP analysis framework for its future operation, so that the Division can provide a professional rebuttal from GAAP perspective. As an article by Mr. Daniel McAvoy and Mr. Stephen Rutenberg regarding Form 10 OIP in The National Law Review stated, "a DAO is not really an entity. There often is a supporting entity in place alongside a DAO… but the DAO itself in almost all circumstances would not be able to produce financial statements prepared in accordance with generally accepted accounting principles." (Rx.58 p.1).

4.4.1. No Revenue, No Profits and No Taxable Income

Deloitte describes Revenue Recognition cited below (Rx.269, p.1) which is applied to American CryptoFed to prove that revenue will never exist.

The core principle of the revenue standard is to depict the transfer of promised goods or services to customers in an amount that reflects the consideration to which an entity expects to be entitled in exchange for those goods and services. Significant judgments frequently need to be made when an entity evaluates the appropriate recognition of revenue from contracts with customers. These judgments are often required throughout the revenue standard's five-step process that an entity applies to determine when, and how much, revenue should be recognized.

◊ **Step 1. Identify the Contract with a Customer**

The Constitution (Dx.1A) is the only contract American CryptoFed has and will have. The Constitution is effective as of September 15, 2021, signed by the symbolic CEO of American CryptoFed DAO LLC and the CEO & COO of MShift as the LLC's sole member. The Constitution only allows the symbolic CEO to communicate to and file documents with regulators (p.3-4, Section 4.4). The future smart contracts to execute the Constitution's clauses are part of this Constitution (p.1, Section 2).

◊ **Step 2. Identify the Performance Obligations in the Contract**

The obligations of American CryptoFed have been defined in the Constitution.

i) The proceeds in US dollar pegged stablecoins ("Stablecoin") from Locke token refundable auctions must be used for refunding the auction purchasers or buying back Locke tokens from the open market (p.13, Section 15.4). The Locke tokens which are bought back, must be immediately and automatically burnt (destroyed) (p.14, Section 16.2).

ii) The proceeds in Stablecoins from Ducat token sales must be used for buying back Locke tokens from the open market (p.14, Section 15.5). The Locke tokens which are bought back, must be immediately and automatically burnt (p.14, Section 16.2).

iii) Because all the proceeds in Stablecoins will be dedicated to buy back Locke tokens from the open market which in turn must be burnt (destroyed), the market price of Locke tokens will be supported by the buyback. In addition, new Locke tokens will be issued to buy back Ducat from the open market to maintain the Target Equilibrium Exchange Rate ("TEER") between Ducat and US dollar (p.14, Section 15.5). The Ducat tokens which are bought back, must be immediately and automatically burnt (destroyed) (p.14, Section 16.2).

iv) During a crisis, all the proceeds in Stablecoins must be used for buying back Locke tokens from the open market (p.11, Section13.2). Again, the Locke tokens which are bought back, must be immediately and automatically burnt (destroyed) (p.14, Section 16.2).

◊ **Step 3. Determine the Transaction Price**

The proceeds of each transaction in Stablecoins should be the transaction price, although the market price of each individual transaction varies.

◊ **Step 4. Allocate the Transaction Price to Performance Obligations**

All the Stablecoin proceeds must be used for buying back Locke tokens. All Locke tokens bought back must been burnt (destroyed). New Locke tokens must be issued to buy back Ducat to maintain the TEER. All Ducat tokens bought back must be burnt (destroyed).

◊ **Step 5: Recognize Revenue When (or as) the Entity Satisfies a Performance Obligation**

After a performance obligation is satisfied, no remaining value exists. The Constitution's mandate is to automatically and immediately burn (destroy) all Locke tokens and Ducat tokens which are bought back (p.14, Section 16.2). American CryptoFed is not allowed to hold its own outstanding tokens of Locke and Ducat. One of the major issues of centralized crypto players, is that they hold their own outstanding tokens as assets. For example, FTX and its sister company Alameda Research held its own FTT tokens as assets, manipulated the FTT market price, lent FTT, used FTT as collateral and created an unrealistic value in their book.

The proceeds in Stablecoins either from Locke token refundable auction or from Ducat token sales, are the only funds received pursuant to the Constitution. However, these proceeds cannot be booked as revenue in accordance with "the revenue standard's five-step process". No revenue also means no profit and no taxable income.

4.4.2. No Assets

FASB provides the definition for and characteristics of asset below (Rx.277, p.5).

> E16. An asset is a present right of an entity to an **economic benefit**.
> E17. An asset has the following two essential characteristics:
> a. It is a present right. b. The right is to an **economic benefit**. (Emphasis added).

Economic Benefit is a key concept in the FASB definition. To the extent that the proceeds in Stablecoins, either from Locke token refundable auction or from Ducat token sales can never provide any economic benefit (revenue), the proceeds can never be booked as assets. Although MShift has licensed to American CryptoFed in accordance with the Constitution (p.4,

Section 4.7) all the intellectual properties ("IPs"), such as, copyrights, trademarks, logos, website, patents, etc. exclusively, permanently and irreversibly, to the extent that these IPs cannot generate any economic benefit (revenue), the IPs can never be booked as assets.

4.4.3. No Fundraising

To the extent there is not and there will never be, any revenue and asset in American CryptoFed business model, there will never be any fundraising.

4.4.4. No Liability (Actual and Contingent)

FASB provides the definition for and characteristics of liability below (Rx.277 p.9-10).

> E37. A liability is a present obligation of an entity to transfer an economic benefit.
> E38. A liability has the following two essential characteristics:
> a. It is a present obligation. b. The obligation requires an entity to transfer or otherwise provide economic benefits to others.

Obligation is a key concept in the FASB definition. Although American CryptoFed pays Ducat interest to Ducat holders and Ducat reward to consumers and merchants, neither interest payment nor reward payment is an obligation pursuant to the Constitution, because the interest and reward payments are not entitlements (Dx.1A p.6 Section 6.1 & p.7 Section 8.1). Therefore, the interest and reward payments are not liabilities. Given that the Constitution does not allow American CryptoFed to have "hierarchy, such as an executive branch, a board of directors, or an advisory board" (Dx.1A p.3, Section 4.4), no liability can be caused by a human resource.

Deloitte describes Contingent Liability as follows (Rx.279, p.1).

> An entity must recognize a contingent liability when both (1) it is probable that a loss has been incurred and (2) the amount of the loss is reasonably estimable. In evaluating these two conditions, the entity must consider all relevant information that is available as of the date the financial statements are issued (or are available to be issued).

Pursuant to the Constitution (p.4-5, Section 4.8), all token holders of Ducat and Locke will have executed a waiver. American CryptoFed has done and will continue to do its best to comply with

laws and regulations pursuant to the Constitution (p.3 Section 4.1, p.5-6 Section 5.1&5.3). Pursuant to the Constitution (p.3-4 Section 4.4), the only contracts other than this Constitution which are allowed to be signed by the symbolic CEO, are contracts with regulators. Thus, there is no possibility of any Contingent Liabilities, whatsoever. The Division raised a hypothetical liability caused by American CryptoFed's violation of anti-money laundering rules (Transcript, p. 869:9-17). However, this hypothetical liability belongs to wallet issuers, because they are responsible for onboarding users and are the gatekeepers for the entrance to American CryptoFed Blockchain, pursuant to the Constitution (p.5, Section 5.1). Pursuant to the Constitution (p.7, Section 7), wallet issuers receive Ducat token as compensation, and pursuant to the Constitution (p.5, Section 4.8), "Ducat and Locke token holders agree to indemnify and hold harmless CryptoFed and CryptoFed IDE for all claims arising out of their CryptoFed Participation."

4.4.5. No Costs

Pursuant to the Constitution (p.3, Section 4.1), American CryptoFed's token economic operation is not allowed to begin until the Registration Statement is declared effective by the SEC. Prior to that timing, the costs belong to MShift as American CryptoFed DAO LLC's sole member, not the DAO per se, even if the invoices are addressed to American CryptoFed. The Registration Statement disclosed (Dx.1, p.26) that the operation prior to the token economy is MShift's operation for DAO setup, not the DAO's operation per se. IRS rule for Single Member Limited Liability Companies also states, "If the single-member LLC is owned by a corporation or partnership, the LLC should be reflected on its owner's federal tax return as a division of the corporation or partnership." Despite the significant delay, once the Registration Statement is declared effective by the SEC, MShift's "powers and rights will completely and irreversibly

become delegated to Locke token holders", pursuant to the Constitution (p.3, Section 4.1). Subsequently, MShift's operation ends and the DAO's token economic operation begins.

Then, participants of the Ducat Economic Zone (Dx.1B), such as merchants, banks, municipalities, consumers, crypto exchanges, etc. can start building and operating American CryptoFed monetary system. The participants as **Autonomous** decision makers, pursuant to the **Constitution** which is a set of rules executed by smart contracts to coordinate all autonomous participants' activities so that the autonomous participants can act as an **Organization**, cover their own costs, and receive tokens as compensation for performing various functions which they voluntarily choose in a completely **Decentralized** American CryptoFed Blockchain without any hierarchy. Because "Locke tokens represent citizenship, not ownership" pursuant to the Constitution (p.4, Section 4.6), the Constitution does not create any form of partnership among participants, ensuring that all participants are completely **Autonomous** and consent to enter or exit the Ducat Economic Zone by acquiring or relinquishing Locke and Ducat tokens. The tokens per se which autonomous participants may receive as compensation, can only be generated collectively by multiple autonomous participants' voluntary actions, in accordance with the mechanism triggers designed by the Constitution, executed by smart contracts on the American CryptoFed Blockchain. American CryptoFed DAO itself as a Wyoming legal entity has no control of the creation / destruction of any tokens. The Constitution and smart contracts can be modified only through the procedures defined by the Constitution.

"*And thus came in the use of money; some lasting thing that men might keep without spoiling, and that, by mutual consent, men would take in exchange for the truly useful but perishable supports of life*", as described by John Locke (Rx. 264 p.125), under the constituted governance by Locke tokens. The costs to operate American CryptoFed Blockchain will be

covered collectively and automatically by all independent and autonomous participants, in exchange for tokens which will also be collectively and automatically generated by these participants. American CryptoFed DAO as a Wyoming legal entity does not bear any costs for American CryptoFed's operation.

5. THE OIP AND SECTION 8(e) EXAMINATION ORDER ARE UNLAWFUL DUE TO LACK OF FAIR NOTICE

5.1. Legal Requirements of Fair Notice and Due Process

In accordance with the US Supreme Court's opinion below in *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012), due process requires that laws give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. Without the fair notice, the laws cannot be applied to the regulated the person.

> 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 March 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, American CryptoFed brings an as-applied challenge to the statutes of the Securities Act and the Exchange Act (not a facial challenge) and argues that it is impossible to apply these to the individual circumstances of Locke and Ducat tokens.

5.2. The Lack of Fair Notice regarding the Registration Statement Filing

The currencies of monetary systems which replace sovereign currencies are not securities, such as Locke and Ducat tokens, according to Jay Clayton, who stated in a CNBC interview on June 6, 2018, while serving as the SEC Chairman, "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, Chairman Gary Gensler emphasized on August 3, 2021 at the Aspen Security Forum "No single crypto asset, though, broadly fulfills all the functions of money." (Rx.57). These conflicting statements caused the lack of fair notice as to what crypto assets are currencies and what are not. Chairman Gensler has made a variety of assertions through speeches and testimony that have introduced fear and uncertainty in crypto

industry. 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.

In order to show good faith and comply with the Securities Act and Exchange Act, American CryptoFed had to file with the Commission the Registration Statement and Form 10 Registration Statement ("Form 10"), while emphasizing American CryptoFed's true belief that Locke and Ducat tokens are not securities. On October 12, 2021, in a letter addressed to the Chairman Gensler, the Commissioners and Corporation Finance ("October 12 Letter"), American 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.

Judge Foelak summarized American CryptoFed's dilemma very well during the hearing.

> 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. (Tr.87:13-18).

American CryptoFed hoped that the Corporation Finance should know better as experts than those "men of common intelligence" like Respondent. The first thing Corporation Finance should do was to comply with the Supreme Court opinion in *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012), ensuring that regulated parties "know what is required of them so they may act accordingly," and furnish "precision and guidance" "so that those enforcing the law do not act in an arbitrary or discriminatory way." Therefore, Corporation Finance had the obligation to give American CryptoFed fair notice as to whether Locke and Ducat tokens were

securities, so that American CryptoFed could act accordingly. If Corporation Finance made judgement that Locke and Ducat tokens were not securities, American CryptoFed could withdraw the Registration Statement accordingly. If Corporation Finance made judgement that Locke and Ducat tokens were securities, it would provide "precision and guidance".

However, instead of fulfilling its obligation to provide American CryptoFed with fair notice as to whether Locke and Ducat tokens were securities, Corporation Finance effectively turned the SEC's Filing Review Process (Rx.3) into a law enforcement process by the Division of Enforcement via the Form 10 OIP, although Mr. Gurbir Gruwal, the Director of the Division of Enforcement argued three times regarding criticism, ***This is not "regulation by enforcement",*** at the end of his prepared remarks entitled 2021 SEC Regulation Outside the United States - Scott Friestad Memorial Keynote Address (November 8, 2021).

The OIP's allegation #12 accuses the Registration Statement of inconsistence and misleading, because it states that the Ducat and Locke tokens are not securities, while using the Form S-1 designed for Securities. So did the Form 10 OIP's allegation #7. Given that even Corporation Finance with professional expertise, was unable to provide American CryptoFed with fair notice as to whether Locke and Ducat tokens were securities, given that even the Division with professional expertise did not know whether Locke and Ducat tokens were securities by stating "As these statements contained in Respondent's Registration Statement contradict each other, regardless of whether the tokens are securities, one of the statements must be false" (OIP Allegation #12), it is undisputable that the Securities Act and the Exchange Act are so vague that even the Commission staff with professional expertise do not have clarity as to whether Locke and Ducat tokens are securities, and thus cannot be constitutionally applied to the individual circumstances of Lock and Ducat tokens.

5.3. No Howey Test by the Division

The Lack of Fair Notice to American CryptoFed was exacerbated when the Division refused to apply Howey Test to prove that Locke and Ducat Token were securities. On January 6, 2021, the Division accused American CryptoFed of willful Section 5 violation and threatened "criminal penalties" as stated below (Rx.208, p.2 and p.8).

> Finally, to the extent Respondent plans a distribution of securities for which there is no registration statement in effect, the Division asserts that Respondent, and all persons directly or indirectly offering or selling such securities, must comply with Section 5 of the Securities Act of 1933 ("Securities Act"), and notes that **willful violations of the Securities Act** can result in **criminal penalties**. See Securities Act Section 24, 15 U.S.C. §77x. (Emphasis added, p.2)
>
> Finally, the Motion appears to suggest that American CryptoFed, Marian Orr, Scott Moeller, and/or Xiaomeng Zhou **intend to willfully violate Section 5 of the Securities Act** by asserting that "Respondent has the rights [sic] to issue restricted, untradeable, and non-transferable tokens to more than 500 persons" as long as Respondent subsequently files a Form 10. (Emphasis added, p.8)

Therefore, in accordance with 5 U.S. Code § 556 (d), the Division has the burden to prove that Locke and Ducat tokens are securities. Thus, American CryptoFed filed the Motion for Leave to File a Motion (Rx.200) to request the Division to provide Howey Test Analysis or other legal justification to prove Locke and Ducat tokens were securities, stating the following:

> However, the Division has repeatedly refused to provide any proof or justification of the allegations through email communications (Exhibit 1 through 5) as well as during the Commission mandated meet and confer on January 20, 2022. **A major factual dispute between the Division and Respondent remains whether or not Locke token and Ducat token of American CryptoFed are securities**. It is important for Respondent to know the Division's proof so that Respondent can prepare for effective defense prior to summary disposition. (Emphasis added, Rx.200, p.2 and Rx.201's Exhibit 1 through 5).

Prior to filing the Motion above, in good faith, American CryptoFed applied a Howey Test analysis to Locke and Ducat tokens, and explained why Locke and Ducat tokens were not securities (Rx.209, P.2-10, Rx.48, p.3-9). The Division never provided any substantive rebuttal.

5.4. The Commission's Indecision on Important Pending Motions

The lack of fair notice to American CryptoFed was exacerbated when the Commission was unable to make decisions on important pending motions. The Commission never made decisions on three major motions of Respondent, which were:

- A motion filed on December 15, 2021 pursuant to *Rule 250 (a)* requested the Commission to lift the Stay Order. ("Motion to Lift the Stay Order", Rx. 202).
- The Exemption Motion filed on January 4, 2022, requested the Commission to confirm the fact that the Form 10 OIP and its Stay Order were equivalent to an order which exempted (prohibited) American CryptoFed from fulfilling its legal disclosure obligations of the Securities Exchange Act (Rx. 207).
- The Motion for Leave to File a Motion filed on January 23, 2022, was to request the Division to provide a Howey Test Analysis or other legal justifications to prove that Locke token and Ducat token were securities. (Rx. 200).

As dispositive motions, these three motions would have a decisive impact on both the Registration Statement and the Form 10. Particularly, the Motion to Lift the Stay Order pursuant to Rule 250 (a) stating "The hearing officer shall promptly grant or deny the motion." However, by September 15, 2022, nine months later, the Commission was still unable to make a decision by stating the following in an Order (*American CryptoFed*, Release No.95799, Rx.181):

> In short, we believe briefing on summary disposition would most productively occur after the Commission resolves Respondent's pending motion to lift the OIP's stay of effectiveness of its Form 10 registration statement.

The inability of the Commission to make timely decisions on important pending motions proved that it was impossible for the Commission to constitutionally apply the Securities Act and the Exchange Act to the individual circumstances of Locke and Ducat tokens.

5.5. The Division's Superficial Justification

The lack of fair notice to American CryptoFed was exacerbated when the Division stated that the Registration Statement filing per se made Locke and Ducat tokens securities.

Given that the Commission was unable to make decisions on important pending motions, American CryptoFed was held in limbo. American CryptoFed, on May 30, 2022, over eight months since initial filing, had to ask the Division again to provide a Howey Test Analysis or other legal justifications to prove that Locke and Ducat tokens were securities (Dx.13, p.2). Tellingly, on June 3, 2022, the Division, in response, instead of providing a Howey Test Analysis or other legal justifications, 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 legal position directly violated US Supreme Court opinion in *SEC v. Howey Co*., 328 U.S. 293 (1946) at 298 and the SEC's own [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).

Therefore, on June 8, 2022, American CryptoFed requested the Division to provide substantive legal justification to classify Locke and Ducat tokens as Securities (Rx.21, p.4), but the Division failed to do so. By substituting substance with form, the Division failed to provide American CryptoFed with fair notice as to whether Locke and Ducat were securities in substance, while discouraging and deterring disclosure.

5.6. Corporation Finance's Request for Withdrawal of Form RW

The lack of fair notice to American CryptoFed was exacerbated when Corporation Finance requested American CryptoFed to withdraw its Form RW for Withdrawal of the Registration Statement. Given that the Division's legal position is that the Registration Statement filing per se made Locke and Ducat tokens securities, given that the Division failed to provide any substantive justification, whatsoever, despite multiple requests, to prove Locke and Ducat tokens were securities, American CryptoFed, on June 6, 2022, filed the Form RW to request for the withdrawal of the Registration Statement for the specific reason that "Locke token and Ducat token are not securities" (Rx.37, p.1). However, Corporation Finance, on June 13, 2022, requested American CryptoFed to withdraw the Form RW voluntarily (Rx.18, p.3). On the same day, June 13, 2022, in response, American CryptoFed requested Corporation Finance to prove that Locke and Ducat tokens were securities, citing 5 U.S. Code § 556 (d) regarding the burden of proof (Rx.18, p.1-2), but Corporation Finance failed to do so.

On the one hand the Division insisted that the Registration Statement filing per se made Locke and Ducat tokens securities, but on the other hand Corporation Finance stated, "If you do not withdraw the Form S-1 withdrawal request, we intend to recommend that the Commission deny the withdrawal request." The contradiction between the Division and Corporation Finance "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)).

5.7. The Commission's Order Denying the Withdrawal of the Registration Statement

The lack of fair notice to American CryptoFed was exacerbated when the Commission issued the Denial Order on June 17, 2022. To the extent that the Division emphasized that the Registration Statement filing per se made Locke and Ducat tokens securities, to the extent that

both the Division and Corporation Finance failed to provide Howey Test or any substantive justification to prove that Locke and Ducat tokens were securities, to the extent that American CryptoFed requested for the withdrawal of the Registration Statement for the specific reason that "Locke token and Ducat token are not securities", to the extent that the Commission issued the Denial Order without fulfilling its obligations, mandated by 5 U.S. Code § 556 (d), to prove that Locke token and Ducat token were securities, the Commission, the Division and Corporation Finance willfully created a limbo situation which violated the US Supreme Court opinion "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." (*F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)).

5.8. The Commission's Contradictory Withdrawal Policies

The lack of fair notice to American CryptoFed was exacerbated when the Commission applied contradictory withdrawal policies to Form 10 and the Registration Statement. The Fifth Amendment's Due Process Clause of the US Constitution requires the United States government to practice equal protection. Both the Registration Statement and Form 10 were similar as the Division described below (Brief, p.5, footnote 5).

> 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).

The Division also confirmed below the Registration Statement and Form 10 shared the same business model below. (Brief, p.14, Item 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.

However, although Corporation Finance recommended and the Commission issued the Order denying the withdrawal of the registration Statement ("Denial Order"), Corporation Finance did not object to American CryptoFed's withdrawal request of Form 10 by stating, "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). If Corporation Finance had applied the same withdrawal policy to the Registration Statement as it did to Form 10, the Registration Statement would have been withdrawn and this OIP would have been unnecessary. This inconsistence and contradiction of withdrawal policies proved that the Corporation Finance violated the US Supreme Court opinion regarding the void for vagueness doctrine in *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) stating "second, precision and guidance are necessary so that **those enforcing the law do not act in an arbitrary or discriminatory way.**" (Emphasis added).

5.9. The SEC's Untrue Press Release

The lack of fair notice to American CryptoFed was exacerbated when the Commission published a press release entitled Registration of Two Digital Tokens Halted on November 10, 2021 ("SEC Press Release", Exhibit 1 for Rx.105) specific to the Form 10 which included a quote of Ms. Kristina Littman as below, while refusing to prove or correct it:

> "Issuers attempting to raise money from the public must provide the information necessary for investors to make informed decisions," said Kristina Littman, Chief of the SEC Enforcement Division's Cyber Unit.

Ms. Littman's quote was equal to state that an investment of money existed in American CryptoFed's business model, and the investment of money prong in *SEC v. Howey Co.,* 328 U.S. 293 (1946) at 299 below was met.

> …an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby **a person invests his money** in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party... (Emphasis added).

Therefore, the Division had the burden of proof in accordance with 5 U.S. Code § 556 (d). Given that both the Division and Corporation Finance failed to provide Howey Test or any legal justification to classify Locke and Ducat tokens as Securities other than the Form 10 filing per se, on July 12, 2022, American CryptoFed, after explaining why Ms. Littman's quote was untrue, requested the Division to withdraw her quote as stated below (Rx.105. p.3 & 5):

> In both the Form S-1 and Form 10 filings, American CryptoFed has described that **American CryptoFed by design, has No Fund Raising, No Revenue, No Costs, No Profits and No Assets.** No entity can generate securities or **an investment contract**, whatsoever, if the entity does not have a traditional balance sheet equation of **Assets = Liabilities + Shareholder's Equities**.
>
> American CryptoFed repeatedly asked the Division of Enforcement to provide a Howey Test Analysis to prove that an investment contract exists, and therefore Locke token and Ducat token are securities. However, the Division of Enforcement refused to do so…
>
> Despite repeated requests by American CryptoFed, other than by American CryptoFed's filing of a Form S-1 and Form 10 with the Commission per se, no Howey Test Analysis or other legal justification has been provided by the Commission or the Division of Enforcement or the Division of Corporation Finance to prove that an investment contract exists, and therefore Locke and Ducat tokens are securities. As a result, before and after the SEC Press Release, as of today, no facts whatsoever, can substantiate Ms. Littman's quote in the SEC Press Release that American CryptoFed is "attempting to raise money from the public." Therefore, it is justifiable for American CryptoFed to file a motion to request that the Division of Enforcement immediately withdraw her untrue quote from the SEC Press Release which has and will continue to mislead the general public, damage American CryptoFed's reputation and obstruct American CryptoFed's innovations.

On July12, 2022, the Division stated that there were no errors (Rx.106, p.2) as below:

> Your desire to file a motion to that effect is utterly without basis. Additionally, we do not believe that there were any errors in the Press Release.

On July 13, 2022, in response, American CryptoFed requested as below the Division to substantiate its position (Rx.107, p.1):

> I have detailed evidence to prove that Ms. Littman's quote is untrue. However, I am open to see your evidence to substantiate Ms. Littman's quote regarding the American CryptoFed. Can you send me evidence by July 15, 2022?

On July 13, 2022, the Division responded: "We have made our position clear." (Rx.106, p.1).

5.10. No Substantive Rebuttal to the October 12, 2021 Letter

The lack of fair notice to American CryptoFed was exacerbated when the Corporation Finance and the Division failed to substantively rebut American CryptoFed's October 12, 2021 letter. On October 8, 2021, Ms. Erin Purnell, Acting Legal Branch Chief, Division of Corporation Finance, sent American CryptoFed two letters regarding the Registration Statement (Dx. 18) and Form 10 (Dx. 17) respectively ("October 8, 2021 Letters") and raised the issues of deficiencies. On October 12, 2021, American CryptoFed responded to Ms. Purnell's two October 8, 2021 Letters point-by-point, also addressed to Chairman Gensler and all Commissioners (Dx.19 and Brief p.5:16-17), and emphasized the following conclusions:

> However, if Ms. Purnell compares our Form 10 and Form S-1 filing to the "digital public monies — the dollar, euro, sterling, yen, yuan" Chairman Gensler listed above, the "deficiencies" she referred to, would disappear immediately. **This is because the "deficiencies" she referred to were the lack of attributes inherent to securities**. These are attributes that the two tokens (Locke and Ducat) of a decentralized blockchain-based CryptoFed monetary system **will never have**. (Emphasis added, Dx.19, p.3)
>
> Ms. Purnell **failed to identify and specify one single item of important information**, **which does exist, but we did not disclose.** (Emphasis added, Dx.19 p.7)
>
> From the perspective of disclosing all existing material and substantial information, CryptoFed has met the disclosure requirements. If 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 CryptoFed.** (Emphasis added, Dx.19 p.8).

The Division and Corporation Finance neither provided a substantive rebuttal to American CryptoFed's conclusion above, despite multiple requests, nor **proved that there was a single item of important information which did exist or will exist, but American CryptoFed failed to disclose.** On October 29, October 30 and November 3, 2021, three letters (Rx.13 p.2, Rx.14 p.1-2, Rx.15 p.1-2) were sent to Ms. Deborah Tarasevich, Assistant Director of the Division's Cyber Unit, coping Chairman Gensler, all Commissioners and Ms. Purnell. On August 4, 2022,

a letter was sent to Mr. Justin Dobbie, as Acting Office Chief of the Division of Corporation Finance, coping the Division. On October 23 and October 27, 2022, two letters were sent to Mr. Christopher Bruckmann at the Division, copying Corporation Finance. In these letters, American CryptoFed requested a written response to the October 12, 2021 Letter respectively (Rx.30 p.2, Rx.35 p.8, Rx.36 p.10), but never received any substantive rebuttal.

To the extent that the Division and Corporation Finance were unable to prove that American CryptoFed did not disclose important information which did exist or will exist, but American CryptoFed failed to disclose, American CryptoFed was not provided fair notice as to how to comply with the Securities Act and the Exchange Act.

5.11. The Absence of Precision and Guidance

The lack of fair notice to American CryptoFed was exacerbated when Corporation Finance failed to provide "Precision and Guidance" mandated by US Supreme Court opinion in *F.C.C. v. Fox Television Stations, Inc*., 567 U.S. 239, 253 (2012) to complete the Registration Statement. Given that Ms. Purnell's two October 8, 2021 Letters were the sole comments received from Corporation Finance during the SEC Filing Review Process, given that American CryptoFed's October 12, 2021 Letter already addressed point-by-point all the issues raised by Ms. Purnell in her October 8, 2021 Letters, given that Corporation Finance and the Division failed to substantially rebut American CryptoFed's conclusions of the October 12, 2021 Letter, given that the Commission denied American CryptoFed's withdrawal request of the Registration Statement, it was reasonable for American CryptoFed to request that Corporation Finance provide "Precision and Guidance" **as to how to complete the Registration Statement when important information required by Form S-1 did not and will never exist.**

On July 22, 2022, American CryptoFed sent two letters (Rx.26 p.2 and Rx.27 p.2) to Mr. Dobbie of Corporation Finance, coping the Division, requesting the followings:

> 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 same order in *SEC v. Ripple Labs* issued by Judge Analisa Torres which stated the followings to allow 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, American CryptoFed sent five follow-up letters to Mr. Dobbie, copying the Division, emphasizing the lack of fair notice.

July 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.

August 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 August 17, 2022 and August 28, 2022 respectively (Rx.41, Rx.42), American CryptoFed sent the seventh follow-up letter (Rx.34 p.3) on October 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.

To the extent that Corporation Finance, despite tireless and multiple requests, failed to provide American CryptoFed with "precision and guidance" required by the US Supreme Court *F.C.C. v. Fox Television Stations, Inc*., as to how to complete the Registration Statement and furnish information for ongoing disclosure **when the information requested by the Form S-1 does not exist and will never exist**, American CryptoFed was not given fair notice.

5.12. Contradiction to Chairman Gensler's Public Statements

The lack of fair notice to American CryptoFed was exacerbated when Chairman Gensler emphasizes Howey Test, flexibility, and exemption, while the Division and Corporation Finance refused to implement them. On June 8, 2022, regarding Howey Test, American CryptoFed outlined the contradiction between Chairman Gensler's public policy remarks and the actions of the Division and Corporation Finance as below (Rx.21, p.5-6).

> Furthermore, Chair Gary Gensler has repeatedly emphasized that the Commission complies with the Supreme Court's Howey Test to make judgements. There is no legal basis that the Division can carry out enforcement without providing a Howey Test analysis. Below are just three examples of Chair Gary Gensler's policy remarks with which the Division should be well aware.
> **On May 11, 2022:**

My predecessor Jay Clayton said it, and I will reiterate it: Without prejudging any one token, most crypto tokens are investment contracts under the Supreme Court's Howey Test. https://www.sec.gov/news/speech/gensler-remarks-swaps-and-derivatives-association-annual-meeting-051122

On April 4, 2022:

The Supreme Court's 1946 Howey Test, which was about orange groves, says that an investment contract exists when there is the investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others. https://www.sec.gov/news/speech/gensler-remarks-crypto-markets-040422

On Aug. 3, 2021:

The following decade, the Supreme Court took up the definition of an investment contract. This case said an investment contract exists when "a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." The Supreme Court has repeatedly reaffirmed this Howey Test. https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03

On October 23, 2022, in a letter to the Division (Rx.35 p.9-10), copying Corporation Finance, American CryptoFed pointed out that the refusal to provide "precision and guidance" by Corporation Finance is in opposition to Chairman Gensler's sworn testimony before the US Senate and his statement during the Yahoo finance interview quoted below.

Thus, **I've asked the SEC staff to work directly with entrepreneurs** to get their tokens registered and regulated, where appropriate, as securities. Given the nature of crypto investments, I recognize that it may be appropriate to **be flexible in applying existing disclosure requirements.** (Emphasis added, Sept. 15, 2022, US Senate Testimony, Rx.8).

GARY GENSLER:…I've said to the industry, to the lending platforms, to the trading platforms, **come in, talk to us**. We do have robust authorities from Congress also **to use their exemptive authority so that we can tailor investor protection,** and in your specific question about the tokens themselves, even tailoring what the disclosures might be, because maybe not all of the disclosures for somebody issuing equity are the same as a crypto token... (Emphasis added, July 14, 2022 Yahoo Interview, Rx.271).

In the same letter, American CryptoFed asked the following two questions:

Mr. Bruckmann, are you aware of a single case in which the staff of the Division of Corporation Finance and/or the Division of Enforcement, has been "flexible in applying existing disclosure requirements" and as such, has already worked directly with American CryptoFed to get Ducat and Locke tokens registered? …

Mr. Bruckmann, in order to get Ducat and Locke tokens registered, are you aware of a single case in which the staff of the Division of Corporation Finance and/or the Division of Enforcement, has ever been "tailoring what the disclosures might be, because maybe not all of the disclosures for somebody issuing equity are the same as a crypto token". (Rx.35 p.11).

On October 25, 2022, American CryptoFed sent a follow-up letter as below (Rx.36 p.11).

> In your October 25, 2022 Email, you did not respond to the following questions and requests posted in our October 23, Letter, and thereby we have no choice but to conclude that the staff of the Division of Corporation Finance and/or the Division of Enforcement have not abided by Chairman Gensler's instructions to the staff, which he testified in the US Senate under oath on September 15, 2022, as well as his public policy announcement in his Yahoo Finance interview on July 14, 2022.

During the hearing, it was confirmed that Corporation Finance was not even aware of Chairman Gensler's sworn testimony above, because Mr. Dobbie testified the following:

> "Well, I mean, I can't speak to this specific testimony which I obviously haven't read today, but -- but can certainly say that what we -- what we did in engaging with American CryptoFed was consistent with our filing review process." (Tr.111: 17-21).

Therefore, to the extent that Chairman Gensler kept making public statements on Howey Test, flexibility in disclosure, exemption from disclosure, and requesting crypto industry to "**come in, talk to us"**, while Commission staff failed in implementation, American CryptoFed was not provided fair notice as to how to comply with the Securities Act and Exchange Acts.

6. CONCLUSION AND PETITION

For the foregoing reasons, American CryptoFed respectfully petitions the Court to:

i) Declare that the OIP is unlawful and dismiss all the OIP's allegations 1 through 32.

ii) Deny the Division's request for a Section 8(d) Stop Order.

iii) Declare that Section 8(e) Examination Order is unlawful and dismiss all the related OIP's allegations 13 through 32.

iv) Strike evidence resultant from Section 8(e) Examination Order from the record.

v) Order that **future** financial statements for **a future token economy** of American CryptoFed audited by a PCAOB accounting firm is acceptable, because no token economy is possible before the Registration Statement is declared effective by the Commission.

vi) Order that an examiner specified in the SEC Filing Review Process will be designated

for American CryptoFed within 10 days.

vii) Order the Division to prove, within 60 calendar days, that Locke and Ducat tokens are securities, and the essential characteristics of securities of financial information (revenues, profit, costs, assets, liability) exists for American CryptoFed, from GAAP perspective.

viii) Order the Division to prove Ms. Littman's quote in the November 10, 2021 SEC Press Release that American CryptoFed is "attempting to raise money from the public".

ix) Order "precision and guidance" to be provided so that American CryptoFed can complete the Registration Statement and furnish information for ongoing disclosure, when the information requested by the Form S-1 does not exist and will never exist.

x) Order that American CryptoFed can seek for the Court's ruling, if the "precision and guidance" provided is vague.

xi) Order that American CryptoFed can remove the Delaying Amendment so that the Registration Statement will become effective automatically, if "precision and guidance" are not provided within 60 calendar days.

Dated: April 2, 2023

Respectfully submitted

DocuSigned by:
Scott Moeller
A82E97EDD0C44FD...

By /s/ Scott Moeller
Scott Moeller, President
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this RESPONDENT AMERICAN CRYPTOFED DAO LLC'S OPPOSITION TO THE DIVISION OF ENFORCEMENT'S PROPOSED FINDINGS AND BRIEF IN SUPPORT OF ISSUING A STOP ORDER was filed by eFAP and was served on the following on this 2nd day of April 2023, in the manner indicated below:

By Email:
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Trial Counsel, Division of Enforcement – Trial Unit
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By /s/ Scott Moeller

DocuSigned by:
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OS Received 04/03/2023