UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 97659 / June 7, 2023

Admin. Proc. File No. 3-20650

In the Matter of

AMERICAN CRYPTOFED DAO LLC

ORDER DENYING MOTION TO DISMISS

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 alleged 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 Division of Enforcement ("Division") has now filed a motion to dismiss this proceeding as moot on the basis of Respondent's filing of a request to withdraw its Form 10 registration statement. Respondent opposes the Division's motion. We now deny that motion.

The basis of the Division's motion is that, on July 6, 2022, during the pendency of this proceeding, Respondent submitted a "Request for Withdrawal of Registration Statement on Form 10-12(g)" via EDGAR (the "Withdrawal Request"). The Withdrawal Request sought Commission consent pursuant to Securities Act Rule 477 to withdraw the Form 10 registration statement because, in Respondent's view, the "Locke token and Ducat token are not securities."[3] On July 15, 2022, Division of Corporation Finance ("Corporation Finance") staff informed Respondent that the staff "does not object" to Respondent's request to withdraw its Form 10 registration statement. In doing so, Corporation Finance staff noted that "the withdrawal of the registration statement does not mean that the staff agrees with your assertion in the withdrawal request that the Locke token and Ducat token are not securities."

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

2 *Id.* at *4.

3 *See* 17 C.F.R. § 230.477.

On August 9, 2022, the Division filed a notice of mootness and motion to dismiss this proceeding. The Division asserts that, by operation of Securities Act Rule 477(b), the Form 10 registration statement was deemed withdrawn as of the date of the Withdrawal Request because "[t]he Commission has taken no action to deny or prevent the withdrawal, and more than 15 calendar days have passed since the [Withdrawal Request] was filed."[4] Respondent opposes the Division's motion on the ground that it would not have sought to withdraw the Form 10 in the first place had it known that Commission staff would decline to accept Respondent's assertion that its tokens are not securities. Respondent further indicates that it would seek to "reinstate" its Form 10 registration statement, including by re-filing it in the event the instant motion is granted.

Because the parties have asked us to determine whether this Section 12(j) proceeding should be dismissed as moot, we necessarily must resolve the antecedent question of whether Respondent effected a withdrawal of its Form 10 registration statement—and, in particular, if Respondent's Withdrawal Request took effect before Respondent in substance retracted it.[5] The text of Section 12(g), its implementing regulations, and existing staff guidance are all silent as to

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[4] *See* 17 C.F.R. § 230.477(b) (providing that a withdrawal request for a Securities Act registration statement "made before the effective date of the registration statement will be deemed granted at the time the application is filed with the Commission unless, within 15 calendar days after the registrant files the application, the Commission notifies the registrant that the application for withdrawal will not be granted").

[5] The dissent suggests that the present adjudicatory order is not an appropriate vehicle for resolving this question, suggesting that doing so here constitutes "regulat[ion] . . . through the enforcement process." But the dissent also acknowledges, as it must, "that the statute and Commission regulations are silent" on the question of registration procedure presented. And courts have long recognized that agencies may resolve within the adjudicatory process questions raised by the parties as to which existing regulations and guidance are silent. *See, e.g.*, *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1069–70 (4th Cir. 1982) (explaining that agencies "may announce and apply new principles" in adjudicatory proceedings in order to "'meet particular, unforeseeable situations'" in the "'absence of a relevant general rule'") (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947)). Thus, far from reflecting "regula[tion] through enforcement," our decision appropriately articulates and refines legal principles as they arise in the context of a concrete adjudication. *See United Food & Com. Workers Int'l Union, AFL-CIO, Loc. No. 150-A v. NLRB*, 1 F.3d 24, 34 (D.C. Cir. 1993) ("[A]n agency's authority to proceed by adjudication . . . implies a power to fill interstices in the law by proceeding case by case."). The dissent also suggests that we should have requested supplemental briefing before addressing the question at hand, but it is settled that where, as here, an issue is squarely presented for decision, we may "identify and apply the proper construction of governing law" without being "limited to the particular legal theories advanced by the parties." *United States v. Berry*, 618 F.3d 13, 17 (D.C. Cir. 2010) (internal quotation marks omitted) (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)).

this question.[6] Neither the statute nor its implementing regulations gives registrants an unqualified right to withdraw a Form 10 registration statement that is voluntarily filed to register a class of securities under Section 12(g) when, prior to its effectiveness, a Section 12(j) proceeding has been instituted.[7] Current staff guidance addressing withdrawal of Section 12(g) registration statements similarly does not address whether Commission approval is required to withdraw a not-yet-effective Exchange Act registration statement that is the subject of a Section 12(j) proceeding.[8] 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.[9]

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[6] By contrast, after a registration statement becomes effective, Section 12(g)(4) provides that "[r]egistration of any class of security pursuant to this subsection shall be *terminated* ninety days, or such shorter period as the Commission may determine, after the issuer files a certification with the Commission [on Form 15] that the number of holders of record of such class of security" is less than a specified threshold. 15 U.S.C. § 78*l*(g)(4) (emphasis added). As a result, an issuer not otherwise required to register its securities under the Exchange Act, *cf. infra* note 7, may voluntarily "terminate[]" an *already effective* Exchange Act registration statement by filing a Form 15. Of course, the Commission still may institute proceedings to deny termination of registration on the basis that the Form 15 certification is untrue. *Id.* If the Form 15 *does* become effective, however, and the issuer "no longer has a class of securities registered under Section 12 of the Exchange Act," the Section 12(j) proceeding will be dismissed as moot. *See, e.g.*, *NXChain, Inc. f/k/a AgriVest Americas, Inc.*, Exchange Act Release No. 87479, 2019 WL 5784734, at *2 (Nov. 6, 2019); *Expleo Sols., Inc.*, Exchange Act Release No. 78638, 2016 WL 4426914, at *1 (Aug. 22, 2016).

[7] Issuers that exceed a specified threshold size *must* file an Exchange Act registration statement, and other issuers *may* file such a registration statement. *See* 15 U.S.C. § 78*l*(g)(1)(A). The situation where an issuer that is required to file an Exchange Act registration statement seeks to withdraw it after the institution of a Section 12(j) proceeding is not before us.

[8] The dissent suggests that this order repudiates that staff guidance. To the contrary, we merely answer the question before us: Whether Commission approval is required to withdraw a voluntarily filed, but not-yet-effective, Exchange Act registration statement that is the subject of a Section 12(j) proceeding. That question is not covered by the staff guidance. Moreover, the Compliance and Disclosure Interpretations ("CDI") specify that they are "the views of the staff of the Division of Corporation Finance," that they are "not rules, regulations, or statements of the Commission," and that the "Commission has neither approved nor disapproved" them. *See* Division of Corporation Finance, *Compliance and Disclosure Interpretations*, https://www.sec.gov/divisions/corpfin/cfguidance (last visited June 1, 2023). Like all staff guidance, the CDI has no legal force or effect, does not alter or amend applicable law, creates no new or additional legal obligations, and does not constitute "a body of precedent from which the Commission may not deviate without explanation." *See SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021, 1037–39 (D.C. Cir. 2017).

[9] *Cf. RPM Advantage, Inc.*, Exchange Act Release No. 66117, 2012 WL 1023984 (Jan. 6, 2012).

To resolve the currently pending motion to dismiss, we therefore must determine whether Respondent's Form 10 has been withdrawn. We find that it has not—and thus deny the Division's motion to dismiss. It would be inconsistent with the purposes of the Exchange Act to allow an issuer to unilaterally withdraw a not-yet-effective registration statement that is voluntarily filed pursuant to Section 12(g) after a Section 12(j) proceeding has been instituted to determine whether to deny, or suspend the effective date of, registration.[10] Notably, allowing withdrawal of such a registration statement to go forward without Commission approval would prevent us from imposing a remedy in the Section 12(j) proceeding, which would have consequences beyond the mere fact that the registration statement at issue was not and never became effective: For example, an issuer that has been "subject to any order of the Commission entered pursuant to Section 12(j) . . . within five years before the filing of the offering statement" is not eligible to make use of the Regulation A exemption.[11] Recognition of a unilateral right to withdraw would also raise the prospect of issuers potentially filing, withdrawing, and re-filing registration statements, requiring the Commission to serially institute administrative proceedings as to each one—a senselessly wasteful and inefficient exercise. As a result, when a Form 10 registration statement is voluntarily filed to register a class of securities under Exchange Act Section 12(g) and, prior to its effectiveness, a Section 12(j) proceeding has been instituted to determine whether to deny, or suspend the effective date of, registration, withdrawal of that registration statement requires affirmative Commission approval.[12]

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[10] We do not consider under what circumstances it may be consistent with the public interest and the protection of investors for the Commission to grant a respondent's request to withdraw its not-yet-effective registration statement even where a Section 12(j) proceeding has been instituted. And indeed, we do not prejudge the outcome should Respondent now unequivocally seek to withdraw its Form 10 registration statement. *See infra* note 17. Contrary to the dissent's contention, we have not "refuse[d] to offer" guidance regarding the factors that should guide a withdrawal analysis. That issue is simply not before us, as Respondent disavowed its initial withdrawal request—claiming it was "misled" into making the request—and has not yet renewed it.

[11] Securities Act Rule 251(b)(6), 17 C.F.R. § 230.251(b)(6); *see also Peoples Sec. Co. v. SEC*, 289 F.2d 268, 273 n.12 (5th Cir. 1961) ("It could not be said, therefore, . . . that withdrawal accomplishes everything a stop order accomplishes.").

[12] Respondent's Withdrawal Request suggested that Respondent itself understood that, under the circumstances, a withdrawal would require Commission authorization: It "hereby *requests* that the Commission *consent* to the withdrawal." (emphasis added) We also note that the far more routine situation, in which an issuer seeks to withdraw a not-yet-effective Form 10 registration statement and a Section 12(j) proceeding has *not* been instituted, is not before us, and we do not here articulate an authorization requirement in that context. *Cf. supra* note 9 (identifying only one prior instance in which the Commission instituted a Section 12(j) proceeding as to a not-yet-effective Exchange Act registration statement). Further, nothing in this order affects the status of any prior requests to withdraw a not-yet-effective Form 10 registration statement that was voluntarily filed under Exchange Act Section 12(g) where a Section 12(j) proceeding was not instituted. The dissent's suggestion that our decision today upsets longstanding practices that companies have relied upon is incorrect.

Respondent's Withdrawal Request was therefore insufficient, without Commission approval, to effect a withdrawal of its not-yet-effective Form 10 registration statement.[13] Corporation Finance staff did not purport to be exercising delegated authority from the Commission in expressing that they "d[id] not object to withdrawal" of Respondent's Form 10.[14] And in its motion to dismiss, the Division acknowledged that the Commission itself had "taken no action to deny or prevent the withdrawal" of the registration statement. 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.[15] 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.[16]

Under the circumstances,[17] we find it appropriate to deny the Division's motion. Because Respondent's Withdrawal Request has not effected a withdrawal of its Form 10

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[13] We have resolved the motion on the premise that Respondent's Form 10 is not yet effective. 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.

[14] Corporation Finance staff has been delegated authority, "[w]ith respect to registration of securities pursuant to the Securities Act of 1933," to "consent to the withdrawal of registration statements . . . , pursuant to Rule 477." 17 C.F.R. § 200.30-1(a)(2). But a Form 10 registration statement like that filed by Respondent seeks to register securities under the *Exchange* Act, not under the Securities Act.

[15] *Cf. Raran Corp.*, Exchange Act Release No. 92571, 2021 WL 3470601, at *3 n.14 (Aug. 5, 2021) (concluding that a Form 10 registration statement that had already become effective cannot be withdrawn using Rule 477).

[16] The dissent's extended discussion on the procedure for withdrawal under Securities Act Rule 477 is similarly inapplicable, as the dissent itself acknowledges that "Rule 477 . . . only applies to the withdrawal of *Securities Act* registration statements and does not apply to the withdrawal of *Exchange Act* registration statements."

[17] 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).

(*continued* . . .)

registration statement, the proceeding is not moot. Accordingly, it is ORDERED that the Division's motion to dismiss is DENIED without prejudice to renewal in the event of changed circumstances.

By the Commission.

Vanessa A. Countryman
Secretary

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). Given the potential confusion, and to provide every opportunity for Respondent to defend this proceeding on the merits (if it so chooses), we have determined not to give effect to Respondent's withdrawal of its opposition to the Division's motion to dismiss at this time. Having said that, our denial of that motion is without prejudice to its renewal if circumstances change—for example, if Respondent unequivocally seeks to withdraw its Form 10, the Commission approves the withdrawal request, and the Division again moves to dismiss this Section 12(j) proceeding.

Commissioners PEIRCE and UYEDA, dissenting:

The Division and Respondent appear to agree that it should be able to withdraw its registration statement. Because we believe that Respondent's request to withdraw was effective when filed, and because the new rule announced in the order both appears inconsistent with longstanding Commission practice and invites confusion by raising unanswered questions for companies seeking to register classes of securities under the Exchange Act, we dissent.

As the order notes, a little more than a year ago, Respondent filed the prescribed form—Form 10[1]—seeking to register two classes of securities under Exchange Act Section 12(g). Under normal operation of Section 12(g), the registration statement would have become effective sixty days after filing.[2] This did not happen because five days before the sixty-day period expired, we instituted a proceeding under Exchange Act Section 12(j) to determine whether it was necessary and appropriate for the protection of investors to deny or suspend the registration statement.[3] As part of our Order Instituting the Proceedings, we stayed the effectiveness of Respondent's Form 10 so it would not become effective during the pendency of the proceeding.[4]

On July 6, 2022, Respondent filed in the Commission's EDGAR system a "Request for Withdrawal of Registration Statement on Form 10-12(g)" that, "[p]ursuant to Rule 477 promulgated under the Securities Act of 1933," requested "the Commission consent to the withdrawal of the Registration Statement Form 10 effective as of the date hereof."[5] Although one will not find it on the Commission's Forms List,[6] the EDGAR Filer Manual's Index to Forms describes a "Submission Type" of "RW" as a "Registration Withdrawal Request."[7] This appears to be the submission type Respondent identified when it filed its withdrawal request in

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[1] *See* 17 C.F.R. § 240.10. Form 10 and its accompanying instructions are available on the Commission's website at https://www.sec.gov/about/forms/form10.pdf.

[2] Exchange Act Section 12(g).

[3] *In the Matter of American CryptoFed DAO, LLC*, Rel. No. 34-93551 (Nov. 10, 2021) (Order Instituting Administrative Proceedings and Notice of Hearing Pursuant to Section 12(j) of the Securities Exchange Act of 1934) (available at https://www.sec.gov/litigation/admin/2021/34-93551.pdf).

[4] *Id*. at 5.

[5] Respondent's request and the Corporation Finance staff's email response are attached as exhibits to the Division's August 9, 2022 Notice of Mootness, Motion to Dismiss, and Incorporated Memorandum of Law (available at https://www.sec.gov/litigation/apdocuments/3-20650-2022-08-09-division-notice.pdf). Although Respondent's letter was dated July 5, it was submitted to the EDGAR system after 5:30 pm ET, resulting in a technical filing date of July 6.

[6] *See* Forms List (available at https://www.sec.gov/forms).

[7] EDGAR Filer Manual, Vol. II, Index to Forms (available at https://www.sec.gov/files/edgar/filermanual/efmvol2-c3.pdf). The Filer Manual's generic description—"Registration Withdrawal Request"—indicates the "Submission Type" is appropriate for use for any registration statement.

the EDGAR system. Up to this point, this case charted a course mapped out in the relevant statutory provisions, Commission rules, and EDGAR filing guidance. Unfortunately, the case next ventured into unmapped territory.

As noted, Respondent cited to Securities Act Rule 477 in its withdrawal request. Yet Rule 477 on its face only applies to the withdrawal of *Securities Act* registration statements and does not apply to the withdrawal of *Exchange Act* registration statements. No statutory provisions or Commission rules govern the process for withdrawing a filed, but not yet effective Exchange Act registration statement.[8] In other words, neither the Exchange Act nor any Commission rule adopted thereunder answers whether Respondent's July 6, 2022 request to withdraw its Form 10 was effective, and if so, when. To date, the only word from the Commission on withdrawal of a filed, but not yet effective Exchange Act Section 12(g) registration statement is Division of Corporation Finance staff guidance issued on September 30, 2008:

> **Question**: Can a company withdraw a Section 12(g) registration statement before it becomes effective?
>
> **Answer**: Yes. A company can withdraw a Section 12(g) registration statement prior to the date of effectiveness. . . . The withdrawal request must be filed with the Commission before the date of effectiveness.[9]

The majority contends that the Corporation Finance staff guidance, like the statutes and regulation, does not answer "whether Respondent effected a withdrawal of its Form 10 registration statement," and further states that it "does not address whether Commission approval is required to withdraw a not-yet-effective Exchange Act registration statement that is the subject of a Section 12(j) proceeding." This is incorrect inasmuch as it asserts that the staff guidance does not speak to the question of whether a request to withdraw a Form 10 registration statement is effective when filed. When the Corporation Finance staff adopted the guidance in 2008, Securities Act Rule 477—the analog rule for withdrawal of Securities Act registration statements—had been in effect for over 60 years.[10] As originally adopted, Rule 477 allowed withdrawal of Securities Act registration statements only with Commission consent. The Commission amended Rule 477 in 2001, and it now states that a request to withdraw a filed, but not yet effective Securities Act registration statement "will be deemed granted at the time the

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[8] Exchange Act Section 12(g)(4) sets out a process whereby an effective registration statement in certain circumstances can be terminated. That process is not relevant here.

[9] Question 116.05, Exchange Act Sections Compliance and Disclosure Interpretations (available at https://www.sec.gov/divisions/corpfin/guidance/exchangeactsections-interps.htm).

[10] REGISTRATION AND REGISTRATION PROCEDURE, Rel. No. 33-3225, 12 Fed. Reg. 4070, 4075 (June 9, 1947).

application is filed" unless the Commission otherwise notifies the requestor within 15 days of filing.[11]

The history of Securities Act Rule 477 establishes that, at the time the Corporation Finance staff issued its 2008 guidance, it was well aware both of the difference between an immediately effective withdrawal request versus one effective only after Commission approval and that a filed, but not yet effective registration statement might merit unique treatment, *e.g.* the withdrawal request is effective only after a defined period during which the Commission could act to reject the request. The Corporation Finance staff guidance nonetheless did not identify any limitations on withdrawing a filed, but not yet effective Exchange Act Section 12(g) registration statement. From this, one concludes that the Corporation Finance staff did not believe that, absent specific limitations imposed by statute or a Commission-adopted regulation, Commission approval was required to withdraw a filed, but not yet effective Section 12(g) registration statement. Consequently, the reasonable interpretation of the 2008 guidance is that a request to withdraw a filed, but not yet effective Section 12(g) registration statement is effective upon filing.

Today's order announces for the first time that, contrary to the 2008 Corporation Finance staff guidance, a company must have the Commission's approval to withdraw a filed, but not yet effective registration statement if there is a related Section 12(j) proceeding pending. The order offers two reasons for this rule: (1) neither the relevant statutory provisions nor any Commission regulations give registrants a unilateral right to withdraw a filed, but not yet effective registration statements and (2) allowing withdrawal during the pendency of a Section 12(j) proceeding would be inconsistent with the purposes of the Exchange Act. The first reason is simply another way of stating that the statute and Commission regulations are silent on the question, but this merely establishes that limitations are permissible, not that they are required or even prudent. Moreover, speaking into that silence is the 2008 Corporation Finance staff guidance, which, for the reasons explained above, indicates that there are no withdrawal limitations. The second reason may have some persuasive force—one can conceive of sound reasons to limit a registrant's right to withdraw a filed, but not yet effective registration statement in certain circumstances. Even accepting that as true, we should not adopt such limitations in a procedural order issued in an adjudication proceeding, especially when neither party briefed the issue, and we have not asked the Corporation Finance staff to express its view on the record.

Furthermore, while we recognize that Corporation Finance staff guidance is not a rule or regulation and does not carry the same weight as a statement of the Commission,[12] companies should be able to rely on longstanding staff guidance, especially when, as the majority obliquely

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[11] INTEGRATION OF ABANDONED OFFERINGS, Rel. No. 33-7943, 66 Fed. Reg. 8887, 8897 (Feb. 5, 2001).

[12] *See Compliance and Disclosure Interpretations,* available at https://www.sec.gov/divisions/corpfin/cfguidance.

acknowledges,[13] that guidance appears to have been providing the operative rule. We should not effectively repudiate such guidance without careful consideration of the effect it will have on companies and established Commission practices. At a bare minimum, if the Commission desires to adopt a rule that changes its longstanding practice, it should offer a reasoned analysis for the change.[14] The order fails to explain why companies can no longer rely on a staff guidance that has been outstanding and followed for nearly 15 years.

Not only does the Commission's new rule contravene existing guidance, but it also creates uncertainty by raising questions about past and future withdrawals of Exchange Act registration statements. The order acknowledges that "it may be consistent with the public interest and the protection of investors for the Commission to grant a respondent's request to withdraw its not-yet-effective registration statement even where a Section 12(j) proceeding has been instituted," yet the order offers no guidance on what the Commission will consider when assessing "the public interest and the protection of investors" in such circumstances.[15] The order further disclaims any intent to "articulate an authorization requirement" when a registrant seeks to withdraw a filed, but not yet effective Exchange Act registration statement that is not subject to Section 12(j) proceedings.[16] While this observation is helpful, it does not dispel the uncertainty raised by the Commission's rationale for limiting a registrant's ability to withdraw filed, but not yet effective registration statements. What other facts and circumstances—beyond a pending Section 12(j) proceeding—might cause the Commission to conclude that withdrawal limitations are necessary to serve "the purposes of the Exchange Act"? And which "purposes" are relevant? Both registrants and Corporation Finance staff are left to guess as to what sort of showing is required either to persuade the Commission that it is "consistent with the public interest and the protection of investors" to allow withdrawal notwithstanding a pending Section

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[13] *See* Order at 5 n.12 ("Further, nothing in this order affects the status of any prior requests to withdraw a not-yet-effective Form 10 registration statement that was voluntarily filed under Exchange Act Section 12(g) where a Section 12(j) proceeding was not instituted.") This statement makes little sense if the 2008 guidance has not been providing the operative rule for withdrawing Section 12(g) registration statements. The contention that today's action does not "upset[] longstanding practice" is difficult to square with the fact that the rule adopted today, in its least disruptive reading, materially alters 15-year-old Corporation Finance staff guidance by adding an asterisk: yes, a company can withdraw a Section 12(g) registration statement before it becomes effective* (*but not without the Commission's approval in some circumstances).

[14] *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-22 (2016) (stating that when changing a longstanding position, an "agency must at least display awareness that it is changing position and show that there are good reasons for the new policy. In explaining its changed position, an agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.") (internal citations and quotation marks omitted).

[15] Order at 4 n.10.

[16] Order at 5 n.12.

12(j) proceeding, or to assure the Commission that it is consistent with "the purposes of the Exchange Act" to allow unilateral withdrawal in other circumstances.[17]

If the Commission wants to change its staff's longstanding guidance, it should consider fully the implications of what it is doing and explain why the change is needed. A procedural order resolving a motion in an adjudication proceeding is poor means to that end[18] and is an example of the Commission regulating companies through the enforcement process. It is evident that the Commission has not given the issue the thoughtful consideration it merits.

The Commission should treat Respondent's withdrawal of its Form 10 on July 6, 2022 as effective when filed and grant the Division's motion to dismiss.

[17] The Commission could provide guidance without prejudging the application of that guidance to the present case. While we believe such guidance would be best crafted after consultation with Corporation Finance staff and other interested parties, providing at least some guidance would be useful not only to the Respondent, should it renew its withdrawal request (*see* Order at 6 n.17), but also to other registrants and to Corporation Finance staff as they respond to the questions that are likely to arise as a consequence of the rule adopted today.

[18] Our objection is prudential, not legal. *Cf.* Order at 2 n.5. We do not contend that the Commission lacks the legal authority to announce a new rule in an adjudication proceeding; we contend that it is unnecessary and imprudent to do so in this proceeding and that the order fails to address adequately the potential consequences of the adopted rule. Simply because the Commission *may* resolve an issue through adjudication does not mean that it *should* do so.