UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 95799 / September 15, 2022

Admin. Proc. File No. 3-20650

In the Matter of

AMERICAN CRYPTOFED DAO LLC

ORDER DENYING MOTION FOR LEAVE TO FILE A MOTION TO SET AN EXPEDITED BRIEFING SCHEDULE ON SUMMARY DISPOSITION

On November 10, 2021, the Securities and Exchange Commission ("Commission") issued an Order Instituting Proceedings ("OIP") pursuant to Section 12(j) of the Securities Exchange Act of 1934 against American CryptoFed DAO LLC ("Respondent").[1] The OIP alleges that, on September 16, 2021, Respondent filed with the Commission a materially deficient Form 10 registration statement seeking to register two classes of digital assets, the Ducat token and the Locke token, as equity securities under Exchange Act Section 12(g). The OIP instituted proceedings to determine whether it was necessary and appropriate for the protection of investors to deny, or suspend the effective date of, the registration of the tokens.[2] The OIP also ordered "that the institution of these proceedings stays the effectiveness of the Respondent's Form 10."[3] Because both parties indicated an intent to file motions for summary disposition, the Commission stated that a briefing schedule for such motions would be set by

1 *Am. CryptoFed DAO LLC*, Exchange Act Release No. 93551, 2021 WL 5236544 (Nov. 10, 2021).

2 *Id.* at *4.

3 *Id.*

separate order in due course.[4] The Division of Enforcement ("Division") now seeks leave to file a motion to set an expedited briefing schedule for summary disposition.[5] We deny that request.

Background

The basis for the Division's motion is its assertion that "[r]ecent developments make it imperative that this proceeding move forward on an expedited basis."[6] Specifically, the Division states that Respondent "has announced its intent to begin distributing the Locke tokens on July 1, 2022 notwithstanding the Commission's prior order staying the effectiveness of Respondent's Form 10." The Division argues that "Respondent's apparent plan to ignore the Commission's stay order and engage in an unregistered offering of securities makes it imperative that this proceeding move forward on an expedited basis."

Respondent opposes the Division's motion. But it does not deny that it intends to proceed with distributing the tokens in the near future. Quite the contrary: Respondent affirms that it "will proceed with implementing its business plan," apparently by conducting auctions for non-fungible tokens that will later be exchangeable for Locke tokens,[7] unless the Division provides it with a "Cease-and-Desist Order" including "a *Howey* Test Analysis or other legal

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[4] *Am. CryptoFed DAO LLC*, Exchange Act Release No. 93971, 2022 WL 118206, at *5 & n.36 (Jan. 12, 2022) (resolving Respondent's motions for a more definite statement).

[5] The Commission issued an order requiring the parties to seek leave prior to filing non-dispositive motions. *Am. CryptoFed DAO LLC*, Exchange Act Release No. 93922, 2022 WL 62722 (Jan. 6, 2022). This step was necessary because, since these proceedings were instituted, Respondent has filed more than a dozen motions, including seven motions for a more definite statement, three motions relating to the prehearing conference, four motions for a judgment on the pleadings, a motion to lift the OIP's stay on the effectiveness of its Form 10 registration statement, and a motion for an exemption from Exchange Act Section 12(g). Notwithstanding repeated warnings that procedurally improper, repetitive, overlapping, or duplicative filings are inconsistent with the Rules of Practice, Respondent persisted in making them. *See Am. CryptoFed DAO LLC*, Exchange Act Release No. 93905, 2022 WL 44323, at *2 (Jan. 5, 2022) (resolving Respondent's motions for judgment on the pleadings); *Am. CryptoFed DAO LLC*, Exchange Act Release No. 93806, 2021 WL 5966848, at *1 n.3 (Dec. 16, 2021) (resolving Respondent's motions regarding the prehearing conference).

[6] The Division previously filed a motion for leave to file a motion to set a briefing schedule for summary disposition, which we view as subsumed by the instant motion. *See infra* note 22.

[7] To the extent that Respondent's newly-outlined distribution plan differs from the one set forth in its already-filed registration statements, that may well raise additional concerns, beyond the scope of this proceeding, about Respondent's compliance with not only the registration and disclosure provisions of the securities laws but also the antifraud provisions.

justifications from the Division to prove that [the] Locke token and Ducat token are securities."[8] Respondent states that it "will assume that the Commission and the Division has no intention or authority to stop the implementation of business plan" unless it receives this analysis by July 8, 2022. It also asserts that the OIP and the stay of the effectiveness of the Form 10 registration statement are "equivalent to an order which exempts American CryptoFed from fulfilling its legal disclosure obligations required by the Securities Exchange Act of 1934."

Analysis

We do not see an immediate need for expedited summary disposition briefing. Although the Division suggests that resolving the Section 12(j) proceeding is necessary in light of Respondent's plan to begin distributing its tokens, we believe Respondent acts at its peril in beginning to distribute the tokens now regardless of the status of the Section 12(j) proceeding.

First and foremost, under the Securities Act of 1933, an offering of securities is unlawful—and subject to significant civil and criminal penalties—unless it is either registered or exempt from registration. Separate and distinct from the Exchange Act's registration requirements,[9] Securities Act Section 5(a) prohibits the sale of securities unless a registration statement is in effect or an exemption applies.[10] And Securities Act Section 5(c) prohibits offers of sale, which include sales,[11] "while the [filed-but-not-yet-effective] registration statement is the subject of . . . any public proceeding or examination" under Securities Act Section 8.[12]

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[8] Respondent has also filed a motion for leave to "file a motion to compel the Division to provide [a] *Howey* Test Analysis or other legal justification to prove [the] Locke token and Ducat token are securities," which will be addressed in a separate order. Suffice it to say, the Division's decision not to preview a legal theory in advance of when it is asserted as a basis for the relief sought does not invalidate the instant proceeding or its authority to maintain enforcement actions for violations of the securities laws. *See, e.g., United States v. Coker*, 514 F.3d 562, 570 (6th Cir. 2008) (explaining that the government is not "obligate[d] . . . to give the defendant legal theories"); *Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir. 2006) (explain that there is no freestanding obligation to "reveal . . . strategies, legal theories, or impressions of the evidence").

[9] Generally, Exchange Act Section 12(a) makes it unlawful for any member, broker, or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective as to such security for such exchange. 15 U.S.C. § 78*l*(a). Section 12(g) makes registration compulsory for issuers that meets size and ownership thresholds, and additionally "[a]ny issuer may register any class of equity security not required to be registered by filing a registration statement." *Id.* § 78*l*(g). Respondent here voluntarily sought Exchange Act Section 12(g) registration by filing a Form 10.

[10] 15 U.S.C. § 77e(a).

[11] *See* 15 U.S.C. § 77b(a)(3) (defining "sale" and "offer to sell" in broad terms).

[12] 15 U.S.C. § 77e(c).

Respondent has not identified, or even purported to identify, any exemption that applies to the distribution of its tokens. And it is undisputed that there is no Securities Act registration statement in effect for the offering: Although the day after filing the Form 10, Respondent filed a Form S-1 registration statement seeking to register transactions involving the Ducat and Locke tokens under the Securities Act, the Form S-1 contains a delaying amendment, and therefore will not become effective until the Commission declares it effective (which it has not done). Moreover, on November 9, 2021, the Commission commenced an examination under Securities Act Section 8(e) with respect to the Form S-1.[13] Finally, on June 6, 2022, Respondent filed a Form RW seeking withdrawal of the Form S-1 registration statement in which it acknowledged that the Form S-1 has not been declared effective by the Commission. We note that, should Respondent proceed with the distribution of its tokens under these circumstances—irrespective of when and how the instant Exchange Act Section 12(j) proceeding is resolved—each of the above facts will be highly relevant to the determination of whether any violation of the Securities Act on its part was willful and deliberate.

Importantly, Respondent's potential liability under the Securities Act for an unregistered, non-exempt offering of the tokens is independent of the effectiveness of Respondent's Exchange Act registration statement with respect to the tokens (*i.e.*, the Form 10). Registration of *securities offerings* under the Securities Act is distinct from registration of *classes of securities* under the Exchange Act.[14] "Registration under the one statute does not excuse registration under the other when it is otherwise required."[15] So even assuming *arguendo* that the Form 10 was effective, any securities offering would need to be pursuant to a *Securities Act* registration statement or pursuant to a *Securities Act* exemption from registration.

Second, we regard Respondent's claim that it is entitled to proceed with implementing its business plan because it already has the "equivalent" of an exemption from the Exchange Act's requirements as misguided. As we have repeatedly explained, although Respondent has filed a number of requests for an exemption, they are procedurally improper and not within the scope of

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[13] Respondent asserts that it was not notified of the Securities Act Section 8(e) examination order until June 2022. The statute does not require that the issuer be given notice of such orders within any particular timeframe, and we have no occasion to decide here whether Securities Act Section 5(c)'s prohibition on sales and offers of sale during the pendency of "any *public* proceeding or examination" would be effective prior to such notice. 15 U.S.C. § 77e(c) (emphasis added). There is no question that Respondent *now* is aware of the order.

[14] *Raran Corp.*, Exchange Act Release No. 92571, 2021 WL 3470601, at *3 n.14 (Aug. 5, 2021); *see also Adoption of Integrated Disclosure System*, Securities Act Release No. 6383 (Mar. 3, 1982), 47 Fed. Reg. 11,380, 11,382 (Mar. 16, 1982) (contrasting the "transaction-oriented framework of the Securities Act" and the "status-oriented framework of the Exchange Act").

[15] Louis Loss, Joel Seligman, & Troy Paredes, 1 *Fundamentals of Securities Regulation* Ch. 6.A.1 (6th ed. 2011); *see also* Thomas Lee Hazen, 2 *Treatise on the Law of Securities Regulation* § 9:1 (7th ed. 2016) ("The 1934 Act registration and reporting requirements are triggered by the securities rather than being transaction specific like the 1933 Act.").

this proceeding.[16] Insofar as Respondent apparently seeks authorization under Exchange Act Section 12(c) to submit alternative information in lieu of the requirements of Exchange Act Section 12(b), or an exemption more generally from the Exchange Act's disclosure requirements pursuant to Exchange Act Section 12(h) or otherwise, Respondent must do so in accordance with the distinct "procedures described in the Commission's regulations and webpages."[17] Exemptive relief must be applied for in a procedurally proper manner, and unless and until an exemptive order is issued, compliance with the otherwise applicable legal requirements is mandatory.[18]

Finally, the remedies in a Section 12(j) proceeding are denial, suspension of the effective date, suspension for a period of up to 12 months, and revocation of the registration of a class of securities under the Exchange Act.[19] Given the current posture of this proceeding, with the effectiveness of the Form 10 stayed, it is not apparent that the Division's request for expedited summary disposition briefing with a view toward imposition of one of these remedies is needed. In the event that Respondent proceeds with its distribution plan, the pendency of this proceeding would not lend it shelter from additional potential liability for violations of the Securities Act.[20]

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

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16 *See, e.g.*, *Am. CryptoFed DAO LLC*, 2022 WL 118206, at *4 n.28; *Am. CryptoFed DAO LLC*, 2022 WL 62722, at *2 n.7; *Am. CryptoFed DAO LLC*, 2022 WL 44323, at *2 n.13.

17 *See, e.g.*, *Am. CryptoFed DAO LLC*, 2022 WL 118206, at *4 n.28 (citing procedures).

18 *Toby G. Scammell*, Advisers Act Release No. 3961, 2014 WL 5493265, at *5 & nn.29-31 (Oct. 29, 2014), *vacated in other part*, Advisers Act Release No. 5272, 2019 WL 2775920 (July 2, 2019).

19 *See* 15 U.S.C. § 78*l*(j); *see also, e.g.*, *Ameritek Ventures, Inc.*, Exchange Act Release No. 93076, 2021 WL 4291677 (Sept. 20, 2021); *Swissinso Holding, Inc.*, Exchange Act Release No. 90516, 2020 WL 6891408 (Nov. 24, 2020). Furthermore, "[n]o member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant" to Section 12(j). 15 U.S.C. § 78*l*(j).

20 *See generally* Louis Loss, Joel Seligman, & Troy Paredes, 1 *Fundamentals of Securities Regulation* Ch. 6.B.2.a (6th ed. 2011) ("The fact that a § 12(g) registration statement may become effective after 60 days in deficient form presents no particular problem for the Commission. It has ample sanctions . . . . It is the issuer itself that may be in an uncomfortable position.").

its Form 10 registration statement.[21] Accordingly, it is ORDERED that the Division's motion is DENIED, but without prejudice to renewal if the Division identifies why immediate relief is necessary notwithstanding the considerations described above.[22]

By the Commission.

Vanessa A. Countryman
Secretary

[21] We note that Respondent's pending motion to lift the OIP's stay of effectiveness of Respondent's Form 10 is simply a request, which remains to be acted upon by the Commission. In the meantime, the last word on the Form 10's effectiveness is the OIP's directive that it be stayed. This order should not be construed as expressing a view as to the disposition of that motion, which the Commission intends to resolve as expeditiously as possible. To provide guidance to the parties regarding further proceedings, it is ORDERED that, pending any further order of the Commission, any motion for summary disposition shall be filed within 30 days of the issuance of the order resolving that motion; any opposition shall be filed within 30 days of the motion for summary disposition; and any reply may be filed within 14 days of the opposition.

[22] The Division's prior motion for leave to file a motion to set a briefing schedule on motions for summary disposition, *see supra* note 6, is also denied as moot.