Department of Justice

TESTIMONY OF

JOHN P. CRONAN
ACTING ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT
COMMITTEE ON THE WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

FOR A HEARING ENTITLED

UPDATE ON THE JOINT IRS AND DOJ EFFORTS TO RETURN SEIZED FUNDS TO TAXPAYERS

PRESENTED ON

JUNE 20, 2018

Testimony of John P. Cronan
Acting Assistant Attorney General, Criminal Division
U.S. Department of Justice
Before the Subcommittee on Oversight
Committee on the Ways and Means
U.S. House of Representatives
June 20, 2018

Chairwoman Jenkins, Ranking Member Lewis, and distinguished members of the Committee. It is a privilege to appear before the Committee today to discuss the vitally important issues of currency structuring and asset forfeiture. Thank you for the opportunity to represent the Department of Justice (the Department) at this hearing and to address the Department's exhaustive review over the past 18 months of 256 petitions for the return of forfeited funds in structuring cases investigated by the Internal Revenue Service-Criminal Investigation (IRS-CI). I look forward to sharing more about the Department's extraordinary efforts to ensure that our nation's asset forfeiture laws are applied to structuring violations in accordance with the Department's policies and regulations and the rule of law. I am privileged to represent the Department today and address our commitment to fighting crime in accordance with our law enforcement priorities and our highest ideals of justice and fairness.

Introduction

Money laundering poses an acute and specific threat to the U.S. financial system. Americans enjoy the deepest, most liquid, and most stable markets in the world – and those very hallmarks that promote confidence in our markets simultaneously attract bad actors looking to "launder" their dirty money in legitimate guise. We protect our financial system from the criminals who would exploit it through vigorous anti-money laundering enforcement. The Bank Secrecy Act – legislation passed by Congress in 1970 – requires financial institutions to file reports concerning suspicious financial transactions that exceed $10,000, ensuring that law enforcement has access to information about those who move large amounts of money through our financial system. The structuring offenses, codified at 31 U.S.C. § 5324, serve the corresponding role of preventing the evasion of those critical reporting requirements. Congress made structuring a criminal offense precisely because it deprives law enforcement of invaluable information about the use – and abuse – of our financial system.

The Department is nonetheless well aware that enforcement of the structuring laws can require a delicate balancing of several, sometimes competing goals. The Department is committed to upholding the rule of law and pursuing legitimate law enforcement efforts to keep our financial institutions safe from intrusion by money launderers and other criminals who would exploit our financial system. At the same time, please know that the Department has heard loud and clear concerns raised by certain Members of Congress about perceived overreach by law enforcement in the past. The Department has taken those concerns to heart and committed to ensure that our priorities are focused on the most serious criminal threats, including the most serious structuring offenses. As part of that commitment, the Department undertook a careful and comprehensive process to review petitions requesting the return of funds in 256 judicial forfeiture cases involving IRS-investigated structuring violations. Today, I am eager to update you on that process and the Department's work going forward at this hearing.

I will focus on three issues this morning. First, I will discuss briefly the central role that the Bank Secrecy Act plays in the protection of the public and the U.S. banking system, and how our structuring laws, which are intended to prevent the evasion of important reporting requirements, are an integral part of that statutory framework. Second, I will discuss the Department's criminal and civil forfeiture enforcement of the structuring laws. Lastly, I will discuss the Department's regulatory framework for reviewing petitions requesting the return of forfeited funds and specifically, the process used to review the 256 petitions for remission or mitigation coming out of the revised IRS and Department policies on structuring.

Importantly, I want to convey to the members of this Committee that the Department's fact-intensive and thorough review of the petitions over the past 18 months left no stone unturned. At the end of the process, the Department issued letters responding to each and every petition submitted for consideration with its decision on remission or mitigation. The Department provided each and every petitioner who was not entitled to a return of their funds with the factual basis for the Department's denial and an opportunity to appeal. At the end of this hearing, the Committee should feel confident that the Department's process ensured that no petitioner was deprived of his or her property unfairly and without due process of law. The Department will continue, as is its duty, to defend the laws Congress enacted while ensuring that the laws are fairly enforced in line with the Department's refocused priorities announced in 2015.

The Bank Secrecy Act and Structuring Laws

The Bank Secrecy Act is a comprehensive legislative scheme that imposes various reporting requirements on financial institutions and their customers for transactions that exceed $10,000. That reporting, as the Act itself recognizes in its declaration of purpose, has a "high degree of usefulness" in "intelligence or counterintelligence activities . . . to protect against international terrorism" as well as "criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. § 5311. When we are able to record, identify, and prosecute violations of our money laundering laws and forfeit the proceeds of crime, we take the profit out of crime and deny criminal organizations the resources they need to thrive. The Bank Secrecy Act and by extension the money laundering statutes are thus integral to our country's law enforcement strategy.

Crime, however, is a business – and because criminals must constantly hide, move, and access their money, they will look for, and seek to exploit, vulnerabilities in our financial system or weaknesses in a bank's compliance structure. "Structuring" generally occurs when, to evade the Bank Secrecy Act's reporting requirements, an individual conducts a series of currency transactions below the $10,000 threshold in lieu of one single transaction. Structuring causes the government to lose valuable information about the use of the financial system and potential unlawful activity. Structuring circumvents a financial institution's duty to file Currency Transaction Reports (CTR), which the government relies on to investigate and prosecute criminal and regulatory offenses. And structuring can often obscure serious criminal activity; terrorists, transnational criminal organizations, and other criminal actors frequently structure transactions to hide their illicit proceeds.

For these reasons, Congress made structuring a stand-alone criminal offense. *See* 31 U.S.C. § 5324. Those structuring laws complement the reporting requirements and are equally integral to the success of our law enforcement strategy. *See United States v. Malewicka*, 664 F.3d 1099, 1107 (7th Cir. 2011) (Congress created structuring offenses "to aid the government's efforts to uncover

and prosecute crime and fraud"). Under 31 U.S.C. § 5324(a), it is a crime if an individual (1) structured his or her transactions, (2) knew of the reporting requirements, and (3) intended to evade the reporting requirements.

But let me emphasize one point about the structuring statute: As Congress spelled out in no uncertain terms, structuring is not a strict liability crime. Intent to evade the reporting requirements is a prerequisite. In other words, the law does not punish people for merely depositing $9,000 in a bank. It only punishes those who do so deliberately to get around the reporting requirement – whether because they wanted to hide funds from someone, to evade their taxes, to prevent the IRS from knowing their business, or some other reason. Those individuals with the necessary intent are the only people who fall under this law and who are subject to its penalties. And that intent – which falls to agents and prosecutors to evaluate based on all the facts and circumstances – serves to "shield innocent conduct from prosecution." *United States v. Taylor*, 816 F.3d 12, 23 (2d Cir. 2016). If the government cannot prove that an individual intended to evade reporting requirements, then that individual is not guilty of structuring. As the Department well understands, the Bank Secrecy Act is not to be enforced merely for enforcement's sake; rather, the Act is designed to equip the government with the tools to identify, address, and deter criminal behavior.

Civil Forfeiture Proceedings in Structuring Cases

Congress has authorized a variety of sanctions for structuring violations, including criminal imprisonment, fines, and forfeiture of the structured funds under 31 U.S.C. § 5317(c). Subsection (c)(1) authorizes *criminal* forfeiture; in a criminal action brought in court against a defendant for any § 5324 violation or conspiracy to commit such a violation, the court may as part of the criminal sentence order the forfeiture of the defendant's property "involved in" or "traceable" to the offense. *Id.* § 5317(c)(1). Subsection (c)(2) authorizes *civil* forfeiture; any property "involved in" or "traceable to" any § 5324 violation or conspiracy to commit that crime may be seized and forfeited to the United States "in accordance with the procedures governing civil forfeitures in money laundering cases pursuant to [18 U.S.C. § 981(a)(1)(A)]." 31 U.S.C. § 5317(c)(2). Thus, even though we term these "*civil* forfeitures," the government must still prove that a crime occurred and that the asset is linked to the crime.

Civil forfeitures under § 5317(c)(2) require the intervention and approval of a court. The "procedures governing civil forfeitures in money laundering cases" require the government to seize property "pursuant to a warrant obtained in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure," 18 U.S.C. § 981(b)(2), and a court will only issue a "search warrant" upon a government showing of probable cause. *See* Fed. R. Crim. P. 41(d)(1). Thus, before the government can seize or forfeit any structured funds, it must obtain a judicially-authorized warrant based on a showing that there is probable cause to believe a structuring crime occurred – namely, probable cause to believe that an individual structured his transactions while knowing of the reporting requirements and intending to evade those reporting requirements. This bears repeating: Seizure warrants based on structuring are governed by the very same "probable cause" standard required for a warrant to issue for the arrest of a person.

Moreover, in a civil action to forfeit property linked to a structuring violation, the government bears the burden of proving by a preponderance of the evidence that the crime occurred and that the property is subject to forfeiture. 18 U.S.C. § 983(c)(1). The government

must therefore show, by a preponderance of evidence, that the relevant funds were "involved in" or "traceable" to the structuring violation. *See* 18 U.S.C. § 983(c)(3) (if the government's theory is that the property "was used to commit or facilitate" or was "involved in" crime, it must establish "a substantial connection between the property and the offense").

Petitions for Remission and Mitigation

Even after a forfeiture is complete, regulations codified at 28 C.F.R. Part 9 set forth a process by which all persons who have an interest in forfeited property may pursue their interests without litigating in court. Specifically, owners, lienholders, and victims are able to seek the return of property by filing petitions for remission or mitigation. The petition process "does not serve to contest the forfeiture, but rather is a request for an executive pardon of the property based on the petitioner's innocence or, for a wrongdoer, on a plea for leniency." *United States v. Ruth*, 65 F.3d 599, 604 n.2 (7th Cir. 1995).

The petitions process is available not only for "judicial forfeitures" under the jurisdiction of the Department, where civil or criminal actions were filed in federal court, but also "administrative forfeitures" under the jurisdiction of the federal seizing agency, where the property was forfeited by the agency. While the IRS handles its petitions in administrative forfeitures on its own, it refers all petitions in judicial forfeitures to the relevant U.S. Attorney's Office for ultimate decision by the Department's Criminal Division's Money Laundering and Asset Recovery Section (MLARS).

The Department decides petitions for remission based on criteria set forth in regulations. Those regulations mandate that the Department "shall presume a valid forfeiture and shall not consider whether the evidence is sufficient to support the forfeiture." 28 C.F.R. § 9.5(a)(4). In order to qualify for remission, the owner or lienholder must establish that he or she "has a valid, good faith, and legally cognizable interest in the seized property as owner or lienholder as defined in this part and is an innocent owner within the meaning of 18 U.S.C. §§ 983(d)(2)(A) or 983(d)(3)(A)." 28 C.F.R. § 9.5(a). Given these criteria, petitioners who themselves committed the underlying structuring violations do not qualify for remission because they are not "innocent" under the terms of the law.

Nevertheless, even when a petitioner does not qualify for remission, the Department may decide that mitigation is warranted. The mitigation regulations provide that where a petitioner was involved in the commission of the offense underlying forfeiture, the Department may exercise its discretion to grant mitigation based on a holistic assessment of factors including:

> the lack of a prior record or evidence of similar criminal conduct; if the violation does not include drug distribution, manufacturing, or importation, the fact that the violator has taken steps, such as drug treatment, to prevent further criminal conduct; the fact that the violation was minimal and was not part of a larger criminal scheme; the fact that the violator has cooperated with federal, state, or local investigations relating to the criminal conduct underlying the forfeiture; or the fact that complete forfeiture of an asset is not necessary to achieve the legitimate purposes of forfeiture.

28 C.F.R. § 9.5(b)(2).

The Department's Review of Forfeiture Practices and Petitions

The Department has in recent years undertaken a comprehensive review of its asset forfeiture practices and policies. The goal of the review, commenced in 2014, was to ensure that the Department was, consistent with Departmental priorities, civil liberties, and the rule of law, allocating resources effectively to address the most serious criminal threats, including the most serious structuring offenses.

As part of that review, the Department announced in March 2015 a policy to limit the use of forfeiture authorities in connection with § 5324(a) structuring violations. That policy broadly restricts the use of civil or criminal forfeiture for structuring offenses until after a defendant has been criminally charged. The policy provides that, in cases where no criminal charges have been filed, a prosecutor cannot move to seize funds unless he or she determines that there is probable cause that the structured funds were generated by unlawful activity or that the structured funds were intended for use in, or to conceal or promote, ongoing or anticipated unlawful activity – and that determination is approved by a supervisor. The only other limited circumstance in which a prosecutor may seize funds in a structuring case where no criminal charges have been filed is if the U.S. Attorney or the Chief of MLARS personally determines that seizure would serve a compelling law enforcement interest.

The 2015 policy additionally expanded protections available after seizures have occurred. The policy requires that, if a prosecutor determines that there is insufficient admissible evidence to prevail in a trial, he or she must direct a seizing agency to return the funds within seven days. The policy also requires that a criminal indictment or civil complaint be filed against seized funds within 150 days, and otherwise directs a return of the full amount. And the policy requires a formal, written settlement agreement vetted by a prosecutor for any settlements of structuring offenses. The policy took immediate, prospective effect – and it has guided the Department's exercise of investigative and prosecutorial discretion in structuring cases since.

Over the past 18 months, moreover, the Department has undertaken and completed an exceptional and exhaustive review process involving 256 petitions for remission or mitigation of judicial forfeitures based on § 5324(a) structuring offenses investigated by IRS-CI. Those 256 petitions were filed with the IRS after IRS-CI in June 2016 notified account holders in approximately 600 forfeitures – based on structuring violations dating from October 1, 2009, through October 2014 – of their eligibility to seek remission or mitigation. IRS had sole discretion to review and decide the petitions relating to administrative forfeitures. But it referred the 256 petitions relating to forfeiture actions that had been prosecuted in court to the Department, and notwithstanding the strong presumption of finality in judicial cases, the Department accepted them for review.

In reviewing those 256 petitions, the Department sought information from and solicited and considered recommendations from both the seizing agency (IRS) and the local U.S. Attorney's Office (USAO) that handled the original case. To ensure that the petitions were handled fairly and consistently nationwide, the Department issued guidance to the USAOs detailing the petition process, applicable regulations, and required documentation. The guidance encouraged each USAO to discuss with the local IRS-CI office the review process, specific facts, and any relevant information to which the USAO had access. It required the USAOs, moreover, to review relevant documents, including the forfeiture complaint, the final order of forfeiture, the indictment or

related indictments, and other documents or materials from the case file such as interview notes and financial records. It thereby ensured that MLARS was equipped to make final decisions on all 256 petitions with comparable documentation, a full picture of the facts, and the benefit of recommendations from both IRS and the line prosecutors. MLARS was then able to conduct a rigorous and even-handed review of all 256 petitions under the remission and mitigation criteria provided in 28 C.F.R. § 9.5(a)(1) and (b)(2).

Upon the Department's decision, each petitioner was notified in writing by letter. Each letter provided the specific bases for the Department's determination whether to grant or deny the petition. For example, denial letters described when the investigation showed inconsistent statements made by the petitioner or continued structuring activity that occurred after the date of the seizure. Each letter further explained the process for appealing the Department's decision and made clear that a petitioner may present any evidence not previously submitted if such information provides a basis upon which to reverse the decision to deny the petition. The reconsideration requests were then assigned to a senior-level, career manager at MLARS – and someone who was not involved in the prior determination - for yet another layer of review and adjudication.

Although the Department will not comment on any particular petition, I can provide a high level summary of the results now that the review process is complete. Of the 256 petitions received, the Department granted 41 petitions, and returned $1.9 million in funds. The Department denied 215 petitions, declining to return $22.2 million. The reasons the petitions were denied varied, but included evidence that the petitioners were convicted in criminal cases; committed other crimes, including money laundering, fraud, tax, and drug crimes; continued to violate the structuring laws even after the forfeitures; and evaded other financial reporting requirements.

As the acting head of the Department's Criminal Division, I am proud of the close and thorough analysis conducted by experienced and dedicated prosecutors in MLARS, which resulted in an inclusive and multi-layered adjudication process for all 256 petitioners. The procedures that were followed ensured that all 256 petitions for remission or mitigation were reviewed under consistent and non-arbitrary standards, and that no petitioner was denied his property unfairly and without due process of law.

Conclusion

The Department is focused on ensuring the just and effective enforcement of structuring and forfeiture laws nationwide, and the Department's robust 18-month review of hundreds of petitions for the return of forfeited funds in IRS-investigated structuring cases is a reflection of that commitment. I am grateful to the subcommittee for this opportunity to address in detail the procedures that were implemented to ensure careful and even-handed review. The public can and should have confidence in the process that was followed and the Department's commitment to fighting crime in accordance with our priorities and highest ideals.

I thank the Subcommittee for its interest in these important topics, and I look forward to answering any questions you may have.