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FinCEN Lays Down a New Marker in Cryptocurrency Anti-Money Laundering Enforcement

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The Financial Crimes Enforcement Network (FinCEN) has taken relatively few enforcement actions involving virtual currency since it issued guidance in 2013 clarifying that virtual currency is subject to the same anti-money laundering (AML) requirements under the Bank Secrecy Act (BSA) as fiat currency. Nonetheless, public statements of its directors along with the issuance of numerous advisory opinions make clear that the agency is heavily engaged in regulatory oversight of the virtual currency industry.

On April 18, 2019, FinCEN announced a new enforcement action—just its third involving virtual currency since the 2013 guidance—penalizing a peer-to-peer (P2P) virtual currency exchanger, Eric Powers, for willfully violating a number of the BSA's key AML requirements. This action shows that FinCEN expects any person, regardless of business form or size, who is exchanging cryptocurrency for other than personal use, to meet the full requirements applicable to a regulated financial institution under the BSA.

FinCEN's Newest Penalty Action

Pursuant to the Assessment of Civil Monetary Penalty, Eric Powers admitted to having conducted over 1,700 transactions as a money transmitter, offering his services to the public online for the exchange of bitcoin, and completing sales and purchases of bitcoin by physically delivering and receiving currency in person, sending or receiving currency through the mail, or coordinating transactions by wire through banks. Some of these transactions were connected to illicit activity, including on the

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Darknet marketplace Silk Road. Powers also made statements in public online postings reflecting that he was aware of BSA/AML obligations and requirements and that he was willing to assist his customers in circumventing those obligations. Finding this to be a willful violation of the BSA, FinCEN's assessment detailed specific failures to meet BSA requirements, such as: registering as a Money Services Business (MSB) with FinCEN; establishing and implementing an effective written AML program; detecting and adequately reporting suspicious transactions (filing "SARs"); and filing reports of currency transactions.

Notably, the conduct at issue in this enforcement action occurred between 2012 and 2014, during the early days of bitcoin trading. In fact, Powers was already the subject of a 2015 civil forfeiture action brought by the US Department of Justice that resulted in a negotiated order of forfeiture of \$100,000 against him related to the same conduct. The FinCEN penalty assessed in this action is itself relatively small, requiring the payment of only a \$35,350 fine in addition to an indefinite industry bar prohibiting Powers from providing money transmission services or engaging in any other MSB activity. Such a small penalty likely reflects the fact that Powers is an individual with a reduced ability to pay a significant fine, as well as the "significant cooperation" that FinCEN noted Powers provided. Additionally, because Powers' conduct was more akin to a rogue actor than an industry participant, a steep penalty against him would not be likely to have a significant impact on compliance measures within the virtual currency industry.

Earlier Criminal Case Against P2P Bitcoin Exchanger

While this is the first instance in which FinCEN has assessed civil monetary penalties against a P2P virtual currency exchanger, it is not the first time an exchanger of convertible virtual currency has been charged with violations of BSA requirements and AML laws. In 2017, the US Attorney's Office for the Central District of California indicted Theresa Lynn Tetley, an unregistered "Bitcoin-for-cash" exchange service provider who called herself the "Bitcoin Maven," for operating as an unlicensed MSB and facilitating money laundering through the use of the Finland-based platform, LocalBitcoins.com. In that case, the government alleged that Tetley operated a multi-million dollar unlicensed money transmitting business, exchanging Bitcoin for cash and vice versa, and knowingly facilitated the laundering of illicit funds while charging a premium to some clients seeking to avoid the regulated financial system. For example, according to the government, Tetley exchanged over \$6 million in Bitcoin for cash for one of her clients who was a notorious Darknet vendor of narcotics. In this criminal case, Tetley ultimately pleaded guilty to one count of operating as an unlicensed money transmitting business and one count of money laundering, and was sentenced to a year in prison, a \$20,000 fine, and forfeiture of the 40 Bitcoins, \$292,264 in cash, and 25 gold bars that were proceeds of her illegal activity.

FinCEN's Warning to Money Transmitters

As FinCEN Director Kenneth Blanco stated, BSA requirements apply to money transmitters “regardless of their size,” and the ramifications of violations of these requirements may be severe. This new action highlights the potential risk of criminal or civil enforcement action to those who engage in virtual currency exchange or other money transmitting activities without the proper registration, licensing, or AML program.

This memorandum is a summary for general information and discussion only and may be considered an advertisement for certain purposes. It is not a full analysis of the matters presented, may not be relied upon as legal advice, and does not purport to represent the views of our clients or the Firm. Laurel Loomis Rimon, an O’Melveny senior counsel licensed to practice law in California and the District of Columbia, Eric Sibbitt, an O’Melveny partner licensed to practice law in California and New York, and Sydney Ryan, an O’Melveny associate licensed to practice law in California, contributed to the content of this newsletter. The views expressed in this newsletter are the views of the authors except as otherwise noted.

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