U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

SEP 09 2016

The Honorable Peter Roskam
Chairman
Subcommittee on Oversight
Committee on Ways and Means
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Kenneth A. Blanco, Deputy Assistant Attorney General of the Criminal Division, before the House Ways and Means Subcommittee on Oversight on May 25, 2016, for a hearing on IRS Civil Asset Forfeiture Authorities and Cases. We hope that this information is of assistance to the Committee.

Please do not hesitate to contact this office if we may be of additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

Peter J. Kadzik
Assistant Attorney General

Enclosure

cc: The Honorable John Lewis
Ranking Member

Questions for the Record
Subcommittee on Oversight
Committee on Ways and Means
U.S. House of Representatives
May 25, 2016

Questions Posed by Representative Peter Roskam

1) **On March 31, 2015, DOJ adopted a policy under which it would limit application of the structuring laws to "illegal-source" structuring cases. With respect to that change:**

   a) **Does DOJ continue to litigate "legal-source" structuring cases (either civil or criminal) that were initiated *before* this policy change? If so, please identify the cases by court and docket number.**

Response:

On March 31, 2015, the Department of Justice (the Department) issued a policy limiting the use of asset forfeiture authorities in connection with structuring offenses under 31 U.S.C. § 5324(a). Under the new policy, in the absence of criminal charges, judicially authorized warrants to seize structured funds can only be sought in two ways. Under the first method, the prosecutor must identify and articulate probable cause of additional federal criminal activity and that determination must be approved by a supervisor. Otherwise, a prosecutor may ask a judge to issue a seizure warrant in structuring cases only if either the U.S. Attorney or the Chief of the Criminal Division's Asset Forfeiture and Money Laundering Section (AFMLS) personally determines that seizure would serve a compelling law enforcement interest.

The policy adopted over a year ago has already effectively eliminated civil forfeiture actions related to violations of the structuring laws except in cases in which (1) the defendant is first criminally charged, (2) a prosecutor can establish 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, or (3) a top ranking prosecutor personally certifies that there are compelling law enforcement circumstances which justify seeking a warrant from a federal judge. This significant change exceeds the requirements of the law and underscores the Department's commitment to fighting crime and returning money to victims while protecting civil liberties and ensuring due process.

The Department does not have a precise automated method to gather the requested information. The Department's automated system tracks cases by the criminal statute that was violated. Because structuring is itself a federal criminal statute, there was no requirement or practice, prior to the implementation of the March 2015 policy, for agents and prosecutors to separately document which structuring cases also involved evidence of additional criminal activity. Nevertheless, having reviewed available information regarding pending cases, the Department is not aware of any pending criminal prosecutions or civil forfeiture actions pursuant to 31 U.S.C. § 5324(a) filed prior to the March 2015 policy in which there is not some indication 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.

b) **Has DOJ initiated any "legal source" structuring cases (either civil or criminal) *after* this policy change? If so, please identify the cases by court and docket number.**

Response:

The Department has reviewed available information and believes there have been three criminal prosecutions initiated after March 31, 2015, where the sole alleged violation is a violation of 31 U.S.C. § 5324(a) and no link to additional federal criminal activity has been alleged in the court filings. Of those three criminal cases, one was voluntarily dismissed by the Department and the remaining two involved individuals and/or entities who have compliance responsibilities under the Bank Secrecy Act. Further, the Department is unaware of any civil forfeiture complaints filed after March 31, 2015, in which the only basis for forfeiture is a violation of 31 U.S.C. § 5324(a) and there is not 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.

c) **Has DOJ filed any civil forfeiture complaints since March 31, 2015, in which the only basis for forfeiture is an alleged violation of the structuring laws? If so, please identify the cases by court and docket number.**

Response:

See response above.

d) **Has DOJ initiated any criminal prosecutions since March 31, 2015, in which the only alleged offense is a violation of the structuring laws? If so, please identify the cases by court and docket number.**

Response:

See response above.

e) **Has DOJ entered into settlement agreements or plea agreements since March 31, 2015, in which the only alleged offense resolved by the agreement is an alleged violation of the structuring laws? If so, please identify the cases by court and docket number.**

Response:

See response above.

f) **What mechanism does DOJ have in place to ensure that its actions comply with the March 31 policy change?**

Response:

The policy itself provides several safeguards to ensure compliance. If a prosecutor wants to seize funds when no criminal charges have been filed, the prosecutor must identify and articulate probable cause of additional federal criminal activity and that determination must be (1) approved by a supervisor and (2) memorialized in the prosecutor's records. Otherwise, a prosecutor may ask a judge to issue a seizure warrant in structuring cases only if either the U.S. Attorney or the Chief of AFMLS personally determines that seizure would serve a compelling law enforcement interest. Such approval then must be communicated to AFMLS.

2) **After the IRS and DOJ changed their policies regarding structuring violations, some property owners have filed petitions for remission or mitigation seeking return of money that was seized before the policy changes. With respect to these petitions:**

   a) **How many petitions for remission or mitigation have been submitted to DOJ since October 17, 2014, in cases where money was forfeited based on alleged violations of the structuring laws?**

Response:

AFMLS, as the central decision maker for petitions filed in judicial cases, annually receives and decides hundreds of petitions for both remission and mitigation. The overwhelming majority of these are petitions for remission from victims of crime seeking to recover losses they have suffered. A much smaller number of petitions for mitigation are filed by property owners and lienholders. Since October 17, 2014, AFMLS has received five petitions for remission and/or mitigation in structuring cases.

These numbers only include the petitions that have been filed directly with or received by AFMLS, the central decision maker for judicial petitions. They do not include petitions currently under review by the Internal Revenue Service (IRS) or U.S. Attorney's Offices.

   b) **How many such petitions has DOJ finally decided? How many remain to be decided?**

Response:

Of the five petitions received by AFMLS, two have been decided. One of the petitions granted remission to a victim of embezzlement because the proceeds from the crime were being illegally structured. As to the second petition, the Department denied the petition for remission, but granted the petition for mitigation. Three petitions for remission and/or mitigation in structuring cases remain pending.

   c) **What standards does DOJ intend to apply when determining whether to return funds in response to such petitions? Will DOJ return funds in all cases where money would not be seized under the policy change announced on March 31, 2015?**

Response:

Owners, lienholders, or victims can seek the return of forfeited property by filing a petition for remission or mitigation. This process has been described by the courts as a pardon process, but for property instead of individuals. This process is governed by regulations to ensure that the Department fairly considers and resolves petitions. These regulations are designed to offer owners, lienholders, and victims a way to pursue their interests in forfeited property without requiring them to litigate those interests in court.

The regulations, codified at 28 C.F.R. § 9, require that the Department or one of its law enforcement agencies send a notice of seizure and intent to forfeit seized property to persons who have a recognized ownership interest in seized property, such as titled owners and lienholders. The regulations require that the notice provide, among other things, information describing the remission process, such as when and where a petitioner may submit a petition for remission or mitigation.

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 and is an innocent owner within the meaning of the statute. 28 C.F.R. § 9.5(a). Given these criteria, individuals who knowingly evaded currency reporting requirements by structuring do not qualify for remission because they are not innocent owners under the statute.

Currency structurers, however, may qualify for mitigation under the Department's specific mitigation regulations. The Department reviews several factors to determine whether to grant or deny mitigation to a party involved in the commission of the offense. Those factors include:

- 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 will thoroughly review and appropriately rule on any current and newly filed petitions for remission or mitigation, including those involving structuring violations. Throughout our process of reviewing petitions for remission and mitigation, we are focused on ensuring fairness and consistency, as well as instilling public confidence in these and other cases. As part of our review process, we solicit and carefully consider recommendations from the seizing agency as well as the relevant U.S. Attorney's Office. In our experience, these stakeholders often have access to information that is relevant to claims presented in the petitions.

d) With respect to those petitions that have not been resolved, when does DOJ expect to issue its decision?

Response:

Although we do not have a specific timeline for resolving petitions, we take seriously our obligation to thoroughly and quickly decide matters that are ripe for decision. Factors that affect how long it takes to review a particular petition may include the age of the case, the complexity of the facts, the need for any back-and-forth discussions with the petitioner, the law enforcement agency, and/or the relevant U.S. Attorney's Office, as well as, in some cases, the need to resolve legal issues presented by the petition.

3) **For any structuring-related petitions for remission or mitigation submitted to DOJ after October 17, 2014, please provide separately *for each petition*:**

   a) **The date of the underlying seizure.**
   b) **The amount of currency seized in the underlying seizure.**
   c) **The date of the underlying forfeiture.**
   d) **The amount of currency forfeited in the underlying forfeiture.**
   e) **Whether the underlying forfeiture was administrative, civil judicial, or criminal.**
   f) **Whether any crime other than structuring was alleged to justify the forfeiture.**
   g) **The date the petition was submitted.**
   h) **The date the IRS provided its recommendation on the petition.**
   i) **Whether IRS recommended return of the seized funds and, if so, how much the IRS recommended should be returned.**
   j) **The date the petition was resolved (if it has been resolved).**
   k) **The amount of money returned in response to the petition (if any).**

Response:

Consistent with longstanding policy, the Department will not comment on pending matters including the timing or substance of any individual pending petitions.

4) **While some property owners have submitted petitions for remission or mitigation, other property owners may not be aware that they have any right to do so. With respect to the latter property owners:**

   a) **Has DOJ undertaken any kind of review to identify those property owners? Does DOJ have any plans to undertake such a review?**

Response:

The regulations for the remission and mitigation process, codified at 28 C.F.R. § 9, require that the Department or one of its law enforcement agencies send a notice of seizure and intent to forfeit seized property to persons who have a recognized ownership interest in seized property, such as titled owners and lienholders. The regulations require that the notice provide, among other things, information describing the remission process, such as when and where a petitioner may submit a petition for remission or mitigation. In addition to the notice required by the regulations, in June 2016, the IRS mailed letters in more than 600 forfeiture matters based on

structuring violations, notifying recipients of their ability to file new or renewed petitions for mitigation.

b) **Has DOJ taken any steps to notify those property owners that they have a right to file a petition for remission or mitigation? Does DOJ have any plans to provide such notice?**

Response:

See response above.

c) **In how many cases before the policy change did DOJ forfeit money based solely on alleged *legal-source* structuring? If the DOJ does not currently have that information, what plans does DOJ have to obtain that information?**

Response:

Prior to the implementation of the March 2015 policy, the Department did not have a specific policy of memorializing which cases involved (1) evidence of the crime of structuring and (2) evidence of additional criminal activity. Although such evidence may have existed in the underlying investigation, there was no obligation on the part of agents or prosecutors to collect or memorialize such evidence given that structuring is by itself a federal criminal offense. In June 2016, the IRS mailed letters in more than 600 forfeiture matters based on structuring violations, notifying recipients of their ability to file new or renewed petitions for mitigation. We are advised by the IRS that a subset of those matters are civil forfeiture cases, petitions related to which would be decided by the Department. The Department does not know, however, nor does the IRS believe it has a solid basis to tell us, how many petitions for mitigation to expect as a result of this process, or how many of those petitions are likely to merit initial or additional mitigation. Rather, we expect to know significantly more after the period for filing new or renewed petitions has closed and the IRS or the Department have received and had an opportunity to review the petitions. In the meantime, we intend to work closely with the IRS to ensure a careful and well-coordinated approach that will permit efficient and consistent decision making.

5) **In recent years, several high profile structuring-related cases have emerged in which federal prosecutors failed to initiate civil or criminal forfeiture proceedings within the deadlines set by 18 U.S.C. § 983, and instead held onto seized property for years while attempting to negotiate a settlement. With respect to these cases:**

a) **Has DOJ conducted an audit to identify cases where the agency is currently holding money in violation of the deadlines set by 18 U.S.C. § 983?**

Response:

The March 2015 policy addresses this issue. The policy requires that, within 150 days of seizure based on structuring, a prosecutor must either file a criminal indictment or a civil complaint

against the asset. The criminal charge or civil complaint can be based on an offense other than structuring. If no criminal charge or civil complaint is filed within 150 days of seizure, then the prosecutor must direct the seizing agency to return the full amount of the seized money to the person from whom it was seized by no later than the close of the 150-day period. Once directed, the seizing agency will promptly initiate the process to return the seized funds. Only a U.S. Attorney or the Chief of AFMLS can grant an exception if needed to meet the needs of the criminal investigation.

b) Does DOJ have any plans to conduct any such audit?

Response:

See response above.

c) What mechanisms does DOJ have in place to prevent prosecutors from holding seized property in violation of the deadlines set by 18 U.S.C. § 983?

Response:

The new policy imposes important protections after a seizure has taken place. The policy requires that, if a prosecutor determines that there is insufficient admissible evidence to prevail in a criminal or civil trial, within seven days the prosecutor must direct a seizing agency to return the funds. The policy also imposes a deadline to file a criminal indictment or civil complaint against the funds seized, or otherwise directs a return of the full amount of the seized funds. The criminal charge or civil complaint can be based on an offense other than structuring.

6) Does DOJ have a policy or practice of issuing grand jury subpoenas to individuals or businesses after they refuse to plead guilty to structuring?

Response:

Both Department policy and federal law prohibit a prosecutor from using the grand jury's subpoena power to harass or intimidate any person, including by issuing a "grand jury subpoena to coerce a plea bargain, when that use has no relation to a proper purpose of the grand jury." *United States v. (Under Seal),* 714 F.2d 347, 350 (4th Cir. 1983).

a) What mechanisms does DOJ have in place to ensure that the power to issue grand jury subpoenas is not used to pressure property owners to agree to guilty pleas?

Response:

See response above.