American CryptoFed

June 11, 2023

Via Electronic Email

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Re: In the Matter of American CryptoFed, AP File No. 3-20650:
A Time to Meet and Confer for Filing Motions

Mr. Bruckmann,

On June 7, 2023, the Securities and Exchange Commission ("SEC" or "Commission") issued an ORDER DENYING MOTION TO DISMISS, Release No. 97659 ("June 7, 2023 Order"), which denied American CryptoFed's Withdrawal Request of Form 10. This Order has created a new situation for us to handle. Therefore, pursuant to the Commission's Order (Release No. 93922 / January 6, 2022), we request some dates and times to Meet and Confer with the Division of Enforcement ("Division") so that we can seek and receive leave from the Commission to file the following motions.

1. Motion to Strike

The Commission's June 7, 2023 Order established the principle that rules only applying to **registration statements under Securities Act** cannot apply to **registration statements under Exchange Act,** "as is the case here", by stating the following:

> In addition, the Division of Enforcement's reliance on Rule 477(b) of the Securities Act is misplaced. **Rule 477 applies "only to the withdrawal of registration statements . . . under the Securities Act of 1933, not registration statements regarding the registration of classes of securities with the Commission under the Exchange Act," as is the case here.** For the same reason, Respondent's citation to Securities Act Rule 477 in its withdrawal request has no impact on whether it obtained Commission approval to withdraw the Form 10 registration statement that is the subject of this Exchange Act Section 12(j) proceeding. (Emphasis added, p.5).

For the same reason, the Division of Enforcement's reliance on *Jones v. SEC*, 298 U.S. 1 (1936) which is a case law of the Securities Act is misplaced, and the entire paragraph below of the Argument section I) A) of DIVISION OF ENFORCEMENT'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO LIFT THE ORDER THAT STAYS THE EFFECTIVENESS OF RESPONDENT'S FORM 10 filed on December 22, 2021 ("December 22, 2021 Memorandum"), should be stricken.

> In *Jones v. SEC*, 298 U.S. 1 (1936), the Supreme Court explored the limits on the Commission's ability to deny an issuer's request to withdraw a registration statement. In so doing, the Court held that initiating proceedings under Section 8(d) of the Securities Act of 1933 ("Securities Act") stays the effectiveness of a registration statement that would otherwise automatically become effective…
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> …
>
> Here, under the analogous provisions of Section 12(j), the same rule should hold true.

We will file a motion to strike the paragraph above pursuant to the Commission's June 7, 2023 Order, because *Jones v. SEC*, 298 U.S. 1 (1936) is not only the sole case law the Division cited to justify the order staying the effectiveness of American CryptoFed's Form 10 registration statements under the Exchange Act, but also is clearly misplaced in accordance with the latest Commission's June 7, 2023 Order.

Furthermore, the latest Commission's June 7, 2023 Order has confirmed that there was no stay order in a not-yet-effective Exchange Act registration statement, by stating the following.

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

American CryptoFed timely filed the Motion to Lift the Stay Order on December 15, 2021, pursuant to Rule 250 (a), so that the disclosure could be moved forward, but the Commission failed to make a timely decision, although Rule 250 (a) mandates "The hearing officer shall promptly grant or deny the motion." Obviously, the Commission did not know how to make a decision on this motion or did not want to make a decision in accordance pursuant to the statue and legal precedent. If they had known and wanted, they would have complied with the mandate of Rule 250 (a) and would have promptly made their decision on American CryptoFed's Motion to Lift the Stay Order.

In the entire 89 years after the Exchange Act became law in 1934, and by their own statement, the Commission is aware of only **one case** "in which the Commission instituted a Section 12(j) proceeding as to a not-yet-effective Exchange Act registration statement", **but no Stay Order was included in the proceeding. By the Commission's own admission, "the Form 10 became automatically effective".** American CryptoFed's Form 10 registration statement should have become automatically effective around November 15, 2021, if the Rule of Law had prevailed.

American CryptoFed welcomes that the Commission now begins to see, albeit reluctantly and unintentionally, that the Order staying the effectiveness of Respondent's form 10 is not consistent with the legal precedent and the statute's plain text of Exchange Act Section 12(g) mandating the automatic effectiveness of a Form 10 registration statement 60 days after filing; although the latest Commission's June 7, 2023 Order states the following:

> Here, the Commission instituted Section 12(j) proceedings before the registration statement automatically become effective 60 days after filing, and the OIP explicitly ordered that "the institution of these proceedings stays the effectiveness of the Respondent's Form 10." **Respondent's motion to lift the OIP's stay of effectiveness remains pending before the Commission. This order should not be construed as expressing a view as to the disposition of that motion.** (Emphasis added, Footnote 13, page 5).

2. Motion to Convene a Public Hearing

"The Division believes that this case is appropriate for summary disposition. **A ruling on a motion for summary disposition could also potentially moot the stay issue.**" (Emphasis

added, December 22, 2021 Memorandum, at the footnote of I) B) 1)). Clearly, **the Division of Enforcement's strategy** has been to use summary disposition to "potentially moot the stay issue", although the Order staying the effectiveness of Respondent's Form 10 is patently unlawful and Respondent's form 10 should have become automatically effective 60 days after filing pursuant to the statute's plain text of Exchange Act Section 12(g).

As a result, American CryptoFed still has concern that the Commission will take an unlawful path of summary disposition without public hearing, because the following statement in the Commission's June 7, 2023 Order has not completely excluded the option of summary disposition:

> After completion of briefing on the Division's motion to dismiss, Respondent purported to withdraw its opposition to that motion, while continuing to insist that it would seek to "reinstate" its Form 10 registration statement—that is, by re-filing the Form 10—if this proceeding was dismissed. Respondent's filing appears to be premised on a misunderstanding about the status of this proceeding: It states it is "disappoint[ed]" that the Commission "took the path of unlawful summary disposition." The Commission has not, however, expressed any view as to whether this proceeding can be resolved by summary disposition or whether an in-person evidentiary hearing will be held (let alone granted summary disposition in favor of any party). See, e.g., Am. CryptoFed DAO LLC, Exchange Act Release No. 93806, 2021 WL 5966848, at *1 (Dec. 16, 2021) (explaining that "[w]hether this proceeding may be resolved by **summary disposition without a public hearing** depends on the content of the record and the parties' briefs and the established standards for summary disposition"). Indeed, the Commission's most recent order referencing summary disposition merely provided guidance to the parties regarding the schedule for submitting summary disposition briefing. Am. CryptoFed DAO LLC, Exchange Act Release No. 95799, 2022 WL 4288944, at *3 & n.21 (Sept. 15, 2022). (Emphasis added, footnote 17, page 5-6).

However, summary disposition without a public hearing is completely prohibited by Exchange Act Section (j) and the U.S. Supreme Court opinions in *Steadman v. SEC*, 450 U.S. 91 (1981) which embody the Due Process Clause of the Fifth Amendment of the US Constitution.

Exchange Act Section (j) provides in part (emphasis added):

> (j)Denial, suspension, or revocation of registration; notice and hearing
>
> The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the

> Commission finds, **on the record after notice and opportunity for hearing**, that the issuer, of such security has failed to comply with any provision of this chapter or the rules and regulations thereunder.

The U.S. Supreme Court opinions in *Steadman v. SEC*, 450 U.S. 91 (1981) at 97 and its note [14] provide:

> The securities laws provide for judicial review of Commission disciplinary proceedings in the federal courts of appeals and specify the scope of such review. Because they do not indicate which standard of proof governs Commission **adjudications**, however, we turn to § 5 of the Administrative Procedure Act (APA), 5 U. S. C. § 554, which "applies . . . in every case of adjudication required by statute to be determined **on the record after opportunity for an agency hearing,"** except in instances not relevant here. **Section 5 (b), 5 U. S. C. § 554 (c) (2),** makes the provisions of **§ 7, 5 U. S. C. § 566,** applicable to adjudicatory proceedings. (Emphasis added).
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> **Section 5 (b), 5 U. S. C. § 554 (c) (2),** provides that "[t]he agency shall give all interested parties opportunity for . . . hearing and decision on notice and in accordance with **sections 556** and 557 of this title." (Emphasis added).

Thus, for a hearing **"on the record"** explicitly required by a statute such as Section 12(j), the Supreme Court in *Steadman v. SEC,* provides a chain of statutes from **5 U. S. C. § 554** through **5 U. S. C. § 554 (c) (2)** to **5 U. S. C. § 556** which inevitably leads to cross-examination at an oral hearing, thereby prohibiting summary disposition:

> A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such **cross-examination** as may be required for a full and true disclosure of the facts (5 U. S. C. § 556(d)) (Emphasis added).

The statutes of Exchange Act Section (j) and 5 U. S. C. § 554 through 5 U. S. C. § 554 (c) (2) to 5 U. S. C. § 556, grant American CryptoFed an absolute right to have an oral hearing,

which is upheld by the US Supreme Court opinion in *Steadman v. SEC*, 450 U.S. 91 (1981) and should be recognized as essential to and consistent with the protections provided by the Due Process Clause of the Fifth Amendment of the US Constitution. Therefore, American CryptoFed will file a motion to convene a public hearing and to urge the Commission to comply with the statutes above, and its own November 10, 2021 ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934 against American CryptoFed ("November 10, 2021 OIP") which states the following at page 5:

> IT IS ORDERED that **a public hearing before the Commission** for the purpose of taking evidence on the questions set forth in Section III hereof **shall be convened** at a time and place to be fixed by further order of the Commission, pursuant to Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

3. Motion to Correct Press Release

On November 10, 2021, the SEC published a press release entitled **Registration of Two Digital Tokens Halted** ("SEC Press Release")[1] specific to the Form 10 filing of American CryptoFed. The SEC Press Release included a statement below:

"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.

American CryptoFed will file a motion to request the Division of Enforcement to provide factual and legal basis to prove Ms. Littman's statement. If the Division of Enforcement cannot prove the statement, the Commission has the duty to make a public correction to the press release to reflect the truth, because American CryptoFed has already and systematically proven that Ms. Littman's statement is untrue. *See* Section 4.4 entitled The Division Has Obligation to Prove Locke and Ducat Are Securities from the Perspective of GAAP, page 20-28, in RESPONDENT AMERICAN CRYPTOFED DAO LLC'S OPPOSITION TO THE DIVISION OF

[1] https://www.sec.gov/news/press-release/2021-231

ENFORCEMENT'S PROPOSED FINDINGS AND BRIEF IN SUPPORT OF ISSUING A STOP ORDER filed on April 3, 2023 ("Opposition Brief").

Whether American CryptoFed 's business model is "attempting to raise money from the public", is a major factual dispute, as you stated below during December 18, 2021 hearing (Transcript, page 620:3-13):

> MR. BRUCKMANN: **That's -- that's obviously a point of contention between the Division and Respondents, Your Honor. We believe that their business model does include raising money.** They -- they deny it, but then they say that they're going to be issuing Ducat in exchange for U.S. dollar-pegged Stablecoins and to the Division that is very much raising money. Their interpretation of facts and law is often something the Division disagrees with which is why we find ourselves at this hearing.

If American CryptoFed's business model is "attempting to raise money from the public" as both Ms. Littman and you have argued, then the money raised **must** be reflected in the balance sheet in one way or another from the perspective of Generally Accepted Accounting Principles (GAAP). In the Division of Enforcement's Reply to American CryptoFed's Opposition Brief filed on April 18, 2023, the Division absolutely had the opportunity, but failed once again to provide any rebuttal to American CryptoFed's systemic analysis that our business model is not "attempting to raise money from the public" from GAAP's perspective.

4. Motion to Request the Division of Enforcement to Prove that Locke and Ducat Tokens Are Securities

The only reason that American CryptoFed filed a request to withdraw its Form 10 registration statement, was because the Division of Enforcement's June 3, 2022 letter stated, "you choose to register these tokens as securities by filing with the Commission a Form 10". The Commission's June 7, 2023 Order acknowledged this reason by stating the following:

> The Withdrawal Request sought Commission consent pursuant to Securities Act Rule 477 to withdraw the Form 10 registration 3 statement because, in Respondent's view, the "Locke token and Ducat token are not securities." (p.1).

Given that Commission's June 7, 2023 Order denied American CryptoFed's withdrawal request for its Form 10, the Commission and its subsidiary divisions indisputably have the burden of proof obligation pursuant to 5 U.S. Code § 556 (d) to prove that Respondent's Locke and Ducat tokens are securities. The first sentence of the plain text of 5 U.S. Code § 556 (d) states: *Except as otherwise provided by statute,* ***the proponent of a*** *rule or* ***order has the burden of proof****.*

As a result, American CryptoFed will file a motion to request the Division of Enforcement to prove that Locke and Ducat tokens are securities. The Division failed to comply with the requirement mandated by *SEC v. W.J. Howey Co.,* 328 US (1946), at 298, "Form was disregarded for substance and emphasis was placed upon economic reality", by stating "We also remind you that you choose to register these tokens as securities by filing with the Commission a Form 10", and by repeatedly refusing to provide the "substance" of proof.

5. Conclusion

Mr. Bruckmann, we want to ascertain the Division's position on these motions and set up a time to Meet and Confer pursuant to the Commission's Order (Release No. 93922 / January 6, 2022), to see if we can come to an agreement.

Could you please let us know your preliminary thoughts on these issues and provide some dates and times as mandated by the Commission to meet and confer?

We look forward to your written response.

Sincerely,

/s/ Scott Moeller

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