

ALERTS

FinCEN Assesses Civil Money Penalty Against P2P Currency Exchanger for BSA Violations

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On April 18, 2019, the Financial Crimes Enforcement Network (“FinCEN”) of the U.S. Department of the Treasury announced the assessment of a civil money penalty against Eric Powers for willfully violating the registration, program and reporting requirements of the Bank Secrecy Act and its implementing regulations (“BSA”).^[1] Between December 2012 and September 2014, Mr. Powers acted as a peer-to-peer (“P2P”) currency exchanger of convertible virtual currency, conducting activities that qualified as money transmission, as defined in 31 C.F.R § 1010.100(ff)(5), and were therefore subject to BSA obligations. This is FinCEN’s first enforcement action against a P2P virtual currency exchanger and the first time FinCEN has penalized a virtual currency exchanger for failure to file Currency Transaction Reports (“CTRs”).

FinCEN determined that Mr. Powers failed to (1) register as a money services business (“MSB”) with FinCEN; (2) implement and maintain a written anti-money laundering (“AML”) program; (3) detect and report suspicious transactions with Suspicious Activity Reports (“SARs”); and (4) file CTRs for transactions involving the transfer of over \$10,000 in currency.

In 2013, FinCEN issued guidance^[2] providing that any virtual currency “exchanger” (i.e., a person engaged as a business in the exchange of virtual currency for real currency, funds or other virtual currency) is a money transmitter (i.e., a person engaged in the business of accepting and transmitting funds or other value that substitutes for currency) under

the BSA and is therefore required to register as an MSB with FinCEN within 180 days of beginning operations.

Mr. Powers failed to register his business as an MSB. He conducted over 1,700 transactions as an unregistered P2P exchanger. He advertised his services, i.e., the purchasing and selling of Bitcoin, on the internet, and completed transactions in person, via mail, and by coordinating wire transactions.

MSBs are additionally required to develop, implement and maintain an effective, written AML program. Mr. Powers had no AML program in place and could not produce written policies, procedures and internal controls upon FinCEN's request. Yet, in multiple online discussions, Mr. Powers demonstrated his awareness of relevant BSA requirements. In one online forum, he explicitly stated that he would assist customers in circumventing AML obligations.

An MSB is obligated to report transactions that it "knows, suspects, or has reason to suspect" are suspicious by filing SARs. This applies to transactions involving or aggregating to at least \$2,000 in funds or other assets. While Mr. Powers processed many transactions over \$2,000 bearing strong indicia of illicit activity, he never filed an SAR. His Bitcoin wallet addresses were associated with over 100 transactions with customers conducting business on the online black market, Silk Road. These transactions aggregated over \$12,000. Other transactions aggregating well over \$2,000 were conducted with customers using email addresses with the "@tormail.org" suffix. These emails used The Onion Router (commonly known as "TOR"), an anonymizing torrent service used to access the darknet. While the use of TOR is not proof of a crime, it warrants additional due diligence to rule out any illegal activity.

In one instance, after the FBI shut down Silk Road, Mr. Powers processed transactions for a customer who publicly commented in news media on alternate ways to access darknet marketplaces. This individual's identifying information could be found by a basic internet search, but Mr. Powers did not list that information in his records. In another instance, Mr. Powers offered to exchange convertible virtual currency for fiat currency, knowing that the fiat currency was illegally sourced.

Lastly, any transaction "by, through, or to" an MSB involving the physical transfer of more than \$10,000 in currency (alone or in aggregate) must be reported by filing a CTR. Mr. Powers processed many such transactions,

without filing a single CTR. For example, on behalf of one client, he purchased \$19,000 worth of Bitcoin from a business and mailed the payment in cash. In another instance, he conducted roughly 160 purchases of Bitcoin for approximately \$5 million through in-person cash transactions, 150 of which required the filing of a CTR.

Mr. Powers will pay a \$35,350 fine. In imposing the penalty, FinCEN considered the severity and duration of his actions, the size and sophistication of his operation, his ability to pay, penalties imposed by other state or federal agencies (including civil or criminal forfeitures imposed in the amount of \$100,000 and 237.53575 Bitcoin) and Mr. Powers' extensive cooperation with the investigation. FinCEN also considered its recent enforcement actions against other exchangers of convertible virtual currency and the likely impact of their action against Mr. Powers on compliance measures in the industry. Mr. Powers has also agreed to an industry bar that prohibits him from providing money transmission services or engaging in any other activity that would make him an MSB for the purposes of FinCEN regulations.

FinCEN Director Kenneth A. Blanco emphasized that “[o]bligations under the BSA apply to money transmitters regardless of their size.” He added, “It should not come as a surprise that we will take enforcement action based on what we have publicly stated since our March 2013 Guidance — that exchangers of convertible virtual currency, such as Mr. Powers, are money transmitters and must register as MSBs. In fact, there were indications that Mr. Powers specifically was aware of these obligations, but willfully failed to honor them. Such failures put our financial system and national security at risk and jeopardize the safety and well-being of our people, as well as undercut responsible innovation in the financial services space.”

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] The Assessment and News Release summarizing the assessment are available on FinCEN's website.

[2] See FIN-2013-G001, “Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies,” March 18, 2013.

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