

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:

**Payward Ventures, Inc. (d/b/a
Kraken)**

Respondent.

CFTC Docket No. 21-20

RECEIVED CFTC



Office of Proceedings
Proceedings Clerk

3:21 pm, Sep 28, 2021

**ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTION 6(c) AND (d) OF
THE COMMODITY EXCHANGE ACT, MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS**

I. INTRODUCTION

The Commodity Futures Trading Commission (“Commission”) has reason to believe that from in or about June 2020 to July 21, 2021 (the “Relevant Period”), Payward Ventures, Inc., doing business as Kraken (“Kraken” or “Respondent”) violated Sections 4(a) and 4d of the Commodity Exchange Act (“Act”), 7 U.S.C. §§ 6(a) and 6d (2018). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether Respondent engaged in the violations set forth herein and to determine whether any order should be issued imposing remedial sanctions.

In anticipation of the institution of an administrative proceeding, Respondent has submitted an Offer of Settlement (“Offer”), which the Commission has determined to accept. Without admitting or denying any of the findings or conclusions herein, Respondent consents to the entry of this Order Instituting Proceedings Pursuant to Section 6(c) and (d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions (“Order”), and acknowledges service of this Order.¹

¹ Respondent consents to the use of the findings of fact and conclusions of law in this Order in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party or claimant, and agrees that they shall be taken as true and correct and be given preclusive effect therein, without further proof. Respondent does not consent, however, to the use of this Order, or the findings or conclusions herein, as the sole basis for any other proceeding brought by the Commission or to which the Commission is a party or claimant, other than: a proceeding in bankruptcy or receivership; or a proceeding to enforce the terms of this Order. Respondent does not consent to the use of the Offer or this Order, or the findings or conclusions in this Order, by any other party in any other proceeding.

II. FINDINGS

The Commission finds the following:

A. SUMMARY

During the Relevant Period, Respondent violated Section 4(a) of the Act, 7 U.S.C. § 6(a)(2018), by illegally offering to enter into, entering into, executing, and/or confirming the execution of **off-exchange retail commodity transactions** with U.S. customers who were not eligible contract participants or eligible commercial entities² (collectively, “ECPs”). Respondent also operated as an unregistered futures commission merchant (“FCM”) in violation of Section 4d(a)(1) of the Act, 7 U.S.C. § 6d(a)(1) (2018).

In accepting Respondent’s offer, the Commission recognizes the cooperation of Kraken with the Division of Enforcement’s investigation of this matter. The Commission also acknowledges Respondent’s remediation efforts in connection with this matter.

B. RESPONDENT

Payward Ventures, Inc. (d/b/a Kraken) is a Delaware corporation formed in 2011 with its principal place of business in San Francisco, California. Kraken has never been registered with the Commission.³

C. FACTS

Kraken is a digital asset company whose primary business is the operation of an online digital asset exchange. The exchange enables customers to engage in retail commodity transactions—specifically, the **purchase and sale of digital assets**, including Bitcoin. Kraken also provides **margin** extensions to some of its customers, which they can use to buy or sell digital assets on the exchange on a leveraged basis.

During the Relevant Period, Kraken offered potential and existing U.S. customers the ability to enter into **margin**ed retail commodity transactions on its exchange. Margin trading was available to any U.S. person who Kraken approved for a user account. Kraken allowed customers to select from varying levels of margin if they met certain contractual prerequisites set by Kraken. These prerequisites did not involve an assessment of any customer’s status as an **ECP**. The margin trading transactions were conducted through Kraken’s central limit order book and execution facility.

When initiating a trade, a customer, whether buying or selling, had the option to settle the transaction with their own funds or to trade on margin, for which Kraken was the sole provider. Kraken offered and provided margin for either one or both sides of the transaction. Kraken **maintained physical or constructive custody of** all digital assets or fiat currency purchased using **margin** for the duration of a customer’s open margin trading position.

² As those terms are defined in Sections 1a(17) and (18) of the Act, 7 U.S.C. §§ 1a(17), (18) (2018), respectively.

³ Kraken is registered with FinCEN as a money services business.

The margined transactions worked as follows: The customer opened an individual account at Kraken and deposited digital assets or fiat currency into the account. The customer initiated a trade by selecting (i) the trading pair they wished to trade, (ii) a purchase or sale transaction, and (iii) a margin option. Kraken offered margin ratio options of 2 to 1, 3 to 1, or 5 to 1, depending in part, on the currency pair being traded as well as the customer's financial qualifications.

All trades were placed on Kraken's central limit order book and executed individually for each customer. For a customer who wished to make margined trades, **Kraken extended margin to the customer from its own inventory of non-client assets/currencies**. Specifically, where a customer purchased an asset using margin, Kraken supplied the digital asset or national currency to pay the seller for the asset. Where a customer sold an asset using margin, Kraken supplied the digital asset or national currency due to the buyer. Trading on margin allowed the customer to establish a position, but also created an obligation for the customer to repay Kraken at the time the margined position was closed. **The customer's position remained open until they submitted a closing trade, they repaid the margin, or Kraken initiated a forced liquidation**, based on the occurrence of certain triggering events.

Triggering events consisted of limitations on the duration of an open margin position as well as pre-set margin thresholds. Kraken required customers to exit their positions and repay the assets received to trade on margin within 28 days. Customers could not transfer assets away from Kraken until satisfying their repayment obligation. If repayment was not made within 28 days, Kraken could unilaterally force the margin position to be liquidated. Kraken could also initiate a forced liquidation if the value of the collateral dipped below a certain threshold percentage of the total outstanding margin. In this situation, Kraken sold the margined position and seized any collateral necessary to cover the customer's losses in the trade, similar to a margin call.

In engaging in these transactions with customers, Kraken never transferred possession and control of the entire quantity of the assets purchased using margin, such that Kraken did not give customers the ability to use the entire quantity of the assets freely in commerce away from the execution venue until the customer satisfied the repayment obligation. Kraken is not registered as a designated contract market or in any capacity.

* * *

Kraken cooperated with the Commission's investigation. During the course of the investigation conducted by the Division of Enforcement, Kraken voluntarily responded to requests for information in a timely fashion, both in writing and via oral presentations. In addition, Kraken was proactive in reaching out to the Commission for guidance on compliance with the Act and Commission Regulations and in taking steps to begin the process of shuttering its unlawful U.S.-based margin trading business prior to the effective date of this Order.

III. LEGAL DISCUSSION

A. Respondent Engaged in Unlawful Off-Exchange Retail Commodity Transactions in Violation of Section 4(a) of the Act

Section 2(c)(2)(D) of the Act, 7 U.S.C. § 2(c)(2)(D) (2018), applies to any agreement, contract, or transaction in any commodity that is entered into with or offered to (even if not entered into with) non-ECPs on a leveraged or margined basis or financed by the offeror, counterparty, or a person acting in concert with the offeror or counterparty on a similar basis and the contract does not result in actual delivery within 28 days.

Section 2(c)(2)(D) of the Act further provides that Section 4(a) of the Act, 7 U.S.C. § 6(a) (2018), applies to such an agreement, contract, or transaction “as if the agreement, contract, or transaction was a contract of sale of a commodity for future delivery.”

Section 4(a) of the Act makes it unlawful for any person to offer to enter into, enter into, execute, confirm the execution of, or conduct an office or business in the United States for the purpose of soliciting, or accepting any order for, or otherwise dealing in any transaction in, or in connection with, a commodity futures contract, unless such transaction is made on or subject to the rules of a board of trade that has been designated or registered by the CFTC as a contract market for the specific commodity.

Kraken offered to enter into, entered into, executed, and/or confirmed the execution of margined or leveraged retail commodity transactions with non-ECP U.S. residents that did not result in actual delivery within 28 days. These margined or leveraged retail commodity transactions were not conducted on or subject to the rules of a board of trade that has been designated or registered by the CFTC as a contract market. Kraken therefore violated Section 4(a) of the Act.

B. Respondent Operated as an Unregistered Futures Commission Merchant in Violation of Section 4d(a)(1) of the Act

Section 1a(28) of the Act, 7 U.S.C. § 1a(28) (2018), in relevant part, defines an FCM as any individual, association, partnership, corporation or trust that engages in soliciting or in accepting orders for or acting as a counterparty in “any agreement, contract, or transaction described in... section (2)(c)(2)(D)(i)” and, in connection therewith, “accepts any money... or property (or extends credit in lieu thereof) to margin... trades or contracts that result or may result therefrom.” Section 4d(a)(1) of the Act, 7 U.S.C. § 6d(a)(1) (2018), in pertinent part, makes it unlawful for any person to act as an FCM unless registered with the Commission as an FCM.

As described above, Kraken, while not registered as an FCM, acted as an FCM as defined in Section 1a(28) of the Act by accepting orders for and entering into retail commodity transactions with customers, and accepting money or property (or extending credit in lieu thereof) to margin these transactions. Therefore, Respondent violated Section 4d(a)(1) of the Act.

IV. FINDINGS OF VIOLATION

Based on the foregoing, the Commission finds that, during the Relevant Period, Respondent violated Sections 4(a) and 4d(a)(1) of the Act, 7 U.S.C. §§ 6(a), 6d(a)(1) (2018).

V. OFFER OF SETTLEMENT

Respondent has submitted the Offer in which it, without admitting or denying the findings and conclusions herein:

- A. Acknowledges service of this Order;
- B. Admits the jurisdiction of the Commission with respect to all matters set forth in this Order and for any action or proceeding brought or authorized by the Commission based on violation of or enforcement of this Order;
- C. Waives:
 - 1. The filing and service of a complaint and notice of hearing;
 - 2. A hearing;
 - 3. All post-hearing procedures;
 - 4. Judicial review by any court;
 - 5. Any and all objections to the participation by any member of the Commission's staff in the Commission's consideration of the Offer;
 - 6. Any and all claims that it may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2018) and 28 U.S.C. § 2412 (2012), and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Commission's Regulations, 17 C.F.R. pt. 148 (2019), relating to, or arising from, this proceeding;
 - 7. Any and all claims that it may possess under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, tit. II, §§ 201-253, 110 Stat. 847, 857-74 (codified as amended at 28 U.S.C. § 2412 and in scattered sections of 5 U.S.C. and 15 U.S.C.), relating to, or arising from, this proceeding; and
 - 8. Any claims of Double Jeopardy based on the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief, including this Order;
- D. Stipulates that the record basis on which this Order is entered shall consist solely of the findings contained in this Order to which Respondent has consented in the Offer;

- E. Consents, solely on the basis of the Offer, to the Commission's entry of this Order that:
1. Makes findings by the Commission that Respondent violated Sections 4(a) and 4d(a)(1) of the Act, 7 U.S.C. §§ 6(a), 6d(a)(1) (2018);
 2. Orders Respondent to cease and desist from violating Sections 4(a) and 4d(a)(1) of the Act;
 3. Orders Respondent to pay a civil monetary penalty of \$1,250,000 (one million two hundred and fifty thousand dollars) within thirty days of the date of entry of this Order, plus post-judgment interest if applicable;
 4. Orders Respondent and its successors and assigns to comply with the conditions and undertakings consented to in the Offer and set forth below in Part VI of this Order.

Upon consideration, the Commission has determined to accept the Offer.

VI. ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Respondent shall cease and desist from violating Sections 4(a) and 4d(a)(1) of the Act, 7 U.S.C. §§ 6(a), 6d(a)(1) (2018).
- B. Respondent shall pay a civil monetary penalty in the amount of \$1,250,000 (one million two hundred and fifty thousand dollars) (the "CMP Obligation"), within ten days of the date of entry of this Order. If the CMP Obligation is not paid in full within ten days of the date of entry of this Order, then post-judgment interest shall accrue on the CMP Obligation beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961 (2012).

Respondent shall pay the CMP Obligation and any post-judgment interest by electronic funds transfer, U.S. Postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made other than by electronic funds transfer, then the payment shall be made payable to the Commodity Futures Trading Commission and sent to the address below:

MMAC/ESC/AMK326
Commodity Futures Trading Commission
Division of Enforcement
6500 S. MacArthur Blvd.
HQ Room 181
Oklahoma City, OK 73169
(405) 954-6569 office
(405) 954-1620 fax
9-AMC-AR-CFTC@faa.gov

If payment is to be made by electronic funds transfer, Respondent shall contact Marie Thorne or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Respondent shall accompany payment of the CMP Obligation with a cover letter that identifies the Respondent and the name and docket number of this proceeding. Respondent shall simultaneously transmit copies of the cover letter and the form of payment to the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

- C. Respondent shall comply with the following conditions and undertakings set forth in the Offer:
1. **Public Statements:** Respondent agrees that neither it nor any of its successors and assigns, agents or employees under its authority or control shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in the Order or creating, or tending to create, the impression that the Order is without a factual basis; provided, however, that nothing in this provision shall affect Respondent's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Respondent and its successors and assigns shall comply with this agreement, and shall undertake all steps necessary to ensure that all of its agents and/or employees under its authority or control understand and comply with this agreement.
 2. **Prevention of Unlawful Trading:** Respondent shall implement and maintain systems and procedures reasonably designed to prevent margined or leveraged trading on Respondent's trading platform by U.S. residents who are not eligible ECPs. Such systems and procedures shall be implemented on or before June 23, 2021, and all existing open margined or leveraged positions held by U.S. residents who are not ECPs shall be closed on or before July 21, 2021.
 3. **Partial Satisfaction:** Respondent understands and agrees that any acceptance by the Commission of any partial payment of Respondent's CMP Obligation shall not be deemed a waiver of its obligation to make further payments pursuant to this Order, or a waiver of the Commission's right to seek to compel payment of any remaining balance.
 4. **Change of Address/Phone:** Until such time as Respondent satisfies in full its CMP Obligation as set forth in this Order, Respondent shall provide written notice to the Commission by certified mail of any change to its telephone number and mailing address within ten calendar days of the change.
 5. **Until such time as Respondent satisfies in full its CMP Obligation, upon the commencement by or against Respondent of insolvency, receivership or bankruptcy proceedings or any other proceedings for the settlement of Respondent's debts, all notices to creditors required to be furnished to the**

Commission under Title 11 of the United States Code or other applicable law with respect to such insolvency, receivership, bankruptcy or other proceedings, shall be sent to the address below:

Secretary of the Commission
Legal Division
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street N.W.
Washington, DC 20581

The provisions of this Order shall be effective as of this date.

By the Commission.

A handwritten signature in black ink, appearing to read "Robert N. Sidman", written over a horizontal line.

Robert N. Sidman
Deputy Secretary of the Commission
Commodity Futures Trading Commission

Dated: September 28, 2021