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I Introduction

When considering business related to Web3, it is impossible to ignore the laws and regulations of crypto-assets in the United States of America, where crypto-assets are actively developed, traded, and invested. As such, this series will highlight various U.S. laws and regulations related to crypto-assets, such as the Electronic Fund Transfer Act, beginning with this article’s discussion of the applicability of money-transmission laws to virtual currency.

Part I provides an overview of U.S. money-transmission laws, which have been in existence since the turn of the nineteenth century¹ to protect consumers who deposit money with people or entities for the purpose of transmitting it to a designated person or location.² These laws have expanded in scope over the past 100-odd years, affecting an increasing number of businesses and activities, including those related to virtual currency. If a virtual-currency transaction is subject to money-transmission laws, the persons³ involved must follow certain due-diligence and reporting requirements, which are summarized in this section. Next, Part II discusses the regulations that the U.S. Treasury’s Financial Crimes Enforcement Division enforces as part of its role in combatting financial crimes, including those involving virtual currency. Then, Part III discusses money-transmission laws applicable to money-services businesses in the context of virtual-currency-related activities. Finally, Part IV concludes the article by reaffirming the main points of each section and looking forward.

¹ See, e.g., Reports of the Immigration Commission, 61 Congress, 3d Session, Document No. 753., p. 436 (A New-Jersey law, effectuated on July 4, 1907, prohibited “any person or corporation from transmitting money to foreign countries, or buying or selling foreign exchange, or receiving money on deposit to be transmitted to foreign countries, without a certificate of authority from the commissioner of banking and insurance.”)

² See *id.*, at pp. 318, 436 (describing early attempts to regulate entities engaged in money transmission to prevent “unauthorized banking”); See generally V. Gerard Comizio, *Virtual Currency Law: The Emerging Legal and Regulatory Framework*, pp. 27–29 (briefly discussing the history of money-transmission laws in the United States); <https://www.csbs.org/sites/default/files/2020-05/Chapter%204%20-%20MSB%20Final%20FINAL.pdf> (same).

³ “Person” in this context refers both to a natural person and to a juridical person.

II Overview of “Money-Transmission Laws”

“Money-transmission laws” refer to the various laws, including regulations, concerning the transmission of money. Although various government⁴ agencies are involved in regulating the transmission of money, for the purposes of this article the main agency is the Financial Crimes Enforcement Division, commonly referred to as “FinCEN.” FinCEN, part of the United States Department of the Treasury, was established in 1990 as part of the government’s effort to combat financial crimes, such as money laundering.⁵ The sections in this Part provide a brief overview of the main statutory authority for FinCEN’s regulations, describe the types of activities and categories of persons subject to money-transmission laws, and discuss the actions that persons subject to FinCEN’s regulations, as well as the foregoing statutes, must take.

1. Statutory Authority

FinCEN’s primary statutory authority is based upon the Bank Secrecy Act (“**BSA**”).⁶ At the time of its passage, the BSA was largely aimed at preventing money laundering and “deposits of illicit profits.”⁷ However, toward the end of the twentieth century it was amended several times to address new concerns regarding financial crimes.⁸ Following the 9/11 terrorist attacks, Congress passed the USA PATRIOT Act of 2001,⁹ Title III of which amended the BSA.¹⁰ Title III was enacted as part of President George W. Bush’s “Financial War on Terror[ism]” and sought to prevent the use of money to finance terrorism.¹¹ Using its authority under the BSA, FinCEN has implemented a framework of regulations aimed at combatting financial crimes. Compliance with these requirements is essential in order to avoid severe penalties and potential jail time.¹²

⁴ “Government,” as used herein, refers to the federal government of the United States, unless context requires otherwise.

⁵ <https://www.fincen.gov/about/mission>; <https://www.fincen.gov/resources/statutes-regulations/bank-secrecy-act/bsa-timeline>.

⁶ Pub. L. No. 91-508 Stat. 1114 (1970); <https://www.fincen.gov/what-we-do>.

⁷ <https://www.fincen.gov/resources/statutes-regulations/bank-secrecy-act/bsa-timeline>.

⁸ V. Gerard Comizio, *Virtual Currency Law: The Emerging Legal and Regulatory Framework*, pp. 41–42. The main acts were the Money Laundering Control Act of 1986, the Money Laundering Prosecution Improvement Act of 1988, and the Annunzio-Wylie Money Laundering Suppression Act, passed in 1992. *Id.* The requirements for compliance with these pieces of legislation, and the implementing regulations, are discussed in the following section.

⁹ Pub. L. 107-56, 115 Stat. 272.

¹⁰ <https://www.fincen.gov/resources/statutes-regulations/bank-secrecy-act/bsa-timeline>.

¹¹ *Id.*

¹² See, e.g., United States v. Campos, Case No. 3:18-CR-3554-H, Unsealed Grand Jury Indictment (U.S.D.C. S.D. Calif., August 9, 2017) (Prosecution for failure to comply with registration requirements for “money transmitters,” as defined in Section C., *infra*, and failure to develop “effective anti-money laundering programs”); *In re Eric Powers*, U.S. Dep’t of Treasury, Financial Crimes Enforcement Network No. 2019-01 (April 18, 2019) (Prosecution for failure to register as a “money-services business,” as defined in Section C., *infra*; failure to establish an effective anti-money laundering program; failure to adequately report suspicious transactions; and failure to report currency transactions).

2. Persons and Activities Subject to Money-Transmission Laws

Money-transmission laws, such as the BSA, largely apply to “money-services businesses” (“**MSB**”).¹³ An MSB can be broadly defined as a person “doing business . . . as a ‘money transmitter.’”¹⁴ A person is considered a money transmitter if he provides “money-transmission services”¹⁵ or if he otherwise engages in the transfer of funds.¹⁶ Federal regulations further define “money-transmission services” as being 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.”¹⁷ This definition can be simplified as “the acceptance . . . and transmission of currency,¹⁸ funds, or value that substitutes for currency.”¹⁹ Although this definition may seem simple, it encompasses a broad range of activities. For example, a person who merely accepts U.S. dollars or Japanese yen and, in exchange, gives the other party to the transaction Bitcoin,²⁰ could be required to take certain actions in order to comply with FinCEN’s regulations.

3. Requirements for Compliance with Foregoing Statutes and FinCEN’s Regulations

Persons required to comply with the foregoing statutes and regulations, or MSB, are required to undertake increased due-diligence in order to comply with money-transmission laws. MSB must engage in certain registration, transaction-monitoring, reporting, and record-keeping obligations.²¹ The main obligations are as follows.

First, an MSB must register with FinCEN within 180 days from the date on which that business is established. This registration is known as a “Registration of Money Services Business”²² and must be renewed every two years.²³ Failure to register is a violation of the BSA and can result in criminal prosecution.²⁴

The second main compliance obligation is the establishment of an “effective written anti-money laundering Program” (“**AML Program**”).²⁵ An effective AML Program generally entails the development and use of internal policies and controls designed to prevent financial crimes, such as money laundering and financing

¹³ <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>; <https://www.csbs.org/sites/default/files/2020-05/Chapter%204%20-%20MSB%20Final%20FINAL.pdf>

¹⁴ <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>

¹⁵ 31 CFR § 1010.100(f)(5)(i)(A).

¹⁶ <https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf>

¹⁷ 31 CFR § 1010.100(ff)(5)(i)(A).

¹⁸ *Nota bene*: The regulations do not distinguish between real, or “fiat,” currency and virtual currency. <https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf>.

¹⁹ <https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf> (internal citations supplied).

²⁰ See Part III, *infra*.

²¹ <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>, pp. 9–12.

²² 31 U.S.C. § 5330; 31 C.F.R. § 1022.380

²³ *Id.*

²⁴ See, *supra*, Note 14.

²⁵ <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>.

terrorist activities.²⁶ FinCEN has released guidance for establishing an effective AML Program.²⁷ An AML Program must generally include a customer-verification program, also known as a “know your customer” program;²⁸ an internal training program designed to ensure compliance with anti-money laundering laws; a designated person responsible for ensuring compliance with the AML Program; and an independent review of the AML Program in order to ensure both its adequacy and compliance.²⁹

Finally, an MSB must make certain types of reports. The two main types of reports are known as suspicious activity reports (“**SAR**”) and currency transaction reports (“**CTR**”).³⁰ An MSB must file a SAR if it “knows, suspects, or has reason to suspect” that a transaction or a group of transactions is “suspicious.”³¹ FinCEN’s regulations define “suspicious” as having any of the following attributes: (1) involving funds derived from illegal activities; (2) being designed or structured to evade any reporting requirements, such as CTR, required by money-transmission laws; (3) having no business or “apparent lawful purpose” and the MSB not knowing of any reasonable explanation for the transaction; or (4) using the MSB to facilitate criminal activity.³² In contrast, a CTR is required even if a transaction is not “suspicious.” A CTR is required if a currency transaction, defined as a “deposit, withdrawal, [or] exchange of currency or other payment,” is over \$10,000.³³ This threshold does not apply merely to a one-time transaction.³⁴ It also applies to any series of currency transactions that amounts to more than \$10,000 in a single day.³⁵ This addition was made as an attempt to prevent the structuring of transactions so as to avoid CTR requirements, which had been seen as a problem in the late 1980s.³⁶

III When Do Money-Transmission Laws Apply to Virtual-Currency-Related Activities?

Although money-transmission laws originally were not designed to target virtual-currency-related activities, they can apply to persons engaged in such activities.³⁷ As money-transmission laws apply to MSB, the principal analysis in this section revolves around whether someone involved in virtual-currency-related activities is an MSB. In 2013, FinCEN issued guidance³⁸ that answered this question, dividing people engaged in virtual-currency-related activities into three categories: “users,” “administrators,” and

²⁶ United States v. Campos, Case No. 3:18-CR-3554-H, Unsealed Grand Jury Indictment (U.S.D.C. S.D. Calif., August 9, 2017).

²⁷ <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>.

²⁸ Campos, *supra* Note 14.

²⁹ <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>; accord *In re Eric Powers*, U.S. Dep’t of Treasury, Financial Crimes Enforcement Network No. 2019-01 (April 18, 2019).

³⁰ *Id.*

³¹ 31 C.F.R. § 1022.320(a).

³² *Id.*; see also *In re Eric Powers* (involving prosecution for, *inter alia*, failure to file SARs).

³³ 31 C.F.R. § 1010.311. Here, “\$” refers to the legal currency of the United States of America, the United States Dollar, or “USD.”

³⁴ 31 C.F.R. § 1010.313.

³⁵ *Id.*

³⁶ V. Gerard Comizio, *International Banking Law*, pp. 347–348.

³⁷ FinCEN defines these types of people as “persons creating, obtaining, distributing, exchanging, accepting, or transmitting virtual currencies.” Dep’t Treasury, Fin. Crimes Enf’t Network, FIN-2013-G001, Application of FinCEN’s Regulations to Persons Administering, Exchanging, or Using Virtual Currencies (2013).

³⁸ *Id.*

“exchangers.”³⁹ Under FinCEN’s regulations, users of virtual currency are not considered MSB, but both administrators and exchangers of virtual currency are considered MSB.⁴⁰ Each of these categories shall be addressed in turn.

A “user” of virtual currency is defined as “a person [who] obtains virtual currency to purchase goods or services.”⁴¹ Purchasing goods or services does not, by itself, fall under the definition of a money-transmission service,⁴² and FinCEN states that a user is not an MSB.⁴³ Therefore, a user of virtual currency is not subject to the registration, reporting, record-keeping, and other compliance requirements for MSB.

An “administrator,” according to FinCEN’s guidance, is a “person engaged as a business in issuing (putting into circulation) a virtual currency, and who has the authority to redeem (to withdraw from circulation) such virtual currency.”⁴⁴ An administrator, in other words, could be roughly analogized to someone who issues stock in exchange for money and who has the authority to purchase back that stock, or to “withdraw [it] from circulation,” as need be. On the other hand, FinCEN defines an “exchanger” as a “person engaged as a business in the exchange of virtual currency for real currency, funds, or other virtual currency.”⁴⁵ As such, an exchanger can be analogized to a currency-exchange business that, for example, exchanges U.S. dollars for Japanese yen. FinCEN’s regulations explain the applicability of money-transmission laws to administrators and exchangers in three different scenarios, discussed infra: brokers and dealers of (1) “e-currencies” and “e-precious metals,” (2) centralized convertible virtual currencies (“**CVC**”),⁴⁶ and (3) de-centralized convertible virtual currencies.⁴⁷

1. E-Currencies and E-Precious Metals

“E-currencies” and “e-precious metals” refer to digital certificates that represent ownership of real currencies or precious metals, respectively, with each digital certificate constituting a unit of virtual currency.⁴⁸ A broker’s or dealer’s activities involving these digital certificates constitute money transmission if the broker or dealer transfers funds between a customer and a third party who is not a party to the underlying transaction.⁴⁹ For example, if a broker or dealer closes out a customer’s account that contains e-precious metals and transfers the proceeds to a third party, he is engaged in money transmission.⁵⁰ In contrast, if a broker or dealer is merely accepting and transmitting funds for the purpose of a bona-fide purchase of real currency or

³⁹ *Id.*

⁴⁰ Although not discussed in this article, there may be an exemption or a limitation that applies that would result in an administrator or exchanger of virtual currency not constituting an MSB. *Id.*

⁴¹ *Id.*

⁴² See 31 C.F.R. § 1010.100(ff)(1–7) (Defining a money-services business and instances in which a person constitutes a money-services business).

⁴³ Dep’t Treasury, Fin. Crimes Enf’t Network, FIN-2013-G001, Application of FinCEN’s Regulations to Persons Administering, Exchanging, or Using Virtual Currencies (2013).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ “Convertible virtual currency” is defined as a type of virtual currency that has either “an equivalent value in real currency” or that “acts as a substitute for real currency.” *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

precious metals, then that activity does not constitute money transmission so long as the fundamental element of the transaction is the exchange necessary for that purchase, or sale, of the underlying goods.⁵¹ To wit, there is no involvement of a third party not part of the underlying transaction.

2. Centralized CVCs

A centralized CVC is a type of virtual currency that has a centralized repository.⁵² Generally, an administrator of a centralized repository is a money transmitter.⁵³ By allowing for the transfer of value between persons or locations, an administrator is “sending ‘value that substitutes for currency’ to another person or . . . location,” which is the definition of money transmission.⁵⁴ As such, the administrator of a centralized repository is an MSB subject to money-transmission laws.

Similarly, an exchanger who uses access to the services of an administrator of a centralized repository in order to accept and transfer CVC on behalf of others is considered a money transmitter,⁵⁵ and, as such, is subject to money-transmission laws. FinCEN describes an exchanger’s activities as taking one of two main forms.⁵⁶ The first form involves a transmission to another location. In this form, the exchanger, as a seller of CVC, accepts real currency or its equivalent from a “user,” namely, a buyer.⁵⁷ In turn, the exchanger transfers the value of that real currency or its equivalent to the user’s CVC account held with the aforementioned administrator.⁵⁸ This action constitutes a transfer between locations, which constitutes a money transmission, because it is moving currency from the user’s real-currency account at a bank to the user’s CVC account with the administrator. The second form that an exchanger’s activities can take is as a transmission to another person.⁵⁹ FinCEN refers to this type of transmission as a “*de facto* sale of [CVC].”⁶⁰ In this case, an exchanger accepts real currency, or its equivalent, from the user and privately credits the user with a corresponding amount of the exchanger’s own CVC held with the aforementioned administrator.⁶¹ As such, no “official” transfer has occurred. Later, the exchanger will transmit that credited value to third parties as directed by the user.⁶² The act of transmitting to another person, where the other person is the third party to which the user directs that money be sent, constitutes a money transmission.⁶³ Therefore, an exchanger is subject to money-transmission laws.

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

3. De-Centralized CVCs

A de-centralized CVC has no central repository, nor does it have a single administrator.⁶⁴ Rather, it involves a type of CVC that a person can obtain using his own computing efforts.⁶⁵ A person who creates this type of CVC and uses it to purchase goods or services, be they real or virtual, is a user.⁶⁶ As a user, this person is not an MBS and is, consequently, not subject to money-transmission laws. In contrast, if instead of using the CVC to purchase goods or services, he sells that CVC to another person, for real currency or its equivalent,⁶⁷ he is a money transmitter and thus subject to money-transmission laws.⁶⁸

IV Conclusion

Money-transmission laws in the United States have been in existence, in some form or another, since the late nineteenth and early twentieth centuries. Over the past 100-odd years, these laws have evolved to address new types and methods of committing financial crimes. Nonetheless, the Bank Secrecy Act and other money-transmission laws, as of this writing, have not been updated to address virtual currency explicitly. Nevertheless, one would be mistaken to think that money-transmission laws do not apply to virtual currency merely because the words “virtual currency” do not appear. Indeed, there have been several enforcement actions against certain categories of people involved in virtual-currency-related activities for the violation of money-transmission laws.⁶⁹ As such, a person making investments with virtual currency ought to ascertain whether he is engaging in money-transmission services, and thus whether the foregoing laws, regulations, and possible penalties, are applicable.

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⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ To wit, he has transmitted the money from one location to another.

⁶⁸ *Id.*

⁶⁹ See, *supra* Note 14 (referencing prosecutions for violation of money-transmission laws in the *Campos* and *In re Eric Powers* cases).