



STATE OF CALIFORNIA

Department of Financial Protection and Innovation

GOVERNOR **Gavin Newsom** • COMMISSIONER **Clothilde V. Hewlett**

IN REPLY REFER TO:
FILE NO: _____

December 6, 2021

VIA EMAIL ONLY

Re: Request for Interpretive Opinion – _____

Dear Mr. _____ and Ms. _____:

Thank you for your request for an interpretive opinion to the Department of Financial Protection and Innovation (Department) dated August 25, 2021 and emails dated October 15, 2021 and October 29, 2021. You requested an interpretive opinion from the Department concerning whether your client, _____ (the “_____”), is required to obtain a license under the Money Transmission Act (“MTA”).

Background

Company’s Proposed Services

In your letter, you describe two types of transactions that will be conducted on the _____ online trading platform (“Platform”). First, customers can purchase and sell digital assets from the Company in exchange for fiat currency. Second, merchants can use the Platform as a payment processor to allow the merchants to accept digital assets from customers in exchange for non-fungible tokens (“NFTs”). The _____ website as of November 5, 2021 states that U.S. customers can purchase Ether, Bitcoin Cash, Bitcoin, multi-collateral Dai on Ethereum, Litecoin, USD Coin on Ethereum, and Tether (ERC 20).

For purchase of digital assets directly from the _____, you explain the _____ will own the digital assets that are being purchased. If a customer wishes to purchase a digital asset that the _____ does not yet own, the _____ will purchase that digital asset using its own funds prior to delivering it to the customer. To initiate the transaction, the customer submits a request through the Platform for a specific amount of a digital asset and provides the customer’s digital wallet address where the asset should be sent. The _____ will show a price for the transaction and if the customer chooses to proceed, they can initiate payment via credit or debit card, or via ACH or wire transfer. Once the _____ confirms receipt of the fiat payment, it immediately releases the digital asset to the customer’s designated digital wallet.

If a customer wishes to sell a digital asset to the _____, the customer will submit a request to sell a specific amount of the digital asset and would identify the bank account where the Customer would like to receive payment. If the _____ agrees, it will request that the Customer transfer the asset to the _____ digital wallet. Upon receipt of the asset, the _____ would initiate payment of fiat currency to the Customer's designed bank account.

For its payment processing services, the _____ will work with merchants that mint and sell NFTs in exchange for digital assets. If a customer wishes to purchase an NFT from the merchant, the merchant will direct the customer to the _____ platform. There, the customer can submit a request to the _____ to purchase the digital assets needed to facilitate the purchase of the NFT and provide the digital wallet address of the merchant, which is a merchant-owned smart contract address. Next, the _____ will inform the customer of the price for the digital assets. If the customer agrees to proceed with the transaction, the customer will initiate payment of fiat currency to the _____ via credit or debit card, ACH, or wire transfer. Once the _____ has received payment from the customer, it will immediately deliver the corresponding amount of the digital asset from its digital wallet to the designated smart contract address. The digital asset must be delivered to the smart contract address of the merchant in order for the NFT to be minted and delivered from the merchant to the customer.

You also explained that if the _____ fails to deliver the digital asset to the smart contract address, the merchant will not be able to mint the NFT and the _____ will be contractually required to refund the fiat payment to the customer.

The _____ will enter into a written agreement with each merchant for these payment processing services. The agreement will provide:

The _____ acts as the Merchant's authorized agent for the limited purpose of accepting payments on the Merchant's behalf from NFT Purchasers who intend to purchase NFTs sold by the Merchant, and Merchant appoints the Company as its agent, and expressly authorizes the _____ to receive such payments on the Merchant's behalf. Payment from an NFT Purchaser to the _____ shall be considered payment to the Merchant, satisfying and extinguishing the payment obligation of the NFT Purchaser to the Merchant as if the relevant NFT Purchaser had paid the Merchant directly.

Money Transmission Act

Financial Code section 2030 prohibits a person from engaging in the business of money transmission in this state unless the person is licensed or exempt from licensure or is an agent of a person licensed or exempt from licensure.

Financial Code section 2003, subdivision (q), defines “money transmission” to include receiving money for transmission and issuing stored value. Section 2003, subdivision (u), defines “receiving money for transmission” to mean receiving money or monetary value in the United States for transmission within or outside the United States by electronic or other means. Financial Code section 2010, subdivision (l), exempts from the MTA transactions in which the recipient of the money is an agent of the payee pursuant to a preexisting written contract and delivery of the money to the agent satisfies the payor’s obligation to the payee for the goods or services provided. An “agent” is one who represents another, called the principal, in dealings with third persons.¹ A “payee” is the provider of goods or services, who is owed payment of money from the payor for the goods or services.² A “payor” is the recipient of goods or services, who owes payment of money to the payee for the goods or services.³

Analysis

The _____ direct purchases and sales of digital assets with customers does not require licensure.

Purchase and sale of digital assets on the Platform do not require an MTA license because they do not involve the sale or issuance of a payment instrument, the sale or issuance of stored value, or receiving money for transmission. For purchases, the customer is purchasing a digital asset directly from the _____. Similarly, for sales, customers are directly selling their own digital assets to the _____.

The _____ provision of payment processing services does not require licensure at this time.

The Department has been studying the cryptocurrency industry closely. Because we have not yet determined that payment processing transactions involving digital assets constitute receiving money for transmission, we decline to address whether the transactions would qualify for the agent of payee exemption. However, at this time, the Department does not require licensure under the MTA for the Company to receive fiat currency from the customer for the transfer in the form of digital assets to the merchant.

At any time, the Department may determine these activities are subject to regulatory supervision. The Department may also adopt regulations or issue interpretive opinions that significantly restrict the _____ business operations. If the _____ chooses to operate in California, it would do so subject to these risks.

¹ Fin. Code, § 2010, subd. (l)(1); Civ. Code, § 2295.

² Fin. Code, § 2010, subd. (l)(2).

³ Fin. Code, § 2010, subd. (l)(3).

January 25, 2022

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This opinion is based solely on the facts presented in your correspondence. Any changes in the facts or circumstances, as we understand them, could lead to a different conclusion.

If you have any questions, please feel free to contact me at _____.

Sincerely,

Clothilde V. Hewlett
Commissioner
Department of Financial Protection and Innovation

By

Senior Counsel

cc: Robert Venchiarutti, Deputy Commissioner, Money Transmitter Division