



Nov. 18, 2024

To:

Clothilde V. Hewlett
Commissioner of the California
Department of Financial Protection and Innovation
2101 Arena Boulevard
Sacramento, CA 95834

**KRAKEN COMMENTS ON PROPOSED APPLICATION-RELATED RULEMAKING
UNDER THE MONEY TRANSMITTER LAW AND DIGITAL FINANCIAL ASSETS
LAW**

Payward, Inc., d/b/a/ Kraken (“Kraken”) welcomes the opportunity to submit a response to the State of California Department of Financial Protection and Innovation’s (“DFPI”) Invitation for Comments (“IFC”) on the proposed application-related rulemaking under the Digital Financial Assets Law (“DFAL”), FILE NO: PRO 02-23.

Please find our responses to specific questions below. We appreciate the opportunity to provide feedback on this important issue and look forward to working with the DFPI as it works to implement the DFAL.

Sincerely,

The Kraken Team

Responses:

I. License exemptions (Fin. Code, § 3002)

1. *An exemption from the Money Transmission Act for fiat money transmission by a person licensed under the DFAL, only if such fiat money transmission is incidental to regulated digital financial asset business activity.*

The information listed in the law is sufficient and conforms with standard money transmission laws, closely aligning with the exemption section 2010 of the California Financial Code's Money Transmission Act.¹

II. Electronic Filings (Fin. Code, § 2046)

2. *The process and requirements to apply for a license.*

The designation of NMLS to receive and store filings, obtain credit reports, and collect fees and assessments from applicants and licenses aligns with the industry standards. NMLS provides a secure and central location for multiple applications, allowing for companies to simplify the process of sharing information to states.

3. *The requirement for applicants to apply for a license and maintain the license through the Nationwide Multistate Licensing System & Registry ("NMLS").*

The requirement for applicants to apply for a license and maintain the license through NMLS aligns with industry standards. With the DFAL and MTL application and maintenance process in the same system, both the company and the DFPI will have more efficient means to share and evaluate information.

4. *The California-specific documents, fees, and other information that must be filed with NMLS and the timeframes for filing the information.*

The filing of California-specific documents, fees, and other information through NMLS aligns with industry standards. NMLS provides a secure method for state-specific information and fees to be filed.

However, under Section (e) of 2048 License Application, the Commissioner may consider an application abandoned if the Commissioner does not receive the information requested within sixty (60) calendar days of a written notification requesting such information.² The Commissioner should allow for reasonable extensions of time if the applicant requests such.

III. License Application (Fin. Code, § 2048)

¹ CA Financial Code § 2010.

² CA Financial Code § 2048(e).

5. *A non-refundable application fee of \$20,000 required of applicants (note that this application fee does not include the investigation fee or annual assessment fees 4).*

The non-refundable DFAL application fee of \$20,000 is significantly higher and may be prohibitive to the growth of the digital asset and fintech industry. This elevated fee could discourage companies from establishing legal operations within California. By comparison, the current MTL application fee in California is \$5,000—the third highest among U.S. states and territories. The highest MTL application fees are \$10,000 in Hawaii and Texas, followed by \$7,500 in Colorado.³

The DFAL application fee should be aligned with that of the MTL application fee, as both applications require the review of similar information. While the \$5,000 MTL fee is high relative to most states, it remains within a reasonable range that encourages serious applicants, supports industry growth, and provides the DFPI with adequate resources for application review. Accordingly, the DFAL application fee should match or closely approximate the \$5,000 MTL fee.

New York and Louisiana, which require virtual currency business licenses in addition to money transmitter licenses, each set their application fees at \$5,000.⁴

A DFAL application fee that is four times higher than an MTL application fee is excessive, and will likely translate to higher fees imposed on California customers. Reducing the DFAL application fee to align with industry norms would foster compliant growth and encourage innovation in the sector.

6. *The information required to enable the Commissioner to investigate applicants to determine whether they meet the standards for licensure*

A digital asset exchange applicant is required to complete and sign the DFPI “Covered Exchange Certification”. Fin. Code, §2048 (a)(3). The form has an applicant disclose each digital financial asset that the company plans to list or offer. This is reasonable and aligns with MTL requirements in multiple states.

However, in the proposed regulation, an applicant must also certify that the company has “[i]dentified the likelihood that the digital financial asset would be deemed a security by federal or California regulators.”⁵ Certification that the applicant has “[i]dentified the likelihood” that a specific digital financial asset would be deemed a security by federal or California regulators could be interpreted to require a numerical (or otherwise definitive) “determination” of “likelihood” that is impractical in view of uncertainties arising from the limited guidance published, and ongoing developments in enforcement actions and public positions taken by the relevant regulators. Current industry standards include evaluating the characteristics of the asset before any listing on an exchange, to determine whether there is a material risk that the asset might be deemed a security based on

³ <https://mortgage.nationwidelicensingsystem.org/slr/SitePages/Checklist-Compiler.aspx>.

⁴ Id.

⁵ CA Financial Code § 2048(a)(3).

then-current understanding of the requirements. This evaluation typically includes review by knowledgeable legal counsel and a legal opinion that forms the basis of a decision. These complex legal opinions often note limited areas of uncertainty and are normally not presented in terms of an identified likelihood.

Therefore, certification that an exchange implements industry-standard securities review before listing an asset would be more appropriate, for example, “[e]stablished a procedure for review of each digital financial assets prior to offering the asset, to determine whether there is a material risk that the such assets would be deemed a security by Federal or California regulators”.

IV. Challenge Process for Information Entered into NMLS (Fin. Code, § 2054); Surety Bond (Fin. Code, § 2060); Surrender a License (Fin. Code, § 2061); Notice of Changes (Fin. Code, § 2057);

- 7. The processes to challenge information entered in NMLS by the Commissioner; submit and maintain a surety bond; surrender a license; and change information in the license application, information related to digital financial asset transaction kiosks or other business locations, or key personnel.*

The process to challenge information entered into NMLS, submit and maintain a surety bond, surrender a license, and change information related to the application is aligned with industry standards. NMLS streamlines procedures for companies operating in multiple states, and improves communication between the DFPI and licensed companies.