Hearing on Internal Revenue Service and U.S. Department of Justice Efforts to Return Taxpayers' Seized Funds

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HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT

OF THE

COMMITTEE ON WAYS AND MEANS

U.S. HOUSE OF REPRESENTATIVES

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Hearing on Internal Revenue Service and U.S. Department of Justice Efforts to Return Taxpayers' Seized Funds

U.S. House of Representatives,
Subcommittee on Oversight,
Committee on Ways and Means,
Washington, D.C

WITNESSES

John P. Cronan
Acting Assistant Attorney General, Criminal Division, U.S. Department of Justice
Witness Statement

Don Fort
Chief, Criminal Investigation, Internal Revenue Service
Witness Statement

WAYS AND MEANS
CHAIRMAN KEVIN BRADY

Chairman Jenkins Announces Hearing on Internal Revenue Service and U.S. Department of Justice Efforts to Return Taxpayers' Seized Funds

House Ways and Means Oversight Subcommittee Chairman Lynn Jenkins (R-KS) announced today that the Subcommittee will hold a hearing on Internal Revenue Service (IRS) and U.S. Department of Justice (DOJ) efforts to return taxpayer funds, which the IRS seized using its civil asset forfeiture authority. The hearing is entitled "Update on IRS and DOJ Efforts to Return Seized Funds to Taxpayers." The hearing will focus on the process the IRS and DOJ used to review taxpayers' petitions for the return of seized funds and the resulting outcomes. **The hearing will take place on Wednesday, June 20, 2018 in 1100 Longworth House Office Building, beginning at 10:00 AM.**

In view of the limited time to hear witnesses, oral testimony at this hearing will be from invited witnesses only. However, any individual or organization may submit a written statement for consideration by the Committee and for inclusion in the printed record of the hearing.

DETAILS FOR SUBMISSION OF WRITTEN COMMENTS:

Please Note: Any person(s) and/or organization(s) wishing to submit written comments for the hearing record must follow the appropriate link on the hearing page of the Committee website and complete the informational forms. From the Committee homepage, http://waysandmeans.house.gov, select "Hearings." Select the hearing for which you would like to make a submission, and click on the link entitled, "Click here to provide a submission for the record." Once you have followed the online instructions, submit all requested information. ATTACH your submission as a Word document, in compliance with the formatting requirements listed below, **by the close of business on Thursday, July 5, 2018**. For questions, or if you encounter technical problems, please call (202) 225-3625.

FORMATTING REQUIREMENTS:

The Committee relies on electronic submissions for printing the official hearing record. As always, submissions will be included in the record according to the discretion of the Committee. The Committee will not alter the content of your submission, but we reserve the right to format it according to our guidelines. Any submission provided to the

Committee by a witness, any materials submitted for the printed record, and any written comments in response to a request for written comments must conform to the guidelines listed below. Any submission not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

All submissions and supplementary materials must be submitted in a single document via email, provided in Word format and must not exceed a total of 10 pages. Witnesses and submitters are advised that the Committee relies on electronic submissions for printing the official hearing record.

All submissions must include a list of all clients, persons and/or organizations on whose behalf the witness appears. The name, company, address, telephone, and fax numbers of each witness must be included in the body of the email. Please exclude any personal identifiable information in the attached submission.

Failure to follow the formatting requirements may result in the exclusion of a submission. All submissions for the record are final.

The Committee seeks to make its facilities accessible to persons with disabilities. If you are in need of special accommodations, please call 202-225-1721 or 202-226-3411 TTD/TTY in advance of the event (four business days notice is requested). Questions with regard to special accommodation needs in general (including availability of Committee materials in alternative formats) may be directed to the Committee as noted above.

Note: All Committee advisories and news releases are available at http://www.waysandmeans.house.gov/

HEARING ON INTERNAL REVENUE SERVICE

AND U.S. DEPARTMENT OF JUSTICE EFFORTS

TO RETURN TAXPAYERS' SEIZED FUNDS

Wednesday, June 20, 2018

House of Representatives,

Subcommittee on Oversight,

Committee on Ways and Means,

Washington, D.C.

The Subcommittee met, pursuant to notice, at 10:00 a.m., in Room 1100, Longworth House Office Building, Hon. Lynn Jenkins [Chairman of the Subcommittee] presiding.

*Chairman Jenkins. The Subcommittee will come to order. Welcome to the Ways and Means Overnight Subcommittee hearing, which will serve as an update on IRS and DoJ efforts to return seized funds to taxpayers.

Over the last three years this Subcommittee has undertaken tireless work examining the IRS's use of its civil asset forfeiture authority, including holding two hearings on this topic last Congress. Today's hearing serves as the third, and will focus on the review process by the Department of Justice for civil asset forfeiture petitions referred to the Department by the IRS.

We remind our audience today how we got here. A few years ago reports began to emerge that the IRS Criminal Investigation Division was seizing what appeared to be legally-sourced funds based solely on allegations of structuring. By intentionally structuring currency transactions to be below $10,000, taxpayers avoid reporting requirements set forth under the Bank Secrecy Act. To ensure individuals don't do this, structuring itself was made a crime.

However, the law was not put in place simply so the government could enforce reporting requirements; it was put into place as a tool to be useful in addressing criminal behavior, such as tax evasion, money laundering, terrorism, or drug trafficking.

During the course of our investigation, the Subcommittee heard from numerous small business owners who had their bank accounts seized for no reason, other than making deposits under $10,000. There was no underlying criminal behavior such as a drug trafficking or money laundering. These seizures, as later confirmed by the Treasury Inspector General for Tax Administration, or TIGTA, were indeed primarily made against legal source funds, with the IRS compromising the rights of some individuals and businesses in the process.

As a result, this Subcommittee has worked with the IRS over the past few years to ensure better outcomes for these taxpayers. I won't say that these outcomes are fair or just, because many people spent years fighting the government over this issue, and some lost their livelihoods in the process. These are events that cannot be erased, and the years cannot be returned. But it is my hope that we can at least get these taxpayers their money back.

While it may have taken a while, I was encouraged to see the example put forth by the IRS, which has gone beyond what was legally required to make things right. We have seen the IRS conduct extensive outreach to those who have a right to petition for the return of their funds. We have seen the IRS change internal policy to no longer pursue seizures solely based on structuring charges, policy changes that were made retroactive to assist those who first brought this issue to light. And ultimately, we have seen the IRS return the vast majority of the seized funds to taxpayers, recommending DoJ do the same, which brings us to why we are here today.

While I was pleased to see the IRS finally do what is right for most of the taxpayers caught up in this issue, I was discouraged to see that the DoJ has not taken the same approach. Although the Department instituted a similar policy change to no longer pursue seizures solely based on structuring charges, it has elected not to make it retroactive. This decision harms the very taxpayers that it was intended to help.

Furthermore, the Department has chosen to deny all but approximately 16 percent of the petitions it received, despite the IRS recommending that 76 percent be granted with the funds returned to their rightful owners.

As a result, I remain deeply concerned that taxpayers whose funds were seized solely based on structuring charges, and whose petitions were referred to DoJ received vastly different outcomes from similarly situated taxpayers whose petitions were reviewed by the IRS.

In closing, I know today we may hear the argument that the law is the law, and that structuring unto itself is a crime. But I would also remind the agencies here before us today that both of you have had documented instances -- and in the case of the IRS, systematic process failures outlined by TIGTA -- that highlight the fact that these seizures were deeply flawed and, at times, unlawful. The rights of the individuals and small business owners at times were subverted, and yet it does not appear DoJ took any of this into account when it overwhelmingly denied most of these petitions.

To that end, I look forward to hearing from our witnesses as we examine why DoJ has chosen to pursue this route, and I want to thank our witnesses for being here today, and I look forward to their testimony.

*Chairman Jenkins. I now yield to the distinguished Member from Washington, Ms. DelBene, for the purpose of an opening statement.

*Ms. DelBene. Thank you, Chairwoman Jenkins, for calling this hearing, and I would like to thank our witnesses for appearing here this morning. You have both served the public with long and distinguished careers, and I want to thank you for what you do.

I find it extremely timely to be participating in this particular hearing during this particular week, because at the most basic level -- today's hearing is a discussion about ensuring that our Nation's laws are enforced reasonably, mercifully, and in a manner that does not offend our sense of justice.

This session today signals at least some common ground between us, that when blind enforcement of the law leads to unjust or immoral outcomes that hurt people who don't deserve it, our Federal Government can change course, even if it has to move mountains to do so.

On this Subcommittee it offended Members' sense of fairness and decency to hear from small business owners who were deprived of their property because of the over-zealous enforcement of the law. For years now, Members have worked in a bipartisan way to push for justice for people who committed technical violations of the law, but who were punished with draconian consequences far in excess of what a reasonable person would consider just.

Members showed empathy and concern to farmers and small business owners whose bank accounts were taken into custody -- some might say caged. And Members demanded answers from officials at the Department of

Justice and the Internal Revenue Service, at times through high levels of tension and confrontation.

And the Committee drafted, marked up, and passed legislation multiple times to address this injustice. And this body has the right to do so, because governments are imperfect, just like the individuals who lead them. And when we are wrong, they need to reverse course. Unjust policies should be challenged, stopped, and remedied.

I look forward to the testimony of our witnesses, and I yield back.

*Chairman Jenkins. Without objection, other Members' opening statements will be made part of the record.

Today's witness panel includes two experts, John P. Cronan, Acting Assistant Attorney General of the Criminal Division of the U.S. Department of Justice; and Don Fort, Chief of Criminal Investigation at the Internal Revenue Service.

The Subcommittee has received your written statements, and they will all be made part of the formal hearing record. You each have five minutes to deliver your oral remarks.

And we will begin with Mr. Cronan.

You may begin when you are ready.

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

*Mr. Cronan. Thank you, Chairman Jenkins, Representative DelBene, and distinguished Members of the Committee. Thank you for this opportunity to address the Department of Justice's review of 256 petitions for the return of judicially forfeited funds in structuring cases investigated by the IRS.

As the acting assistant attorney general of the criminal division and previously a long-time national security and international narcotics prosecutor, I am privileged to represent the Department today and to address our commitment to fighting crime in accordance with our law enforcement priorities and our highest ideals of justice and fairness.

Money laundering poses an acute threat to the U.S. financial systems, where we enjoy the deepest, most liquid, and most stable markets in the world. But those very hallmarks also attract bad actors looking to launder their dirty money. The Department is committed to keeping our financial system safe from money launderers and other criminals.

But at the same time, the Department has heard concerns raised by certain Members of Congress about perceived overreach by law enforcement, and we have ensured that we are focused on the most serious criminal threats, including the most serious structuring offenses.

The Bank Secrecy Act imposes several reporting requirements on financial institutions, including for transactions that exceed $10,000 in currency. Structuring, which occurs when an individual engages in a transaction to evade a reporting requirement, causes the government to lose valuable information about potential unlawful activity, and can often obscure serious criminal activity. For these reasons, Congress made structuring a stand-alone criminal offense.

But let me emphasize 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 a reporting requirement. If the government cannot prove that an individual intended to evade a reporting requirement, then that individual has not committed structuring.

Congress has authorized various sanctions for structuring violations, including imprisonment, fines, and criminal and civil forfeiture of the structured funds. A civil forfeiture frequently is initiated by a judicially authorized seizure warrant that requires probable cause that the structuring occurred, the same probable cause standard required for an arrest warrant.

Moreover, in the civil forfeiture based on a structuring violation, the government must prove by a preponderance of the evidence that the crime occurred, and the property to be forfeited is linked to that crime.

Even after a forfeiture is complete, owners, lien holders, and victims can seek return of property by filing petitions for remission or mitigation, which effectively are pardon requests for the property. Petitioners who themselves structure do not qualify for remission, because they are not innocent owners of the property. Nevertheless, the Department may decide that mitigation is warranted, a discretionary decision that is based on criteria set forth in federal regulations.

Over the past 18 months, the Department has conducted an exhaustive review of 256 petitions for remission or mitigation of judicial forfeitures based on structuring offenses investigated by IRSCI. The Department sought information and recommendations from both the local U.S. Attorney's office and the IRS, and the Department issued guidance to the U.S. Attorney's offices detailing the petition process, regulations, and required documentation.

These procedures ensure that the criminal division's Money Laundering and Asset Recovery Section, or MLARS, was equipped to make consistent, even-handed decisions on all 256 petitions with a full picture of the facts.

The Department notified each petitioner in writing of our decision, including any bases for any denial and the -- as well as the process for seeking reconsideration. Reconsideration requests were then assigned to a different attorney and senior manager at MLARS for yet another layer of review.

Although today I am not able to comment on any particular petition, I can provide a high-level summary of the results of our review. Of the 256 petitions received, the Department granted 41 and denied 215.

As the acting head of the criminal division, I am proud of the close attention and thorough review conducted by experienced and dedicated prosecutors and MLARS. All 256 petitions were reviewed pursuant to consistent standards, federal regulations, and in accordance with due process.

Thank you, and I look forward to the Subcommittee's questions.

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.

*Chairman Jenkins. Thank you.

Mr. Fort, you are recognized.

STATEMENT OF DON FORT, CHIEF, CRIMINAL INVESTIGATION, INTERNAL REVENUE SERVICE

*Mr. Fort. Good morning, and thank you, Chairwoman Jenkins and Members of the Subcommittee. Thank you for the opportunity to appear before you today to discuss the implementation of policy changes concerning seizure and forfeiture activities involving legal source structuring.

The IRS Criminal Investigation Division, CI, changed its policy with regard to legal source structuring cases on October 17, 2014. Under the current policy, CI does not pursue the seizure and forfeiture of funds associated solely with legal source structuring cases unless there are exceptional circumstances justifying the seizure and forfeiture, and the case is approved by the director of field operations.

We have taken a number of steps to implement and enforce the new policy since its release. Our executives have communicated both the letter and spirit of policy -- of the policy to CI field personnel and asset forfeiture personnel through our intranet site, executive-led in-person meetings and conference calls, and a virtual town hall meeting. We have also updated our Internal Revenue Manual to incorporate the new policy, and we believe the IRS's current policy strikes the proper balance between the needs of law enforcement and the rights of property owners.

By concentrating primarily on illegal source structuring

violations, we are able to devote our limited resources to investigating the most egregious federal violations, including those where structuring activity is indicative of other, more serious, crimes.

After the House Ways and Means Oversight Subcommittee hearing in May of 2016, CI proactively sent over 1,800 letters to property owners whose assets were forfeited based on structuring activity five years prior to the date of the

policy change. In these letters we advised property owners of the opportunity to file a petition for return of forfeited funds. We accepted petitions under this program until December 31, 2016.

In reviewing the petitions, CI followed the Internal Revenue Manual regarding remission or mitigation of forfeiture and DoJ regulations governing remission or mitigation of forfeiture. Based on the area special agent in charge's report and criminal tax counsel's recommendation, the CI chief either reviewed and decided on the petition if it involved an administrative forfeiture, or, in the case of a judicial forfeiture, made a recommendation through the respective United States Attorney's offices for consideration of the petition by DOJ.

CI has sole discretion and authority to grant or

deny the petition in an administrative forfeiture case. DOJ is the deciding official for each petition involving a judicial forfeiture. DoJ provided a copy of their final decision letter to CI in each judicial forfeiture case it reviewed.

CI received a total of 464 petitions, of which 208 were determined to be administrative forfeiture cases and 256 were determined to be judicial forfeiture cases. Based on the

DoJ regulations and the IRS guidance set forth in the Internal Revenue Manual, CI granted relief with respect to

174 administrative forfeiture petitions and made a recommendation to DoJ to grant relief with respect to 194 judicial forfeiture petitions.

There were five judicial petitions received after December 31st, 2016. CI referred four of those five ultimately judicial forfeiture petitions directly to DoJ without a recommendation. For the 174 administrative forfeiture petitions granted by CI, all funds, totaling almost $10 million, were returned to petitioners.

Chairwoman Jenkins and Members of the Subcommittee, I

appreciate the opportunity to testify here this morning on this important topic, and would be happy to take your questions.

WRITTEN TESTIMONY OF
JOHN D. FORT
CHIEF, CRIMINAL INVESTIGATION
INTERNAL REVENUE SERVICE
BEFORE THE
HOUSE COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON OVERSIGHT
ON FINANCIAL TRANSACTION STRUCTURING
June 20, 2018

I. Introduction

Chairwoman Jenkins, Ranking Member Lewis, and Members of the Subcommittee, thank you for the opportunity to appear before you today to discuss the implementation of policy changes concerning seizure and forfeiture activities involving legal source structuring. Structuring as defined in 31 U.S.C. § 5324 criminalizes the practice of conducting financial transactions in a specific pattern calculated to avoid the creation of records and reports required by the Bank Secrecy Act. Structuring can involve "illegal" source funds associated with an illegal cash-generating activity, such as drug dealing, or the concealment of income "legally" earned in order to evade the payment of income taxes. In substance, however, Title 31 authorizes the government to seize and forfeit property involved in or traceable to structuring, irrespective of whether the property was derived from an illegal source.

II. The October 2014 Policy Change

Criminal Investigation ("CI") changed its policy with regard to "legal source" structuring cases on October 17, 2014. Under the current policy, the IRS does not pursue the seizure and forfeiture of funds associated solely with "legal source" structuring cases unless: (1) there are exceptional circumstances justifying the seizure and forfeiture; and (2) the case has been approved at the Director of Field Operations ("DFO") level.

We have taken a number of steps to implement and enforce the new policy since its release on October 17, 2014. Our executives have communicated both the letter and spirit of the policy to CI field personnel and asset forfeiture personnel through our intranet site, executive-led in-person meetings and conference calls, and a virtual town hall meeting. We also updated the Internal Revenue Manual ("IRM") on March 3, 2015, to incorporate the new policy. We believe the IRS's current policy strikes the proper balance between the needs of law enforcement and the rights of property owners. By concentrating primarily on illegal source structuring violations, we are able to devote our limited resources to investigating the most egregious federal violations, including those cases where structuring activity is indicative of other, more serious crimes.

After the House Ways and Means Oversight Subcommittee hearing about this topic on May 25, 2016, CI proactively sent letters to property owners whose assets were forfeited based on

structuring activity going back five years prior to the date of the policy change. In these letters, we advised property owners of the opportunity to file a petition for return of the forfeited funds. We identified a total of 691 cases that fell within this time period. We sent more than 1,800 letters to people with a potential interest in forfeited property. We accepted petitions under this program until December 31, 2016.

In reviewing the petitions, CI followed section 9.7.7.4 of the IRM regarding remission or mitigation of forfeiture and the Department of Justice ("DOJ") regulations governing remission or mitigation of forfeiture under 28 C.F.R. § 9.1 et seq. Under those provisions, CI assigned the petitions filed during the program to the CI Special Agent in Charge ("SAC") office in the location where the property was forfeited. The area SAC evaluated the merits of the petition and prepared a report of their findings. Criminal Tax (CT) Counsel also reviewed the petition and rendered an opinion of the merits based on the DOJ regulations and the IRM. Based on the SAC's report and CT Counsel's recommendation, the CI Chief either reviewed the petition if it involved an administrative forfeiture or made a recommendation through the respective United States Attorney's Offices for consideration of the petition by the Money Laundering Asset Recovery Section, DOJ, Criminal Division ("MLARS"), if it involved judicial forfeiture.

CI has sole discretion and authority under 19 U.S.C. § 1618 and 28 C.F.R. § 9.3(g) to grant or deny the petition in an administrative forfeiture case. DOJ is the deciding official for each petition involving a judicial forfeiture pursuant to 28 C.F.R. § 9.4(g). DOJ provided a copy of their final decision letter (the same letter provided to the petitioner) to CI in each judicial forfeiture case it reviewed.

III. Results

CI received a total of 464 petitions, of which 208 were determined to be administrative forfeiture cases and 256 were determined to be civil judicial forfeiture cases. Based on the DOJ regulations and the IRS guidance set forth in the IRM, CI granted relief with respect to 174 administrative forfeiture petitions (representing over 80%) and made a recommendation to DOJ to grant relief with respect to 194 judicial forfeiture petitions (representing over 75%). For the 174 administrative forfeiture petitions granted by CI, all funds (totaling $9,916.800.12) were returned to petitioners.

Chairwoman Jenkins, Ranking Member Lewis, and Members of the Subcommittee, I appreciate the opportunity to testify on this important topic and would be happy to take your questions.

*Chairman Jenkins. Thank you. We will now proceed to the question-and-answer session, and I would like to direct my first question to Mr. Fort.

Each of your agencies was responsible for reviewing a portion of these petitions. Can you provide us with a brief overview of how many petitions were referred to DoJ and how many IRS recommended DoJ grant or deny? My rough math tells me IRS recommended that DoJ grant about 76 percent of the petitions. Is that correct?

*Mr. Fort. So on the judicial petitions, there were 246 that we received. We recommended to the Department of Justice granting 194 of those petitions.

*Chairman Jenkins. Okay. Mr. Cronan, of the petitions DoJ received from IRS, how many of these were granted and how many were denied? Because, again, my rough math tells me about 16 percent were granted. Is that correct?

*Mr. Cronan. I -- the -- 41 were granted and 215 were denied. I couldn't tell you the percentage off the top of my head right now, but I believe 16 percent seems about right.

*Chairman Jenkins. And you each have completed your petition reviews, is that correct?

*Mr. Fort. That is correct.

*Mr. Cronan. That is correct.

*Chairman Jenkins. Okay. Mr. Cronan, what is the status of the cases underlying these petitions? Are they closed? Are they open to additional criminal charges?

*Mr. Cronan. My understanding is that they would all be closed by this point.

*Chairman Jenkins. Those who were not satisfied with the outcomes of this petition process, what additional actions are available to them? For example, can they still repetition DoJ?

*Mr. Cronan. At this point, those individuals would have received a letter from DoJ -- I should say have received letters from DoJ explaining the bases for denial of their petition. Those letters provide specific information as to why

the petitions were denied, and those letters also provided the petitioners with an opportunity to submit additional information and seek reconsideration.

Thirty-six individuals sought reconsideration. Of those 36, less than 5 of them provided any new information. And as of earlier this year -- April, as of April, all those reconsiderations were denied. So we are complete with the process.

*Chairman Jenkins. Okay. Mr. Cronan, what would a petitioner need to provide DoJ for it to reverse a denial of a petition for remission or mitigation?

*Mr. Cronan. It would depend on the specific reason for denial. And it is kind of tough to speak generally. But if they would have a basis for contradicting a reason for the Department's denial of their petition, that information would be relevant.

Under the federal regulations, the burden is on the petitioner to establish a basis for mitigation. That was -- that is pretty clear on -- that is clear under the regulations. And in the initial petition, that is when they have the opportunity to present the reason for mitigation. We then give them a second shot at a reconsideration to provide additional information for us to consider under the applicable regulations.

*Chairman Jenkins. Okay, thank you. I now recognize Ms. DelBene.

*Ms. DelBene. Thank you. I have a question for both of you. I would like to know what -- what are your views on the responsibility of the Federal Government to balance enforcement of the letter of the law with the pursuit of justice?

And based on your experiences with this program, have you observed that the Federal Government is capable of reversing a mistaken policy that imposes Draconian punishments on people who don't deserve them? And if so, how does that happen?

*Mr. Cronan. Well, Representative DelBene, as a long-time federal prosecutor, I fully appreciate the importance of prosecutorial discretion. I have -- very much understand that just because a law is on the books -- you have to look at the specific facts of an individual case to determine what route to take, whether to pursue an investigation or prosecution. The decision to commence an investigation and prosecution is one of the most important decisions any prosecutor makes.

I think, when you look at these cases -- and again, I can't speak about individual cases -- you repeatedly do see elements of prosecutorial discretion here. There are situations where criminal charges could have been pursued, where there was evidence of a violation of a criminal statute, but criminal charges were not pursued. There were civil settlements that were entered into that were a tiny fraction of the total amount that could have been forfeited. At that settlement point, mitigation considerations were taken into account.

And also, I -- you see in the March 2015 policy the Department of Justice took a perspective look, going forward, how to best allocate its limited resources to ensure that those resources are being best focused on the most serious structuring offenses.

So, to answer your question, prosecutorial discretion is extremely important, and I do think we have exercised that here.

*Ms. DelBene. Mr. Fort?

*Mr. Fort. So I would agree, and I would say we are certainly capable and did demonstrate in this case that we were able to reverse course. And I heard the Committee -- the testimony before this Subcommittee, and the witnesses that testified before this Subcommittee. We changed our policy in October of 2014. I believe we were the first law enforcement agency to do that.

And taking it a step further, after the testimony before the Subcommittee in May of 2016, we made the decision to go back 5 years from the date of policy to provide redress for those property owners whose funds would not have been seized under the new -- the current policy that was set forth in 2014.

And since the date of the policy going back almost three-and-a-half years, we have had a total of 32 structuring seizures -- illegal structuring seizures -- approved in that three-and-a-half-year period of time. I am very proud of the work that we have done in timely and expeditiously addressing all of the petitions that were sent in -- as I mentioned, well over 400 petitions that were sent into the IRS, and deciding expeditiously on those, or sending our decisions to the Department of Justice.

*Ms. DelBene. Thank you. So it seems that it is both of your conclusions at the end of this process that the Federal Government can successfully reverse a flawed policy when it imposes a devastating hardship on people who have only committed a minor infraction. Is that a fair summary?

*Mr. Cronan. Representative, I will say that the Department of Justice regularly does evaluate its prosecutorial law enforcement priorities, and can adjust its policies in accordance with that. That is not necessarily a reflection that the prior policy was wrong or improper, but a perspective look going forward as how the Department should allocate its resources.

*Mr. Fort. And again, we, changing our policy in 2014, recognized that we needed to focus our limited investigative resources on the most egregious violations. And again, by going back and applying our policy retroactively for five years, we demonstrated that fact, I believe.

*Ms. DelBene. Thank you. I yield back.

*Chairman Jenkins. Mrs. Walorski, you are now recognized.

*Mrs. Walorski. Thank you, Chairman Jenkins, for holding this important hearing.

Mr. Cronan, can you discuss the standards that the DoJ used when reviewing the petitions for remission and mitigation?

*Mr. Cronan. I certainly can. The standards are reflected in the federal regulations 9.31CFR9.5 --

*Mrs. Walorski. Can you just summarize those?

*Mr. Cronan. Absolutely.

*Mrs. Walorski. Quickly.

*Mr. Cronan. They provide a few things. First, they provide for both remission and mitigation. Remission, in most cases, was not an option, because in most circumstances the person was not -- the petitioner was not an innocent owner. So we were looking at mitigation. The regulations provide that it is the burden on the petitioner to establish a basis for mitigation.

And then the regulations provide a list of five non-exclusive factors to take into consideration. Those included -- those are lack of a prior record or similar conduct; whether the person has taken steps to prevent future criminal conduct; whether the violation was minimal, and not part of a larger criminal scheme; whether the person, the violator, cooperated regarding the conduct that was underlying the forfeiture, and here the structuring offense; and a general

consideration of whether complete forfeiture is necessary to achieve the legitimate purposes of forfeiture.

So those are the general considerations we took into account, and then we applied a holistic totality of circumstances evaluation looking at that case, and more broadly, other similar cases we were able to adopt -- reach consistent inappropriate results.

*Mrs. Walorski. I appreciate it.

And Mr. Fort, can you discuss the standards the IRS used when reviewing those petitions?

*Mr. Fort. Sure. So we used the same standards as Mr. Cronan just laid out, and I won't restate those for the --

*Mrs. Walorski. Yes. That is fine.

*Mr. Fort. -- the Subcommittee. I will say the process, to go into a little bit more detail, the -- any petition that was sent in was sent to an IRS field office, to a special agent in charge, who took certain steps before a package was sent up to the chief of CI to render a decision.

So they looked at the petition, they had access to the petition, looked at the petition, they looked at whatever was in the investigative file, and did minimal, non-intrusive investigative steps, such as running a current criminal history check, and any available public record information. Then they package that information with a recommendation of our criminal tax counsel, sent that up through our headquarters, and the chief of CI was the one that actually looked at those factors -- again, that Mr. Cronan laid out -- and rendered a decision in the administrative cases, or made a recommendation to the Department of Justice in the judicial cases.

I appreciate it. You are both listing the same criteria, more or less. There is a wide -- but there is a wide discrepancy in the percentage of petitions granted. IRS recommended that DoJ grant 76 percent of the petitions, but DoJ only granted 16 percent of the petitions. How can we say that we are all -- that you are all looking at the same evidence, using the same standards, but reaching the opposite conclusion so often?

*Mr. Fort. So I can say, with respect to the decisions that we made and the recommendations that we made, because I personally reviewed many of these

and signed them myself. We decided to give more weight to one particular factor, and that was whether it was a minimal violation or part of a larger criminal scheme. And we did that because that most closely aligned with our October 2014 policy to only pursue seizures of illegal source funds.

And I will also stress that -- going back to what I testified to a minute ago, the agents and the special agents in charge in the field offices were going on only the investigative information that was in the file. We did not open and conduct additional investigations.

*Mrs. Walorski. And Mr. Cronan?

*Mr. Cronan. I am not in a position to speak about the review process at the IRS, but I can speak about the review process --

*Mrs. Walorski. Yes, how can the results be so vastly different --

*Mr. Cronan. Yes.

*Mrs. Walorski. -- when you are looking into -- what is DoJ doing that IRS isn't doing?

*Mr. Cronan. What we were doing is taking a close look at all the relevant facts in the case, a comprehensive, thorough review. By the time the petitions would get to the Department of Justice's Money Laundering Asset Recovery Section, we had the benefit of the -- of all documentation that would be relevant, the benefit of recommendation from the U.S. Attorney's Office and the IRS.

And also, there were circumstances where our review would have likely looked at stuff that might not have been part of the IRS's review, such as whether or not there was ongoing structuring conduct by the petitioner, such as whether or not --

*Mrs. Walorski. Let me interrupt for one second. That is where I see the -- I think this gap is unbelievable. Because what you are saying is what the IRS gave you, 60 percent -- that 60 percent gap -- are basically because people had criminal records.

*Mr. Cronan. Well, I think it is hard to say the basis for the 60 percent gap without going into individual details on each case. But I could say globally there were numerous different broad categories that the petitions fell into,

whether it be evidence of other criminal activity, evidence of ongoing structuring and failure to file required forms under the Bank Secrecy Act --

*Mrs. Walorski. I have got to stop you right there, I apologize.

*Mr. Cronan. Yes.

*Mrs. Walorski. Thank you and, Madam Chair, I yield back.

*Chairman Jenkins. Thank you.

Mr. Bishop, you are recognized.

*Mr. Bishop. Thank you, Madam Chairwoman, and thank you, gentlemen, for being here today and sharing your testimony.

Mr. Cronan, you used words like "deliberately" and "intended" regarding the criminal investigation process. Those are words of art in the law. They suggest a specific-intent crime. And I want to -- I would like to just ask you. Your -- the -- your process in investigating, and the evidence, the threshold necessary -- I am reading that probable cause -- that the structured funds were generated by unlawful activity, that the structured funds were intended for use in or to conceal or promote ongoing or anticipated unlawful activity.

What evidence are you looking at? What typically do you look at, behavior -- what kind of evidence?

*Mr. Cronan. Thank you, Congressman. I assume you are talking about at the time of the original --

*Mr. Bishop. Yes.

*Mr. Cronan. What the -- the prosecutors and the agents would be looking at at that time is evidence that there were transactions conducted with the intention of evading the filing -- the reporting requirements under the Bank Secrecy Act. And here in particular we are dealing with currency transaction reports, CTRs.

And the way that that is proven in case varies. But often it is by looking at a series of bank activities. You may see, for example, multiple cash deposits on the same day, between 9,000 and $10,000. That is a pretty clear indication that structuring is going on. Doing that just one time, just one deposit of $9,000, is

not structuring. We look at a pattern of activity, and that is what we had in these cases, sometimes a very long pattern. Many of these cases involved over $100,000 in structured funds over a 12-month period.

And the other thing is based on statements made by the individuals who were suspected of engaging in the structuring activity. Repeatedly there were statements made that -- that were made along the lines of, yes, I knew I had to avoid making a deposit above $10,000, because that would require a report to be filed. Those were the types of things that a prosecutor would be looking at.

*Mr. Bishop. Okay, thank you.

Mr. Fort, I am also looking at your 2014 IRS criminal investigation changes that you made. And in this case it appears as though you use the standard of exceptional circumstances, which I have not heard of before. And I would be interested to hear what that means, exceptional circumstances justifying the seizure and forfeiture, and the case has been approved at the -- by the director of field operations.

*Mr. Fort. Yes. Thank you, Congressman. As I mentioned a few minutes ago, we have not had any exceptional circumstance memos approved at the chief's level. It is not defined, but typically it would be extremely rare, in the interest of national security, something of that nature. But we have not had any, we have not approved any.

The director of field operations level, the reason that was done was to elevate the approval level of those particular cases, and the director of field operations level is the front-line executive that oversees all field operations in the field.

*Mr. Bishop. In your mind, is exceptional circumstances higher than probable cause, in terms of a standard?

*Mr. Fort. Yes.

*Mr. Bishop. Evidentiary standard?

*Mr. Fort. Yes. And, you know, as I mentioned, we have only done -- we have only approved 32 illegal structuring seizures since the date of the policy, and have not had any exceptional circumstances. But it would, again, deem to me to be in the interest of national security, or funds were going to be dissipated overseas, in international -- something of that capacity.

*Mr. Bishop. Okay, thank you. I have a quick question, Mr. Fort, on the subject of review process of petitions for remissions and mitigation.

There is a process by which owners, lien holders, victims can seek this process, forfeited property. Can you just tell us quickly how that works?

*Mr. Fort. Are you talking about the process by which we went back --

*Mr. Bishop. Yes.

*Mr. Fort. -- five years?

*Mr. Bishop. How do you notify these folks?

*Mr. Fort. So we went back in this process, we went back through our databases of all cases in which we had seized funds under a structuring violation. And we -- the only category of individuals we excluded were those that were criminally convicted of a structuring charge. We identified well over 600 individuals, and we sent out 1,800 notices to anybody who may have an interest in that property.

*Mr. Bishop. Of that group, how many actually responded? How do you know you actually --

*Mr. Fort. We had -- so we had -- and I think I misspoke at the beginning, and we had a total of 464 total petitions that we received from the notices that we sent out.

*Mr. Bishop. Of how many? Of how many, all together, was it --

*Mr. Fort. We sent out 1,800 notices.

*Mr. Bishop. And then 400 --

*Mr. Fort. On close -- actually, close to 700 cases. So in one particular case you could have notice to two or three potential individuals that may have a property -- that may have a right to that particular property.

*Mr. Bishop. Thank you, sir. I yield back.

*Chairman Jenkins. I now recognize Mr. Wenstrup.

*Mr. Wenstrup. Thank you, Madam Chairman.

And thank you for being here. My first question is until you have gone back and done some of this retroactively to seemingly right some wrongs, do you ever feel the agency ever acts parentally? Or is it always just punitive?

In other words, do you ever go advise someone, or do you just come in and seize their property? Do they ever get a warning? Do you ever say, "Hey, this doesn't look right," or is it just immediately show up to your door and say, "We are going to take away your assets"?

*Mr. Fort. Thank you for the question, Congressman. We do have a process where we advise individuals of potential criminal wrongdoing, and you know, I think in this case, where we have corrected and fixed our procedure, we don't just go out and seize individuals' funds, particularly as it relates to legally -- what we believe to be legally-derived funds.

And, you know, one of the reasons that we changed this policy was to really allocate our limited resources to the most egregious criminal violations. So we still look carefully at all structuring and Bank Secrecy Act violations, but more as a potential indicator of a violation of another larger criminal scheme.

*Mr. Wenstrup. Yes, because it seems like a lot of the cases that we read about previously -- and hopefully this has improved -- you know, people were guilty until proven innocent. I mean it was on them to prove their innocence. And in the meantime, their businesses are closing down, et cetera.

Let me ask you. Do you think it is good business policy to have more paperwork based on amounts of deposit, and a crime if you don't? I mean that doesn't -- it is perverse incentives here for people.

*Mr. Fort. I am sorry, Congressman, I don't understand the question.

*Mr. Wenstrup. Well, you have -- there is going to be more requirements if you deposit over $10,000. And yet you are punished if you are under $10,000. You know, I am a doctor. I started with my own practice. You know, some days you didn't have much to deposit. But you don't want to hide it under your bed. And so how many deposits are you going to have under $10,000 in a small business? And that is a crime? I don't understand that.

I mean it seems to me that is a pretty perverse policy there.

*Mr. Fort. So, again, having, you know, changed our policy, we, you know, carefully review, you know, the Bank Secrecy Act information and agents, you

know, make those determinations as to whether or not it may be an indicator of another criminal violation or in and of itself the activity is, we believe -- and we have documented that it is -- connected to an illegal source.

*Mr. Wenstrup. And that I understand. So one other question. Have any of the seizures where the person ended up being innocent of a crime resulted in any punitive damages against the agency that accused them and maybe took away their business, and took away their income? Did they ever get their income back and punitive damages, or just --

*Mr. Fort. I am --

*Mr. Wenstrup. -- the income that was removed?

*Mr. Fort. Sorry. I am not aware of any punitive damages.

*Mr. Wenstrup. So there isn't much liability on the agency when it comes to these decision-making processes. So you can be wrong and it doesn't harm you at all.

*Mr. Fort. Not being an attorney, I can't answer that question. But I am not aware of any punitive damages against the agency.

*Mr. Wenstrup. Okay, thank you. I yield back.

*Mr. Cronan. Congressman, being an attorney, I think I might be able to answer part of that question.

With respect to the judicial forfeitures at issue, I would just clarify that none of them were unlawful. They were all lawful forfeitures. But the Congress has passed a statute, the Civil Assets Forfeiture Reform Act, that does allow for attorneys fees and litigation costs against the government where a claim is -- substantially prevails in a civil forfeiture action.

So if there -- if a claim had prevailed during the judicial civil forfeiture proceeding, there is an opportunity to recover it. But that is not the situation we are in here.

*Mr. Wenstrup. So it recovers the expenses, but not necessarily any additional damages?

*Mr. Cronan. I believe it is attorneys fees and litigation costs. I don't know if that statute allows for more than that.

*Mr. Wenstrup. Thank you.

*Mr. Cronan. Thank you.

*Mr. Wenstrup. I yield back.

*Chairman Jenkins. Mr. LaHood, you are recognized.

[No response.]

*Chairman Jenkins. Mr. Roskam, you will be recognized.

Oh, Mr. LaHood?

*Mr. LaHood. You want me to --

*Chairman Jenkins. Yes.

*Mr. LaHood. You want me to go?

*Chairman Jenkins. Mr. LaHood is recognized.

*Mr. LaHood. And thank you for your testimony here today. I want to focus initially on the Treasury Inspector General for Tax Administration, or TIGTA, report from March of 2017.

And in that report it was found -- there were many concerns with the IRS's enforcement of structuring laws that had -- and it recommended in that report "In light of the fact that some property owners may be reluctant to again engage the government and may not file petitions, or that the Criminal Investigation Division may again treat property owners who do file petitions inconsistently, that the Criminal Investigation should simply return the forfeited funds and recommend to DoJ to do so in judicial cases."

Additionally, in that report TIGTA had findings such as, number one, most seizures for structuring violations involved legal source funds, even though the Criminal Investigation Division civil forfeiture program exists to interdict criminal enterprises. Number two, interviews with property owners did not meet all IRS requirements, and most individuals weren't advised of their

rights. Number three in the report, when property owners provided realistic defenses or explanations, the IRS did not consider them. And fourthly, the outcomes for legal source cases lacked consistency.

Now, that was four of many things that were in that report. And I could talk about a number of those other ones, Mr. Cronan. I guess my question is was DoJ aware of the TIGTA audit findings when it reviewed the petitions in question?

*Mr. Cronan. Congressman, I joined the Department of Justice in this past August. Previously I was at the U.S. Attorney's Office in New York. So I hesitate to answer that question, because I do not know for certain. But I would be happy to look into that and follow up.

*Mr. LaHood. Well, I mean, maybe you can comment on those concerns raised by the IG. Tell me how they have been taken into account by the Department of Justice.

*Mr. Cronan. Well, in looking at the mitigation or remission petitions, we looked at a variety of factors, like I mentioned. And one of the factors we would consider would be conduct by the AUSA and/or of the agents. So that would be a factor that we would look into.

*Mr. LaHood. And before I get to my next question here, can you comment, Mr. Cronan, on whether, at the -- I guess the federal circuit level or in any other OIG report, has there been scrutiny or criticism at the appellate level for AUSAs or the federal government going over the line or being inappropriate related to prosecutorial misconduct?

*Mr. Cronan. I am -- Congressman, I am not aware of any criticism, but I do not know for certain. And again, that -- I would be happy to look into that and follow up. But I am not aware of any decision, as I am sitting here today.

*Mr. LaHood. Generally speaking, when DoJ knows that a seizing agency did not conform to the laws, regulations, or policies governing civil asset forfeitures, does DoJ consider this information when deciding whether to grant or deny a petition?

*Mr. Cronan. It is hard to speak generally. But it would be a relevant consideration if there was inappropriate action by AUSA or an agent in reviewing the mitigation process.

*Mr. LaHood. Well, I think you referenced earlier that it may not be, and that was part of the issue why we are here.

But it appears that we have, you know, a little bit of an interesting situation here. On one hand, the IRS, you know, made significant mistakes in the seizure process. However, it was limited in the types of petitions it could grant, and had to refer some to DoJ. But DoJ is prohibited from taking the IG's findings into account.

So, I guess, looking at -- what is the solution here, moving forward?

*Mr. Cronan. What I think, Congressman, is twofold. One, as a solution moving forward, is the policy changed by the Department in March 2015 going forward, and that change makes clear that if criminal charges are not filed in a case, then prosecutors may not seize structured funds unless there is probable cause that the funds originated from criminal activity, and that must be approved at a supervisory level. Or there is some compelling law enforcement interest. That must be approved at the U.S. Attorney or the chief of the Money Laundering and Asset Recovery Section. So going forward we have that protection.

Looking back, we had the process of reviewing the 256 petitions for mitigation and remission, and that was a thorough, comprehensive review that looked at a variety of facts and criteria. And in looking at many of those petitions, we found a number of circumstances that made further mitigation not warranted.

*Mr. LaHood. And just one last follow-up on -- that new policy is proactive, it is not retroactive, correct?

*Mr. Cronan. That is correct.

*Mr. LaHood. Thank you.

*Chairman Jenkins. Mr. Roskam, you are recognized.

*Mr. Roskam. Thank you, Madam Chairman, and thank you for allowing me to sit in today.

Mr. Fort, my compliments to the IRS. I think you have acted forthrightly when this has come to the agency's attention. The Commissioner apologized,

changed policies, and was incredibly proactive. And I want to acknowledge that, publicly.

Mr. Cronan, you said something interesting in your written statement. It was in the third paragraph. It was a phrase that caught my attention. And it is important to you because you emphasized it again in your oral statement. And that was, "These are the most serious criminal threats," that the Department has evaluated this in light of the most serious criminal threats.

Now, based on your background -- and just looking at your bio -- your bio is involved in 9/11. Your bio is involved in international narcotics rings. You are not making the representation to this Committee today that this rises to that level, are you? Surely, these types of cases, that are de minimi at best, are not the most serious criminal threats. Do you want to revisit that phrase?

*Mr. Cronan. Congressman, I apologize if I wasn't clear. But when I referred to the most serious criminal threats, I am talking about the Department's focusing its efforts post the March 2015 policy and ensuring that we are focused on the most serious structuring offenses.

Now, I do think structuring is a -- is something that is --

*Mr. Roskam. We agree, and we will stipulate that. But now why not -- if you are focusing in on the most serious threats, why not follow the Department's own standards? That is in mitigation.

So you take cases that allow mitigation in certain petitions, and yet -- and these criterion that are your criterion in mitigation: lack of a prior record or evidence of similar conduct; violation does not involve drug distribution manufacturing; to prevent further criminal conduct; the fact that the violation was minimal and not part of a larger scheme; the fact that the violator has cooperated with state, federal, et cetera; and the fact that complete forfeiture is not necessary to achieve a legitimate purpose of forfeiture.

Surely, these cases that the IRS reviewed, that the IRS was closest to, that the IRS recommended to the Department of Justice that they release those funds, why is it that the Department of Justice didn't follow its own regulations?

And just for the record, you didn't do these cases, did you? You are just being provided talking points today. Is that right?

*Mr. Cronan. Congressman, I -- when I joined the Department in August, I was brought up to speed as to this issue. And ever since then, I have been closely monitoring this issue and meeting with our Money Laundering and Asset Recovery Section --

*Mr. Roskam. Okay.

*Mr. Cronan. -- on a very regular basis.

*Mr. Roskam. If that is true, then why not follow the Department's own regulation?

*Mr. Cronan. Well --

*Mr. Roskam. In mitigation.

*Mr. Cronan. Congressman, we have been following our own regulations. And when applying those regulations we found time and time again reasons to deny the petitions. We found --

*Mr. Roskam. Look, let me draw your attention to a case I will comment on, you won't. But this is the case of Mr. Kwon, who, in the admonition, in the denial letter from DoJ, they said he pleaded guilty to criminal structuring, which -- that is the underlying case find. But there is no other mention of anything, in terms of why he shouldn't get his money back. And yet the representation you made moments ago was that this was all explained to these clients, or these people that have been caught up in this mess. And yet there is no description that is consistent with your own standard in mitigation. Why is that?

*Mr. Cronan. Well, I think a criminal conviction would be consistent with that standard. There were cases where someone has been convicted and -- in a companion criminal case, or --

*Mr. Roskam. No, it is not a conviction, it is a guilty plea. And you know how this guilty plea went down. If you evaluated the files, if you got up to speed in terms of the briefing, you are familiar with this case.

So this is a case where the DoJ comes, Mr. Cronan, to somebody and they put big muscle on him. And they say, "You have got two choices, immigrant businessman. We are either going to bring a file against you, or we are going to take your business away." And you know what? In this case, the DoJ did

both. And now this guy is broken. And you are making a representation to this Committee that this is part of the most serious criminal threats? This businessman in Northern Virginia is somehow involved in the most serious criminal threat? That is obtuse.

And how is it possible that the agency that is closest to these cases -- that is, the Internal Revenue Service -- that initiated the cases, that brought the cases, that pursued the cases, and then refers them, knows less about these cases than the Department of Justice? How is that possible?

*Mr. Cronan. First of all, the regulations put in the responsibility of the Department of Justice to make the decision on judicial forfeitures --

*Mr. Roskam. Yes, but you just --

*Mr. Cronan. -- and then maybe --

*Mr. Roskam. -- represented that you were taking into consideration what the Internal Revenue Service has brought to your attention. Why the denial, to Mrs. Walorski's point, in terms of the number of these cases that are denied? What is it about the Department of Justice on these cases that is so obtuse?

*Mr. Cronan. Well, there were cases where we found evidence of tax evasion, a nexus to black market peso exchange, to trade-based money laundering, evidence of fraud, a drug nexus to property, continued structuring, continued violations of reporting requirements --

*Mr. Roskam. I challenge you --

*Mr. Cronan. -- hiding assets --

*Mr. Roskam. I challenge the Department to make the representation about these, in some of these specific cases.

When I had a briefing a couple of weeks ago there were two factors that were brought to my attention. And I agreed. I said, "Listen, if that is the fact, then fine. There is nobody that is quarreling about that." But the notion that Mr. Kwon or Clyde -- Mr. Andrews, these other cases, where there is an innocence -- I will tell you what has happened. And in some of these cases an AUSA crossed the line.

And there has been not a level of discipline [sic] that has come to this Committee's attention when the AUSA says, in writing, "The reason that we have brought this case is because your client talked to the press." Your client asserted a First Amendment right -- this is my paraphrase. Has there been any level of disposition on that, in terms of AUSA abuse, Mr. Cronan?

*Mr. Cronan. Congressman, I am, of course aware from the prior hearings of the allegations that have been made with respect to certain AUSAs. I am also aware that you have been in communication with the Department regarding those matters.

As I am sure you know, that falls within the office --

*Mr. Roskam. No, communication presumes two-way, Mr. Cronan. Us making inquiries and being stiff-armed by the Department of Justice is not communication.

*Mr. Cronan. Well, I believe the office of professional responsibility provided a briefing to your staff regarding the matter. But I can report --

*Mr. Roskam. What is the disposition? What is the disposition of those cases?

*Mr. Cronan. I cannot speak to the disposition of the case. I can tell you, Congressman --

*Mr. Roskam. Has anybody been disciplined?

*Mr. Cronan. I can tell you that the cases were reviewed by OPR, and those OPRs have been completed and disposed of. For privacy reasons, obviously, I am sure you understand I cannot talk about the dispositions of individual matters.

*Mr. Roskam. I see. So it has been reviewed by top people.

Mr. Cronan, my time has expired. I think that the way the Department of Justice has approached this is not admirable. I think that the way the Internal Revenue Service has approached this is admirable. You are not in the muscle end of the family. You are a guy who is brought in here, you read a file, you get some briefs, and they sent you out here.

You are defending something today that is indefensible. And the notion that people at DoJ have this kind of power and this kind of discretion and can run roughshod over innocent people and basically get stiff-armed and say, "Well, you pled guilty and now we are going to use your guilty plea against you, even though we manipulated a guilty plea," that is shameful.

I yield back.

*Chairman Jenkins. Mr. Lewis, you are recognized.

*Mr. Lewis. Thank you, Madam Chair. Madam Chair, I had to be delayed because I felt very, very strongly with my soul that we had to do something about the children. There are hundreds and thousands of children, little babies that have been taken from their mothers, from their fathers. They are being held in cages. It is not right. It is not fair. And it is not just.

My position is very simple. History will not be kind to us as a nation and as a people if we continue to go down this road. In the final analysis, we are one people, we are one family. We all live in the same house. Not just an American house, but the world house. And it doesn't matter if we are black or white, Latino, Asian-American or Native American. Maybe our foremothers and our forefathers came to this great land in different ships, but we are all in the same boat now.

What is happening in our country today will set us back for many, many years to come. We must end it and end it now. Free and liberate these children. That is the right thing to do.

And I yield back.

*Chairman Jenkins. I want to thank our witnesses for appearing before us today.

Please be advised that Members have two weeks to submit written questions to be answered later in writing. Those questions and your answers will be made part of the formal hearing record.

And with that, the Subcommittee stands adjourned.

[Whereupon, at 10:55 a.m., the Subcommittee was adjourned.]

MEMBER QUESTIONS FOR THE RECORD

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

DEC 0 3 2018

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

Dear Madam Chairman:

Please find enclosed responses to questions arising from the appearance of then-Acting Assistant Attorney General John P. Cronan before the Subcommittee on June 20, 2018, at a hearing entitled "Internal Revenue Service and U.S. Department of Justice Efforts to Return Taxpayers' Seized Funds."

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 from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Stephen E. Boyd
Assistant Attorney General

Enclosure

cc: The Honorable John Lewis
Ranking Member

Questions for the Record
U.S. House of Representatives
Committee on Ways and Means
Oversight Subcommittee
Update on IRS and DOJ Efforts to Return Seized Funds to Taxpayers
June 20, 2018

Questions Posed by Subcommittee

1. **What, if any, additional standards does DOJ use when reviewing petitions for remission or mitigation in question that the IRS does not?**

Response:

While the Department cannot speak to the specifics of the review conducted by the Internal Revenue Service Criminal Investigation (IRS-CI), the legal standards set out in the applicable regulations are the same for the Department of Justice (the Department) and IRS-CI. Specifically, the remission and mitigation criteria used by both the Department and IRS-CI are set forth in 28 C.F.R. § 9.5(a) (remission) and § 9.5(b) (mitigation). To qualify for remission, an owner or lienholder must establish that he or she has a valid, good faith, and legally cognizable interest in the seized property as an owner or lienholder and is an innocent owner within the meaning of the statute. 28 C.F.R. § 9.5(a).

In these cases, the Department's review pursuant to the criteria outlined in 28 C.F.R. § 9.5 revealed that certain individuals who knowingly evaded currency reporting requirements by structuring did not qualify for remission because they did not qualify as innocent owners under the statute. These petitioners, however, were considered for mitigation under the factors set forth in 28 C.F.R. § 9.5(b)(2). 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; and
- the fact that complete forfeiture of an asset is not necessary to achieve the legitimate purposes of forfeiture.

2. **To the best of your knowledge, please explain whether DOJ weights criteria outlined in the mitigation regulations differently than the IRS.**

Response:

The Department and IRS-CI both apply the standards outlined in the regulations at 28 C.F.R. § 9.5. However, as was discussed at the hearing held before this Subcommittee on

June 20, 2018, the agencies engage in separate review processes, and the scope of those reviews may differ.

For example, IRS-CI explained at the hearing that it "decided to give more weight to one particular factor, and that was whether it was a minimal violation or part of a larger criminal scheme." Tr. at 26. Additionally, IRS-CI testified that a special agent reviewed the petitions and information contained in the investigative file, but did not open and conduct additional investigations; any further review of the petitions involved "minimal, non-intrusive investigative steps, such as running a current criminal history check and any available public-record information." Tr. at 18.

In contrast, as the Department explained at the hearing and in prior briefings, the Department conducted a systematic review of the remission and mitigation petitions pursuant to the criteria set forth in 28 C.F.R. § 9.5(a)(1) and (b)(2) and taking into consideration the totality of all relevant factors identified in the regulations. Moreover, the Department's process included obtaining information and recommendations from both IRS-CI and the U.S. Attorneys' Offices (USAOs) that handled the original cases. To ensure that the petitions were handled fairly and consistently nationwide, the Department issued guidance to the USAOs for their review of the petitions received by those offices. This guidance encouraged each USAO to engage with the local IRS-CI office in the review process and to gather all relevant information related to the case to which the USAO had access. This process further required the USAOs to review relevant documents from the case file–including interview notes, financial records, and other investigative materials–some of which may not have been available to IRS-CI. Thus, the Department's review may have included information that was not part of IRS-CI's review of the same petitions.

The Department's process was designed to ensure that the Department's decision-makers were equipped to make final decisions on all 256 petitions. Adherence to the remission and mitigation procedures ensured that the Department's consideration was in accordance with the applicable law and regulations, and consistent not only nationwide as to these petitions, but also with Department practice for other petitions.

If so, please identify which criteria are weighted differently.

Response:

See response above to Question 2.

a. If so, is it possible that weighing criteria differently may result in different outcomes in the petition review process?

Response:

Yes. The differences highlighted at the hearing and discussed above regarding the processes undertaken by IRS-CI and the Department may explain why the Department's review of judicial forfeiture petitions resulted in a lower percentage of returned funds than was recommended by IRS-CI.

3. **What additional sources of information does DOJ use or have access to when reviewing these petitions that the IRS does not?**

Response:

As explained in response to Question 2, the Department's petition review process relied not only upon information provided by IRS CI, but also upon information provided by the USAO. In addition, the Department reviewed information available in public records searches or other law enforcement databases, such as the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) database of Bank Secrecy Act-related reports. For example, in some cases the Department had access to information which indicated continuing structuring activity after the forfeiture, or continued evasion of other financial reporting requirements. This information may not have been contained in the petition reports and supporting materials reviewed by IRS-CI. Additionally, the Department had access to certain non-public court records, which IRS-CI may not have accessed or reviewed.

While both the Department and IRS-CI had the opportunity to review the investigative file, conduct follow-up interviews with petitioners, and access law enforcement databases such as the FinCEN Bank Secrecy Act-related reports, as noted above, the Department understands from the IRS-CI's hearing testimony that the IRS-CI limited its review to information contained in the investigative file. The Department further understands that any additional IRS-CI review involved "minimal, non-intrusive investigative steps, such as running a current criminal history check and any available public-record information." Tr. at 18.

4. **On what date did DOJ receive the petitions for remission or mitigation from the IRS?**

Response:

Beginning in June 2016, IRS-CI provided notice of the remission or mitigation process in 691 cases to people with a potential interest in assets forfeited based on structuring activity in the five years leading up to the IRS's October 2014 policy change. As a result of that process, the Department received from the IRS 251 petitions for remission or mitigation on a rolling basis between August 2016 and July 2017. In addition, the Department received five petitions submitted to IRS-CI in June and July 2015 and June 2016, prior to the IRS-CI notice process.

The Department understands that IRS-CI reviewed each petition, and then forwarded the petition to the USAO that handled the underlying civil or criminal forfeiture. IRS-CI forwarded petitions received during the notice process to the USAOs on a rolling basis between August 2016 and July 2017. The five petitions received prior to the notice process were forwarded by IRS-CI to the USAOs in the period from August 2015 to June 2016.

The USAOs then conducted their own review of the petitions. This review involved obtaining and reviewing the information in their forfeiture case files to prepare recommendations on the petitions for final review and determination by the Criminal Division's Money Laundering and Asset Recovery Section (MLARS). The length of time for the USAOs' review varied based on

the complexity of the case, the volume of petitions received by each USAO, and the age of the underlying matter.

Upon completing their review, the USAOs forwarded the petitions and recommendations to MLARS on a rolling basis between August 2016 and September 2017. The five petitions received prior to the notice process were forwarded by the USAOs to MLARS between September 2015 and September 2016.

Once MLARS received the recommendations and information from IRS-CI and the USAOs, MLARS evaluated each petition under the regulations. MLARS issued decisions between December 2016 and November 2017 for all petitions received as a result of IRS-CI's noticing. The five petitions received prior to the noticing were resolved between February 2016 and November 2017.

MLARS concluded its initial petition review process on November 17, 2017, and its review of the petitioners' requests to reconsider denial decisions on April 18, 2018.

5. **What date did DOJ begin its petition review process?**

Response:

See response above to Question 4.

6. **What date did DOJ conclude its petition review process?**

Response:

See response above to Question 4.

7. **What was the average number of business days spent on reviewing each case?**

Response:

With respect to the time the Department spent reviewing these petitions, based on the average time between the date the petition was received by the USAO and the date MLARS made a determination, on average, the Department's review took approximately 192 business days, excluding appeals.

8. **What were the major reasons that petitions were denied? For each reason, please provide the following:**

    a. **The number of petitions denied based on each reason.**

Response:

The Department cannot address any individual case. And in many cases, denials were based on multiple, overlapping reasons. Therefore, the Department is unable to provide a specific number of petitions denied based on each reason.

However, the reasons for denials of petitions generally fell into the following categories:

- Four petitions were filed by people who were not the owners of the forfeited property.
- Five of the petitioners pleaded guilty to a criminal structuring offense and eight of the petitioners were convicted in companion criminal cases.
- Over 60 petitioners previously had been given explicit notice or training on the structuring laws, thereby demonstrating the level of their intent to violate the law. Some had received notice from a bank; some had received a notice document from the IRS or USAO which was signed and acknowledged by the petitioner; and approximately ten of the petitioners worked at a bank or in a financial business and were aware of the laws as a result of their employment.
- The Department had information that approximately 20 petitioners appeared to be engaging in further structuring offenses following the seizure or forfeiture in the underlying structuring cases.
- In approximately 30 cases, the Department found indicia of tax evasion or a nexus to black market peso exchange or trade-based money laundering.
- In approximately 15 cases, the Department had information that petitioners had evaded other types of financial reporting requirements, *e.g.*, failing to declare cash at the border.
- In approximately four cases, the Department found indicia of fraud.
- In approximately ten cases, the Department found indicia of a drug nexus to the forfeited property.
- In approximately ten cases, the Department found indicia that the petitioners were involved in hiding assets in state court divorce matters.
- Approximately 33% of petitions included amounts forfeited over $100,000 with many approaching $1,000,000. Because structuring involves small deposits of less than $10,000, these amounts indicate that petitioners did not engage in one-time, isolated or mistaken conduct. Instead, these petitions revealed that the petitioners went to the

bank repeatedly to structure these large amounts into small deposits less than $10,000—for example, amounts forfeited over $100,000 and up to $1,000,000 would require between ten and 100 bank trips, respectively.

b. The total dollar amount attributed to each denial reason.

Response:

In many instances, multiple factors contributed to the denial of each petition. Therefore, the Department cannot attach a monetary value to each factor or basis for denial.

c. The statutory, regulatory, or other basis that allows for the denial.

Response:

The remission and mitigation petition process is akin to the exercise of the executive branch's pardon power. The Attorney General is never required to remit or mitigate a forfeiture. The published regulations at 28 C.F.R. Part 9 govern the remission and mitigation of administrative, civil, and criminal forfeitures.

9. In general, when DOJ knows that a seizing agency did not conform to laws, regulations, or policies governing civil asset forfeitures, how does DOJ consider this information when deciding whether to grant or deny a petition for remission or mitigation?

Response:

The criteria set forth in 28 C.F.R. § 9.5 are not exhaustive. *See* 28 C.F.R. § 9.5(b)(2). Thus, in general, if the Department knows "that a seizing agency did not conform to laws, regulations, or policies governing civil asset forfeitures," such information would be a factor considered in deciding the petition for remission or mitigation.

a. Does the process of reviewing petitions for remission or mitigation permit DOJ to consider whether the seizure followed agency policy?

Response:

The criteria set forth in 28 C.F.R. § 9.5 are not exhaustive. *See* 28 C.F.R. §§ 9.5(a)(1), (b)(2). Thus, in general, if the Department determines that the seizure was not in accordance with agency policy, such information would be a factor considered in deciding the petition for remission or mitigation.

10. In March 2017, the Treasury Inspector General for Tax Administration (TIGTA) recommended "in light of the fact that some property owners may be reluctant to again engage the Government and may not file petitions or that CI may again treat property owners who do file petitions inconsistently, CI should simply return the forfeited funds (and recommend to [DOJ] to do so in judicial cases)." TIGTA also had numerous findings highlighting areas of concern with the IRS's use of its civil asset forfeiture authority.

a. Was DOJ aware of TIGTA's audit findings when it reviewed the petitions in question?

Response:

At the time the Treasury Inspector General for Tax Administration (TIGTA) issued a report in March 2017 entitled, "Criminal Investigation Enforced Structuring Laws Primarily Against Legal Source Funds and Compromised the Rights of Some Individuals and Businesses," the Department's review process was underway. The Department cannot know if any of the individuals connected to the particular cases referenced in the TIGTA report are the same individuals who submitted petitions to the Department in these cases, in part because the TIGTA report examined a larger group of investigations and cases which included administrative forfeitures that were handled exclusively by IRS-CI as the seizing agency. Regardless, before the TIGTA report was issued, the Department had already determined that allegations of agent or attorney misconduct would be a factor to consider when adjudicating the petitions under the Department's review.

b. If so, how were the concerns raised by TIGTA taken into account during the review process?

Response:

See above response to Question 10(a).

11. Has the DOJ Inspector General or the Government Accountability Office issued any findings in the last ten years related to DOJ's handling of petitions for remission or mitigation? If so, please list the reports containing these findings and describe any actions taken by DOJ to address these recommendations.

Response:

The Department is not aware of any public reports issued by the Office of the Inspector General or the Government Accountability Office relating to the Department's handling of petitions for remission or mitigation in structuring cases over the past ten years.

12. Does DOJ believe that it has the statutory authority to return the funds to the petitioners in question if it so chooses?

Response:

The Department has general statutory authority under 21 U.S.C. § 853(i)(1) that authorizes the Attorney General to grant petitions for remission or mitigation of forfeiture with respect to property that is judicially forfeited under the criminal forfeiture statutes. *See* 21 U.S.C. § 853(i)(1). While section 853(i) governs forfeitures under the drug abuse prevention and control laws, it is incorporated by reference in 18 U.S.C. § 982(b)(1), which extends forfeiture authority to most other criminal offenses. In civil judicial forfeitures, the Attorney General has general statutory authority to transfer funds through remission or mitigation. *See* 18 U.S.C. § 981(d). Accordingly, remission and restoration authority exists for virtually all offenses for which a related civil or criminal forfeiture order is obtained.

The federal regulations governing the remission of civil or criminal forfeiture are found at 28 C.F.R. Part 9. The Department exercised its discretion to consider petitions and the return of funds to petitioners pursuant to those regulations. The Department then received and decided all requests for reconsideration. The Department considers the remission and mitigation process completed and all decisions final.

13. Is DOJ prohibited by law in any of these cases from returning the funds or do all of these cases fall within the discretion of DOJ under the CFR?

Response:

See response above to Question 12.

14. Can a settlement agreement bar DOJ from later granting petitions for remission or mitigation? If so, please explain, including the percentage of cases with settlement agreements in which DOJ denied remission or mitigation.

Response:

A settlement agreement does not bar the Department from later granting petitions for remission or mitigation.

15. What happened to the $22.2 million in funds seized that DOJ declined to return to petitioners?

Response:

The $22.2 million in funds seized by the IRS were deposited into the Treasury Forfeiture Fund (TFF). *See* 31 U.S.C § 9705. The TFF is administered by the Treasury Executive Office for Asset Forfeiture (TEOAF). As a routine practice, the Department's Asset Forfeiture Fund (AFF) receives funds from the TFF when a Department agency participates in a case that results in a

forfeiture deposited in the TFF. In parallel fashion, when a Treasury agency participates in a case that results in a forfeiture deposited in the AFF, the TFF may receive funds from the AFF. The Department reports total amounts of these transfers between the AFF and the TFF (*see, e.g.*, "Audit of the Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statements Fiscal Year 2017" at 7-8, *available at* https://oig.justice.gov/reports/2017/a1805.pdf#page=1), but does not have specific information about any transfers of forfeited funds from the TFF to the AFF that may have occurred in connection with these specific cases. Any questions regarding the disposition of these funds should be directed to TEOAF.

a. Does DOJ receive any of these funds? If so, how much and what does DOJ use these funds for?

Response:

See answer above to Question 15.

16. Mr. Cronan testified before the Oversight Subcommittee that agent and/or Assistant U.S. Attorney (AUSA) conduct is taken into account when reviewing a petition for remission or mitigation. Please describe how this is taken into account.

Response:

While the Department cannot comment on the specifics of any particular petition, the Department considered any allegations of agent or attorney misconduct when adjudicating the petitions. As explained above in response to Question 2, the Department considered the remission and mitigation petitions pursuant to the criteria set forth in 28 C.F.R. § 9.5(a)(1) and (b)(2), and taking into consideration the totality of all relevant factors identified in the regulations.

17. Has there been any criticism at the district or appellate court level for AUSAs or DOJ employees citing inappropriate prosecutorial misconduct? If so, please provide a list of the court cases that discuss these concerns.

Response:

The Department is not aware of any district or circuit court opinions criticizing the conduct of AUSAs or Department employees in connection with any of the forfeitures underlying the petitions at issue here.

18. Similarly, has the DOJ Inspector General identified any inappropriate prosecutorial misconduct by AUSAs or DOJ employees[?] If so, please provide a list of reports identifying such conduct.

Response:

The Department is not aware of any public reports issued by the Office of the Inspector General concerning allegations of prosecutorial misconduct relating to the petitions at issue here.

19. Is it against DOJ policy to penalize a petitioner for talking to the press?

Response:

Department attorneys are expected to negotiate and structure settlements consistent with the principles set forth in the Justice Manual at 9-113.100, *et seq.* (Forfeiture Settlements).

In addition, the Justice Manual at 9-27.260 makes clear that, "[i]n determining whether to commence or recommend prosecution or take other action against a person, the attorney for the government should not be influenced by:

1. The person's race, religion, gender, ethnicity, national origin, sexual orientation, or political association, activities, or beliefs;
2. The attorney's own personal feelings concerning the person, the person's associates, or the victim; or
3. The possible affect [sic] of the decision on the attorney's own professional or personal circumstances."

9-27.260 (Initiating and Declining Charges—Impermissible Considerations). The comments further state that "9-27.260 sets forth various matters that plainly should not influence the determination whether to commence or recommend prosecution or to take other action. They are listed here not because it is anticipated that any attorney for the government might allow them to affect his/her judgment, but in order to make clear that federal prosecutors will not be influenced by such improper considerations."

Hence, it would be inappropriate to penalize any petitioner for exercising First Amendment rights.

20. How many DOJ employees have been disciplined or reprimanded for conduct related to the handling of one of these cases for which DOJ received a petition?

Response:

As we have previously reported to the former Chair and Ranking Member of the subcommittee, the Department's Office of Professional Responsibility (OPR) reviewed the conduct of three AUSAs in three cases. For background, OPR has jurisdiction to review, investigate, and refer for appropriate action allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice. *See* 28 C.F.R.

§ 0.39a(a)(l). In accordance with its policies and procedures, OPR's inquiry sought to determine whether the AUSAs committed professional misconduct by intentionally violating or recklessly disregarding a clear and unambiguous statutory, regulatory, or professional obligation. *See* https://www.justice.gov/opr/overview-opr-and-its-policies-and-procedures-attorney-misconduct-matters. In conducting such inquiries, OPR reviews relevant pleadings and documents, including e-mails (including communications with private counsel), and may obtain a response from the AUSA. As we have previously informed the former Chair and Ranking Member, after carefully considering the facts and circumstances and applicable statutory, regulatory, and professional obligations, OPR determined that the allegations of professional misconduct were not supported by the evidence and further investigation was not likely to lead to professional misconduct findings.

Questions Posed by Rep. Mike Bishop (MI-08)

1. **Please explain why DOJ believed it necessary to make its 2015 policy change to no longer pursue civil asset forfeitures under structuring laws where legal source funds were involved.**

Response:

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, consistent with Departmental priorities, civil liberties, and the rule of law, the Department is allocating resources effectively to address the most serious criminal threats, including the most serious structuring offenses.

To that end, in March 2015, the Department announced a policy (March 2015 Policy) to limit the use of forfeiture authorities in connection with 31 U.S.C. § 5324(a) structuring violations. The March 2015 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. That determination must be 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 March 2015 Policy additionally expanded protections available after seizures have occurred: first, it 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; and second, it 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 seized. The policy also requires a formal, written settlement agreement vetted by a prosecutor for any settlements of structuring offenses.

The March 2015 Policy took immediate, prospective effect, and it has guided the Department's exercise of investigative and prosecutorial discretion in structuring cases since. This policy change exceeded 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.

a. Were the issues raised with the IRS seizing legal source funds a factor that led to this policy change?

Response:

No. While the Department reviewed IRS-CI's October 2014 policy change relating to legal source structuring cases, the Department's March 2015 Policy was based on its own determinations and efforts to improve the Department's Asset Forfeiture Program.

b. Did DOJ consider making its policy change retroactive?

Response:

Yes. Any decision to make policy changes retroactive is made on the basis of current and prior enforcement priorities and policy, and is driven by considerations related to those changes. Such considerations include the best approach to crime at the time of the policy change, enforcement priorities, the best use of limited government resources, and deference to valid legal prosecutions and judicial findings.

In this case, the Department decided on balance not to make the policy change retroactive. The March 2015 Policy was put into place to focus the Department's limited resources on the most serious structuring violations. Structuring remains a federal criminal offense, whether it involves clean money or otherwise. Individuals who were prosecuted for structuring offenses or whose property was forfeited as a result of their intent to evade the currency reporting requirements were treated fairly under the law and our policies at that time. The protections reflected in the March 2015 Policy exceed the requirements of law, and underscore the Department's commitment to fighting crime and returning money to victims, while protecting civil liberties and ensuring due process.

c. Why was DOJ's policy not made retroactive?

Response:

See response above to Question 1(b).

QUESTIONS FOR THE RECORD
HEARING BEFORE THE COMMITTEE ON WAYS AND MEANS
OVERSIGHT SUBCOMMITTEE
UPDATE ON IRS AND DOJ EFFORTS TO RETURN SEIZED FUNDS TO TAXPAYERS
JUNE 20, 2018

Questions from Chairman Jenkins.

1. **Would the Internal Revenue Service (IRS)'s Criminal Investigation (CI) agents be involved in multi-agency crime task forces to combat drugs, money laundering, financial crimes, and terrorism?**

   Answer: Yes. IRS CI special agents are experts in following the money trail and participate in a variety of multi-agency investigations, financial task forces and narcotics task forces. Some of these task forces include Organized Crime Drug Enforcement Task Force (OCDETF), High Intensity Drug Trafficking Area (HIDTA), Joint Terrorism Task Force (JTTF), Financial Crimes Task Force (FCTF), Suspicious Activity Review Task Force (SAR-TF), National Cyber Investigative Joint Task Force (NCIJTF) and the National Cyber Forensics and Training Alliance (NCFTA).

   a. **On those task forces, would the CI agents be aware of crimes other than tax fraud?**

      Answer: In most investigations, IRS-CI leads the investigative efforts into potential tax and financial crimes (money laundering and Bank Secrecy Act violations) while our partner agencies lead efforts into other crimes. However, since the other crimes being investigated are usually the specified unlawful activity that produced the illicit monies being laundered, it is critical that IRS-CI be aware of and understand other violations being investigated.

2. **In general, is there a potential for a case to show indicia of tax fraud from an IRS seizure that IRS was unaware of?**

   Answer: Yes. IRS may initially be involved in a money laundering or Bank Secrecy Act investigation that results in a seizure of criminal proceeds. During the non-tax investigation the IRS may later uncover indicia of tax fraud and expand to include potential tax changes.

Question from Representative Bishop.

For the 256 petitions referred to the U.S. Department of Justice for review, under current IRS policy, would the IRS have still made the majority of these seizures today?

Answer: While each case is dependent on its own set of facts, if the only evidence supporting the seizure was a violation of Title 31 structuring and the source of the structured funds was tied to a legal source, the IRS would likely not have seized those funds.

PUBLIC SUBMISSIONS FOR THE RECORD

STATEMENT FOR THE RECORD

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

June 20, 2018

Hearing on Internal Revenue Service and U.S. Department of Justice Efforts to Return Seized Funds

Statement of Robert Everett Johnson
On Behalf of The Institute for Justice

Thank you, Chairman Jenkins and Ranking Member Lewis, for the opportunity to submit this statement for the record. My name is Robert Everett Johnson, and I am an attorney at the Institute for Justice, a public-interest law firm that litigates to protect property rights nationwide.

The Institute for Justice has been at the vanguard of efforts to combat the use of civil forfeiture to take money under the structuring laws. We represented a series of small business owners who had their entire bank accounts seized based on nothing more than a pattern of under-$10,000 cash deposits. Our efforts in those cases led both the Internal Revenue Service and the Department of Justice to revise their policies to prohibit legal-source structuring seizures. Then, we created a procedure for those agencies to reopen *closed* structuring forfeitures. We filed petitions for remission or mitigation on behalf of two property owners—seeking the return of forfeited money—and when those petitions were granted we provided resources for other property owners to follow the precedent we had set.

The Ways and Means Oversight Subcommittee has also played a leading role combatting structuring forfeitures. Led by then-Chairman Roskam, the Subcommittee held two prior hearings to address these issues—properly calling the government to account for its mistreatment of property owners. The Members of the Subcommittee also joined together to send letters urging the IRS and DOJ to grant our remission petitions. And the Subcommittee has continued to work behind the scenes to ensure that the IRS and DOJ give the petition process the careful attention it is due. The Institute for Justice once again thanks the Subcommittee for its work on this issue.

Unfortunately, while we have come a great distance, there is still more to be done. For technical reasons, some petitions for remission or mitigation fall within

the jurisdiction of the IRS, while others fall within the jurisdiction of the DOJ. And, while the IRS has generally done its part to return money where appropriate, the DOJ has not. As a result, many property owners have had their petitions denied simply because they fall under the purview of the DOJ and not the IRS. These inconsistent results are fundamentally unfair.

DOJ can—and must—do better. The standard that DOJ has applied to deny remission petitions is contrary to its own regulations, is inconsistent with DOJ's policies for future structuring seizures, and is fundamentally irrational. Meanwhile, there is no question that DOJ has the ability to return these seized funds: Money seized under the structuring laws is placed in the Treasury Forfeiture Fund, which had a net position of $2.2 *billion* at the end of Fiscal Year 2017.[1] DOJ should reopen these petitions, consider them under the same standard applied by the IRS, and give back the money it has unjustly seized.

In addition, DOJ's refusal to return money seized under the structuring laws is part-and-parcel of a broader pattern of troubling behavior. For instance, in July 2017, the DOJ rescinded Holder-era reforms that had curtailed DOJ's use of civil forfeiture.[2] Then, when the House unanimously passed measures that would have restored the Holder-era reforms, the measures were removed from the final bill, apparently due to DOJ opposition.[3] DOJ has also lobbied to resist more general efforts at civil forfeiture reform. The civil forfeiture laws are broken, and DOJ should stop opposing meaningful reform.

Structuring: The Law Of Bank Deposits

As the Subcommittee is by now well aware, so-called "structuring" laws criminalize everyday financial transactions that most Americans would never think could be a crime.

Federal law requires banks to file a currency transaction report with the U.S. Department of the Treasury for any cash transaction in excess of $10,000 (an amount that has not been adjusted for inflation since first being set in the 1970s).[4] Federal structuring law, meanwhile, makes it unlawful for a bank customer to break up cash deposits or withdrawals into amounts below that $10,000 threshold

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[1] *See* Office of Inspector General, *Audit of the Department of the Treasury Forfeiture Fund's Fiscal Years 2017 and 2016 Financial Statements* at 13 (Dec. 2017), https://bit.ly/2K0HHcV.

[2] *See* Dept. of Justice, *Attorney General Sessions Issues Policy and Guidelines on Federal Adoptions of Assets Seized by State or Local Law Enforcement* (July 19, 2017), https://bit.ly/2wXRdar.

[3] *See* Nick Sibilla, Forbes, *Congress Killed Efforts to Undo Sessions's Civil Forfeiture Expansion, Despite Unanimous House Votes* (Apr. 2, 2018), https://bit.ly/2ys25PA.

[4] 31 U.S.C. § 5313

"for the purpose of evading" federal currency reporting.[5] A person who has violated this latter prohibition is said to have impermissibly "structured" cash transactions.

These laws were intended to target drug dealers and other hardened criminals engaged in money laundering or other criminal activity. In practice, however, the IRS has enforced the structuring laws against innocent Americans who have no idea that depositing cash in the bank could possibly get them in trouble with the law. For instance:

- In May 2012, Jeffrey, Richard, and Mitchell Hirsch, the proprietors of Bi-County Distributors, Inc., had over $446,000 seized by the IRS—the entire contents of their business's bank account.[6] The Hirsch brothers were advised by their own accountant to keep cash deposits under $10,000 to reduce paperwork burdens for their banks, as banks today often close the accounts of customers that make frequent large cash deposits. The IRS held the Hirsch brothers' money for thirty-two months, over two-and-a-half years, and repeatedly sought to negotiate a settlement under which the brothers would agree to forfeit a significant portion of the money.

- In August 2013, Carole Hinders, the proprietor of Mrs. Lady's Mexican Food, a small-town restaurant in Spirit Lake, Iowa, had more than $32,000 seized by the IRS—the restaurant's entire bank account.[7] Years ago, Carole's mother told her that depositing more than $10,000 created a hassle for the bank. Carole had no idea that trying to make life easier for the bank might be a federal crime.

- In July 2014, Lyndon McLellan, the proprietor of L&M Convenience Mart in Fairmont, North Carolina, had more than $107,000 seized by the IRS—once again, the business's entire bank account.[8] A bank teller told Lyndon's niece that cash deposits over $10,000 required additional paperwork, and Lyndon's niece agreed to limit the size of her deposits to make life easier for the bank. The seizure was discussed at a hearing of this Subcommittee, and afterwards the federal prosecutor on the case sent an email to Lyndon's attorney stating that "publicity . . . doesn't help" and "ratchets up feelings in the agency." The prosecutor offered to return half of the money if Lyndon agreed to forfeit the other half.

In all these cases, the individuals targeted by the IRS had no interest in concealing their activities from the government; each had a legitimate purpose for their

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[5] 31 U.S.C. § 5324.

[6] *See In the Matter of the Seizure of Four Hundred Forty Six Thousand Six Hundred Fifty One Dollars an Eleven Cents in U.S. Currency*, No. 14-mc-1288 (E.D.N.Y.).

[7] *See United States v. Thirty-Two Thousand Eight Hundred Twenty Dollars and Fifty-Six Cents in U.S. Currency*, No. 13-CV-4102 (N.D. Iowa).

[8] *See United States v. $107,702.66 in United States Currency*, No. 7:14-cv-295 (E.D.N.C.).

banking practices. None of these individuals was ever accused of any crime other than depositing cash in the bank in amounts under $10,000.

In each case, moreover, the government's conduct was made possible by civil forfeiture's lack of procedural safeguards. In each case, the government was able to seize the allegedly structured funds without any prior warning, based only on a pattern of under-$10,000 bank deposits. Then, the government was able to hold those funds for months without taking its case before a judge, placing extraordinary pressure on even innocent property owners to enter into a settlement. Those kinds of tactics are by no means unique to the structuring context. To the contrary, that seize-first-question-later approach is the norm under the civil forfeiture laws.

Shockingly, when law enforcement engages in such tactics, it can use the money that it takes to pad its own budget. When the IRS uses civil forfeiture to take money, the money is deposited in the Treasury Forfeiture Fund. By law, the assets in the Fund are available "without fiscal year limitation" for use by the Secretary of the Treasury to fund the law enforcement activities of the IRS and other agencies within the Treasury Department—including funding additional seizures.[9] In other words, the money that the IRS takes from hardworking Americans can be put back to work to seize money from *additional* Americans.

The Remission Petition Procedure

In October 2014, the IRS announced that it would no longer engage in "legal-source structuring" seizures, meaning it would henceforth limit application of the structuring laws to real criminals. The DOJ followed suit in March 2015. Despite those changes, however, the agencies still retained millions of dollars already seized from innocent property owners.

So, in July 2015, the Institute for Justice launched an effort to get the IRS and DOJ to reopen old structuring forfeitures. The Institute dusted off an obscure legal provision that authorizes "petitions for remission or mitigation," which are administrative filings asking the government to voluntarily return money that it took through civil forfeiture.[10] The government has discretion to grant a remission petition, and thus to return forfeited money, whenever it determines that doing so would advance the interests of justice.

The Institute for Justice filed two remission petitions. One was filed with the IRS on behalf of Khalid Quran, a North Carolina convenience store owner who had over $150,000 taken because he withdrew money from the bank in amounts under $10,000. And the second was filed with the DOJ on behalf of Randy and Karen Sowers, two Maryland dairy farmers who had $29,500 taken because they deposited proceeds from local farmers markets in amounts under $10,000. The IRS granted

[9] 31 U.S.C. § 9703(a).
[10] *See* 19 U.S.C. § 1618; 31 U.S.C. § 5321.

the Quran petition in February 2016, and DOJ granted the Sowers petition in June 2016.

Those initial victories kicked off a broader process. In June 2016, IRS Commissioner Koskinen announced that the agency would be sending letters to over 700 property owners informing them of their right to file remission petitions.[11] The Institute for Justice responded by setting up a clearinghouse of information for property owners, including a template that property owners could use to create their own remission petitions. Hundreds of petitions were filed, and as of May 2017 the IRS had reviewed 454 petitions, returned over $6 million, and recommended that the DOJ return an additional $16 million.[12]

The DOJ Falls Short Of The IRS

Unfortunately, while the IRS has granted many of the petitions within its jurisdiction, the DOJ has not. Reports from property owners and their attorneys indicate that the DOJ has applied a far more stringent standard than the IRS and, as a result, continues to hold millions in unjustly seized funds.

Letters sent by the DOJ to property owners indicate that the agency is denying remission petitions whenever it concludes that a property owner is technically guilty of structuring, regardless of whether the property owner actually did something wrong. In other words, it does not matter *why* the property owner sought to avoid having a report filed with the IRS. And it does not matter whether the structured funds were lawfully-earned. So long as the property owner sought to avoid IRS paperwork, their petition will be denied.

This standard is far too restrictive. Many Americans are justifiably afraid of the IRS, and few go out of their way to trigger IRS reports. Yet the DOJ is denying petitions simply because the property owner sought to avoid IRS paperwork, even if that was the property owner's *only* offense. DOJ should not be treating paperwork-avoidance as a major federal crime.

Moreover, in addition to being bad policy, DOJ's approach is inconsistent and irrational. DOJ's approach is contrary to its own policy for *future* seizures, as DOJ guidelines generally prohibit legal-source structuring seizures.[13] And DOJ's approach is also contrary to the standard applied by the IRS to remission petitions, as the IRS has said that petitions should be granted so long as the structured funds

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[11] Letter from IRS Commissioner John A. Koskinen to Congressmen Peter Roskam and John Lewis (June 10, 2016), https://bit.ly/2xAbTCw.

[12] Letter from Congressmen Peter Roskam and John Lewis to Attorney General Jeff Sessions (May 2,2017), https://bit.ly/2ynUodq.

[13] *See* Dep't of Justice, *Guidance Regarding the Use of Asset Forfeiture Authorities in Connection with Structuring Offenses* (March 31, 2015), https://bit.ly/1UzKmEB.

came from a legal source.[14] Indeed, DOJ's approach is contrary to its regulations governing the remission process, which expressly say that the agency has discretion to grant relief even if the petitioner is technically guilty of a crime.[15] DOJ will presumably say that it is simply enforcing the structuring laws, but DOJ's own policies and regulations make clear that it has discretion to return property where those laws make no sense. DOJ's refusal to exercise that discretion is inexplicable.

As noted above, DOJ's approach to the remission process is also part of a broader pattern of troubling behavior. Civil forfeiture remains one of the greatest threats to private property today, and stories of abuse continue to emerge.[16] Yet the DOJ has opposed efforts to enact reforms. Indeed, DOJ has moved in precisely the opposite direction, rescinding Holder-era reforms that had curtailed DOJ's use of forfeiture.[17] And, when the House unanimously passed measures that would have restored the Holder-era reforms, those measures were removed from the final bill, apparently due to DOJ opposition.[18] While a bipartisan coalition has continued to push for civil forfeiture reform, DOJ has positioned itself as a roadblock to change.

DOJ must clean up its act. DOJ should reconsider its denial of these petitions under a correct standard—the *same* standard applied by the IRS. And DOJ should reconsider its position on civil forfeiture more generally. DOJ should embrace reforms that would protect the property rights of innocent Americans, not continue to stand in the way.

Legislative Reform Remains Necessary

In addition to exercising oversight over the petition process, Congress should also move to enact legislative reform. This Committee took an important step in that direction when it passed legislation—the Clyde-Hirsch-Sowers RESPECT Act—to permanently restrict application of the structuring laws to real criminals. The RESPECT Act unanimously passed the House, but it is stalled in the Senate, where it has not received a vote.

More generally, Congress should enact comprehensive civil forfeiture reform. Among other things, Congress should:

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[14] Letter from IRS Commissioner John A. Koskinen to Congressmen Peter Roskam and John Lewis (June 10, 2016), https://bit.ly/2xAbTCw.

[15] 28 C.F.R. § 9.5(b)(2).

[16] *See, e.g.*, Christopher Ingraham, *A 64-year-old put his live savings in his carry-on. U.S. Customs took it without charging him with a crime,* Washington Post (May 31, 2018), https://wapo.st/2I1lkz0; Meagan Flynn, *She saved thousands to open a medical clinic in Nigeria. U.S. Customs took all of it at the airport*, Washington Post (May 9, 2018), https://wapo.st/2li8Wlz.

[17] *See* Dept. of Justice, *Attorney General Sessions Issues Policy and Guidelines on Federal Adoptions of Assets Seized by State or Local Law Enforcement* (July 19, 2017), https://bit.ly/2wXRdar.

[18] *See* Nick Sibilla, Forbes, *Congress Killed Efforts to Undo Sessions's Civil Forfeiture Expansion, Despite Unanimous House Votes* (Apr. 2, 2018), https://bit.ly/2ys25PA.

- Eliminate the profit incentive that underlies this phenomenon by directing forfeiture revenues to the general fund, rather than making them available to law enforcement to fund its operations.

- Abolish administrative forfeiture, under which property is forfeited without any judicial oversight. Some of the most troubling structuring seizures occurred using the administrative forfeiture mechanism.

- Provide property owners a prompt and meaningful opportunity to contest the seizure of their property. In the structuring context, where funds were often seized on the basis of a mere pattern of deposits, a prompt post-seizure hearing would have provided property owners an early opportunity to show that they did nothing wrong.

- Restore the presumption of innocence by placing the burden on the government to prove that property owners did something wrong. Current law places the burden on the innocent property owner—an arrangement that violates due process under *Nelson v. Colorado*, 137 S. Ct. 1249 (2017).

- Raise the burden of proof from a preponderance of the evidence to the "beyond a reasonable doubt" standard that applies in the criminal context. Under that standard, a mere pattern of deposits would not be a sufficient reason to deprive somebody of their funds.

- Abolish equitable sharing, under which state and local law enforcement share in the proceeds of federal forfeitures. Equitable sharing offends principles of federalism, as it allows state and local law enforcement to evade safeguards put in place by state forfeiture laws.

- Increase transparency and require more detailed reporting about the federal government's use of civil forfeiture.

Conclusion

In closing, I want to thank the Subcommittee for its continued engagement on this topic. The Subcommittee's actions have played an important part in the progress that has already been made. I look forward to continuing to work with the Subcommittee to secure justice for Americans wrongly targeted under the structuring laws.