

New DOJ Policy on Asset Forfeiture in Structuring Offenses

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In an effort to lessen the risk that businesses and individuals performing legitimate financial transactions will have funds frozen through a prosecutor's use of forfeiture laws, on March 31, **Attorney General Eric Holder** issued new guidance concerning asset forfeiture in structuring offenses. The new policy restricts the use by prosecutors of civil or criminal asset forfeiture for structuring until after a defendant has been criminally charged or found to have engaged in additional criminal activity. A typical structuring offense is where a single currency transaction with a financial institution (generally above \$10,000) is broken into a series of transactions by an individual for purposes of avoiding the filing of a currency transaction report by the financial institution. Structuring at times accompanies charges of other criminal activity such as money laundering, but can also be charged as a standalone offense.

The new policy states that absent a criminal charge, a prosecutor "shall not move to seize structured funds unless 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." Thus, while the "probable cause" standard is not terribly burdensome, the new policy should provide protection against seizures of funds in cases where there is suspected structuring, but no apparent connection to other unlawful activity. Prosecutors have broad forfeiture powers under the current statutory regime, however, the DOJ states that the new policy is aimed at focusing law enforcement's resources on the most serious structuring offenses. Time will tell whether the policy leads to a shift in the types of forfeiture cases the DOJ pursues.

In addition to the restrictions on when asset forfeiture may be used in structuring offenses, the policy requires that if a prosecutor determines there is insufficient admissible evidence to prevail at trial, any funds properly seized pursuant to a warrant must be returned within 7 days of such conclusion. Additionally, prosecutors will now face a deadline of 150 days from the seizure of funds to file a criminal indictment or civil complaint.

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