

Locke Lord QuickStudy: Exchangers Beware: FinCEN Issues First Fine Against a P2P Virtual Currency Exchanger

WRITTEN BY

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On April 18, 2019, the Financial Crimes Enforcement Network (“FinCEN”) announced¹ a civil monetary penalty against an individual for operating a peer-to-peer virtual currency exchanger. FinCEN assessed a \$35,350 civil monetary penalty against Eric Powers of Kern County, California for willfully violating registration and reporting requirements under the Bank Secrecy Act (“BSA”). According to the FinCEN assessment,² Powers—who conducted over 1,700 virtual currency transactions between December 6, 2012 and September 24, 2014—was operating as a “money transmitter” and a “financial institution” without the required regulatory oversight. In doing so, FinCEN concluded that Powers had failed to: (1) register as a Money Services Business (“MSB”); (2) establish and implement an effective written anti-money laundering (“AML”) program; (3) detect and adequately report suspicious transactions; and (4) report currency transactions. In 2017, FinCEN had issued a high-profile civil monetary penalty against the founder and operation of the digital currency exchange BTC-e. See prior [Locke Lord QuickStudy: Digital Currencies: FinCEN Shuts Down Foreign Exchange for Anti-Money Laundering Violations – Another Mt. Gox?](#)

REQUIREMENTS

1. Register as a Money Services Business

The BSA requires an MSB to register with FinCEN by filing a Registration of Money Services Business³ and renewing every two years thereafter.⁴ An MSB includes individuals and/or entities functioning as a “money transmitter”⁵ or a “financial institution.”⁶ FinCEN explained that Powers was “was not simply a ‘user’ of virtual currency (i.e., someone who obtains and uses convertible virtual currency to purchase real or virtual goods or services for his benefit).”⁷ Instead, Powers “advertised his intent to purchase and sell bitcoin on the internet[,] . . . completed transactions by either physically delivering or receiving currency in person, sending or receiving currency through the mail, or coordinating transactions by wire through a depository institution.”⁸ The FinCEN assessment noted that Powers conducted over 1,700 transactions within a two-year period without ever registering as an MSB.

2. Establish and Implement Effective Written AML Program

The BSA also requires MSBs to establish and implement written anti-money laundering policies to prevent the MSB from being used to facilitate money laundering and finance terrorist activities. At a minimum, MSBs are required to (a) incorporate policies, procedures and internal controls reasonably designed to assure ongoing

compliance; (b) designate an individual responsible to assure day-to-day compliance with the program and Bank Secrecy Act requirements; (c) provide training for appropriate personnel, including training in the detection of suspicious transactions; and (d) provide for independent review to monitor and maintain an adequate program.⁹ The FinCEN assessment concluded that Powers failed to establish and implement *any* written AML programs. In fact, the assessment indicated that Powers publicly stated he would assist customers looking to side-step AML program obligations.

3. Detect and Adequately Report Suspicious Transactions

An MSB must report transactions that it “knows, suspects, or has reason to suspect” are suspicious,¹⁰ if the transactions are conducted or attempted by, at, or through the MSB, and the aggregate amount of the transaction is at least \$2,000 in funds or other assets.¹¹ According to the FinCEN assessment, Powers engaged in numerous such suspicious transactions, including “49 transactions with a customer who had an email address with the suffix ‘@tormail.org,’ aggregating over \$86,000.”¹² The assessment went on to explain that, without engaging in additional due diligence, the use of a torrent service to facilitate a transaction is a strong indicator of potential illicit activity.

4. Report Currency Transactions

An MSB must file a currency transaction report (“CTR”) when any transaction conducted “by, through, or to” the MSB involves a physical transfer exceeding \$10,000 in currency.¹³ A CTR must be filed within 15 calendar days after the transaction occurs and a copy of the CTR must be saved for five years from the date filed.¹⁴ According to the FinCEN assessment, Powers conducted numerous transactions involving the physical transfer of more than \$10,000 in currency—as well as about 160 purchases of bitcoin totaling \$5 million—without ever filing a CTR.

Conclusion

In the end, FinCEN imposed a \$35,350 civil monetary penalty against Powers for violating laws under the Bank Secrecy Act. This comes six years following FinCEN’s first issued guidance mandating individuals who buy and sell virtual currency on behalf of others to register as an MSB. Kenneth A. Blanco, the Director of FinCEN, reiterated in the Press Release that “[o]bligations under the BSA apply to money transmitters regardless of their size we will take enforcement action based on what we have publicly stated since our March 2013 Guidance—that exchangers of convertible virtual currency . . . are money transmitters and must register as [money services businesses].”¹⁵ Accordingly, as enforcement of virtual currency continues to grow, individuals and financial institutions alike must ensure that any trading services platform involving virtual currency must evaluate their BSA obligations to ensure they are taking the required steps needed to comply. This evaluation can be complex and persons making such evaluation should contact legal counsel for assistance.

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1. The FinCEN official Press Release can be found [here](#).?
 2. The FinCEN Assessment of Civil Money Penalty, *In the Matter of Eric Powers*, Number 2019-01 can be found [?here](#). ?
 3. Information about Money Services Business Registration can be found [here](#).?

4. See 31 U.S.C. § 5330.
5. A “money transmitter” is “[a] person that provides money transmission services. The term ‘money transmission services’ means the acceptance of currency, funds, or other value that substitutes for currency from one person and the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means.” See 31 C.F.R § 1010.100(ff)(5)(A).
6. A “financial institution” contemplate several definitions including “[a] money services business.” See 31 C.F.R § 1010.100(t).
7. See FinCEN’s Assessment of Civil Money Penalty, *In the Matter of Eric Powers*, Number 2019-01.
8. *Id.*
9. See 31 U.S.C. § 5318(a)(2) and (h)(1).
10. See 31 U.S.C. § 5318(g)(1).
11. See 31 U.S.C. § 5318(g)(1).
12. See FinCEN’s Assessment of Civil Money Penalty, *In the Matter of Eric Powers*, Number 2019-01.
13. See 31 U.S.C. § 5313(a).
14. *Id.*
15. See FinCEN’s Assessment of Civil Money Penalty, *In the Matter of Eric Powers*, Number 2019-01.

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