

Money Laundering and Forfeiture

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Overview of Asset Forfeiture and Money Laundering Program

Jaikumar Ramaswamy

Chief

Asset Forfeiture and Money Laundering Section

The Department of Justice's (the Department) Asset Forfeiture Program will celebrate its 30th anniversary in 2014. Much has happened in the nearly 30 years since Congress first passed the Comprehensive Crime Control Act of 1984. What began as an effort to address a growing national and international drug trafficking problem in the 1980s has become a powerful tool to address white collar crime, international organized crime, drug trafficking, cybercrime, terrorism, human trafficking, child exploitation, and so much more.

There has been a similar transformation in the nature of the Department's efforts to combat the threat of illicit financing through criminal prosecution. Historically, the Department has attacked illicit finance through the prosecution of individuals and financial institutions for money laundering and associated offenses under 18 U.S.C. §§ 1956, 1957, and 1960. The criminal money laundering convictions of Bancomer and Banco Serfin in Operation Casablanca and the successful prosecution of and forfeiture action against Bank of Credit and Commerce International for racketeering were landmark cases whose effects on the integrity of the financial system still resonate today. More recent cases against digital currency purveyors such as e-Gold and Liberty Reserve represent the Department's efforts to vigorously enforce federal money laundering laws in the face of new and emerging technologies.

One notable additional development has been the renewed attention paid to criminal enforcement of the Bank Secrecy Act (BSA), the statutory and regulatory framework that requires financial institutions to detect and prevent money laundering. The BSA, codified in Title 31, has undergone several revisions, most recently through amendments introduced by the Patriot Act, and it places affirmative obligations on financial institutions to implement anti-money laundering policies that prevent the flow of illicit funds through those institutions. Financial institutions are also required to report large cash transactions, as well as any suspicious transactions—information critical for law enforcement to prosecute criminal actors and forfeit criminal proceeds. Notably, although principally a regulatory framework, Title 31 provides criminal as well as civil penalties for “willful” violations of the BSA. In the last decade, federal prosecutors have collected forfeitures exceeding \$1.69 billion in connection with BSA violations by both large and small financial institutions.

This issue of the [United States Attorneys' Bulletin](#) is intended to demystify asset forfeiture and money laundering law and practice. It is my hope that by providing an overview of the available enforcement tools and an understanding of how they can be effectively used to punish criminal offenders, protect the integrity of the U.S. financial system, and provide some relief to the victims of crime, federal prosecutors will see the value of using the robust techniques described by the various contributors to this issue.

In his introductory essay, *Money Laundering and Asset Forfeiture: Taking the Profit Out of Crime*, Douglas A. Leff, Assistant Special Agent-in-Charge of the Complex Financial Crimes Branch of the FBI's New York Field Office, explores the means employed by criminals to launder illicit profits and the tools available to investigators to identify, seize, and ultimately forfeit criminal proceeds. The article presents a cogent explanation of why charging money laundering offenses and forfeiting assets is an

indispensable tool for attacking the financial infrastructure used by criminal organizations and other criminal offenders to launder their illicit proceeds.

As the body of law associated with asset forfeiture grows more complex, federal prosecutors are often intimidated by its intricacies and consequently refrain from using this powerful law enforcement tool. Based on his decades of experience bringing asset forfeiture cases, Assistant U.S. Attorney (AUSA) Stefan D. Cassella sets forth asset forfeiture processes and procedures in a manner understandable to all federal prosecutors. His article, *Making Forfeiture Part of Your Criminal Case*, simplifies asset forfeiture procedure and explains the importance of including asset forfeiture in every appropriate case. The article also discusses some challenges that arise in asset forfeiture cases, such as how to handle parallel proceedings, which require close coordination between the criminal and asset forfeiture prosecutors.

Two articles also explore the changing landscape of enforcement priorities in a manner designed to more effectively combat the threat of illicit finance. In *Prosecuting Financial Institutions and Title 31 Offenses*, Principal Deputy Chief M. Kendall Day of the Asset Forfeiture and Money Laundering Section (AFMLS), discusses the use of BSA prosecutions to preserve the integrity of the U.S. financial system and harden it against existing and emerging illicit finance threats. The article surveys several recent cases and explores the considerations that factor into a decision to bring a criminal BSA case. *Understanding and Detecting the Black Market Peso Exchange* by AUSA Evan Weitz and AFMLS' Trial Attorney Clay Porter describes the history of Black Market Peso Exchanges (BMPE) and their structure. The article focuses on how the BMPE system works and identifies red flags that can alert investigators and prosecutors to BMPE related activity in financial transactions. A greater understanding of these criminal schemes and how to prosecute them is vitally important as law enforcement seeks to disrupt the illicit flow of criminal proceeds by transnational criminal organizations, including the drug cartels.

No discussion of the growth and expansion of asset forfeiture and money laundering would be complete without highlighting recent developments in international forfeiture and money laundering cooperation. In light of the increasingly transnational nature of crime, it is not uncommon for transnational criminal organizations and individual criminals to secret abroad the proceeds of crimes perpetrated in the United States. In his article *International Forfeiture Cooperation*, AFMLS' Assistant Deputy Chief Jack de Kluiver discusses the processes, available tools, and complicating factors that arise in connection with identifying, restraining, and forfeiting assets located abroad. This article also features recent developments in the international sharing of forfeited assets, the expansion of international forfeiture and money laundering agreements and treaties, and the increasing relevance of asset forfeiture and money laundering on the global stage through organizations such as the Financial Action Task Force, Camden Assets Recovery Interagency Network, the G8, and other international bodies.

One of the most important developments in the Asset Forfeiture Program over the past two decades has been the use of forfeited assets to compensate victims of crime for their direct pecuniary losses. Three AFMLS attorneys—Deputy Chief Alice Dery, Senior Counsel John Andre, and Legal Counsel Jennifer Bickford—describe in *Restraining and Forfeiting Assets for Crime Victims* the statutory and regulatory framework established in the late 1990s that gave birth to this increasingly important aspect of the Asset Forfeiture Program. The Program has transferred over \$3 billion to victims of crime since its inception. The article explains that the pre-conviction restraint and seizure of assets represents the most powerful and effective way to ensure that ill-gotten gains are preserved for victims, sets forth remission and restoration procedures and policies, explores current issues and trends, and discusses some recent cases that highlight the effectiveness of the Victim's Program.

Along these same lines, the Department has in recent years prosecuted a number of complex fraud schemes—*Dreier* (S.D.N.Y.), *Rothstein* (S.D. Fla.), *Madoff* (S.D.N.Y.), *Adelphia* (S.D.N.Y.), *Petters* (D. Minn.), and *Stanford* (N.D. Tex.)—involving billions of dollars in victim losses. These complex fraud schemes have spawned a spate of civil and bankruptcy litigation as victims scramble to recover losses. AFMLS' Deputy Chief Alice Dery surveys the myriad ways in which bankruptcy law,

forfeiture, and the remission/restoration process complement as well as conflict with each other in *Interplay Between the Forfeiture and Bankruptcy Proceedings*. This article discusses the critical importance of cooperation where bankruptcy and forfeiture collide, surveys recent issues, and sets forth some best practices. The article also addresses the emerging importance of cooperation agreements between the bankruptcy trustee and the Government in connection with the allocation and distribution of assets.

Finally, Jeffrey G. Snyder of the Asset Forfeiture Management Staff of the Department's Justice Management Division provides a stunning illustration of the Asset Forfeiture Program's success. *The Structure and Operations of the Department of Justice Assets Forfeiture Fund* explores the growth of the Justice Assets Forfeiture Fund forfeitures from approximately \$27 million in 1985 to over \$4 billion in 2012, including the transfer of over \$1.5 billion to victims that same year, and the sharing of over \$450 million to state and local law enforcement partners. The article also describes how the Fund is managed and how allocations from the Fund are made among the Asset Forfeiture Program's stakeholders.

This issue closes with AFMLS' Training Unit Assistant Deputy Chief Craig Newell's *AFMLS Training and Publications Resource Highlights*. The article serves as a catalogue of training, publications, and other technical resources that are available through AFMLS to prosecutors and other members of the law enforcement community who participate in the Asset Forfeiture and Money Laundering Program.

It is perhaps an overused cliché, but crime today is big business, and the most effective way to combat its growth is through the vigorous prosecution of money laundering and BSA violations, and the aggressive pursuit of forfeiture wherever possible. As the methods employed to launder money have become more advanced and complicated, AFMLS is working hard to bring landmark money laundering, BSA, and asset forfeiture actions, and to help federal prosecutors around the country stay one step ahead of the criminals. It is my hope that this issue will provide prosecutors with a better understanding of all the tools and resources available to undertake this important mission. ❖

ABOUT THE AUTHOR

❑ **Jaikumar Ramaswamy** is the Chief of the AFMLS in the Criminal Division of the Department of Justice. As Chief, Mr. Ramaswamy has overseen several of the most significant criminal resolutions brought by the Department against financial institutions over the past year, resulting in nearly \$2 billion in forfeitures. Mr. Ramaswamy started his career as an Assistant United States Attorney for the Southern District of New York, subsequently moved to the Department's Computer Crime and Intellectual Property Section, and most recently served as AFMLS' Principal Deputy Chief prior to his appointment as Chief. Before joining the Department, Mr. Ramaswamy clerked for the Honorable Gerard Lynch on the United States District Court for the Southern District of New York and the Honorable Dennis Jacobs on the United States Court of Appeals for the Second Circuit. He also worked as a litigation associate at Cravath, Swaine & Moore and Covington & Burling in New York.

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Money Laundering and Asset Forfeiture: Taking the Profit Out of Crime

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As all investigators quickly learn, the majority of crimes committed have financial gain as their motive. This article will explore modern means utilized by criminals to launder the proceeds of their crimes, investigative techniques available to locate and seize those proceeds, and legal issues associated with those efforts.

One common theme throughout all financial investigations is that they must be started as early as practicable. To whatever extent time can be on the side of the investigator, it will be an extremely valuable ally. For this reason, the majority of the techniques set forth in this article can be utilized while the investigation is still in a covert stage.

I. Money laundering: the law

Simply put, money laundering is the act of taking criminal proceeds and moving them in a prohibited manner. Specifically, a criminal or someone acting on a criminal's behalf generates proceeds, in the form of money or property, as a result of committing a designated crime known as a Specified Unlawful Activity (SUA). The entire catalog of these violations is located at 18 U.S.C. § 1956(c)(7), which also incorporates other criminal statutes.

The criminal then moves that money, often with the intent to disguise the nature, location, source, ownership, or control of the funds. Such movement is known as "concealment money laundering." The movement can be as simple as the handing of money from one party to another. See 18 U.S.C. § 1956(c)(4) for the full definition of "financial transaction," which encompasses most forms of transfer, including physical ones.

Alternatively, the criminal moves the money to reinvest it in criminal activities. This type of movement is known as "promotion money laundering." Either theory will suffice for a charge of money laundering. 18 U.S.C. § 1956(a)(1) (2013). Concealment and promotion are the two most common money laundering theories and will therefore be the focus of this article. The less frequently prosecuted theories involve the movement of money to either: (1) evade taxes, 18 U.S.C. § 1956(a)(1)(A)(ii), or (2) avoid transaction reporting requirements, 18 U.S.C. § 1956(a)(1)(B)(ii).

Fortunately, most profit-based crimes are designated as SUAs. Thus, the movement of any of those SUA proceeds for the purpose of either concealing them or promoting the same or a different SUA will establish the foundation needed for a money laundering charge. Importantly, it is not necessary to prove that the money launderer had knowledge of the specific SUA from which the proceeds were generated. All that needs to be proven is that the person laundering the money believed it was dirty. This standard often permits the investigator to prove the knowledge element entirely through circumstantial evidence by showing that the manner in which the launderer received or handled the money was inconsistent with an innocent money transfer. Juries can relate to this evidence remarkably well. In sum, the elements needed to prove a basic charge of money laundering, under 18 U.S.C. § 1956, are (1) SUA

proceeds, (2) knowledge that the proceeds are from some type of felony, and (3) a financial transaction intended to conceal the proceeds or promote an SUA. *See, e.g., United States v. Persaud*, 411 F. App'x 431, 434 (2d Cir. 2011); *United States v. Frazier*, 605 F.3d 1271, 1282 (11th Cir. 2010); *United States v. Gallardo*, 497 F.3d 727, 737 (7th Cir. 2007); *United States v. Pizano*, 421 F.3d 707, 723 (8th Cir. 2005).

The specific elements needed to prove other money laundering violations are set forth below.

A. International money laundering

Provided that money is moved to or from the United States in order to promote an SUA, there is no requirement that the money be dirty. In other words, even clean money that is sent internationally to promote an SUA is enough to charge money laundering. 18 U.S.C. § 1956(a)(2)(A) (2013). Thus, the only elements that must be proven are (1) the movement or attempted movement of funds, (2) to or from the United States, (3) with the intent to promote an SUA. There is also a provision for charging the international movement of money for concealment, but to prevail on that theory the funds must be SUA proceeds and the actor must know that the funds are derived from unlawful activity. *Id.* § 1956(a)(2)(B)(i).

B. Reverse money laundering

The “Money Laundering Sting provision” provides that money launderers can be charged so long as they *believe* the funds that they are moving are SUA proceeds, even if the money is actually case funds or other government property. Subject to availability, the Department of Justice (the Department) Assets Forfeiture Fund may be used to fund reverse money laundering transactions. *See* 28 U.S.C. § 524(c) (2013). The Treasury Forfeiture Fund has similar authority. *See* 31 U.S.C. § 9703(a)(2)(B)(i) (2013). Investigators should contact their headquarters’ components to apply for forfeiture funds when needed to carry out a money laundering sting. This opportunity regularly presents itself when undercover employees or confidential human sources are introduced to money launderers during the course of their covert roles. Similarly, undercover investigators or informants can represent themselves as seeking professional money launderers. In either case, law enforcement can engage in a reverse money laundering transaction with these criminals, who can then be charged with money laundering. Proceeding in this manner can reveal the network of individuals and bank accounts involved in a professional money laundering network, which can lead to large-scale asset forfeiture.

The elements necessary to charge reverse money laundering are (1) conduct or attempt to conduct a financial transaction, (2) of funds believed to be SUA proceeds, (3) with intent to conceal the proceeds or promote an SUA. 18 U.S.C. § 1956(a)(3) (2013). Also, if criminals move money represented to be SUA proceeds in order to avoid transaction reporting requirements, they may be similarly charged. *Id.* § 1956(a)(3)(C).

The maximum sentence for violating 18 U.S.C. § 1956 is 20-years imprisonment. *Id.* §1956(a).

C. Money spending

In addition to the money laundering violations in 18 U.S.C. § 1956, there is a second, often-overlooked money laundering charge found in 18 U.S.C. § 1957. Known as the “Money Spending Statute,” this provision sets forth a 10-year maximum penalty for knowingly engaging or attempting to engage in a monetary transaction with proceeds of an SUA in an amount greater than \$10,000 by, through, or to a financial institution. 18 U.S.C. § 1957(b)(1) (2013). Two important facts must be remembered about the Money Spending Statute, both of which inure to the benefit of the investigator.

First, unlike the money laundering violations in § 1956, there is no need to prove any intent to promote an SUA or conceal the proceeds thereof. The simple fact that the transaction has occurred is all that is required to charge a criminal under § 1957. For this reason, it is important to charge § 1957 along

with § 1956 whenever there is proof to support both. A judge or jury disagreeing with proof of intent to conceal or promote will have to dismiss or acquit on the § 1956 count but will still be able to convict on the corresponding § 1957 charge. Section 1957 is not a lesser included offense of § 1956. Thus, a jury can convict on both charges. *United States v. Huber*, 2002 WL 257851, at *4 (D.N.D. Jan. 3, 2002); *United States v. Caruso*, 948 F. Supp. 382, 390-91 (D.N.J. 1996).

Secondly, the definition of “financial institution” is extremely broad and goes well beyond banks and credit unions. Indeed, it includes most merchants through which a criminal would ordinarily spend criminal proceeds, such as dealers in precious metals, stone, or jewels; car and boat dealerships; casinos; travel agencies; pawnbrokers; and many others. 31 U.S.C. § 5312(a)(2) (2013).

The elements required to charge a violation of § 1957 are (1) transfer of SUA proceeds in a monetary transaction over \$10,000, (2) involving a financial institution, and (3) knowledge that the proceeds are dirty. 18 U.S.C. § 1957(a) (2013).

D. Money laundering conspiracy

Each act of money laundering must be charged as a separate offense. *United States v. Prescott*, 42 F.3d 1165, 1166-67 (8th Cir. 1994). In order to charge money laundering as a continuing course of conduct, it must be charged as a conspiracy. *United States v. Robertson*, 67 F. App'x 257, 269 (6th Cir. 2003). Additionally, there is no need to prove that the conspirator knew the precise SUA that generated the proceeds being laundered. All that is necessary is that two or more criminals intended to launder dirty money. *United States v. Threadgill*, 172 F.3d 357, 367 (5th Cir. 1999).

Venue for a money laundering conspiracy is in any district where the agreement to launder money took place or where any act in furtherance of the conspiracy occurred. *United States v. Angotti*, 105 F.3d 539, 541-42 (9th Cir. 1997). However, unlike most conspiracies, no overt act is necessary to charge a conspiracy to commit money laundering. *Whitfield v. United States*, 543 U.S. 209, 209-10 (2005).

II. Presenting a money laundering case to the prosecutor

As formulated by U.S. Attorney John Vaudreuil, Western District of Wisconsin, there are four questions that the investigator must be able to answer to establish a viable money laundering prosecution:

1. What is the transaction? There must be an example of money going between people, businesses, bank accounts, etc.
2. Where does the money come from? The proof must identify, through either direct or circumstantial evidence, the SUA from which the proceeds were generated. Notably, while the type of SUA must be proven, the specific crime need not be. For example, cash spent by a drug dealer may be proven circumstantially to be drug proceeds without having to demonstrate the particular drug transaction that produced them. This can be accomplished with evidence that the money launderer was a drug dealer and had no legitimate source of income. *See, e.g., United States v. Shafer*, 608 F.3d 1056, 1067 (8th Cir. 2010).
3. How did the money launderer know the money was dirty? As set forth above, the proof need only show that the money launderer knew it came from some kind of unlawful activity, but not necessarily any particular SUA.
4. What was the subject trying to do with the money? The answer to this question will be one of the purposes described above, such as concealment of SUA proceeds, promotion of an SUA, or, in the case of 18 U.S.C. § 1957, merely the movement of an amount over \$10,000 into or through a financial institution.

III. Asset forfeiture

Federal asset forfeiture laws permit the Government to take title to money and property belonging to criminals, based on proof that can often be developed in conjunction with the overall investigation. Unfortunately, asset forfeiture is often neglected or misunderstood, thereby allowing criminals to enjoy the fruits of their crimes even after being convicted. For this reason, the types of asset forfeiture and the procedure for each are set forth here, along with a few common misconceptions. For a full review of federal asset forfeiture by the preeminent scholar in this area of the law, *see* STEFAN D. CASSELLA, *ASSET FORFEITURE LAW IN THE UNITED STATES: A TREATISE ON FORFEITURE LAW* (2d ed. 2012).

A. Common asset forfeiture misconceptions

Property seized for evidence can automatically be forfeited: This common error results in many missed opportunities for forfeiture. Each type of forfeiture set forth below contains strict time limits. Once missed, the Government is prohibited from commencing forfeiture under the time-barred provision. For this reason, it is critical for investigators to consult with their asset forfeiture personnel regarding any item that they do not wish to return to the person from whom it was seized.

All property owned by a criminal is subject to forfeiture: On the contrary, asset forfeiture is purely a creature of statute. While there are numerous federal laws providing for forfeiture, there are also some crimes that do not have a corresponding forfeiture statute. Other crimes have only limited forfeiture provisions.

Asset forfeiture and restitution are mutually exclusive: Actually, asset forfeiture relates to the amount of proceeds generated by a crime and, in some cases, the actual property used to commit a crime, while restitution relates to the amount of losses caused by a crime. By statute, judges are required to order both where applicable. *See* FED. R. CRIM. P. 32.2(b)(1)(A) (forfeiture); 18 U.S.C. § 3556 (2013) (restitution). The main benefit to the investigator who achieves asset forfeiture is that there is no time limit for amending an order of forfeiture, so that subsequently acquired property of the defendant found years later can still be forfeited. Furthermore, the discovery provisions for enforcing an order of forfeiture are far easier to utilize than the provisions that are available to enforce an order of restitution, which basically involves filing a separate lawsuit under the Federal Debt Collections Act. 18 U.S.C. § 3664(m)(1)(A) (2013).

B. Types of asset forfeiture

State and local law enforcement officers can benefit from federal asset forfeiture law through the adoption process, whereby federal law enforcement processes a seizure originally made by state or local law enforcement officers. This system permits the state or local agency to make an equitable sharing request. Subject to approval by the Department, those agencies can receive up to 80 percent of the net forfeiture to be used by their agencies for enumerated law enforcement purposes. The FBI Asset Forfeiture and Money Laundering Unit (AFMLU) manages the FBI's Money Laundering and Asset Forfeiture Programs and can facilitate any adoption for which FBI assistance is sought. The main number for AFMLU is 202-324-8628.

There are three types of asset forfeiture under federal law:

Administrative: Many federal law enforcement agencies have authority to forfeit certain types of lawfully seized property, without the need for any court proceedings, provided that the forfeiture is uncontested. *See* 18 U.S.C. § 983(a)(1), (2) (2013); 19 U.S.C. §§ 1602–1631 (2013).

Any amount of cash can be forfeited administratively. Other personal property can only be forfeited if it is worth \$500,000 or less, unless it is a conveyance used to traffic narcotics, such as a car, truck, or airplane, in which case there is no limit on the value. Real property cannot be forfeited

administratively. Often, criminals will not contest an administrative forfeiture because of the requirement that they swear to their interest in the property under penalty of perjury. However, the agency must send notice within 60 days after seizure or the administrative forfeiture is time-barred. If the property was seized by state or local law enforcement during a state investigation and adopted by federal law enforcement, then the notice deadline is increased to 90 days. 18 U.S.C. § 983(a)(1)(A)(iv) (2013). There is a provision for delayed notice if notice would jeopardize an ongoing investigation. *Id.* § 983(a)(1)(B), (C), (D). If the notice results in timely submission of a claim by the owner of the property, then the matter must be referred for prosecution as a criminal or civil forfeiture, or else the property must be returned.

Criminal: Commenced by adding a forfeiture allegation to an indictment or information, only the interest of a convicted defendant can be forfeited, and only if the defendant is convicted of a violation for which forfeiture is permitted. Thus, property belonging to uncharged third parties cannot be forfeited criminally. The forfeiture allegation is extremely simple and need only advise the defendants that, upon conviction of the charges in the referenced counts of the indictment, the Government will seek forfeiture as part of the sentence. FED. R. CRIM. P. 32.2(a). Specific property not named in the indictment or information can be listed in a bill of particulars and served on the defendants. However, if no forfeiture allegation is ever put into the indictment or information, the court will be without jurisdiction to enter an order of forfeiture. Provided that the forfeiture is properly alleged and the defendant is convicted by a jury on a charge for which forfeiture is permitted, either the defendant or the Government can retain the jury. If this is done, the jury hears any new evidence presented and then deliberates to decide the forfeiture. *Id.* 32.2(b)(5). Because forfeiture is part of the sentencing phase, the Government's burden of proof is only a preponderance of the evidence. Lastly, criminal forfeiture is the only means through which the Government can get a forfeiture money judgment, which is a finding by the court or jury as to the total dollar amount of proceeds generated by the defendants' crimes. Upon entry of an order of forfeiture containing a money judgment, the Government may then execute on any property traceable to the defendants, even though it is unrelated to the crimes for which they were convicted. *Id.* 32.2(e). The general statute referencing crimes for which criminal forfeiture is available is 18 U.S.C. § 982. All crimes for which civil forfeiture is available may also serve as predicates for criminal forfeiture. 28 U.S.C. § 2461(c) (2013).

Civil: Regardless of whether there is a criminal conviction, a civil forfeiture complaint can be filed against any specific property, real or personal, that is subject to forfeiture based on the underlying criminal activity. *See generally* Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, 28 U.S.C. app. (2013). Civil forfeiture can even be used against a defendant who has been acquitted of criminal charges. *United States v. Ursery*, 518 U.S. 267, 277 (1996). However, if a criminal defendant was convicted of a crime but prevailed during the forfeiture phase of the trial, principles of res judicata would preclude a subsequent civil forfeiture action. Anyone with an ownership interest in the property can challenge the civil forfeiture by filing a notice of claim, followed by an answer to the complaint. Either the Government or claimants can demand a jury. *See* FED. R. CIV. P. 38. The Government has the burden of proving the forfeitability of each property by a preponderance of the evidence. Once this burden is satisfied, all interests in the property are forfeited unless claimants can prove, by a preponderance of the evidence, that they were an innocent owner. 18 U.S.C. § 983(d) (2013).

To prevail on this defense, claimants who owned the property during the time period alleged in the complaint must prove that they either had no knowledge of the conduct giving rise to the forfeiture, or that they took all reasonable steps to terminate the illegal conduct. *Id.* § 983(d)(2). Claimants who took title to the property after the criminal activity occurred must prove, by a preponderance of the evidence, that they were bona fide purchasers for value without knowledge of the prior criminal activity. *Id.* § 983(d)(3)(A). One of the main concerns of bringing a civil forfeiture action is the broad discovery involved, which far exceeds the boundaries of criminal discovery. *See* FED. R. CIV. P. 26-37. For this reason, motions to stay a civil forfeiture are routinely made by the Government where the discovery is

likely to adversely affect a related pending criminal case. *See* 18 U.S.C. § 981(g) (2013). The general statute referencing crimes for which civil forfeiture is available is 18 U.S.C. § 981.

C. Asset forfeiture theories

Proceeds: Most federal crimes giving rise to forfeiture do so under the proceeds theory, whereby any money or property traceable, directly or indirectly, to the underlying crime is subject to forfeiture. Thus, if the funds earned while committing a predicate crime were used to buy a home or car, that property would then be subject to forfeiture.

Facilitating property: A select group of federal crimes also provides for the forfeiture of any property used in furtherance of committing those crimes, regardless of whether the property was purchased with criminal proceeds. An example of facilitating property would be a vehicle used to transport cocaine. Another would be clean money in a bank account used to conceal criminal proceeds that were laundered into the account. The most common examples of crimes for which facilitating property is subject to forfeiture are (1) money laundering, (2) narcotics trafficking, (3) human trafficking, (4) unlicensed money remitting, (5) racketeering, and (6) trafficking in counterfeit goods.

Terrorist assets: The broadest forfeiture permitted under U.S. law is in terrorism violations, for which all property owned by a terrorist is subject to forfeiture, without the need for any tracing or connection of the property to criminality. *See* 18 U.S.C. § 981(a)(1)(G) (2013).

IV. Investigative techniques

The following is a list of investigative techniques that have been used effectively to investigate money laundering and asset forfeiture cases.

1. **Bank Secrecy Act reports.** Currency Transaction Reports, Suspicious Activity Reports (SARs), Foreign Bank Account Reports Form 8300, and similar documents are required to be filed with the Financial Crimes Enforcement Network (FinCEN) by financial institutions, including casinos and some merchants, and can help investigators connect the dots on laundered or concealed assets. SARs are a tremendous source of intelligence, often actionable, and can be used proactively to launch new investigations. They also assist investigations reactively by identifying accounts, assets, previously unknown associates, and other information that can prove useful in an investigation. SAR Review Teams exist around the country, enabling multiple agencies to examine SARs with prosecutors and choose viable targets. Importantly, financial institutions are required to provide the supporting documentation behind a SAR upon request from law enforcement. No subpoena is required. 31 C.F.R. § 103.18(d) (2013).
2. **Egmont.** This network consists of the financial intelligence units of over 130 countries and permits law enforcement to request data in support of a significant money laundering or terrorist financing investigation, which at a minimum will include the requested country's equivalent of SARs filed on the subjects of the request. No subpoena, prosecutor, or court involvement is needed, and law enforcement makes the request through FinCEN.
3. **Mutual Legal Assistance Treaties.** A formal request for records or enforcement action by a foreign country is made through the Department's Office of International Affairs. The best way for an investigator to begin the formal process or to decide if it is worthwhile to proceed with a formal request is to contact the Office of International Affairs by calling 202-514-0000 and ask to speak to an attorney assigned to handle the country where the request will be sought.
4. **Federal Reserve.** The New York Federal Reserve Bank has a team of investigators that can provide research assistance which can often reveal previously unknown beneficiaries and

accounts. Their help can be sought by sending a letterhead request to the Federal Reserve, 33 Liberty Street, New York, NY 10045.

5. **Clearing House Interbank Payment System (CHIPS).** A subpoena can be served to search the CHIPS network, which is used by many financial institutions to process international wire transfers. CHIPS subpoenas are served by mail to 100 Broad Street, New York, NY 10004.
6. **Mail covers.** A request through the Postal Inspection Service will reveal the information on the outside of envelopes sent to the requested address. This information will often identify financial institutions with whom the subjects of the investigation are dealing, as well as shell corporations, virtual offices, and phone companies.
7. **Tax returns.** Through a court order obtained by a U.S. Attorney's office, the investigator can examine relevant tax returns, which will often yield the location of accounts as well as front companies and shell corporations through which the subject is laundering money. The U.S. Attorney must personally approve an application for tax return orders. The investigator must show reasonable cause to believe that (1) federal criminal violations have been committed, (2) relevant evidence will be found in the tax returns, and (3) the evidence cannot reasonably be obtained from other sources or the tax returns will provide the most probative form of evidence. 26 U.S.C. § 6103(i)(1)(B) (2013). Investigators or prosecutors working with a subject who is cooperating or proffering can request the subject to sign IRS Form 8821, which will authorize the release of the subject's tax records without the need for a court order.
8. **Patriot Act 314(a) search.** Likely the most important money laundering tool available, the Patriot Act 314(a) search allows investigators to request that FinCEN post the names of any individuals or entities that are the subjects of a significant money laundering or terrorist financing investigation on a secure Web site. All U.S. financial institutions are then required to advise the requesting investigator of any accounts in the names of the requested subjects, along with contact information for service of a subpoena. This method is far superior to serving a subpoena on credit bureaus, as the investigator will learn of all domestic accounts, and not just those linked to some form of credit. No subpoena, prosecutor, or court involvement is needed, and law enforcement makes the 314(a) request through FinCEN. However, if positive results come up as a result of the search, a subpoena will be needed to get the documentation.
9. **Correspondent bank accounts.** Virtually all foreign banks maintain correspondent accounts in the United States in order to conduct U.S. dollar transactions on behalf of their customers. These are simply accounts opened at U.S. banks in the name of a foreign financial institution. Even without jurisdiction over a foreign bank, investigators can serve a grand jury subpoena on the U.S. correspondent account and require production of records of any checks or wire transfers that cleared through the U.S. correspondent account on behalf of the foreign bank. Investigators can learn the location of a foreign bank's U.S. correspondent account by consulting the Bankers Almanac. AFMLS keeps current editions of this volume and can be consulted at 202-514-1263. Also, Thomsons Global is a commercially available service that provides this information. Their Web site address is www.tgbr.com. By learning the senders or beneficiaries of these transactions, the investigator will be able to determine the likely beneficial owners of the foreign account, as well as other foreign and domestic accounts involved in the money laundering cycle. Finally, where laundered funds are traced to a financial institution in a country that will not cooperate with the United States, the Department can authorize the use of 18 U.S.C. § 981(k), a Patriot Act provision, which permits the seizure from a U.S. correspondent account of a sum equivalent to the amount of criminal proceeds laundered to the foreign bank. The U.S. correspondent bank relinquishes the money and provides the foreign bank with the seizure warrant so that the foreign bank can recoup the amount seized from its correspondent account by taking the same sum from its account holder. The foreign bank is usually not complicit in the money laundering but is

subject to the seizure based on its role in holding the money launderer's funds overseas. A more in-depth discussion on 981(k) is included in the international asset forfeiture article in this issue of the Bulletin.

V. Conclusion

The 21st century has ushered in a wave of technologically savvy professional money launderers. While the challenges in apprehending them are apparent, an investigator familiar with the money laundering and asset forfeiture tools and laws will find the means to disrupt and dismantle any criminal activity done for profit. This activity includes transnational criminal enterprises, whose survival depends on earning and moving large sums of money. ❖

ABOUT THE AUTHOR

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Making Forfeiture Part of Your Criminal Case

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Forfeiture is one of the most important tools in the federal prosecutor's arsenal. It allows the Government to punish defendants by depriving them of the fruits of their crime, makes it less likely they or anyone else will be able to use their property to commit other crimes in the future, deters others from committing similar crimes, and provides a mechanism for recovering property for the benefit of victims. Accordingly, there should be a forfeiture notice in virtually every indictment alleging an offense committed for financial gain or an offense for which the forfeiture of property used to commit the offense is authorized by statute.

This article discusses, in a checklist format, the steps that a prosecutor should take to ensure that forfeiture is part of the indictment, plea agreement, jury verdict, and sentence in a criminal case.

I. Include forfeiture in the indictment

A. Notice

Criminal forfeiture is part of the sentence imposed on a person who has been convicted of a crime. *See Libretti v. United States*, 516 U.S. 29, 38-39 (1995). Forfeiture authority is governed by each specific statute and criminal forfeiture is available even where the statute specifically authorizes civil forfeiture. 28 U.S.C. § 2461(c) (2013).

Criminal forfeiture is governed by Rule 32.2 of the Federal Rules of Criminal Procedure and by the procedures in 21 U.S.C. § 853. *See* 28 U.S.C. § 2461(c) (2013) (making the procedures in § 853 applicable to all criminal forfeitures). Rule 32.2(a) requires the indictment or information to put the defendant on notice that the Government will be seeking forfeiture as part of his or her sentence. FED. R. CRIM. P. 32.2(a). The notice is typically labeled "Forfeiture Notice" or "Forfeiture Allegation." It should not be labeled as "count."

The notice does not have to list the property subject to forfeiture, but it must at least track the applicable forfeiture statute language. For example, if the forfeiture will be based on a conviction for mail or wire fraud, the notice would track the language of 18 U.S.C. § 981(a)(1)(C), and state that if the defendant is convicted, all proceeds traceable to the offense will be forfeited to the United States. If the forfeiture will be based on a conviction for money laundering, the notice would track the language of 18 U.S.C. § 982(a)(1), and state that if the defendant is convicted of money laundering, all property involved in that offense will be forfeited. *United States v. Clemens*, 2011 WL 1540150, at *3-4 (D. Mass. Apr. 22, 2011); *United States v. Woods*, 730 F. Supp. 2d 1354, 1371, 1372-73 (S.D. Ga. 2010); *United States v. Galestro*, 2008 WL 2783360, at *10-11 (E.D.N.Y. July 15, 2008); *United States v. Lazarenko*, 504 F. Supp. 2d 791, 796-97 (N.D. Cal. 2007). At some point before trial, the Government may give notice of specific property it intends to forfeit by filing a bill of particulars listing the property.

One of the virtues of criminal forfeiture is that the Government can seek a forfeiture order in the form of a money judgment, even if defendants no longer have the proceeds of the crime in their possession and lack the present ability to satisfy the judgment out of other funds. *See United States v. Vampire Nation*, 451 F.3d 189, 202 (3d Cir. 2006). The amount of the money judgment is typically

determined in the sentencing phase of the case and need not be alleged in the indictment. *See United States v. Smith*, 656 F.3d 821, 827 (8th Cir. 2011); *United States v. Kalish*, 626 F.3d 165, 169 (2d Cir. 2010). If the indictment does include a specific figure, however, you should preface it with terms like “at least” or “not limited to.” That way, the defendant cannot claim surprise if at the end of the case it turns out that the Government is able to establish its right to a larger forfeiture judgment than seemed to be the case at the outset. *See United States v. Poulin*, 690 F. Supp. 2d 415, 422-23 (E.D. Va. 2010); *United States v. Segal*, 495 F.3d 826, 839-40 (7th Cir. 2007).

B. Parallel proceedings

When drafting the indictment, it is important that the prosecutor check with the case agent about the status of any administrative forfeiture proceeding. If the property has already been forfeited administratively, there is no need to include it in the indictment. In that case, the property already belongs to the United States. If, however, it was seized for administrative forfeiture and someone did file a claim, you must include the property in an indictment or bill of particulars within 90 days, obtain an extension of time, or file a parallel civil forfeiture action to preserve the Government’s right to forfeit the property. *See United States v. Martin*, 662 F.3d 301, 304 (4th Cir. 2011). If the indictment was returned *without* a forfeiture notice and you then discover that someone has filed a claim in the administrative forfeiture proceeding, you will likely have to obtain a superseding indictment within the 90-day period. Navigating this scenario is a nuisance and is a compelling reason to include the forfeiture notice in the indictment in the first instance.

If the Government files only a criminal indictment and does not file a civil forfeiture action as well, it may only continue to possess the property if it has complied with the forfeiture statutes governing seizure. *See* 18 U.S.C. § 983(a)(3)(C) (2013). A criminal seizure warrant or a criminal restraining order meets that requirement. However, if the property was originally seized under civil seizure authority, usually a civil seizure warrant, the Government must obtain a housekeeping order allowing it to retain the property pending trial. *See United States v. Abrahams*, 2013 WL 285719, at *1-2 (D. Md. Jan. 24, 2013); *United States v. Scarmazzo*, 2007 WL 587183, at *3 (E.D. Cal. Feb. 22, 2007).

At the end of the day, not every criminal case will result in a forfeiture, but including a boilerplate forfeiture notice preserves the forfeiture option. If you later decide to seek forfeiture, you can identify the assets in a bill of particulars. *See United States v. Adams*, 2009 WL 1766794, at *3 (W.D. Va. June 24, 2009). If you decide *not* to seek forfeiture, there is nothing lost. If you omit the forfeiture notice, however, forfeiture will not be possible, even if you later discover forfeitable assets, unless the defendant waives the notice requirement. There is no reason to put yourself in the position of having to choose between having to supersede the indictment to include a forfeiture notice or allowing the defendant to retain forfeitable property just because you failed to include the forfeiture notice in the indictment in the first instance.

II. Preserve the property pending trial

It is important to make sure that the forfeitable property is preserved pending trial. Often the property will already be in the Government’s possession when the indictment is returned because it was seized at or before the time of the defendant’s arrest. If that is not the case, you should ask for a pre-trial restraining order or a criminal seizure warrant under 21 U.S.C. § 853(e) or (f), respectively.

Restraining orders and seizure warrants must be issued on a finding of probable cause. While it is not necessary to list the property subject to forfeiture in the indictment, it is useful to do so if it appears likely that you will be seeking a restraining order or seizure warrant. Under these circumstances, the court may rely on the grand jury’s finding of probable cause and will not require the Government to submit a separate affidavit. For example, if you are seeking to restrain a bank account that is listed in the forfeiture notice in the indictment, you would simply file an *ex parte* application for the restraining order, stating

that an indictment has been returned and that the grand jury has found probable cause to believe that the account in question will be subject to forfeiture if the defendant is convicted. *United States v. Holy Land Found. for Relief and Dev.*, 493 F.3d 469, 474-75 (5th Cir. 2007) (en banc); *United States v. Jamieson*, 427 F.3d 394, 405 (6th Cir. 2005); *United States v. Bollin*, 264 F.3d 391, 421 (4th Cir. 2001).

To take advantage of this procedure, it is good practice to advise the grand jury that there is a forfeiture notice at the end of the indictment and that you are asking them to find probable cause to believe the property listed in the notice is forfeitable, based on the testimony they have heard.

Defendants have no right to a pre-restraint hearing, *Holy Land Found.*, 493 F.3d at 475, and no right to challenge the restraining order in a post-restraint hearing unless they show that they have no funds other than the restrained property with which to hire counsel, *and* that there is a reasonable basis to believe that the court erred in granting the restraining order. This is called the *Jones-Farmer* Rule after the two leading cases. See *United States v. Farmer*, 274 F.3d 800, 804-05 (4th Cir. 2001); *United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998). The details of the rule vary from circuit to circuit, however, so it is important to know how it has been implemented in your circuit.

In the Fourth Circuit, both directly forfeitable property and substitute assets may be seized or restrained. Elsewhere, only traceable property can be seized or restrained. Compare *In re Billman*, 915 F.2d 916, 919, 220 (4th Cir. 1990) (holding that the Government is not required to trace proceeds in order to execute a forfeiture judgment and that property may be seized so long as there is probable cause that the property will ultimately be proven forfeitable), with *United States v. Parrett*, 530 F.3d 422, 430-31 (6th Cir. 2008) (holding that the Government may not place restraints on substitute property prior to entry of an order of forfeiture because the Government “has only a potential and speculative future interest in substitute assets prior to conviction”); *United States v. Gotti*, 155 F.3d 144, 148-50 (2d Cir. 1998); *United States v. Field*, 62 F.3d 246, 249 (8th Cir. 1995); *United States v. Ripinsky*, 20 F.3d 359, 363-64 (9th Cir. 1994); *In re Assets of Martin*, 1 F.3d 1351, 1359 (3d Cir. 1993); *United States v. Floyd*, 992 F.2d 498, 501-02 (5th Cir. 1993).

If the property is real property, you can also file a notice of lis pendens in the local land records, unless the indictment is sealed, in which case you must wait until the indictment is unsealed.

III. Plea agreements

You should insist that defendants agree to the forfeiture as part of their plea agreements, which should spell out what the defendant is agreeing to forfeit and that they are waiving all of their rights under the federal rules.

In general, it is a bad idea to agree to return property to obtain a guilty plea. This creates the appearance of buying a guilty plea, undermines the purpose of forfeiture (to punish the defendant), and is devastating to the morale of the agents who worked hard to locate the property. It is equally wrong to agree to a lesser jail sentence for a defendant who is willing to give up the property, as that creates the impression that a defendant with property to forfeit is able to “buy his way out of jail.”

An Assistant U.S. Attorney may *not* agree to return property that has already been administratively forfeited. Once property has been forfeited, it belongs to the United States, and prosecutors have no more authority to agree to return it than they would have to agree to turn over title to office furniture or a Government computer.

It is important to remember that the defendant must plead to an offense that supports the forfeiture. Forfeiture is part of the defendant’s sentence, and he or she may only be sentenced for the offense for which he or she has been convicted. So, if the defendant pleads guilty to Crime A, the court may only forfeit property derived from or used to commit Crime A. The court has no authority to forfeit property connected to Crime B, even if the defendant is willing to agree to it. See *United States v.*

Venturella, 585 F.3d 1013, 1016, 1017 (7th Cir. 2009) (noting that in the Seventh Circuit, a defendant's agreement to a sentence not authorized by law is not binding on the defendant).

Consequently, it will usually be best to base the forfeiture on a conspiracy charge or a scheme to defraud that encompasses the entire course of conduct and all of the property that should be forfeited. On the other hand, if criminal forfeiture is impossible, you may require the defendant to agree not to contest a parallel civil forfeiture of the property involved in offenses other than the one to which he or she is pleading guilty.

The plea agreement may state that the U.S. Attorney will *recommend* that any forfeited property be used to satisfy a restitution order, but it cannot bind the Attorney General. Recommendations must be approved by Main Justice. *United States v. Pescatore*, 637 F.3d 128, 131 (2d Cir. 2011); *United States v. Fenner*, 2011 WL 2014939, at *2 (M.D. Pa. May 23, 2011). Forfeiture and restitution serve entirely different purposes and can both be imposed for the same conduct. *United States v. Newman*, 659 F.3d 1235, 1241 (9th Cir. 2011).

The defendant cannot be penalized for failing to convince his wife not to contest the forfeiture of her share of the property in the ancillary proceeding. *United States v. Bennett*, 252 F.3d 559, 564 (2d Cir. 2001). The defendant can, however, be penalized under the sentencing guidelines for attempting to frustrate the forfeiture by transferring the property to third parties. *United States v. Keeling*, 235 F.3d 533, 536-37 (10th Cir. 2000); *United States v. Baker*, 227 F.3d 955, 967 (7th Cir. 2000).

IV. Consent order of forfeiture

Federal Rule of Criminal Procedure 32.2(b) says that the court must enter a preliminary order of forfeiture sufficiently in advance of sentencing to allow the parties to suggest revisions before the order becomes final. The court's failure to comply with this and the other procedural requirements in the rule can have dire consequences. See *United States v. Shakur*, 691 F.3d 979, 988-89 (8th Cir. 2012) (vacating the order of forfeiture).

The easiest way to comply with most of the procedural requirements is to have the defendant sign a "Consent Order" at the time of the guilty plea or re-arraignment, or have the defendant specifically agree to the entry of the Preliminary Order at the time of the plea. You definitely should not wait until the day of sentencing to get the forfeiture order. It is not uncommon for everyone to forget about the forfeiture at sentencing. As discussed below, if that happens, the entire forfeiture process may be void.

The content of the consent order of forfeiture will differ depending on whether the defendant is agreeing to forfeit specific assets, to a money judgment only, or to a combination of the two. There is also a variation that defers the calculation of the amount of the money judgment until after sentencing. Check with your asset forfeiture coordinator to get the proper model order.

V. Special verdict/jury instructions

If the case goes to trial, the forfeiture does not come into play until the jury has returned a guilty verdict, at which point there is a post-verdict forfeiture hearing. Per Rule 32.2(b)(5), the court must ask the parties, before the jury begins to deliberate, if they will waive the jury or ask that the jury be retained to determine the forfeiture. Some courts hold that the burden is on the defendant to make an affirmative request to have the jury retained. See *United States v. Nichols*, 429 F. App'x 355, 356 (4th Cir. 2011) (per curiam). Others have held that the effect of a 2009 amendment to the rule was to put the burden on the court to make an affirmative inquiry. *United States v. Mancuso*, 2013 WL 1811276, at *13 (9th Cir. May 1, 2013). Under the latter view, if the court does not make the inquiry, defendant's silence may not constitute a knowing waiver of his or her jury right, with the result that any forfeiture order entered by the court may be void. *Id.*

To avoid this situation, you *must* remind the court of its duty to inquire of the defendant if he or she will be requesting that the jury be retained to determine the forfeiture in the event that it returns a guilty verdict. Note, however, that there is no right to have the jury retained if the Government is only asking for a money judgment. *See United States v. Gregoire*, 638 F.3d 962, 972 (8th Cir. 2011); *United States v. Tedder*, 403 F.3d 836, 840-41 (7th Cir. 2005). The amount of the money judgment is therefore always determined by the court alone, either on the papers submitted by the Government or following an evidentiary hearing.

If the jury is waived, the court may postpone the forfeiture hearing to a later date—as long as the forfeiture order is entered prior to sentencing. If the jury is retained, you must prepare jury instructions and special verdict forms and decide if you will need to call any additional witnesses. Generally, calling witnesses is unnecessary because the Government is allowed to rely on evidence from the “guilt phase” of the trial. *See United States v. Sabhnani*, 599 F.3d 215, 262-63 (2d Cir. 2010); *United States v. Roberts*, 696 F. Supp. 2d 263, 271 (E.D.N.Y. 2010). Also, because forfeiture is part of sentencing, hearsay is admissible. *See United States v. Ali*, 619 F.3d 713, 720 (7th Cir. 2010); *United States v. Capoccia*, 503 F.3d 103, 109 (2d Cir. 2007).

The only issue in the forfeiture phase of the trial is whether the Government is able to establish the required nexus between the property and the offense of conviction by a preponderance of the evidence. The Government is *not* required to prove that the property belonged to the defendant, and it is not a defense that the property belonged to a third party. All issues regarding ownership are deferred to a post-trial ancillary proceeding by Rule 32.2(b)(2). *United States v. Andrews*, 530 F.3d 1232, 1236 (10th Cir. 2008).

VI. Sentencing

Rule 32.2(b)(4) says that the forfeiture *must* be included in the oral announcement of the sentence and included in the judgment. As mentioned earlier, the court’s failure to issue a forfeiture order at or before sentencing is likely to be fatal. *See United States v. Shakur*, 691 F.3d 979, 988-89 (8th Cir. 2012); *United States v. Ferguson*, 385 F. App’x 518, 530 (6th Cir. 2010); *United States v. Petrie*, 302 F.3d 1280, 1284 (11th Cir. 2002). Forfeiture is part of the defendant’s sentence and, unless Rule 35 applies, the court cannot amend the sentence at a later date to add a forfeiture order that should have been entered at sentencing or before. Thus, if there was no consent order and the court did not issue a preliminary order, the court *must* issue a forfeiture order at sentencing.

If the court did enter a consent order at the guilty plea or re-arraignment, however, it will become final by its own terms at sentencing, making it unnecessary for the court to enter another order at that time. In that case, all the court is required to do at sentencing is to mention the forfeiture in the oral announcement and to include the forfeiture order in the judgment. The omission of the latter requirement is considered a clerical error that may be corrected at any time. *United States v. Smith*, 656 F.3d 821, 828 (8th Cir. 2011).

If there are victims, you will generally want to have the court issue both a forfeiture order *and* a restitution order, even if you are agreeing to recommend that the forfeited funds be applied to restitution. You will want to do this because the forfeiture laws have provisions for recovering assets that the restitution laws do not.

The defendant is not entitled to an offset against a restitution order to reflect the amount forfeited, or vice versa. *United States v. Newman*, 659 F.3d 1235, 1241-43, 1244 (9th Cir. 2011); *United States v. Pescatore*, 637 F.3d 128, 137 (2d Cir. 2011). Forfeiture is not a ground for reducing the defendant’s period of incarceration. *United States v. Milo*, 506 F.3d 71, 74 (1st Cir. 2007); *United States v. Cacho-Bonilla*, 404 F.3d 84, 92 (1st Cir. 2005); *United States v. Bright*, 353 F.3d 1114, 1119 (9th Cir. 2004).

VII. Third parties

As mentioned earlier, the ownership of the property is *not* an issue in the forfeiture phase of the trial. Determining the ownership of the property is deferred to the ancillary proceeding where it is the *only* issue before the court.

The ancillary proceeding is a forum for third parties to establish that the property should not have been forfeited because it belonged to them, not to the defendant. It is not an opportunity for third parties to relitigate the issues that were litigated in the defendant's trial. *United States v. Davenport*, 668 F.3d 1316, 1321 (11th Cir. 2012); *United States v. Porchay*, 533 F.3d 704, 710 (8th Cir. 2008); *United States v. Andrews*, 530 F.3d 1232, 1236-37 (10th Cir. 2008).

Thus, there are only two grounds on which a third party may recover in the ancillary proceeding: (1) the property belonged to the third party, not the defendant, at the time it became subject to forfeiture; or (2) the third party acquired the property from the defendant as a bona fide purchaser for value after it became subject to forfeiture, and did not have any reason to believe that it was subject to forfeiture when he or she acquired it. 21 U.S.C. § 853(n)(6)(A), (B) (2013). See *United States v. Monea Family Trust I*, 626 F.3d 271, 277 (6th Cir. 2010); *United States v. Timley*, 507 F.3d 1125, 1130 (8th Cir. 2007).

Because having a pre-existing ownership interest in the forfeited property is a complete defense in the ancillary proceeding, it is not necessary for third parties to show that they were "innocent owner[s]." That concept is unique to civil forfeiture law. Thus, if the Government is attempting to forfeit property in which a non-innocent third party, such as the defendant's spouse, has an interest, it will likely need to file a civil forfeiture action against the property and force the third party to establish an innocent owner defense. See *United States v. Fleet*, 498 F.3d 1225, 1232 (11th Cir. 2007); *United States v. Soreide*, 461 F.3d 1351, 1354 (11th Cir. 2006); *United States v. Totaro*, 345 F.3d 989, 995 (8th Cir. 2003). It is entirely permissible to use both criminal and civil forfeiture against the same property to complete the forfeiture. *United States v. Nava*, 404 F.3d 1119, 1136-37 (9th Cir. 2005).

In most cases, the Government is able to dispose of a third party claim in the ancillary proceeding by moving to dismiss the claim under Rule 32.2(c)(1)(A) for lack of standing or for failure to state a claim. The Government may also move for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *United States v. Oregon*, 671 F.3d 484, 489 n.4 (4th Cir. 2012); *United States v. Sigillito*, 2013 WL 1448749, at *1 (E.D. Mo. Apr. 1, 2013); *United States v. Dupree*, 2013 WL 311403, at *24 (E.D.N.Y. Jan. 28, 2013).

At the conclusion of the ancillary proceeding, the court must enter a final order of forfeiture which amends the preliminary order to account for any third party interests. FED. R. CRIM. P. 32.2(c)(2). If no third party files a petition, the preliminary order becomes the final order if the court finds the defendant had an interest in the property. *Id.*

VIII. Resources

Criminal forfeiture procedure is also covered in detail in chapters 15 through 24 of *Asset Forfeiture Law in the United States*, a treatise written by Assistant U.S. Attorney Stef Cassella. See STEFAN D. CASSELLA, *ASSET FORFEITURE LAW IN THE UNITED STATES* 473-738 (2d ed. 2013). ❖

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Prosecuting Financial Institutions and Title 31 Offenses

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I. Introduction

Prosecutors have several tools available to them when investigating whether a bank, financial institution, or other entity facilitates money laundering by organized criminal groups. This article will focus on the Bank Secrecy Act (BSA) and how it has been used in recent prosecutions to expand the reach of anti-money laundering (AML) laws beyond aiding and abetting liability for the underlying substantive money laundering violations.

A. The Bank Secrecy Act

Since it was enacted in 1970, the BSA has provided for civil and criminal penalties against individuals or banks that violate its provisions. *See* 31 U.S.C. §§ 5311–5332 (2013). Prior to 1996, the primary BSA requirement for financial institutions was to file Currency Transaction Reports (CTRs). Since that time, however, additional statutory and regulatory requirements have been enacted that impose new compliance responsibilities on banks. In 1996, Treasury Department regulations required banks to file Suspicious Activity Reports (SARs). *See* 31 C.F.R. § 1020.320 (2013). In 2001, banks were required to establish AML programs that included the following:

- The development of internal policies, procedures, and controls
- The designation of a compliance officer
- An ongoing employee training program
- An independent audit function to test programs

31 U.S.C. § 5318(h) (2013). In short, the BSA imposes a legal obligation on banks to know their customers' business, the source of their customers' money, and the type of transactions that are typical for their customers. Banks have an obligation to report or, in some cases, to refuse to conduct transactions they find suspicious—those that appear to be from an illegitimate source, have no legitimate business purpose, or are out of character with what they understand their customers' business to be. “Willful” failures to establish or maintain an effective AML program are subject to criminal penalties. *Id.* § 5322.

Prior to 2002, there were no criminal enforcement actions, or even serious regulatory penalties, for the failure of financial institutions to file SARs or comply with the requirements of § 5318(h). The first civil penalty against a bank for failing to file SARs was imposed on Great Eastern Bank of Miami, Florida, in September 2002. In November 2002, the Department of Justice (the Department) began conducting a series of criminal investigations into financial institutions, resulting in either significant criminal convictions or deferred prosecutions of several institutions for a variety of offenses, including the aforementioned BSA statutes. Among the banks that have been prosecuted are Lloyds, Credit Suisse, Wachovia, Barclays, HSBC, Standard Chartered Bank, ING Bank, Ocean Bank, and a money transmitter in MoneyGram International. (This list of bank prosecutions also includes several prosecutions of non-BSA violations, such as violations of the Trading with the Enemy Act or the International Emergency

Economic Powers Act.) Moreover, in the last seven years alone, the Department's prosecutions of banks have resulted in forfeitures of nearly \$3 billion dollars.

In bringing these enforcement actions, the Department has not focused solely on large banks. Indeed, the banks have run the full gamut—from Pamrapo Savings Bank, a small community bank in New Jersey that pleaded guilty in 2010 to conspiring to violate the Bank Secrecy Act, to banking giant HSBC, which admitted in December 2012, in a deferred prosecution agreement, to failing to implement an AML program capable of adequately monitoring suspicious transactions and activity, laundering drug trafficking proceeds, and allowing Office of Foreign Assets Control (OFAC)-prohibited transactions to be processed through United States financial institutions in violation of United States economic sanctions.

In both of these cases, the institutions abdicated their roles as responsible gatekeepers to the U.S. banking system. Pamrapo, for example, admitted to failing to file CTRs and SARs related to approximately \$35 million in illegal and suspicious transactions, including more than \$5 million in structured currency transactions. HSBC admitted to allowing at least \$881 million of drug trafficking proceeds to flow unimpeded through its accounts. As seen in just these two cases, the amount of dirty money that can move through a single bank as a result of systemic and pervasive compliance failures can be staggering.

In each case, the bank's compliance processes fell far short. The Department is aware that at many banks, BSA and AML responsibilities are considered a cost center. Setting up an effective compliance program to detect and report suspicious activity means accruing significant expenses for technology, personnel, and training—all without the promise of any short-term profits. As recent prosecutions show, however, failing to adopt and maintain a real compliance structure will have serious consequences for the financial institution and can often result in forfeiture and monetary penalties that far exceed any cost savings.

This article will discuss recent criminal enforcement actions against banks for BSA and AML violations, the rationale for the outcome in each case, and the role that banks and other financial institutions play in complying with the BSA and the AML program generally.

B. Money Laundering and Bank Integrity Unit

Proving a criminal violation of the BSA against an institution is no easy task. The Government must show that the institution acted “willfully” in the sense that it knew it was violating the law. Moreover, due to the interplay between federal criminal law and the underlying regulatory regime, the jury instructions necessarily are lengthy and cumbersome. In addition, these investigations are resource intensive and can consume years of prosecutor and agent time. Nevertheless, these cases are an important part of protecting the U.S. financial system from illicit money flows.

Given these demands, in 2010 the Asset Forfeiture and Money Laundering Section of the Criminal Division (AFMLS) established a unit staffed with prosecutors whose mission specifically includes investigating and prosecuting financial institutions for BSA violations. This unit—the Money Laundering and Bank Integrity Unit (MLBIU)—has handled some of the Department's largest and most complicated criminal investigations of financial institutions. MLBIU is devoted to investigating complex national and international criminal cases, including BSA violations like those discussed below.

MLBIU often pairs with other offices—a United States Attorney's office (USAO), law enforcement agencies, federal banking regulators, state banking regulators, and the Treasury Department's Financial Crimes Enforcement Network (FinCEN) and Office of Foreign Assets Control (OFAC), to name a few—in working these cases. Coordinated efforts between law enforcement and regulators often achieve the greatest impact and general deterrence effect.

C. Prosecutorial considerations

Each of the cases discussed below was resolved by a deferred prosecution agreement pursuant to the Principles of Federal Prosecution of Business Organizations. BSA prosecutions typically arise in connection with a fraud, narcotics, or other predicate investigation that identifies significant criminal proceeds flowing through a financial institution. Further investigation subsequently reveals that the bank had systemic compliance failures that prevented it from stopping the flow of illicit funds. Prosecutors and investigators in each of the cases cited below were in fact alerted to these pervasive compliance failures in connection with an investigation of other criminal activity. When initial scrutiny of the bank's conduct raised serious concerns about its activity and compliance shortcomings, the investigations proceeded into full criminal investigations.

Once a criminal investigation begins, several factors are considered in assessing whether an institution's violation of the BSA warrants criminal remedies. Each of these factors is reflected in the investigations described below, and there is every reason to believe that these are the factors that prosecutors will continue to look to in evaluating cases in the future.

The violation must be willful: A criminal violation of the BSA must involve evidence (beyond a reasonable doubt) that a decision was "willful," that is, the bank understood its obligations under the BSA and, nevertheless, deliberately decided to violate the law, demonstrated a flagrant organizational indifference, or a willful blindness. This burden is the highest that the law allows and, as prosecutors, we are mindful that the criminal law is not a law of negligence.

The decision whether to file a SAR is a judgment call: Under the BSA, a bank is required to file a SAR when it

knows, suspects, or has reason to suspect that:

- (i) the transaction involves funds derived from illegal activities or is intended or conducted in order to hide or disguise funds or assets derived from illegal activities . . . as part of a plan to violate or evade any Federal law or regulation or to avoid any transaction reporting requirement under Federal law or regulation;
- (ii) the transaction is designed to evade any requirements of this chapter or of any other regulations promulgated under the Bank Secrecy Act; or
- (iii) the transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the bank knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.

31 C.F.R. § 1020.320 (2013). Since this is not a clearly objective standard, the Government needs strong and compelling evidence that the transactions in question were suspicious and that the institution knew they were suspicious in order to prove a criminal violation.

There must be evidence of a systemic failure: The Government will look closely at whether the financial institution has a healthy and effective AML program. If the bank has a program to detect potentially suspicious activity and, after researching the transactions involved, determines that no SAR need be filed, it would be extremely rare for the Government to second-guess that decision, even if the decision was clearly wrong. However, where the bank either does not have an AML program or has a poor one and, as a result, does not even detect a suspicious transaction, the Government will be far less sympathetic. Most prosecutions of institutions for BSA violations have centered on this factor.

What does an effective compliance program look like? The United States Sentencing Commission has put forth an excellent description of an effective compliance program in § 8B2.1 of the United States Sentencing Guidelines. Some of the operative factors include the involvement of high-level personnel in the operation of the program, appropriate incentives to employees to ensure effective compliance, and education and independent testing of the effectiveness of the program. The mere

existence of a paper program is insufficient. Prosecutors will not hesitate to investigate whether a compliance program is effective.

The bank has a duty independent of its regulator: While regulators periodically assess an institution's AML program, the BSA makes clear that the responsibility for determining whether the program is effective rests on the institution, not the regulator. Prosecutors will consider whether an institution received favorable reports from its regulator, but they will also look behind those reports to determine whether such clean bills of health were reasonable. In a number of instances, prosecutors have found no justification for a regulator's conclusion of a satisfactory AML program and, consequently, have given it little weight.

As a result of this analysis, financial institutions that take their obligations seriously, and that fund and maintain a real AML program, are well positioned to avoid criminal scrutiny for a BSA violation. Institutions that do not take their obligations seriously may face a criminal enforcement action if their conduct should come within the scope of a criminal investigation.

II. Criminal prosecution of banks under the BSA

A. HSBC

Overview: In December 2012, HSBC Holdings PLC and HSBC Bank USA (HSBC USA) entered into a deferred prosecution agreement with AFMLS and the USAO for the Eastern District of New York, accepting responsibility for HSBC USA's criminal violations of the BSA, the International Emergency Economic Powers Act (IEEPA), and the Trading with the Enemy Act (TWEA). As part of the agreement, HSBC agreed to the largest forfeiture ever of \$1.256 billion to the Department and agreed to pay an additional \$665 million in civil penalties to the Office of the Comptroller of the Currency and to the Federal Reserve. HSBC Holdings and HSBC USA replaced most of its senior management, "clawed back" deferred compensation bonuses given to its most senior AML and compliance officers, and agreed to partially defer bonus compensation for its most senior executives during the period of the five-year deferred prosecution. *United States v. HSBC Bank USA, N.A.*, No. 12-cr-00763-ILG, DPA para. 5b (E.D.N.Y. Dec. 11, 2012).

Perhaps the most significant part of the deferred prosecution agreement, however, has also been the least discussed: HSBC Holdings agreed to export United States AML practices to each of its HSBC Affiliates around the world. The implementation of a single global standard shaped by the highest AML standards available in any location where an HSBC Affiliate operates has, at a minimum, required HSBC and its Affiliates worldwide to adhere to United States AML standards. The implementation of enterprise-wide standards is designed to prevent a repeat of conduct that gave rise to this prosecution, and perhaps even more significantly, it establishes a new benchmark against which to measure the AML programs of other global financial institutions.

HSBC further agreed to retain an independent corporate monitor who will regularly report to the Department and oversee implementation and maintenance of the enhanced compliance obligations. The corporate monitor also is expected to evaluate the overall effectiveness of HSBC's anti-fraud and AML programs.

The AML investigation: The investigation uncovered that, from 2006 to 2010, HSBC USA severely understaffed its AML compliance function and failed to implement an AML program capable of adequately monitoring suspicious transactions and activities from HSBC Group Affiliates, particularly HSBC Mexico, one of HSBC USA's largest Mexican customers. HSBC USA failed to monitor billions of dollars in purchases of physical U.S. dollars, or "banknotes," from these Affiliates. Despite evidence of serious money laundering risks associated with doing business in Mexico, from at least 2006 to 2009, HSBC USA rated HSBC Mexico as "standard" risk, its lowest AML risk category. As a result, HSBC

USA failed to monitor over \$670 billion in wire transfers and over \$9.4 billion in purchases of physical U.S. dollars from HSBC Mexico during this period, when HSBC Mexico's own lax AML controls caused it to be the preferred financial institution for drug cartels and money launderers.

A significant portion of the laundered drug trafficking proceeds were involved in the Black Market Peso Exchange (BMPE), a complex money laundering system designed to move the proceeds from the sale of illegal drugs in the United States to drug cartels outside of the United States, often in Colombia. Beginning in 2008, an investigation conducted by Homeland Security's Immigration and Customs Enforcement Division, El Dorado Task Force, in conjunction with the USAO for the Eastern District of New York, identified multiple HSBC Mexico accounts associated with BMPE activity and revealed that drug traffickers were depositing hundreds of thousands of dollars in bulk U.S. currency each day into HSBC Mexico accounts. Since 2009, the investigation has resulted in the arrest, extradition, and conviction of numerous individuals illegally using HSBC Mexico accounts in furtherance of BMPE activity.

As a result of HSBC USA's AML failures, at least \$881 million in drug trafficking proceeds—including proceeds of drug trafficking by the Sinaloa Cartel in Mexico and the Norte del Valle Cartel in Colombia—were laundered through HSBC USA. HSBC Group admitted it did not inform HSBC USA of significant AML deficiencies at HSBC Mexico, despite knowing of these problems and their effect on the potential flow of illicit funds through HSBC USA.

The sanctions investigation: An important part of the HSBC deferred prosecution agreement included non-BSA conduct, namely, the bank's willful violations of two separate sanctions statutes, IEEPA and TWEA. From the mid-1990s through September 2006, HSBC Group allowed approximately \$660 million in OFAC-prohibited transactions to be processed through United States financial institutions, including HSBC USA. HSBC Group followed instructions from sanctioned entities such as Iran, Cuba, Sudan, Libya, and Burma, to omit their names from U.S. dollar payment messages sent to HSBC USA and other financial institutions located in the United States. The bank also removed information identifying the countries from U.S. dollar payment messages; deliberately used less-transparent payment messages, known as cover payments; and worked with at least one sanctioned entity to format payment messages, which prevented the bank's filters from blocking prohibited payments.

Specifically, beginning in the 1990s, HSBC Group Affiliates worked with sanctioned entities to insert cautionary notes in payment messages including "care sanctioned country," "do not mention our name in NY," or "do not mention Iran." HSBC Group became aware of this improper practice in 2000. In 2003, HSBC Group's Head of Compliance acknowledged that amending payment messages "could provide the basis for an action against [HSBC] Group for breach of sanctions." *HSBC Bank USA, N.A.*, Statement of Facts, para. 66. Notwithstanding instructions from HSBC Group Compliance to terminate this practice, HSBC Group Affiliates were permitted to engage in the practice for an additional three years through the granting of dispensations to HSBC Group policy.

As early as July 2001, HSBC USA's Chief Compliance Officer confronted HSBC Group's Head of Compliance on the issue of amending payments and was assured that "Group Compliance would not support blatant attempts to avoid sanctions, or actions which would place HSBC USA in a potentially compromising position." *Id.* para. 75. As early as July 2001, HSBC USA told HSBC Group's Head of Compliance that it was concerned that the use of cover payments prevented HSBC USA from confirming whether the underlying transactions met OFAC requirements. From 2001 through 2006, HSBC USA repeatedly told senior compliance officers at HSBC Group that it would not be able to properly screen sanctioned entity payments if payments were being sent using the cover method. These protests were ignored.

Additionally HSBC USA failed to terminate suspicious accounts, after being alerted by Mexico's Financial Intelligence Unit of the unusually high volume of USD exports from Mexico to the United States, which clearly should have raised red flags at HSBC USA. Especially notable, over \$3

billion in physical currency was exported from Culiacan, Sinaloa, Mexico, home of the Sinaloa drug cartel.

B. MoneyGram International

Overview: In November 2012, MoneyGram International entered into a deferred prosecution agreement with the Department in which it admitted to criminally aiding and abetting wire fraud and failing to maintain an effective AML program, in violation of the BSA. MoneyGram was involved in mass marketing and consumer fraud phishing schemes, perpetrated by corrupt MoneyGram agents and others, who defrauded tens of thousands of victims in the United States. MoneyGram agreed to forfeit \$100 million to the Department, which then returned the forfeited funds to the victims of the fraud scheme through AFMLS. *United States v. MoneyGram Int'l, Inc.*, No. 12-cr-00291-CCC, DPA para.6 (M.D. Pa. Nov. 9, 2012).

Similar to the HSBC deferred prosecution agreement discussed above, MoneyGram agreed to enhanced compliance obligations and structural changes in connection with the five-year agreement. MoneyGram was required to:

- Create an independent compliance and ethics committee of the board of directors with direct oversight of the chief compliance officer and the compliance program
- Adopt a worldwide anti-fraud and AML standard to ensure all MoneyGram agents, worldwide, are at a minimum required to adhere to United States anti-fraud and AML standards
- Adopt a bonus system that rates executives on success in meeting compliance obligations, with failure making the executive ineligible for a bonus that year
- Adopt enhanced due diligence for agents deemed to be high-risk or operating in a high-risk area

Also like HSBC, MoneyGram agreed to retain an independent corporate monitor, who will regularly report to the Department and oversee implementation and maintenance of the enhanced compliance obligations. The corporate monitor also is expected to evaluate the overall effectiveness of MoneyGram's anti-fraud and AML programs.

The fraud scheme: The investigation into the fraud scheme revealed that starting in 2004, and continuing until 2009, MoneyGram violated U.S. law by processing thousands of transactions for MoneyGram agents known to be involved in an international scheme to defraud members of the U.S. public. MoneyGram profited from the scheme by collecting fees and other revenues on the fraudulent transactions.

The scams, which generally targeted the elderly and other vulnerable groups, included posing as victims' relatives in urgent need of money and falsely promising victims large cash prizes, various high-ticket items for sale over the Internet at deeply discounted prices, or employment opportunities as "secret shoppers." In each case, the perpetrators required the victims to send funds through MoneyGram's money transfer system.

Despite thousands of complaints by customers who were victims of fraud, MoneyGram failed to terminate agents known to be involved in the scams. As early as 2003, MoneyGram's Fraud Department identified specific MoneyGram agents believed to be involved in fraud schemes and recommended termination of those agents to senior management. These termination recommendations were rarely accepted because they were not approved by executives in the Sales Department and, as a result, fraudulent activity grew from 1,575 reported instances of fraud by customers in the United States and Canada in 2004, to 19,614 reported instances in 2008. Cumulatively, from 2004 through 2009, MoneyGram customers reported instances of fraud totaling at least \$100 million.

Ineffective AML program: MoneyGram’s involvement in this international fraud scheme resulted from a systematic, pervasive, and willful failure to meet its AML obligations under the BSA. MoneyGram failed to meet its AML obligations by, among other things, failing to:

- Implement policies or procedures governing the termination of agents involved in fraud and/or money laundering
- Implement policies or procedures for filing the required SARs when victims reported fraud to MoneyGram on transactions over \$2,000
- File SARs on agents who MoneyGram knew were involved in the fraud
- Conduct effective AML audits of its agents and outlets
- Conduct adequate due diligence on prospective and existing MoneyGram agents by verifying that a legitimate business existed
- Sufficiently resource and staff its AML program

MoneyGram’s BSA failures spanned five years and resulted from the failure of its fraud and AML compliance functions to share information, and from its regularly resolving disagreements between its Sales and Fraud Departments in the Sales Department’s favor. One notable disagreement occurred in April 2007, when, at a meeting attended by senior MoneyGram executives, the Fraud Department recommended that 32 specific Canadian agents who were characterized as “the worst of the worst” in terms of fraud, be immediately closed. The Sales Department disagreed with this recommendation, and these outlets were not closed. Instead, MoneyGram continued to process transactions from the 32 outlets despite continued complaints of fraud.

C. Ocean Bank

Overview: In August 2011, Ocean Bank, the largest privately-owned state-chartered commercial bank headquartered in Florida, entered into a deferred prosecution with the USAO for the Southern District of Florida to resolve charges that it had willfully failed to establish an AML program from 2001 through June 2010, in violation of the BSA. Ocean Bank agreed to forfeit \$10,988,136 to the United States as a condition of the deferred prosecution. Due to Ocean Bank’s willingness to acknowledge responsibility for its actions and omissions, combined with its cooperation and remedial actions, the USAO agreed to defer prosecution for 24 months. *United States v. Ocean Bank*, No. 11-cr-20553-JEM, DPA para. 5 (S.D. Fla. Aug. 16, 2011).

The history: As early as 1996, Ocean Bank was aware of the high risk that drug money was being laundered through Mexican currency exchange houses, commonly known as “casas de cambio” (CDC’s). Ocean Bank was also aware of its overall high-risk rating regarding its BSA and AML program due, in part, to its high percentage of international account holders and international transactions. Notwithstanding these facts—which were coupled with warnings from state and federal regulators, the DEA, and other AML organizations about money laundering risks—Ocean Bank did not provide the necessary BSA or AML controls to mitigate its high-risk rating.

During earlier investigations, law enforcement reviewed five subject accounts at Ocean Bank. In three of the five accounts, Ocean Bank failed to properly monitor and notify law enforcement that deposits into these accounts consisted mainly of currency and wire transfers originating from Mexican CDC’s that were controlled by the Bernal-Palacios drug trafficking organization. The Bernal-Palacios organization used the CDC’s to transfer their narcotics proceeds to different bank accounts around the world, including the three subject accounts at Ocean Bank.

A fourth account was used by a Miami-area business to launder narcotics proceeds. This business accepted large sums of cash from convicted drug traffickers and money launderers, which the business

then deposited into its Ocean Bank account. Notwithstanding such large cash deposits and a wire transfer that appeared to be inconsistent with the account holder's purported business, Ocean Bank failed to perform enhanced due diligence and/or notify law enforcement in a timely fashion of the suspicious activity in the account.

The last of the five accounts was used by another Miami-area business to launder narcotics proceeds. That business maintained an operating account at Ocean Bank from October 1990 through at least December 2009, and received incoming wire transfers from several Mexican CDCs.

Among the "red flags" of potential money laundering activity in these five accounts, which Ocean Bank ignored and failed to report, were:

- Unusually large cash deposits, ranging from \$10,000 to \$140,000, which were unsupported by the purported customer's business model
- Structured cash deposits in amounts of less than \$10,000 to avoid bank currency reporting requirements
- Deposits of thousands of money orders and traveler's checks, many of which were sequentially numbered
- Hundreds of incoming wire transfers originating from Mexican CDC's
- Same-day incoming and outgoing wire transfers in large, round dollar amounts

The BSA investigation: In 2008, the USAO for the Southern District of Florida began investigating Ocean Bank's BSA Compliance Program. This investigation revealed that the serious and systemic deficiencies in Ocean Bank's BSA and AML programs resulted in Ocean Bank's failure to identify, report, and prevent the suspicious activity described above. These BSA and AML violations allowed certain Ocean Bank customers to launder millions of dollars in narcotics proceeds through Ocean Bank over an extended period of time.

The financial investigators uncovered millions of dollars of suspicious financial transactions that went unreported by Ocean Bank and which ultimately facilitated the laundering of narcotics proceeds from several trafficking organizations. The financial transactions included structured currency deposits, wire transfers originating from Mexican CDC's, and unusual money order and cashier's check deposits. Ocean Bank failed to recognize and mitigate risks and report transaction activity often associated with money laundering involving direct foreign account relationships in high-risk jurisdictions. Additionally, the Bank's failure to respond to such risk with commensurate systems and controls was both systemic and longstanding.

At least since 2001, Ocean Bank failed to take appropriate steps to correct identified deficiencies in its BSA and AML programs. For example, in 2001, the Federal Deposit Insurance Corporation (FDIC) and the Office of Financial Regulation (OFR) noted deficiencies in Ocean Bank's BSA and AML programs and made recommendations to Ocean Bank on how to fix the problems. In March 2004, the FDIC and the OFR's Quarterly Supervisory On-Site Review at Ocean Bank noted a continuation of the previous weaknesses and additional deficiencies in the BSA and AML systems, and a large volume of high-risk accounts that lacked the appropriate customer due diligence. They recommended, and Ocean Bank adopted, a Corrective Action Program aimed at addressing the weaknesses in the BSA and AML programs. Despite the 2004 Corrective Action Program, Ocean Bank failed to develop and maintain an effective AML program. The same deficiencies continued throughout 2005 and 2006. Finally, in 2007, the FDIC and the OFR jointly issued a Cease and Desist Order to Ocean Bank in response to its serious, chronic problems with its BSA and AML programs and its failure to correct the problems. That Cease and Desist Order remained in effect until May 2011, when it was replaced with a modified Consent Order.

In sum, Ocean Bank had significant compliance failures, including:

- Failing to maintain sufficient documentation through which to develop customer profiles (know your customer/due diligence)
- Failing to maintain adequate account monitoring systems that would help identify suspicious account activity
- Failing to identify high-risk customers and transactions
- Failing to identify activity that warranted the filing of a SAR
- Failing to maintain a well-trained staff in the BSA compliance department

D. ABN AMRO Bank N.V.

Overview: In 2010, the former ABN AMRO Bank N.V. (ABN AMRO) (now part of Royal Bank of Scotland N.V.) entered into a deferred prosecution agreement with AFMLS and the USAO for the District of Columbia. ABN AMRO accepted and acknowledged responsibility for its conduct in connection with a conspiracy to defraud the United States and to violate the IEEPA, the TWEA, and the BSA. As a part of the deferred prosecution, ABN AMRO agreed to forfeit \$500 million to the United States. Due to ABN AMRO's remedial actions, previous penalty payments, consent agreements, and its willingness to acknowledge and accept responsibility for its actions, the deferred prosecution agreement lasted for 12 months. *United States v. ABN AMRO Bank N.V.*, No. 10-cr-00124-CCK, DPA para. 5 (D.D.C. May 10, 2010).

In addition to the deferred prosecution agreement with the Department, ABN AMRO entered into a consent agreement and paid penalties involving OFAC, the Federal Reserve, and FinCEN.

The scheme: The BSA violations involved the failure of the New York branch of ABN AMRO to maintain adequate AML procedures and processes. Beginning as early as January 1998 and continuing until approximately December 2005, ABN AMRO's New York branch office willfully failed to establish an adequate AML program. The office did not have adequate staffing, training, and oversight, which permitted multiple high-risk shell companies and foreign financial institutions to use the bank to launder money through the United States. More than \$3.2 billion dollars involving shell companies and high-risk transactions with foreign financial institutions flowed through ABN AMRO's New York branch. ABN AMRO also admitted it failed to maintain proper documentation regarding its customers or readily available documentation about its high-risk clients.

In addition, ABN AMRO violated both the IEEPA and TWEA. Over the course of a decade, ABN AMRO assisted sanctioned countries and entities in evading U.S. laws by facilitating the movement of illegal money through the U.S. financial system by stripping information from transactions and turning a blind eye to its compliance obligations. From approximately 1995 and continuing through December 2005, certain offices, branches, affiliates, and subsidiaries of ABN AMRO removed or altered names and references to sanctioned countries from payment messages. ABN AMRO implemented procedures and a special manual queue to flag payments involving sanctioned countries so that ABN AMRO could amend any problematic text. It also added instructions to payment manuals on how to process transactions with these countries in order to circumvent U.S. laws. Despite the institution of improved controls by ABN AMRO and its subsidiaries and affiliates after 2005, a limited number of additional transactions involving sanctioned countries occurred from 2006 through 2007.

ABN AMRO used similar stripping procedures when processing U.S. dollars, checks, traveler's checks, letters of credit, and foreign exchange transactions related to sanctioned countries. ABN AMRO and the sanctioned entities knew and discussed the fact that without such alterations, amendments, and code words, the automated OFAC filters at banks in the United States would likely halt the payment messages and other transactions, and, in many cases, the banks would reject or block the sanctions-related transactions and report the same to OFAC. By removing or altering material information, these payments

and other transactions would pass undetected through filters at U.S. financial institutions. This scheme allowed United States-sanctioned countries and entities to move hundreds of millions of dollars through the U.S. financial system.

III. Conclusion

Banks are the principal gateway into the U.S. financial system and have been given major responsibilities for safeguarding that gateway and trying to detect and prevent criminal proceeds and terrorism funds from entering the financial system. These responsibilities are imposed by law and there must be sanctions for failing to fulfill these responsibilities. Criminal enforcement of the BSA is a robust tool that can be used to enforce obligations placed on financial institutions by federal law to implement and maintain an effective AML policy. However, it is a tool that should be used sparingly, reserved for those institutions whose conduct raises sufficient indicia of criminal intent—that is, willful conduct that is systemic, pervasive, and results in significant amounts of criminal proceeds flowing into or through a financial system. Under the appropriate circumstances, the responsible financial institution should be examined to determine if it has effective AML policies and practices, and whether a civil regulatory sanction is sufficient or whether a criminal sanction is necessary.

Pursuant to § 9-105.300 of the United States Attorneys' Manual, in any criminal case under 31 U.S.C. § 5322 (or the money laundering statutes) in which a financial institution, as defined in 18 U.S.C. § 20 and 31 C.F.R. § 1020.100(d), would be named as a defendant, or in which a financial institution would be named as an unindicted coconspirator or allowed to enter into a deferred prosecution agreement, Criminal Division approval through AFMLS is required before any indictment, complaint, information, or deferred prosecution agreement is filed. AFMLS attorneys should be consulted when such investigations are initiated, and MLBIU stands ready to lend resources and expertise in cases where a USAO would like assistance. AFMLS can be reached at 202-514-1263. ❖

ABOUT THE AUTHOR

❑ **M. Kendall Day** was appointed Principal Deputy Chief of the AFMLS in April 2013. Mr. Day joined the Department through the Honors Program in 2003. After serving as a Trial Attorney in the Tax Division, he joined the Criminal Division's Public Integrity Section, where he has been serving as a trial attorney for several years and, more recently, as Deputy Chief. During his tenure at the Public Integrity Section, Mr. Day prosecuted and tried some of the Division's most challenging cases, including the prosecutions of Jack Abramoff, a Member of Congress and several chiefs of staff, and elected local officials. He has also served overseas as the Division's Anti-Corruption Resident Legal Advisor in Serbia, where he mentored organized crime prosecutors and drafted a criminal procedure code. Before joining the Department, he clerked for U.S. District Judge Benson E. Legg in the District of Maryland. ❖

Understanding and Detecting the Black Market Peso Exchange

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The Black Market Peso Exchange (BMPE) is one of the largest and most extensive money laundering schemes in the history of financial crime. The BMPE is one of the primary means by which drug cartels launder the proceeds of their drug money back into the countries where the narcotics are produced. Each year, billions of illicit dollars are laundered through the BMPE without detection by law enforcement or financial institutions.

This article seeks, in very basic terms, to explain the history of the BMPE, how the BMPE operates and, most importantly, to highlight how prosecutors, investigators, and private industry can detect BMPE-related activity in financial transactions.

I. Overview of the BMPE

The sale of cocaine in the United States produces a tremendous amount of illicit currency or “cash.” This creates problems for narcotics dealers because bulk cash is difficult to disguise, attracts attention, has inherent transportation risks, and is difficult to introduce into the U.S. financial system where it can easily and quickly be wired to any location in the world and laundered.

To solve this problem, drug cartels utilize the BMPE, which is a form of trade-based money laundering (TBML). A recent Senate Report defines TBML as “the process of disguising the proceeds of crime and moving value through the use of trade transactions.” UNITED STATES SENATE CAUCUS ON INTERNATIONAL NARCOTICS CONTROL, *THE BUCK STOPS HERE: IMPROVING U.S. ANTI-MONEY LAUNDERING PRACTICES* 7 (Apr. 2013). More simply, TBML uses the international movement of funds as payments for goods and services to hide and transport illicit dollars. The BMPE is the most common form of TBML.

Understanding the BMPE requires understanding two unrelated problems faced by two very different groups: drug cartels dealing drugs in the United States and legitimate businessmen in South America, primarily Colombia. The drug cartels have entirely too much U.S. currency or cash to transport south undetected. At the same time, legitimate businesses in Colombia need U.S. dollars to conduct both local and international business, but because of strict controls and penalties on the use of U.S. dollars in Colombia, Colombian businesses look for alternative methods to obtain this money.

Through the BMPE, the peso broker or professional money launderer brings these two groups together and solves both of their problems. The peso broker uses the narcotics proceeds in the United States to pay for the goods needed by the Colombian business. In turn, the peso broker receives payments for the goods from the Colombian business, usually in the form of Colombian pesos. The peso broker then turns over that money in Colombia, minus his profit, to the narcotics dealer, completing the cycle. Through this cycle, drug money in the United States is moved to Colombia without the knowledge

of the United States or the Colombian Governments. The drug dealer has successfully laundered the proceeds of cocaine sold in the United States and the Colombian business has successfully paid for goods, all without any government scrutiny.

II. History of the BMPE

The origins of the BMPE are not rooted in narcotics trafficking. Rather, the BMPE can be traced back to the coffee boom in Colombia in the 1950s. During that time, the sale of Colombian coffee generated large amounts of international profits for Colombia. However, this influx of foreign exchange devalued the Colombian peso and caused instability in the Colombian economy. As a result, Colombia passed Decree Law 444 in 1967, which prohibited Colombian citizens from holding foreign currency, both within Colombia and abroad. As part of this initiative, the Colombian Government also instituted very high tariffs on foreign goods or banned the import of certain goods altogether in an effort to strengthen the Colombian peso by encouraging more goods to be produced in Colombia and keeping more Colombian wealth in the country.

These laws, put in place to safeguard the value of the Colombian peso, left Colombians who wished to send money abroad with two options. First, assuming the goods were not outright prohibited, they could go through official channels to purchase goods outside of Colombia. However, this process could be very expensive. The Colombian entity first had to go to a Colombian bank, which would charge a surtax for the exchange from pesos to dollars. The bank then notified the Colombian Government, which required the pre-payment of the sales tax on the imported goods that were to be sold in Colombia. The Colombian entity then had to pay a customs duty as well as a value added tax on the goods. In total, these taxes and tariffs could more than double the price of the goods.

The alternative was to use the black market to get money out of Colombia to pay for goods. Originally, the peso broker likely had numerous sources of U.S. currency that he could “sell” to Colombians who needed to purchase goods in the United States or who needed to have money sent outside of Colombia. These reasons could be completely legitimate. Colombian individuals may have wanted investments in the United States as a hedge against a volatile Colombian financial system, they may have wanted to finance the college education of their children abroad, or they could have been looking to import legitimate items for resale as part of a business. However, by the late 1970s, the source of this U.S. currency changed. By then, the sale of cocaine in the United States skyrocketed, producing a large source of cash that needed to be laundered. This immense pool of funds proved to be the perfect catalyst for the BMPE. Peso brokers now had an almost unlimited supply of U.S. dollars that they could offer to Colombians or other individuals in South and Central America. By 1991, Colombia had begun to relax some of the restrictions on the movement of international funds, but the damage already had been done. Colombians and others in South and Central America now had the ability to avoid government scrutiny and the heavy tax and tariff burdens entirely by using a peso broker to conduct their transactions, instead of going through official channels.

The BMPE is unlike other black market financial systems. In most black market financial systems, the person purchasing money in a foreign country pays a premium for that currency. For example, if a Colombian individual wanted to purchase the equivalent of \$1,000 in U.S. currency, they would presumably have to supply the equivalent of \$1,000 in pesos plus a fee. However, the BMPE is different. Narcotics dealers are willing to take a “haircut,” or less, in pesos than their money is worth in the United States, if the dollars can be exchanged into pesos and disbursed in Colombia. That is, a narcotics dealer in Colombia who has \$1,000 in drug proceeds in the United States may be willing to accept as little as the equivalent of \$750 in Colombian pesos, if those pesos are delivered in Colombia. This allows the peso broker the opportunity to actually provide a discount to the Colombian citizen. The peso broker may purchase \$1,000 in narcotics dollars in the United States for \$750 in Colombia. The peso broker can then offer that same \$1,000 in the United States to the Colombian individuals for the

equivalent of only \$900 in Colombia. Therefore, the Colombian individual not only avoids the taxes and tariffs associated with legitimate channels, but they also receive a discount on the money they purchase in the United States. This advantage continues to be a powerful incentive to use the BMPE instead of legitimate banking channels.

III. How the BMPE works

A typical BMPE transaction usually starts with a peso broker contracting with a drug trafficking organization (DTO) to pick up and launder a large amount of money—for example, \$300,000—somewhere in the United States. The peso broker will then also contract with a Colombian business to pay for goods purchased in the United States—for example, \$100,000 in laptop computers—meant for resale in Colombia, and will have \$200,000 additional to sell.

A representative of the DTO will then make arrangements to transfer or “drop” the \$300,000 in drug money to a low-level employee of the peso broker. The low level employee is usually referred to as a “smurf” by law enforcement. The two parties will meet in a public area, a parking lot or a street corner, for instance. The smurf and the DTO employee will usually have code words in order to ensure that the money is being dropped to the right person. The two likely do not know each other and will never meet again. The secrecy serves to insulate the actors from each other so that if one person is arrested, he cannot provide information on the other.

Once the smurf has the \$300,000, he will await instructions on what to do with the money from the peso broker. Usually these instructions will come in the form of a “structuring list,” which contains numerous bank account numbers and account names. The smurf is then responsible for breaking up and depositing the \$300,000, sometimes into dozens of banks or bank branches. Almost always, these deposits are structured. Structuring is the practice of breaking up these large amounts of money into smaller increments below \$10,000, so as to remain anonymous and avoid the filing of a Currency Transaction Report (CTR). Structuring is expressly prohibited by 31 U.S.C. § 5324.

The point of structuring deposits is to avoid triggering a CTR. Financial institutions in the United States are required to report any cash transaction in excess of \$10,000 to the Financial Crimes Enforcement Network through a CTR. A CTR requires that a bank obtain the identity of the individual making the deposit, which is a problem to those seeking anonymity because they are dealing in illicit dollars.

The accounts that are receiving these structured deposits usually fall into one of two categories. The first type of account can be thought of as an interstate funnel account, which is a single account that receives multiple deposits of narcotics dollars. These dollars are then used to fund the purchase of goods in the United States, like the laptops in the example above. Notably, the funnel account may be opened in a location in the United States, like New Jersey. However, the DTO’s money and the cash drop may occur in another city where the DTO is operating and has generated cash that needs to be laundered, like Atlanta. So this New Jersey-based account receives cash deposits from Atlanta, or any other city in the United States within which the DTO has money that needs to be laundered.

Another practice used by the smurf is to deposit the funds directly into the second type of account, which is held directly by the business that exports goods to Colombia. In our example, the laptop distributor provides their banking information to their customer in Colombia who passes that information to the peso broker. The peso broker orders the smurf to make structured cash deposits directly into the laptop distributor’s bank account for the benefit of the Colombian customer. Once again, the laptop distributor may be located in one area, like southern Florida, but the drug money may be deposited into the distributor’s Florida-based business account in bank branches in Atlanta, where the DTO’s money is located.

Once the deposits are made into either the funnel account or the business account, the smurf sends copies of the deposit slips back to the peso broker for proof of the deposit. In the case of the funnel account, the peso broker may then wire transfer funds from the funnel account to the laptop distributor's account.

The laptop distributor then ships the goods, which are usually smuggled into Colombia. The smuggling can happen in a variety of ways. For instance, the business owner in Colombia may bribe a customs official, or the goods may be smuggled in through Panama or a port city in Colombia. After delivery of the goods, the peso broker is free to turn over a portion of the Colombian business's pesos to the DTO, completing the laundering cycle. The Colombian business has its laptops without paying the taxes and tariffs due, the DTO has its narcotics proceeds in pesos, and the peso broker has his commission.

IV. Detecting BMPE activity

While it is difficult to detect the presence of BMPE activity in a bank account, it is far from impossible. In fact, there are numerous tell-tale signs in a statement of an account that has BMPE or other money laundering activity. Below is a non-exhaustive list of some indicators of BMPE activity.

A. Structuring

Structuring can be a sign of almost any sort of money laundering or illicit financial activity. However, structuring is particularly prevalent when dealing with narcotics proceeds, given the sheer amount of cash generated by the sale of narcotics and the need to get that cash into the banking system where it can be more easily laundered.

As discussed above, after receiving the narcotics dollars from a DTO, the next step for the peso broker is depositing those narcotics dollars into the financial system. For law enforcement, this presents a unique opportunity, as money launderers are at their most vulnerable when attempting to inject these large amounts of cash into the financial system. Frequently, the peso broker will instruct the smurf to deposit these funds in a structured manner to keep the smurf's identity a secret.

While an extensive description of structuring is beyond the scope of this article, we highlight two tips to detect BMPE-related structuring. First, peso brokers have gotten increasingly sophisticated in their structuring techniques. Realizing that repeated deposits of amounts slightly less than \$10,000 are very easy to spot, peso brokers have evolved to "micro-structuring," which is the practice of keeping deposits much lower, sometimes even below \$3,000 at a time, but making more deposits to compensate. While not as easy to detect, this method of depositing money is still a form of structuring.

Also, the use of money orders and official checks in structuring schemes is well documented. Individuals may take some of their illicit cash and use it to purchase money orders, in an attempt to place additional transactions between the illicit cash and its ultimate destination. Once in money order or official check form, the funds can be deposited into a funnel account or provided directly to the retailer/exporter involved in the BMPE. However, 31 U.S.C. § 5325 requires financial institutions to collect certain identifying information before issuing an official check or money order in an amount or aggregate amount of \$3,000. Individuals looking to remain anonymous will then structure their purchase of money orders to ensure that they stay below \$3,000. A tell-tale sign of this would be the deposit of numerous money orders or official checks, all issued around the same time, instead of a single instrument that exceeds \$3,000.

B. Geographically disparate deposits

Another strong sign of BMPE activity is a bank account receiving deposits at multiple locations far from one another and at places other than where the account was opened or is domiciled. As discussed

above, the peso broker will contract to pick up the DTO's proceeds. Often, the DTO may have proceeds deposited across the country, wherever their narcotics were sold. It can be difficult and time consuming for the peso broker to transport those funds to one central location for deposits. Rather, the peso broker will deposit those funds into bank branches wherever the funds are picked up. For example, you may see a bank account both opened and domiciled in southern Florida, but with cash deposits made across several different states. While often missed, this pattern of geographically disparate deposits is a strong indicator of BMPE or other illicit activity.

C. Third party payment and deposits

Businesses that turn a blind eye to payments made with illicit dollars will frequently allow their customers to make direct cash deposits into the business's bank accounts in exchange for goods sold. The business then accepts a copy of the deposit slip, or other evidence of the deposit, as payment for goods that are usually shipped to Central or South America as their ultimate destination. There is no legitimate reason to do business in this fashion. This method of business is tantamount to willful blindness of the source of the funds the business is receiving.

Along with the presence of geographically disparate deposits, numerous other signs can point to this practice. For instance, an excessive amount of counter deposit slips can be indicative of third parties making deposits into a bank account. Counter deposit slips are the blank deposit slips provided at bank branches, as opposed to the pre-printed deposit slips issued to the account holder. Also, video showing multiple individuals making deposits into a bank account can be a flag for this type of activity, as legitimate businesses typically only have a handful of employees that are allowed to handle cash derived from the business. The presence of multiple sets of handwriting on the deposit slips can also be an indicator of this practice for the same reason.

D. Failure to file Form 8300s

Businesses that receive more than \$10,000 in any single or related transaction are required by 31 U.S.C. § 5331 to file a Form 8300 with the IRS. The Form 8300 contains much of the same identifying information as CTRs. A business can face criminal and civil liability for failing to file Form 8300s on their customers' transactions. However, many businesses that receive narcotics proceeds as part of the BMPE frequently fail to file Form 8300 in an effort to preserve the anonymity of their customers. A business that receives large amounts of cash, especially if some of the other factors discussed above are present, but has filed few or no Form 8300s, may be involved in the BMPE.

E. Types of goods sold and location of accounts

While not definitive, much of the goods sold as part of the BMPE are durable goods that are shipped from or through southern Florida. Usually, the goods destined for export are sought for resale. The goods generally include electronics, perfume, small appliances, and clothing, just to name a few. Also, southern Florida's position as a conduit for business in Central and South America makes the area ripe for BMPE activity. A typical BMPE scenario involves a bank account opened by a business in southern Florida that receives cash deposits at locations throughout the United States. Usually these businesses will have no real connection to the locations where the deposits are made.

F. Export activity

With the BMPE, goods purchased in the United States generally are ultimately delivered to Central or South America. Indications that a business may be involved in the BMPE are even stronger if the business is shipping goods to Central or South America. A review of certain targeted databases maintained by the Department of Homeland Security may be able to assist in confirming the destination. However, many of these businesses use freight forwarding businesses, which makes it harder to detect

when the business is shipping goods overseas. Nevertheless, simple investigative steps can sometimes identify complex money laundering schemes. For instance, does the business advertise on the Internet or elsewhere that they ship overseas? Do personnel from that business travel to Central or South America, or are the personnel of Central or South American origins? Does the business send or receive wires from Central or South America? While not definitive, these signs, coupled with other indicia, may show that the business's goods are destined for Central or South America and may be part of the BMPE.

G. Account holder information

Information about the account holder can be tremendously beneficial in determining if an account is a funnel account or a business account that accepts illicit proceeds as payment. Investigation into the physical address associated with the account may reveal that the address does not exist, that it belongs to a rented mailbox, or that it belongs to a vacant store front. If the account holder is a business, an investigator may look into whether the business is registered with the Secretary of State or equivalent agency in the state in which the business is purportedly located. Those same records will also list the corporate officers, who can then, in turn, be investigated.

Also, investigators should ask themselves if the business has the indicia of a legitimate entity. For instance, is the business listed in the Yellow Pages, does it maintain an Internet page, or does it have signage on the physical location associated with the account? Access to Internet protocol, or "IP" addresses, can also be helpful. For example, evidence from the IP address may show that the account has been accessed in Colombia or other high risk countries, which could be strong evidence that the account is being used to launder funds.

Finally, and most importantly, ask whether the account activity comports with the account holder's estimated account activity. For example, the account holder may purport to have only \$100,000 dollars on deposit in a given month, yet as soon as the account opens millions of dollars flow through. Also, ask if the financial transactions associated with the account make sense for that type of account.

V. Conclusion

The BMPE offers drug cartels a venue in which they are able to launder the proceeds of their drug money without detection by law enforcement or financial institutions. While these cartels have been successful in laundering illegal funds, educating prosecutors, investigators, and private industry about the indicators that accompany BMPE activity will assist in detecting and reducing BMPE-related activity. This article hopes to publicize these red flags in order to reduce BMPE-related activity in financial transactions and to stop the flow of illegal funds. ❖

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International Forfeiture Cooperation

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I. Introduction

The primary purpose of this article is to provide practical advice to the ever-increasing number of U.S. prosecutors and federal agents challenged by cases where criminals have managed to place substantial forfeitable assets abroad. There is one undeniable fact: Criminal activity affecting the United States is more international in scope today than it ever was before. With international commerce continually expanding, international financial services becoming more readily accessible, the Internet operating as an international marketplace for goods and services, and all the recent advances in technology, the ability of criminal actors to move assets over international borders has grown exponentially. These primarily e-world developments underscore the need for coordinated bilateral or multilateral law enforcement operations to trace, freeze, seize, manage, and forfeit the proceeds and instrumentalities of crime located abroad. International cooperation in forfeiture matters has grown into a frequent law enforcement demand under treaties covering the subject, so all federal agents and prosecutors should be prepared to make such treaty requests.

Consistent with the Financial Action Task Force (FATF) International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, many countries have or should have in place laws and resources to use and rely on in such endeavors. *See FINANCIAL ACTION TASK FORCE, THE FATF RECOMMENDATIONS, Recs. 4 and 38, Interpretative Note 38 (2012), available at <http://www.fatf-gafi.org/recommendations>.* The FATF standards are used to evaluate the anti-money laundering and counterterrorist financing laws of over 180 jurisdictions. Consequently, the chance of law enforcement successfully forfeiting assets across borders has increased dramatically. In the next round of FATF evaluations, the examiners will focus on a country's effectiveness in combating crime and, therefore, the International Unit (IU) of the Asset Forfeiture and Money Laundering Section (AFMLS) invites and encourages federal prosecutors and law enforcement agents to test countries on their international commitments to assist in the forfeiture of the proceeds and instrumentalities of crime. This article briefly explains the international forfeiture options available to federal prosecutors and law enforcement agents and the possible challenges of these options.

II. Forfeiture assistance to international partners

Over the past two decades, AFMLS has worked tirelessly to establish effective international forfeiture partnerships with dozens of foreign jurisdictions. In many instances, based upon international standards set by the FATF, AFMLS assisted other countries in the drafting and enactment of forfeiture, money laundering, and mutual legal assistance laws. As a result, these countries are now better positioned to respond to requests from the United States to freeze, seize, and forfeit property involved in crime. Furthermore, AFMLS has been instrumental in developing existing bilateral partnerships with countries that have active asset forfeiture dockets by strategically entering into formal asset sharing agreements.

Currently, the United States has over 70 bilateral Mutual Legal Assistance Treaties (MLATs) in effect covering criminal forfeiture assistance. The United States has formal Asset Sharing Agreements and forfeiture cooperation agreements with the following countries: Andorra, Anguilla, Austria, British Virgin Islands, Canada, Cayman Islands, Colombia, Dominican Republic, Ecuador, Hong Kong Special

Administrative Region, Jamaica, Mexico, Monaco, Montserrat, Kingdom of the Netherlands, Singapore, Turks and Caicos Islands, and the United Kingdom.

AFMLS also develops these partnerships by consistently testing new legal theories in as many jurisdictions as possible by, for example, seeking the enforcement of non-conviction-based (civil) forfeiture orders and judgments. AFMLS is working diligently through international groups such as the Camden Asset Recovery Interagency Network (CARIN), to enhance informal cooperation and examine best practices on cross-border forfeiture. CARIN is an informal forfeiture group composed of legal practitioners and investigators from 52 jurisdictions. It is, first and foremost, a point-of-contact network with the aim of increasing the effectiveness of members' efforts to deprive criminals of their ill-gotten gains. It is also a cooperative group that shares information on best practices in asset forfeiture and suggests procedural and substantive changes to forfeiture law and practice for consideration by member states, in order to encourage fuller and faster international forfeiture assistance within the scope of treaty obligations. It undertakes to make recommendations on topics concerning the proceeds of crime to other international bodies and has established itself as not only a highly-functional cooperation network, but as a center of expertise on forfeiture.

Through the FATF, AFMLS is working to improve the global forfeiture and forfeiture assistance standards. It also seeks to help other countries in their forfeiture cases by employing U.S. laws authorizing assistance in foreign forfeiture efforts.

It is not always practical or possible for prosecutors in one jurisdiction to prosecute a crime committed in another jurisdiction or where the illicit proceeds are located in another jurisdiction. Therefore, the capability of countries to register and enforce forfeiture judgments on behalf of one another is a necessary component of any international forfeiture regime. In the United States, the types of enforceable foreign orders include civil forfeitures and criminal forfeiture judgments based on "any violation of foreign law that would constitute a violation or an offense for which property could be forfeited under Federal law if the offense were committed in the United States." 28 U.S.C. § 2467(a)(2)(A) (2013). This section also allows for the entry of a restraining order based either on evidence in a foreign request or on the enforcement of a foreign restraining order. *Id.* § 2467(d)(3)(B).

AFMLS' efforts to help other governments' forfeiture efforts have been very extensive. For example, at the time of this publication, AFMLS has a score of active cases initiated pursuant to 28 U.S.C. § 2467 against assets valued at over \$110 million that are subject to confiscation or forfeiture proceedings abroad. The United States, using its various domestic forfeiture tools, has, within the last decade, repatriated at least \$130 million of criminal proceeds to foreign countries for the benefit of the victims of those foreign crimes. At the request of a foreign jurisdiction, U.S. prosecutors can obtain an ex parte order from the court for the initial 30-day restraint against assets of a person arrested or charged in a foreign country in connection with an offense that would give rise to the civil forfeiture of property in the United States, pending the arrival of evidence from the foreign country to support the filing of a forfeiture action under 18 U.S.C. § 981 or under the Controlled Substances Act. 18 U.S.C. § 981(b)(4) (2013). This provision should only be used if there is a basis under U.S. law to forfeit the property and charges have been laid or an arrest has been made in the foreign country. *Id.*

Another important component of international forfeiture assistance is the international asset sharing program. Since 1989, the Department of Justice (DOJ) and the Department of the Treasury have shared almost \$300 million in forfeited assets with 48 foreign jurisdictions. Most of those assets were located abroad and, without the help of the foreign partner, would likely have been beyond the reach of U.S. forfeiture laws. In addition, the DOJ Assets Forfeiture Fund has received approximately \$70 million in shared forfeited assets from foreign partners, with the overwhelming majority of this occurring in the last 10 years. At present, AFMLS is monitoring at least \$400 million in forfeitable assets restrained abroad that, once forfeited by the United States, will be shared with our foreign partners or returned to victims of the underlying criminal offenses.

In summary, the U.S. asset forfeiture program has built up tremendous goodwill around the world through training, helping others draft laws, freezing and forfeiting assets at the request of foreign jurisdictions, sharing forfeited assets, and returning forfeited assets to the victims of foreign offenses. With the continued help of federal prosecutors and U.S. law enforcement agents, we can build on this legacy.

III. Forfeiting assets located abroad

A. Tracing assets

The first step in international forfeiture is identifying and tracing forfeitable assets located abroad. Investigators can look to four sources for help in this area: (1) public sources, (2) informal legal assistance, (3) Egmont Group (Egmont) channels, and (4) formal mutual legal assistance (MLA) channels. It may come as a surprise to some investigators, but various international corporate, vessel, and land registry records are available via the Internet, as well as through many commercial software packages that U.S. law enforcement does or can subscribe to. Furthermore, the Internet is a powerful tool and it is shocking what criminal suspects divulge on a variety of public Internet forums.

Second, there are also a number of informal law enforcement channels that should be used, such as U.S. law enforcement attachés stationed at U.S. embassies throughout the world, who have developed extensive relationships with local law enforcement entities that can assist in asset tracing exercises. In addition, the United States is a founding member of CARIN, which includes judicial and law enforcement expert forfeiture practitioners from 51 other jurisdictions. (Albania, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Gibraltar, Greece, Guernsey, Hungary, Iceland, Indonesia, Ireland, Isle of Man, Israel, Italy, Jersey, Kosovo, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom). One of CARIN's primary functions is for its designated points-of-contact to serve as conduits for informal cooperation in ongoing asset forfeiture matters. Members may make inquiries for information via the CARIN network protocols. These inquiries may result in information that is held by or readily accessible to foreign law enforcement being shared with other law enforcement partners, generally for intelligence purposes only, without the need to resort to any formalized treaty or request. In some jurisdictions, law enforcement agencies have special access to lists of all financial accounts or other property records that can also be shared with other law enforcement entities without a formal treaty request. The key to CARIN's point-of-contact system is that it allows for bilateral coordination between practitioners in both countries. In other words, the parties executing the forfeiture assistance requests are talking to the persons seeking to forfeit those assets. It is advisable to do this well before the need for a formal request arises, so the tracing stage would be a good place to start. AFMLS' IU functions as the primary legal CARIN contact in the United States, in coordination with the U.S. Marshals Service, which serves as the U.S. law enforcement contact. Requests to CARIN partners can be made through them.

A third method of obtaining financial information relevant to tracing forfeitable assets is through formal Egmont requests. Egmont is a formal organization comprised of most of the Financial Intelligence Units (FIUs) in the world. For more information about the Financial Intelligence Unit and the more than 130 members of the Egmont group, please see <http://www.egmontgroup.org/about/what-is-an-fiu> and <http://www.egmontgroup.org/about/list-of-members>, respectively. The U.S. FIU—the Financial Crimes Enforcement Network (FinCEN)—houses financial information about suspicious transactions and cash dealings provided by financial institutions, or government data collected from persons entering or leaving the United States with more than \$10,000 in currency. Many foreign FIUs have similar and sometimes more extensive data, which, through the formal Egmont channel, can be shared with foreign FIUs and law enforcement agencies. How such shared information can be used often comes with caveats. Use is for

intelligence purposes only, and it cannot be publically disclosed. However, FinCEN will counsel you on the use of and restrictions on such information. Further, be advised that almost all federal law enforcement agencies have dedicated FinCEN representatives who should be able to walk any agent engaged in financial investigations through the formal Egmont process.

Finally, the option of last resort for investigatory assistance in tracing assets is the formal MLA channel which is transmitted from one jurisdiction's central authority to another jurisdiction's central authority. For the United States, the Office of International Affairs (OIA) in the DOJ's Criminal Division is the central authority. Because MLA is a formal legal process, it can be a relatively protracted procedure. Obtaining evidence in six months, for example, would be fast. It also involves serious front-end lifting by the investigatory team, namely, the drafting of a detailed MLA request outlining the underlying criminal facts, identifying all subjects of the investigation, listing all offenses that could be charged, explaining the need for such information or evidence, and detailing how information or evidence must be collected or maintained. In asset tracing exercises, the need for secrecy is often paramount. Thus, an asset tracing MLA requestor should always ask that the MLA request be executed under conditions of strict confidentiality. That said, in some jurisdictions the owner of financial records may get notice that his records are being sought by a foreign state. Thus, the obtaining of financial records in such jurisdictions is often only possible in MLA requests sent contemporaneously with the take down of the investigation.

The concept of the Rule of Specialty comes into play in all formal MLA requests, and the asset tracing investigator would be wise to focus on the use of the evidence to support forfeiture efforts. The Rule of Specialty simply means that one can only use the evidence provided pursuant to an MLA request against the targets identified in the request, in support of the criminal offenses listed in the request, and for the purposes specifically set forth in the request. Hence, the asset tracing team should underline the fact that law enforcement intends to use the evidence requested to facilitate the forfeiture of assets. The team should also be sure to include references to the relevant forfeiture statutes, both civil and criminal, in the MLA request.

B. Freezing, seizing, managing, repatriating, and forfeiting assets

Asking a foreign government to restrain, seize, and execute a forfeiture judgment is generally done through the formal treaty process. Typically, MLA requests involve making requests under a treaty, convention, executive agreement, or a letter rogatory. The latter is a court-issued request for assistance that is helpful if no applicable treaty exists, as some countries have laws that allow them to provide evidence or other assistance for criminal or related matters even in the absence of any formal treaty. The United States has over 70 bilateral MLATs and executive agreements and has signed on to a number of key multinational United Nations and other conventions. These instruments have helped regularize international forfeiture cooperation and serve as the vehicle for making requests for, among other things, assistance in forfeiture and money laundering cases.

In addition to the multitude of MLATs that provide for bilateral cooperation in criminal proceedings and matters related thereto, the United States ratified several major multilateral conventions that provide for a very wide range of assistance in forfeiture and money laundering cases, including the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (also known as the Vienna Convention, covering all major drug and related money laundering offenses); the 1999 International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention); the 2000 United Nations Convention against Transnational Organized Crime (also known as the Palermo Convention or UNTOC, covering all organized criminal offenses with three or more actors and carrying a maximum sentence of four or more years); the 2003 United Nations Convention Against Corruption (also known as the Merida Convention or UNCAC, covering a variety of corruption offenses and related money laundering); and the 1992 Inter-American Convention on Mutual Assistance in Criminal Matters (Organization of American States treaty based upon dual-criminality). In the absence of

a bilateral treaty, most major federal offenses will qualify as an offense covered by these comprehensive United Nations legal assistance treaties. Such UN conventions obligate the parties to (1) enact domestic forfeiture and money laundering laws; (2) assist requesting states to identify, trace, seize, freeze, or forfeit property, proceeds, or instrumentalities located in the requested country involved in the offense covered by the applicable conventions; and (3) remove impediments, such as bank secrecy laws, that prevent the disclosure of information to a requesting state.

Upon identifying the foreign-based property subject to forfeiture, the United States may then send a request to the country where the assets are found to freeze or seize such property in anticipation of, or in connection with, forfeiture proceedings in the United States. Such MLA requests should be supported by a finding of probable cause. *See Kim v. U.S. Dep't of Justice*, 2:05-CV-03155-ABC (C.D. Cal. July 11, 2005). It is preferable that the probable cause finding be done in the context of criminal forfeiture efforts. The number of nations that can assist in civil forfeiture matters is certainly rising and, given the new requirement of FATF Recommendation 38, civil forfeiture should one day be an option available in most countries. *See FINANCIAL ACTION TASK FORCE, THE FATF RECOMMENDATIONS*, Recs. 4 and 38, Interpretative Note 38 (2012), *available at* <http://www.fatf-gafi.org/recommendations>. However, as most countries are very comfortable with conviction-based forfeiture as a legal concept, AFMLS' IU advises that when seeking to forfeit assets abroad, the criminal forfeiture option should be pursued in favor of the civil forfeiture option discussed below. As for probable cause findings, AFMLS suggests this be done via 21 U.S.C. § 853(e)(1)(A), contemporaneously with the filing of an indictment or information.

Other freeze or seizure options are available under U.S. or foreign law, but it is best to talk to AFMLS' IU about the possible practical limitations of such procedures in the international setting. While obtaining a probable cause finding is advisable under U.S. law, some jurisdictions procure their own orders under their own domestic law, even when the United States makes a formal treaty request. Therefore, in some cases, it is not necessary to transmit the U.S. order to the foreign jurisdiction for execution. It is sufficient to simply mention the order in the MLA request. Again, lawyers in AFMLS' IU can help inform you of the preference a country may have in this regard. Moreover, some countries can initiate asset freezes simply based on the domestic powers that certain entities have under that country's anti-money laundering regime, and based solely on evidence provided by the United States through the appropriate channel. These foreign freezes are often very short in duration and require formal treaty action on the part of the United States within days to avoid any dissipation of the assets frozen by the foreign state.

Another important issue that comes up frequently is the management of forfeitable assets located abroad. Many governments lack the infrastructure or legal regime required to actively manage property such as real estate, planes, boats, and other items that might require active management or special handling. AFMLS and the U.S. Marshals Service may be able to address this problem by entering into a contractual arrangement that would permit the management of assets by contractors under the control of the U.S. Government when our foreign law enforcement partners are unable to fulfill that function. If complications in managing foreign assets are anticipated, then prudent pre-seizure planning dictates that these issues be broached with our foreign counterparts long before we seek restraint of such foreign assets.

Sometimes, reverting to civil forfeiture is the only viable forfeiture option. It is particularly useful in cases where criminal forfeiture is not possible because the defendant is dead, a fugitive, or unknown. It is also useful if the foreign country where the property is located cannot forfeit the property under its own laws, but may be able to take other steps that assist the U.S. forfeiture effort by, for example, seizing the property, enforcing a U.S. forfeiture judgment, or repatriating the assets. When seeking to bring an *in rem* forfeiture action against foreign-based assets, jurisdiction and venue will be based on 28 U.S.C. § 1355(b)(2). In such cases, once the assets have been civilly forfeited in the United States, OIA can transmit the final civil forfeiture judgment to the foreign country for enforcement or repatriation of the assets. In a § 1355(b)(2) action, the United States will require assistance from the foreign authorities to

enable it to perfect the court's *in rem* jurisdiction over the property so that the United States court will have constructive (if not actual) control over the property subject to forfeiture. Such assistance may include serving the property, arranging for publication of notice of the U.S. forfeiture action in a newspaper of general circulation where the property is located, and providing notice to the property, other individuals, and entities that may have an interest in the property. Before filing a civil forfeiture against assets located abroad, one is required to consult with OIA. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-13.526 (2013). OIA and AFMLS' IU will determine whether the foreign country where the assets are located can assist in the U.S. action.

In both civil and criminal forfeiture cases, the United States will often seek the repatriation of the property for forfeiture. Such a request may occur in connection with a criminal case, a civil forfeiture case related to the criminal investigation, or an extradition where property (cash, jewelry, and other objects of the offense) was found within the immediate control of the subject at the time of detention. Indeed, U.S. law expressly authorizes courts to direct defendants to return the proceeds and instrumentalities of their crimes to the court's registry pending a determination of its forfeitability pursuant to 21 U.S.C. § 853(e)(4). Sometimes repatriation can be accomplished through the cooperation of the property's owner or a defendant who agrees to forfeit the property as part of a plea agreement. However, it may not always be possible to compel the repatriation of assets:

- If a foreign jurisdiction restrained an asset at the request of the United States, the asset cannot be returned to the United States unless a competent authority in the foreign jurisdiction agrees to lift the freeze
- If the property at issue may be subject to domestic proceedings in the foreign jurisdiction
- If a foreign jurisdiction deems another government's efforts at repatriating assets located in their jurisdiction to be a violation of their sovereignty, or, in rare instances, a foreign jurisdiction deems any persons who instigate or are involved in that process to be involved in a criminal offense, such as money laundering

Often, many countries do not object to a negotiated voluntary repatriation of assets and allow such transfers to occur as part of a plea or settlement agreement. Some countries, however, will object to court-ordered repatriations because they regard such to be a "coercive measure" that violates a person's civil rights under their laws. There are also other countries that take the position that a failure to inform them of forfeitable assets located in their jurisdiction is a violation of specific treaty obligations. It is best to call OIA and AFMLS' IU to find out where a particular jurisdiction stands on this issue before getting a repatriation order.

C. Disposition of forfeited assets

In cases where foreign-based property has been forfeited under U.S. law as a result of the criminal conviction of its owner or a civil forfeiture action, the United States may also request that the foreign government give effect to the final forfeiture judgment in one of two ways: (1) by enforcing the judgment and repatriating the assets to the United States, or (2) by sharing the forfeited assets with the United States in recognition of its assistance to the forfeiture.

It is the policy of the United States to encourage international asset sharing and to recognize foreign assistance that facilitates United States forfeitures, so far as it is consistent with U.S. law. International sharing is governed by 18 U.S.C. § 981(i), 21 U.S.C. § 881(e)(1)(E), and 31 U.S.C. § 9703(h)(2), and is often guided by standing international sharing agreements or case-specific forfeiture sharing agreements. The decision to share forfeited assets with a foreign government is a completely discretionary function of the Attorney General or the Secretary of the Treasury. It requires the concurrence of the Secretary of State, and, in certain circumstances, it is a decision that can be vetoed by Congress.

The statutory provisions that authorize the Attorney General and/or the Secretary of the Treasury to transfer forfeited property to a foreign country make international sharing conditional upon the following:

- Direct or indirect participation by the foreign government in the seizure and/or forfeiture of the property subsequently forfeited under U.S. law
- Authorization by the Attorney General or the Secretary of the Treasury to transfer all or a portion of the forfeited property to the cooperating foreign country
- Approval of the transfer by the Secretary of State
- Authorization in an international agreement (which may be a standing bilateral agreement, such as an MLAT, or a case-specific agreement reached for the purpose of effecting the transfer) between the United States and the foreign country to which the property is to be transferred, and
- If applicable, certification under 22 U.S.C. § 2291j(b) [§ 481(h) of the Foreign Assistance Act of 1961] of the foreign country in question

The ultimate decision of whether, and how much, to share in a case in which the seizing agency was a DOJ law enforcement agency, or an agency that is a participant in the DOJ's Assets Forfeiture Fund, is made subject to the review by the Secretary of State, the Attorney General, or his designee, based on a recommendation from the Chief of AFMLS. On May 27, 2013, authority to approve international sharing was delegated to the Chief of AFMLS in uncontested cases involving a sharing of \$5 million or less. In cases where the Internal Revenue Service Criminal Investigation or the Department of Homeland Security is the lead seizing agency, international sharing decisions are made by the Treasury Executive Office for Asset Forfeiture.

IV. Forfeiture of correspondent bank accounts

All too frequently, crimes are committed in the United States and criminals are able to find willing jurisdictions to provide safe havens for their illicit proceeds. Certain foreign authorities may impose substantial obstacles to international cooperation in the investigation and prosecution in money laundering and asset forfeiture cases. If the foreign bank that holds the illicit proceeds has a correspondent account at a U.S. bank, not only the foreign bank, but also its clients, can transact business through the U.S. bank and the U.S. financial system. Prior to the passage of § 319 of the PATRIOT Act, codified at 18 U.S.C. § 981(k), the correspondent account was insulated from forfeiture, even if a client placed illicit proceeds in that account, because the bank was regarded as the "owner" of the funds. The Government could not successfully maintain a civil forfeiture action because the foreign bank was, in most cases, an innocent owner. Members of Congress were expressly concerned that even though foreign banks maintain a presence in the United States and conduct business in U.S. dollars, the Government was unable to forfeit illicit funds in a correspondent account. These accounts facilitated foreign criminals in the laundering of criminal proceeds and in concealing the money trail from law enforcement. This situation led to the enactment of § 981(k).

Section 981(k) permits the *in rem* forfeiture of funds held in U.S. correspondent bank accounts on behalf of foreign banks as a substitute for criminal funds held on deposit at the foreign bank. Federal prosecutors can now file an *in rem* forfeiture action against the equivalent amount of money that is held in a foreign bank's U.S. correspondent account, if the Government can show that forfeitable funds were deposited into the account at the foreign bank. Being able to file this action enables the forfeiture of criminal assets that were previously beyond the Government's reach.

The objective of this powerful provision is not to punish foreign banks or to forfeit their assets. On the contrary, the intent of the statute is for the Government to seize funds from a foreign bank's U.S. correspondent bank account and for the foreign bank to, in turn, make itself whole by effecting a set-off

against the foreign bank's customer's funds. The account holder agreement with the customer generally permits the bank to do this. The onus is on the foreign bank which holds the tainted funds to make itself whole, and its failure to act promptly to redress its loss from its customer can be costly. *See United States v. Union Bank for Sav. and Inv. (Jordan)*, 487 F.3d 8, 21 (1st Cir. 2007) (foreign bank that failed to exercise set-off rights against its customer whose account contained proceeds from telemarketing fraud had not discharged its obligation to its customer prior to the Government's seizure action and lacked standing under § 981(k)(4)(B)(ii)(II) to challenge the seizure of funds from its New York correspondent account).

For the purpose of § 981(k), it is not relevant whether the foreign funds to be forfeited ever transited through the foreign bank's U.S. correspondent account from which the Government seized the funds. It is not necessary to trace the money in the correspondent account to deposits in the foreign bank. 18 U.S.C. § 981(k)(2) (2013). Under the law, for purposes of forfeiture, the criminal funds in a foreign bank account are deemed to have been deposited in the correspondent account in the United States. There are two key features of § 981(k). First, the Government can seize/restrain, in the correspondent account, up to the value of the criminal funds deposited into the account at the foreign bank. *Id.* § 981(k)(1)(A). Second, the correspondent bank or the foreign bank generally does not have standing to contest the action. *Id.* § 981(k)(4)(B)(i)(II). However, the law provides for two exceptions that confer standing on the foreign bank to contest the forfeiture: (1) when the foreign bank is alleged to have been the wrongdoer in acts giving rise to the forfeiture (§ 981(k)(4)(B)(ii)(I)), and (2) where the foreign bank establishes, by a preponderance of the evidence, that prior to the seizure/restraint of the funds, it had discharged its obligation to the prior owner of the funds (§ 981(k)(4)(B)(ii)(II)).

The second exception includes the foreign depositor closing the account or withdrawing money from the foreign bank, leaving no available balance from which the foreign bank could take a set-off. These acts must occur before the money in the correspondent account is restrained or seized. This means that the foreign bank whose account will be the subject of the forfeiture proceeding cannot object to the U.S. forfeiture action. Instead, the "owner" of the funds is defined as the account holder at the foreign bank (the one who holds the illicit proceeds). *Id.* § 981(k)(3), (k)(4)(B)(i)(I). Thus, the law redefines who is an owner of the funds for purposes of contesting a forfeiture proceeding and applying the innocent owner defense.

There are consultation and approval requirements that must be satisfied before an action can be filed under § 981(k). Requests to file a § 981(k) action are considered on a case-by-case basis. The use of this provision is not intended to circumvent existing treaties providing for international forfeiture cooperation. The use of this power could very well adversely affect U.S. bilateral or multilateral law enforcement relations. It could also adversely impact international banking and legitimate commerce. Therefore, the use of this provision has been reserved for instances where the foreign jurisdiction is unable or unwilling to provide the requisite forfeiture assistance to the United States. This may occur because the foreign jurisdiction does not recognize the offense at issue and requires dual criminality in order to render assistance. It could also be because the foreign country lacks legislation to enable it to provide the requested forfeiture assistance, or the foreign jurisdiction could be one which is not cooperative with the United States on law enforcement matters. Approval authority rests with the Chief of AFMLS. AFMLS, in turn, consults with, and obtains the concurrence of OIA, as well as the Department of the Treasury and the Department of State.

To date, forfeiture actions under § 981(k) have been filed against funds in U.S.-based correspondent bank accounts of foreign banks holding criminal proceeds in Andorra, Belize, Bolivia, Cambodia, China, Guernsey, Haiti, India, Israel, Japan, Jordan, Korea, Kuwait, Lebanon, Liechtenstein, Nigeria, Oman, Pakistan, Singapore, Taiwan, UAE, and Yemen. Importantly, even though this provision was enacted as part of the PATRIOT Act, its application is not limited to terrorism cases. Section 981(k)(1)(A) capabilities apply to money laundering forfeitures and the forfeiture of proceeds of all specified unlawful activities.

V. Conclusion

As criminal activity becomes increasingly transnational and criminal assets move easily from one jurisdiction to another, international law enforcement cooperation is essential, particularly in the forfeiture arena. The DOJ is actively engaged in forfeiting proceeds of U.S. crimes located beyond U.S. borders, as well as the proceeds of foreign crimes located in the United States. Much of the work in developing standards in this area is handled by AFMLS' IU. AFMLS' IU performs numerous responsibilities in this area, including handling litigation and providing case support and legal advice to Assistant United States Attorneys and foreign officials in international money laundering and asset forfeiture investigations and proceedings. It initiates litigation relating to the execution of restraining orders and foreign judgments pursuant to incoming requests from foreign jurisdictions. AFMLS' IU attorneys participate in negotiations and consultations with foreign governments concerning forfeiture cooperation and international asset sharing.

AFMLS' IU also assists in the development of U.S. governmental policy in international forfeiture and money laundering matters through participation in interagency working groups and international organizations and bodies. For instance, AFMLS' IU represents the DOJ in a number of high-level bilateral and multilateral forums on forfeiture, money laundering, and terrorist financing matters, including the FATF and its regional bodies, the European Union, G8, Organization of American States, CARIN, and bilateral initiatives with various governments such as Mexico. AFMLS' IU attorneys also provide technical assistance to foreign governments and international organizations on the drafting and implementing of money laundering and asset forfeiture legislation and the training of domestic and foreign law enforcement.

AFMLS' IU attorneys are continuously striving to improve the enforcement of U.S. asset forfeiture and money laundering laws and to enhance cooperation with foreign jurisdictions. Questions regarding international forfeiture matters should be directed to the International Unit of AFMLS at 202-514-1263. ❖

ABOUT THE AUTHOR

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Restraining and Forfeiting Assets for Crime Victims

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I. Why bother with forfeiture in a victim case?

Is it really necessary to pursue the seizure and forfeiture of assets in a fraud or embezzlement case when the Government will seek restitution for victims? If the defendant is ordered to pay restitution, isn't the victim going to receive compensation anyway? Who will get credit for compensating victims? Why bother seeking forfeiture or restitution?

These are questions frequently asked by prosecutors who are pressed for time and want to successfully convict the defendant who has committed fraud. Before we answer these questions, two important concepts need to be addressed: forfeiture and restitution. Forfeiture is the taking away of the profits generated from the criminal activity. Restitution is providing recompense to the victim for the loss incurred as a result of the defendant's criminal activity. In short, forfeiture focuses on what the defendant gained from their crime and restitution focuses on what the victim lost. *See, e.g., United States v. Navarrete*, 667 F.3d 886, 887-88 (7th Cir. 2012); *United States v. Taylor*, 582 F.3d 558, 566 (5th Cir. 2009); *United States v. Browne*, 505 F.3d 1229, 1281 (11th Cir. 2007); *United States v. DeFries*, 129 F.3d 1293, 1315 (D.C. Cir. 1997).

It is also important to know that forfeiture and restitution are both mandatory components of a sentence for most federal crimes. The federal forfeiture statutes that apply to most fraud offenses use mandatory language:

The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, **shall order** that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

18 U.S.C. § 982(a)(1) (2013) (emphasis added).

If the defendant is convicted of the offense giving rise to the forfeiture, the court **shall order** the forfeiture of the property as part of the sentence in the criminal case

28 U.S.C. § 2461(c) (2013) (emphasis added).

A wide variety of case law supports the notion that criminal forfeiture is mandatory and that the court may not decline to order forfeiture. *E.g., Alexander v. United States*, 509 U.S. 544, 562 (1993) ("A RICO conviction subjects the violator not only to traditional, though stringent, criminal fines and prison

terms, but also mandatory forfeiture under § 1963.”); *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (“Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied . . .”); *United States v. Newman*, 659 F.3d 1235, 1240 (9th Cir. 2011) (“The mandatory nature of that phrase [‘shall order’ in the criminal forfeiture statutes] is clear: When the government has met the requirements for criminal forfeiture, the district court must impose criminal forfeiture, subject only to statutory and constitutional limits. . . . Criminal forfeiture is separate from the discretionary sentencing considerations under 18 U.S.C. § 3551. Unlike a fine, which the district court retains discretion to reduce or eliminate, the district court has no discretion to reduce or eliminate mandatory criminal forfeiture.”) (internal citations omitted).

Likewise, the mandatory nature of restitution is embodied in the title of the statute: the Mandatory Victims Restitution Act. 18 U.S.C. § 3663A (2013). The Act requires that a court imposing a sentence for most federal crimes, and notwithstanding any other provision of law, “shall order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense.” *Id.* § 3663A(a)(1). The court must order restitution in the “full amount of each victim’s losses” without regard to the defendant’s economic circumstances. *Id.* § 3664(f)(1)(A); e.g., *United States v. Roper*, 462 F.3d 336, 338 (4th Cir. 2006) (making clear that district court is required to order restitution to victim in the full amount of victim’s loss).

While forfeiture and restitution serve different purposes, these purposes converge when the Attorney General exercises discretion to restore forfeited funds to victims. In criminal cases, restored funds are generally credited against the defendant’s restitution obligation in order to avoid double recovery for victims. *See Taylor*, 582 F.3d at 567-68; *United States v. Smith*, 297 F. Supp. 2d 69, 72-73 (D.D.C. 2003). *But see United States v. Davis*, 706 F.3d 1081, 1083-84 (9th Cir. 2013) (defendants not entitled to offset their forfeiture orders by the amount of their restitution orders even though forfeiture went to Department of Justice (DOJ) and restitution went to FBI; there was no double recovery since forfeiture and restitution serve different goals); *United States v. Bright*, 353 F.3d 1114, 1119 (9th Cir. 2004) (“[E]ven if the money were eventually restored to the victims, reducing Bright’s loss calculation by the amount seized would distort the magnitude of his crime[.]”). Accordingly, the possibility of restoration may give the defendant additional incentive to accept forfeiture as part of a plea agreement or stipulation. E.g., *United States v. Fenner*, 2011 WL 2014939, at *1 (M.D. Pa. May 23, 2011) (defendant’s plea agreement included civil forfeiture of a boat and a provision stating that the Government would “recommend that funds recovered through the civil forfeiture be applied to victim restitution”). However, a plea agreement or stipulation may not commit the Attorney General to granting restoration. It may only state that the U.S. Attorney will request that the Attorney General grant restoration in this particular case. *See, id.* at *2 (Government’s agreement to recommend application of funds to victim restitution is not binding on Attorney General). The final decision regarding remission or restoration always rests with the Attorney General. 21 U.S.C. § 853(i)(1) (2013); 28 C.F.R. § 9.1(b)(2) (2013) (remission authority has been delegated to the Chief of the Asset Forfeiture & Money Laundering Section); 1997 ATT’Y GEN. ORDER NO. 2088-97 (June 14, 1997) (restoration authority has also been delegated to the Chief of the Asset Forfeiture & Money Laundering Section); *see United States v. Pescatore*, 637 F.3d 128, 137 (2d Cir. 2011) (Attorney General has discretion to choose between restoration of forfeited funds to victims and retention of funds); CRIMINAL DIV., DEP’T OF JUSTICE, ASSET FORFEITURE POLICY MANUAL, Ch. 3, Sec. 4, 76 (2012).

As set forth in the 2011 Attorney General Guidelines for Victim and Witness Assistance (AG Guidelines), all DOJ employees shall, pursuant to the Crime Victims’ Rights Act (CVRA), “make their best efforts to see that crime victims are . . . accorded the rights contained in the CVRA (18 U.S.C. § 3771(c)(1)),” that is, the “right to full and timely restitution as provided in law.” 18 U.S.C. § 3771(a)(5), (c)(1) (2013); AG Guidelines, Article V.B.1. Therefore, it is important in victim cases that prosecutors pursue the seizure and forfeiture of the defendant’s assets. When Congress passed the Mandatory Victims Restitution Act of 1996 (MVRA), it did not provide for the restraint or seizure of the defendant’s assets

prior to conviction. While the MVRA provides the Government with an extensive array of statutory tools to pursue the defendant's assets for restitution post-conviction, these tools can be labor-intensive and require years to collect from the defendant. Experience tells us that most defendants dissipate their assets during the criminal case if the assets are not restrained and/or seized using the forfeiture tools. Without the use of forfeiture early in these cases, the victim is often left with no recovery because the defendant's assets are unavailable at the conclusion of the case. *See* CRIMINAL DIV., DEP'T OF JUSTICE, ASSET FORFEITURE POLICY MANUAL, Ch. 11, Sec. 2, 154-55 (2012) (discussing the interplay between restitution and forfeiture).

The government can and should request restitution payments through the Inmate Financial Responsibility Program and seek garnishment of the defendant's wages. However, for the victim, this generally means minimal payments over a long period of time. In fact, under the MVRA, wage garnishment can extend to 20 years. *See* 18 U.S.C. § 3613(b) (2013). There is also no incentive for the defendant to be cooperative after sentencing and identify any additional assets for restitution.

On the other hand, the pretrial preservation tools of the asset forfeiture statutes are the single most important technique for ensuring that a criminal defendant does not dissipate assets, and they fill the legislative gap in the restitution statutes that provide no mechanism for preserving assets for restitution until after sentencing. In the forfeiture arena, the prosecutor has numerous statutory provisions, both civil and criminal, to restrain and seize the defendant's assets prior to conviction. *See, e.g.*, 18 U.S.C. §§ 981–982 (2013); 21 U.S.C. § 853 (2013); 28 U.S.C. § 2461 (2013). Civil and criminal forfeiture statutes permit the pretrial restraint of the proceeds of most fraud offenses. When the Government successfully seizes and forfeits the defendant's assets, the proceeds from the liquidation of those assets, minus costs and expenses, are available to the victim following the criminal case through the restoration or remission process discussed below. *See, e.g., United States v. \$7,599,358.09*, 2011 WL 3611451, at *4 (D.N.J. Aug. 15, 2011) (fraud victims who lack standing as unsecured creditors may file remission petitions with the Attorney General); *United States v. 8 Gilcrease Lane*, 641 F. Supp. 2d 1, 6 (D.D.C. 2009) (reliance on remission process instead of granting standing to fraud victims prevents forfeiture from becoming “forum[] for general civil litigation”); *United States v. Kline*, 199 F. Supp. 2d 922, 927 (D. Minn. 2002) (where plea settlement included forfeitures and court declined to grant restitution, claimants may pursue a civil judgment and then petition the government for remission).

In civil forfeiture, prosecutors can obtain civil restraining orders for bank accounts and real property in lieu of taking physical custody of the assets. However, for those assets that are easily moved, such as cash, cars, and jewelry, physical seizure may be necessary. *See United States v. 2005 Mercedes Benz E500*, 2012 WL 761689, at *5 (E.D. Cal. Mar. 6, 2012) (where property is an automobile, risk that it will be concealed or rendered unavailable is great, making it difficult for claimant to show that the hardship outweighs the risk). Generally, the Government may seize bank accounts, cars, boats, aircraft, jewelry, and other items of value pursuant to a warrant after proving that restraining the property would not be effective. In addition, some investigative agencies have seizure authority for forfeiture (for example, DEA, FBI, IRS-CI) and may institute administrative forfeiture proceedings, which do not require judicial action unless a third party claim is filed with the agency. *See* 18 U.S.C. § 983(a)(3) (2013). A civil forfeiture action may be stayed pending the conclusion of the criminal case. *See United States v. Contents of Nationwide Life Ins. Annuity*, 2008 WL 1733130, at *4 (S.D. Ohio Apr. 10, 2008); *United States v. \$247,052.54*, 2007 WL 2009799, at *2 (N.D. Cal. June 6, 2007); *United States v. All Funds on Deposit in Suntrust Account Number XXXXXXXXX8359*, 456 F. Supp. 2d 64, 64–65 (D.D.C. 2006).

In criminal forfeiture, a forfeiture allegation should be included in the indictment. *See* FED. R. CRIM. P. 32.2(a); *United States v. Dolney*, 2005 WL 1076269, *4 (E.D.N.Y. May 3, 2005) (if the Government wishes to seek forfeiture, it must include forfeiture allegations in indictment). Specific assets can be identified in the indictment, as well as the inclusion of a money judgment in the amount of the fraud proceeds. *See* FED. R. CRIM. P. 32.2(a) (indictment may, but need not identify the property subject

to forfeiture or specify the amount of money judgment that the Government seeks). The Government may seek a restraining order for the proceeds of fraud offenses pursuant to 21 U.S.C. § 853(e), as incorporated by 18 U.S.C. § 982(b). A pre-indictment restraining order is good for 14 or 90 days. *See* 21 U.S.C. § 853(e)(1)(B), (e)(2) (2013). A post-indictment restraining order is good indefinitely. *See id.* § 853(e)(1)(A); *see also United States v. Kirschenbaum*, 156 F.3d 784, 791-93 (7th Cir. 1998) (post-indictment ex parte restraining order remains in effect through trial). Criminal forfeiture also allows the court to order the indicted defendant to repatriate assets held overseas. *See* 21 U.S.C. § 853(e)(4) (2013); *United States v. Adams*, 782 F. Supp. 2d 229, 234-36 (N.D. W. Va. 2011) (repatriation order issued post-indictment under § 853(e)(1) and (4) does not require notice and a hearing and does not expire before the conclusion of the criminal case); DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 9-13.526, 9-111.700 (2010). Thus, the defendants can no longer move assets overseas in the hope of evading the court and their restitution obligations to the victims.

What does all of this mean for the victim? Assets are available for victim recovery at the end of the case. There is also greater incentive for defendants to cooperate with the Government post-conviction but prior to sentencing because more assets available to the victim may lessen their sentences. *See* DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-113.000 (2010).

What if the prosecutor does not pursue forfeiture and restitution is not ordered in the case? Although fines and penalties are assessed against the defendant, fines and penalties go to the Crime Victims Fund, which supports victims programs nationwide. However, it does not provide compensation directly to individual victims, who will receive no recovery unless they pursue a separate civil action against the defendant. The best possible outcome in a criminal case is when a defendant's assets are forfeited; the defendant is ordered to pay restitution, fines, and penalties assessed in the case; and the forfeited assets can be used to make the victim whole.

II. Transfers to victims: remission and restoration

Once assets have been forfeited, only the Attorney General has the authority to direct their ultimate disposition. Although a court cannot order that forfeited assets be applied to restitution or transferred directly to victims, over **\$3.5 billion** in forfeited assets have been disbursed to victims since the year 2000 under the Attorney General's discretionary authority.

As a matter of DOJ policy, victims of crime have first priority of forfeited funds over law enforcement and equitable sharing with federal, state, and local agencies. CRIMINAL DIV., DEP'T OF JUSTICE, ASSET FORFEITURE POLICY MANUAL, Ch. 12, Sec. 1, 171 (2012). Thus, in cases involving victims, every dollar of forfeited funds, less government expenses, is returned to victims who can demonstrate a pecuniary loss and otherwise meet the regulatory requirements for remission.

Once the defendant's illegally obtained assets are forfeited, two principal procedures are available to return them to victims: remission and restoration. In remission, the Attorney General, acting through the Asset Forfeiture and Money Laundering Section (AFMLS) or the seizing agency, exercises discretion to compensate persons who have incurred a pecuniary loss from the offense underlying the forfeiture. In restoration, the Attorney General transfers forfeited assets to a court to be applied toward satisfaction of a criminal restitution order.

A. Petition for remission process

Remission is available to "victims," a term defined as any person who has suffered a specific and identifiable pecuniary loss as a direct result of the crime underlying the forfeiture or a related offense. 28 C.F.R. §§ 9.2, 9.8(b) (2013). "Persons" include individuals, partnerships, corporations, joint business enterprises, estates, or other legal entities capable of owning property. *Id.* § 9.2. To receive remission in criminal or civil judicial forfeitures, a victim must complete a petition for remission and submit it to the

U.S. Attorney for the judicial district where the forfeiture was completed. *Id.* § 9.4(e). If the assets were forfeited administratively, the seizing agency is responsible for adjudicating the remission petition.

The definition of a victim for purposes of remission is generally narrower than the definition of a victim for purposes of criminal restitution under the MVRA, 18 U.S.C. § 3663(a)(2) and 3663A(a)(2). The following types of losses cannot be compensated through remission:

- Losses not directly resulting from the underlying offense or a related offense (for example, time lost from work)
- Interest forgone
- Collateral expenses incurred to recover lost property (for example, attorneys' fees and investigative expenses)
- Physical injuries or damage to property

28 C.F.R. § 9.8(b)(1), (c) (2013). Further, a person cannot qualify for remission as a victim if he:

- Knowingly contributed to or benefited from the offense underlying the forfeiture or was willfully blind to it
- Has been compensated or has recourse to other reasonably available assets or compensation (for example, litigation or insurance), or
- Seeks recovery for torts that are associated with the offense but are not the bases for the forfeiture

Id. § 9.8(b), (c).

Following the seizure or forfeiture of property, the U.S. Attorney's office (USAO), in cooperation with AFMLS and the investigating agency, makes an effort to identify all potential victims and provides them with notice of the opportunity to file a petition for remission. Potential victims known to the Government are notified in writing via postal or electronic mail, while other victims may be notified by publication via traditional media or the Internet.

A successful petition for remission requires documentary evidence demonstrating a direct pecuniary loss. As noted above, indirect losses such as investigative costs or time lost from work are not compensable. Acceptable evidence of loss includes cancelled checks, receipts, bank statements, and invoices. Losses may also be substantiated through records seized by the Government during the investigation. In calculating a victim's pecuniary loss, any money previously returned to or recovered by the victim must be accounted for and deducted.

If a remission petition is denied, the petitioner may request reconsideration from AFMLS or the seizing agency within 10 days of receipt of the denial notification. *Id.* § 9.4(k). A request for reconsideration must present evidence not previously submitted or a basis upon which the original denial was erroneous. Reconsideration requests are reviewed and decided by officials different from those who reviewed and decided the original petition.

In multiple-victim cases, if the forfeited funds are insufficient to fully compensate all victims who file a petition, the funds are generally distributed on a *pro rata* basis in accordance with the amount of loss suffered by each victim. *Id.* § 9.8(f). However, the Ruling Official has discretion to give priority to particular victims in appropriate circumstances. *Id.* The Government's administrative expenses incident to the forfeiture, sale, or other disposition of the property are deducted from the amount available to the victims. *Id.* § 9.9(a). Victims have priority over federal official use or equitable sharing with law enforcement agencies. Sharing is available only if all known victims have been fully compensated and additional proceeds remain in the forfeiture fund.

B. Restoration

A USAO, in its sole discretion, may request that AFMLS apply forfeited funds toward satisfaction of a criminal restitution order through a process called “restoration.” After consultation with the seizing agency, the USAO must certify that the victim or victims listed in the restitution order (1) are the only known victims of the offense underlying the forfeiture, (2) suffered a specific monetary loss directly attributable to the crime, (3) have no reasonable access to other sources of recovery, and (4) were not complicit in the offense or willfully blind to it. If there is more than one victim, the restitution order must generally specify that funds are to be distributed *pro rata*. However, private victims may take priority over government victims in accordance with 18 U.S.C. § 3664(i). Direct victims also take priority over an insurance company or other source that provided compensation for a loss in accordance with 18 U.S.C. § 3664(j)(1). If the forfeited assets are not sufficient to restore the victims’ losses in full, the defendant remains liable to pay the unpaid balance of restitution.

Restoration eliminates the need for each victim named in the restitution order to file a petition for remission. Thus, restoration generally leads to faster and more efficient disbursement. The restitution order must, however, include all known victims and comply with the remission requirements. Inaccurate or incomplete restitution orders will result in AFMLS denying restoration. If the USAO does not request restoration, or if restoration is denied by AFMLS, a victim may still petition for remission.

C. Which process to use: remission or restoration?

In criminal cases, the USAO may need to choose between initiating remission or restoration. Restoration is generally preferable in simpler cases in which the victims and their loss amounts are reliably reported in the restitution order. Restoration reduces the burden on the victims, who will not be required to submit a petition, and benefits the Government by eliminating the need to review petitions and distribute funds directly to the victims. In addition, funds forfeited in administrative, civil, or criminal forfeiture matters can all be included in a single restoration request and transferred at once to the clerk of court.

If, on the other hand, there is no criminal case or restitution order or the restitution order is not complete or subject to change (for example, additional victims may come forward after sentencing), remission is the appropriate vehicle to ensure the victims receive compensation. Because remission is not subject to time constraints imposed by the Federal Rules of Procedure or by the court, a thorough search for potential victims and more deliberate review of the petitions is generally possible. In large multiple-victim criminal cases, it may be more efficient to request that the court approve a remission process in lieu of restitution pursuant to 18 U.S.C. § 3663A(c)(3)(A). *See infra* Part IV.

Many large-victim cases have assets forfeited both administratively and judicially. Administrative remission decisions should await DOJ decisions on remission to ensure consistency and simplify disbursements. In criminal cases, the USAO and case agent should coordinate with AFMLS regarding determinations of restoration and/or remission.

III. Interest of justice transfers

In addition to remission and restoration, the Attorney General has authority to “take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this subsection.” 21 U.S.C. § 853(i)(1) (2013). This provision is applicable to forfeitures in most criminal offenses through 18 U.S.C. § 982(b)(1). The text and legislative history of § 853(i) suggest an authority of the Attorney General to remit forfeited property to innocent persons where the regulatory requirements for remission or mitigation are not met but the interest of justice would be served. AFMLS has applied the interest of justice provision sparingly and usually in the

context of innocent owner claims against specific forfeited property. In addition, this provision may not be applicable in civil forfeiture cases.

IV. Large-victim cases

With the advent of the Internet and other technological advances in communications, criminals may easily victimize hundreds or thousands of victims in a single scheme. In such cases, in-house noticing of victims, petition review, and disbursement to victims may not be feasible. Consequently, in 2012 DOJ/AFMLS entered into a contract with three private claims administration firms to provide support for petition processing in larger cases. These firms are experienced in mass class-action litigation and have worked extensively with federal regulatory enforcement agencies such as the Securities and Exchange Commission and Federal Trade Commission. The contractor assists the USAO and AFMLS with the design of notices and petitions, handles all contact with victims through toll-free hotlines and Web sites, processes petitions, makes remission recommendations, and distributes funds to victims.

USAOs handling a civil or criminal forfeiture involving a large number of victims (generally 100 or more) should contact AFMLS early in the forfeiture case to determine the potential need for and availability of claims administration support. AFMLS will provide a questionnaire to fill out regarding the underlying facts, amount and nature of assets, number of potential victims, status of forfeitures, etc. When appropriate, AFMLS will award a contract to a claims administration vendor through a competitive bid process. The vendor's fees are deducted from the forfeited assets prior to distribution to victims, pursuant to 28 C.F.R. § 9.9(c).

In large cases, information must be managed so that the contractor, seizing agency, USAO, and AFMLS do not receive hundreds of inquiries from victims seeking information or provide contradictory information regarding the remission or restoration process. Important do's and don'ts to keep in mind include:

- **DO** keep victims advised of remission status through contractor Web site, USAO Web site, mailings, and/or other communications. Provide as much detail as possible, for example, "Department of Justice is reviewing requests for reconsideration."
- **DO** tell victims that claims processing is time-consuming in large cases and that distribution will likely take one year or more after the petition deadline has passed.
- **DO** assure victims that all forfeited money will be returned to victims after deduction of government expenses.
- **DO** ask AFMLS for help and guidance in large or complex cases.
- **DON'T** tell victims that they will receive a specific dollar amount or particular percentage of their loss. The amount of the victims' recovery is not known until all petitions are processed and the funds are ready to be distributed.
- **DON'T** tell victims to expect remission payments by a particular date. Unforeseen factors can delay distribution (for example, discovery of additional victims).
- **DON'T** try to do everything in-house. Attempting to handle a large, multiple-victim case with limited government resources can actually delay remission. Most victims would prefer faster recovery as opposed to receiving a slightly increased payment because contractor costs were minimized through in-house process.

V. Asset tracking

With the increasing number of seized and forfeited assets, and multiple options for asset disposition, it is imperative that all assets are properly tracked. The DOJ maintains the Consolidated Asset

Tracking System (CATS) to track the activity and “lifecycle” of assets as they move through the forfeiture process. Every asset seized for forfeiture by a DOJ Asset Forfeiture Program participant or included in a judicial action in one of our 94 districts is entered into CATS and assigned an asset identification number that can be referenced by anyone with access to the system. CATS currently contains information for over 1.1 million assets.

When the forfeiture program began in the 1980s, federal law enforcement components maintained separate asset tracking systems. The need for a centralized system quickly became apparent because many different entities take actions that affect a single asset. A typical case involves a law enforcement agency seizing the asset, a USAO filing a forfeiture complaint against the asset, the U.S. Marshals Service (USMS) coordinating the auction of the asset, and AFMLS reviewing a petition for remission or restoration request that affects disposition of the asset. To address this need for centralization of information, the DOJ began the process of creating a consolidated asset forfeiture database. By the early 1990s, CATS was accessible to users via stand-alone terminals placed throughout the various DOJ agencies. In 2005, the system received a major upgrade and became available on a user’s desktop through an Internet browser. Today, CATS interacts with several DOJ and Department of the Treasury databases and feeds data to several other programs that have become integral to the forfeiture community, such as www.forfeiture.gov, the Internet publication Web site.

CATS contains information for both administrative and judicial forfeitures and tracks the seizure, forfeiture, custody, and disposition of each asset. Users from any participating agency can access this data, which includes updates on the forfeiture status, custody location, and accounting transactions related to the asset. Each component is responsible for maintaining current records on an asset’s status.

USAOs update forfeiture information, including the date of filing for a complaint or indictment and date of the forfeiture order, generate the advertisement for Internet publication, and enter disposal instructions for the USMS on assets for which judicial forfeiture is being pursued. If no updates are entered on assets included in a forfeiture case, a Division or Section will not be able to initiate Internet publication, which is generally required prior to forfeiture. In addition, although an agency may have successfully forfeited an asset, if the forfeiture decision is not recorded in CATS, the asset may never be transferred from the DOJ Seized Asset Deposit Fund (SADF) (the holding account for assets pre-forfeiture) to the DOJ Assets Forfeiture Fund (AFF) or liquidated at auction.

Neglecting updates to CATS may seem inconsequential, but the reality is that a few missing screens of data can cause the Government to expend significant amounts of money managing assets that should have been liquidated. Incomplete updates also cause significant delay in processing payments to victims through remission and restoration or payments to our state and local law enforcement partners through the Equitable Sharing Program. Funds that are not transferred from the SADF to the AFF are not available to support the Forfeiture Program’s financial obligations.

CATS also provides controls that prevent the inappropriate disposition of assets if a victim matter is pending. The USAO and the seizing agency have the ability to place a hold on assets to indicate future victim recovery. It is imperative that both the USAO and seizing agency enter these holds and other information on petitions for remission or restoration to ensure that the asset is not prematurely equitably shared or otherwise transferred before the victims are fully compensated.

If the assets were seized by an agency from the Department of the Treasury (IRS-CI, USSS, ICE, or CPB), although the asset may have been entered in CATS for the purposes of publication, it is important to note that those agencies do not access CATS and do not track seizures through this system. Accordingly, the holds and disposition controls available to DOJ agencies cannot be used effectively to ensure asset preservation. The Treasury seizing agency must be contacted and instructed to obligate the funds for future victim compensation. If the USAO does not request obligation, the assets will not be available for distribution to victims.

In addition to tracking assets, CATS also serves as a reporting tool for DOJ. Every year, the data from CATS is compiled into a report to Congress detailing the status of the Assets Forfeiture Fund (<http://www.justice.gov/jmd/afp/02fundreport/>). The report contains information on assets on hand, equitable sharing distributions, and deposits to the AFF. Important statistics regarding victim compensation are also available from the system. In addition, each quarter, every USAO is provided with updated statistics regarding pending and completed matters, forfeiture deposits, and victim compensation paid since the beginning of the fiscal year.

If attorneys from a DOJ component or federal agency other than a USAO pursue a matter in which assets are seized, the attorneys must contact AFMLS to ensure that the assets are properly entered in CATS. If a case results in the entry of a money judgment, AFMLS must also be contacted to ensure the judgment is properly recorded in CATS, even if no tangible assets have been seized. The USMS recently placed Deputy U.S. Marshals whose primary mission is to collect unsatisfied money judgments in USAOs across the country. If the judgment is not entered in CATS, the USMS will not have the information necessary to pursue collection.

In recent months, AFMLS located multiple assets that the Government successfully forfeited, but were either pending auction or being held in the SADF because the forfeiture updates were not completed in CATS. If an agency is currently handling a forfeiture matter without the assistance of a local USAO, that agency should contact the AFMLS Program Operations Unit to ensure the assets are properly tracked, published, and liquidated. For general information regarding compensation for victims, please contact AFMLS. ❖

ABOUT THE AUTHORS

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Interplay Between the Forfeiture and Bankruptcy Proceedings

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I. Introduction

In recent years, the Department of Justice (the Department) has prosecuted a number of complex fraud schemes involving billions of dollars in victim losses, most notably those conducted by Marc Dreier (Southern District of New York), Scott Rothstein (Southern District of Florida), Bernard Madoff (Southern District of New York), Adelphia Communication (Southern District of New York), Thomas Petters (District of Minnesota), and R. Allen Stanford (Northern District of Texas). These schemes have spawned significant criminal, civil, and bankruptcy litigation and have resulted in victims scrambling to recover their lost investments. This article examines the ways that bankruptcy law, forfeiture, and the remission/restoration process interact. This article addresses the importance of coordination between the bankruptcy and forfeiture cases when appropriate, highlights recurring problem areas, and sets forth best practices.

Forfeiture of the proceeds of fraud is not a matter of prosecutorial discretion, but is a statutory mandate. Congress used the same “shall order” terminology in both the forfeiture and restitution statutes when prescribing the penalties a court must impose as part of the sentence in most fraud cases. *See* 18 U.S.C. § 3663A(a)(1) (2013); 18 U.S.C. § 982(a)(1) (2013); 28 U.S.C. § 2461(c) (2013). Congress thus intended that a white collar criminal shall not profit from crime, and that the victims of crime shall be provided full and timely restitution. This mandate is an important marker for any federal prosecutor and informs his or her decision on the best course of action when negotiating with the bankruptcy trustee.

II. Benefits of forfeiture and bankruptcy

Bankruptcy and asset forfeiture are rooted in two distinct and separate areas of law with divergent goals. Bankruptcy law is designed to result in an orderly unwinding of affairs when a business or individual becomes insolvent. The bankruptcy process is designed to sift through competing claims of creditors, but may not adequately protect the interests of victims who are not secured or unsecured creditors. In contrast, forfeiture, and the associated means of returning assets to victims described elsewhere in this publication, seeks to compensate all victims—not just various classes of creditors—on a pro rata basis. Consequently, when these two distinct proceedings intersect, questions arise. What are the benefits of both proceedings? How can the proceedings work together to accomplish their respective goals?

A. Benefits of forfeiture

The interests of crime victims are typically better protected if a defendant’s assets are forfeited rather than administered through the bankruptcy estate. There is an important distinction between a crime victim in a fraud case, whose loss is the direct result of a criminal act, and a trade creditor who extended services or credit to an individual or entity that is now unable to repay. The bankruptcy statutes allow any creditor to seek relief from debtors in a proceeding in which the debts are discharged. However, in criminal cases, Congress provided that defendants must compensate their victims for the full amount of the loss caused by the criminal conduct, without regard to the defendant’s economic circumstances. 18

U.S.C. § 3664(f)(1)(A) (2013). When assets are forfeited, the Attorney General can apply them toward the defendant's restitution obligation or the funds can be returned to victims directly through the remission process. Thus, the first benefit of forfeiture over bankruptcy is that fraud victims do not compete with general trade creditors for a defendant's limited assets.

The second benefit of forfeiture over bankruptcy as to fraud victims is that the forfeiture process is usually far less expensive, thereby resulting in more of the recovered assets being paid to victims rather than financing the costs of proceedings. When assets are forfeited and liquidated, the Government takes no "cut" to pay for the efforts of law enforcement personnel who locate and recover assets, government attorneys who litigate the forfeiture case, or government personnel who manage and liquidate the property. The only costs deducted from forfeited assets are actual out-of-pocket costs associated with the storage and liquidation of assets. By contrast, in bankruptcy, the trustee may charge fees and often hires lawyers and accountants to assist in managing the estate. These expenses must be paid from the debtor's estate, and their fees often take priority over any creditor's or victim's claim.

A third benefit of forfeiture is that foreign governments and the international law enforcement infrastructure are typically more receptive to assisting with a law enforcement task like forfeiture than with a purely civil function such as bankruptcy. Enforcement of forfeiture orders is often facilitated by mutual legal assistance treaties (MLATs) and United Nations and other multilateral conventions, which include specific provisions for the restraint and seizure of foreign-based assets, and by forfeiture agreements that the United States has entered into with many other countries. With criminal proceeds increasingly being transferred into foreign jurisdictions, the status of a U.S. court order can be critical as to whether a foreign court or government is able to assist with the repatriation of assets.

Finally, forfeiture law enables the Government to recover certain assets that may not be easily available to a bankruptcy trustee. For example, the "relation-back doctrine" does not exist under bankruptcy law. Accordingly, bankruptcy trustees may not be able to obtain certain forfeitable assets transferred to third parties well before the bankruptcy proceeding.

B. Benefits of bankruptcy

Bankruptcy law provides a useful supplement to the Government's powers under forfeiture law when an individual, partnership, or corporate entity that participated in or was otherwise closely associated with a fraud seeks or is placed into bankruptcy while the criminal prosecution, and any associated forfeiture proceedings, is pending. Recent cases have shown that it is often in the best interest of victims to cooperate with bankruptcy trustees (and vice versa), as well as other governmental and private entities, in order to maximize recovery of assets.

Although forfeiture is generally the most cost-effective tool for victim recovery, the bankruptcy process also provides a mechanism for the victims of fraud to recover assets. When creditors of a company or individual are also victims of crimes, the bankruptcy trustee can often oversee the complicated winding down of the business operations more efficiently than the Government. This process frequently involves, among other things, the collection of accounts receivables, the continuation or winding up of payroll and employee benefits, the liquidation of office equipment, the orderly transition of client files, and the rejection of property leases.

In some instances, a bankruptcy trustee has powers unavailable to the Government in a forfeiture action. For example, Chapter 5 of the Bankruptcy Code permits a bankruptcy trustee to investigate and recover a variety of claims against third parties, including so-called avoidance actions and preference claims under 11 U.S.C. § 547(b). These "claw back" powers can permit a trustee to recover assets that may not ultimately be forfeitable, such as property in which a third party has a right, title, or interest that was superior to the defendant's right, title, and interest at the time of the offense, or property that was transferred to a bona fide purchaser for value who was without reason to know that the property was

subject to forfeiture. In addition, the bankruptcy trustees can pursue the proceeds of fraudulent transfer claims under 11 U.S.C. §§ 544 and 548 for distribution to creditors.

III. Intersection of asset forfeiture and bankruptcy procedures

As asset forfeiture has become increasingly important in the prosecution and punishment of white collar crimes, the case law regarding asset forfeiture and bankruptcy has developed. To understand the intersection of asset forfeiture and bankruptcy procedures, it is important to review how the ancillary proceeding works in criminal forfeiture. As set forth below, a bankruptcy proceeding does not stay a criminal forfeiture proceeding, and the forfeiture proceeding is not subject to challenge by a bankruptcy trustee or creditors of the bankruptcy estate other than through the ancillary proceeding.

A. Criminal forfeiture proceedings are not subject to the automatic stay

Although the automatic stay under the Bankruptcy Code enjoins “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate,” 11 U.S.C. § 362(a)(3) (2013), the stay does not in any way affect criminal forfeiture proceedings, which may continue unabated during the pendency of a bankruptcy.

First, the automatic stay does not affect “the commencement or continuation of a criminal action or proceeding against the debtor.” *Id.* § 362(a)(1). *See Petition of Smouha*, 136 B.R. 921, 928 (S.D.N.Y. 1992) (criminal forfeiture proceedings not subject to automatic stay by virtue of § 362(a)(1)).

Second, the stay also does not affect “the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit’s . . . police and regulatory power.” 11 U.S.C. § 362(b)(4) (2013). Forfeiture proceedings are an exercise of the Government’s police power, so they are not affected by the automatic stay. *See, e.g., In re James*, 940 F.2d 46, 51 (3d Cir. 1991) (“[W]e conclude that the district court here was correct in holding that a civil forfeiture action proceeding is an exception to the automatic stay under the ‘police power’ exception of section 362(b)(4).”); *United States v. Grooms*, 1997 WL 578752, at *3-5 (W.D. Va. Aug. 29, 1997) (holding that federal civil forfeiture action fell within § 362(b)(4) under either the pecuniary interest test or the public policy test); *In re Chapman*, 264 B.R. 565, 570-72 (B.A.P. 9th Cir. 2001) (holding that, at least in drug cases (which satisfy the public interest test), a civil forfeiture action is an exercise of the police power and is therefore exempt from the automatic stay provision); *In re WinPar Hospitality Chattanooga, LLC*, 401 B.R. 289, 293 (Bankr. E.D. Tenn. 2009) (following *Chapman*; automatic stay provision does not apply to civil forfeiture action filed after bankruptcy proceeding was commenced and property turned over to the trustee; motion to compel trustee to turn over property granted); *In re WinPar Hospitality Chattanooga, LLC*, 404 B.R. 291, 296 (Bankr. E.D. Tenn. 2009) (denying motion for reconsideration; that the Government plans to use the forfeited funds to pay restitution to victims does not make the forfeiture any less an exercise of the Government’s police power); *United States v. 45 Poquito Road*, 2006 WL 2233645, at *4 (D. Or. Aug. 2, 2006) (automatic stay provision of bankruptcy code does not bar a civil forfeiture proceeding against property purchased with fraud proceeds and involved in a money laundering offense); *In re Brewer*, 209 B.R. 575, 577 (Bankr. S.D. Fla. 1996) (civil forfeiture action is an exercise of the Federal Government’s police power and so is not stayed by a filing in bankruptcy). *But see In re Finley*, 237 B.R. 890, 895 (Bankr. N.D. Miss. 1999) (the exemption to the automatic stay provision does not apply to civil forfeitures; the Government must apply to the bankruptcy court for relief from the stay before filing forfeiture action).

Third, and finally, because of the relation-back doctrine, directly forfeitable property is not estate property subject to the automatic stay. The relation-back doctrine, as codified in 21 U.S.C. § 853(c), is a well-established principle of forfeiture law. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 627 (1989); *United States v. Monsanto*, 491 U.S. 600, 613 (1989). Under the relation-back doctrine, the Government’s interest in forfeitable property vests at the time of the offense giving rise to forfeiture.

See 21 U.S.C. § 853(c) (2013) (“All right, title, and interest in [forfeitable] property . . . vests in the United States upon the commission of the act giving rise to forfeiture under this section.”); *United States v. United States Currency in the Amount of \$228,536.00*, 895 F.2d 908, 916 (2d Cir. 1990) (because “the forfeiture occurs when the crime is committed,” a defendant has no interest in the forfeited property “as of that moment”). Thus, title in assets obtained through fraud proceeds, or traceable to fraud proceeds, vests in the United States at the time of the commission of the offense, and that property is not part of the bankruptcy estate.

B. Ancillary proceedings in criminal forfeiture

Criminal defendants can only be made to forfeit their own interest in property. *Pacheco v. Serendensky*, 393 F.3d 348, 355 (2d Cir. 2004) (“Although partial forfeitures may occasionally make for strange bedfellows—such as making the government co-owners of real property with the spouse of a criminal defendant—the alternative could give the government an undeserved windfall and deny an innocent third party her valid property interest.”); *United States v. Grossi*, 482 F. App’x 252, 255 (9th Cir. 2012) (same, quoting *Pacheco*). Thus, the forfeiture law provides a mechanism for innocent third parties to recover their interest in any property preliminarily forfeited to the Government. See, e.g., *United States v. Ramunno*, 599 F.3d 1269, 1273 (11th Cir. 2010) (the purpose of the ancillary proceeding is to exempt the interests of qualifying third parties from the final forfeiture order); *United States v. Real Prop. in Waterboro*, 64 F.3d 752, 756 (1st Cir. 1995) (third party’s argument that property vested in him instead of defendant had to be made in the ancillary proceeding, not in a motion to dismiss the indictment).

Under the criminal forfeiture statute, a third party may petition for a hearing to adjudicate its alleged interest in property to be forfeited in an “ancillary proceeding,” conducted after the court enters its preliminary order of forfeiture. See 21 U.S.C. § 853(n)(2) (2013) (requiring that any such petition be filed “within thirty days of the final publication of notice or . . . receipt of notice under paragraph (1), whichever is earlier”). As the Second Circuit made clear in *Pacheco*, a court resolving a third party petition does not necessarily need to conduct a hearing; rather, these ancillary proceedings resemble civil actions, may involve discovery, and may be resolved by motion to dismiss or for summary judgment. See *Pacheco*, 393 F.3d at 351-52; *United States v. Marion*, 562 F.3d 1330, 1342 (11th Cir. 2009) (following *Pacheco*); *United States v. Salti*, 579 F.3d 656, 667 (6th Cir. 2009) (same); *United States v. Corpus*, 491 F.3d 205, 208 (5th Cir. 2007) (same). If the court does conduct a hearing, both the petitioner and the Government are entitled to present evidence, and the court may also consider relevant portions of the criminal record. See 21 U.S.C. § 853(n)(5) (2013); FED. R. CIV. P. 32.2(c)(1)(B) (court may permit parties to conduct discovery in the ancillary proceeding “if the court determines that discovery is necessary or desirable to resolve factual issues”). The burden is ultimately on the petitioner to prove his or her claim by a preponderance of the evidence. See 21 U.S.C. § 853(n)(6) (2013).

There are *only* two ways that a third party can show a valid interest in property subject to forfeiture under § 853(n): The petitioner

must either (a) have an interest in the property that is superior to the criminal defendant’s because it arose prior to “the time of the commission of the acts [that] gave rise to the forfeiture,” 21 U.S.C. § 853(n)(6)(A), or (b) be a “bona fide purchaser for value” of the property who was “reasonably without cause to believe that the property was subject to forfeiture” at the time of purchase, *id.* § 853(n)(6)(B).

Pacheco, 393 F.3d at 353. See, e.g., *United States v. Monea Family Trust I*, 626 F.3d 271, 277 (6th Cir. 2010); *United States v. Timley*, 507 F.3d 1125, 1130 (8th Cir. 2007); *United States v. Schechter*, 251 F.3d 490, 494 (4th Cir. 2001).

A third party comes under paragraph 6(A) if it had an interest in the property *at the time of the offense*, and it comes under 6(B) if it acquired its interest *after the offense*. If the third party comes under 6(A), it only has to show an interest in the property superior to the defendant’s interest—for example, a

secured creditor—whereas if the third party comes under 6(B), it has to be a bona fide purchaser for value. In either case, the third party petitioner must have an interest in the specific property being forfeited. *See, e.g., United States v. Ribadeneira*, 105 F.3d 833, 835-36 (2d Cir. 1997) (per curiam) (General creditors have no standing in ancillary proceeding because they have no interest “in” specific forfeited property. Section 853(n) requires petitioners to demonstrate “an interest in a particular, specific asset, as opposed to a general interest in an entire forfeited estate or account.”); *United States v. White*, 675 F.3d 1073, 1080 (8th Cir. 2012) (following *Ribadeneira*).

If the petitioner cannot meet the requirements of either paragraph 6(A) or 6(B), he or she cannot demonstrate an interest in property subject to forfeiture. *See, e.g., United States v. Hooper*, 229 F.3d 818, 822-23 (9th Cir. 2000) (given the clear direction in § 853(n)(6) limiting recovery to two categories of claimants, courts are not at liberty to create additional grounds for relief); *United States v. Kennedy*, 201 F.3d 1324, 1335 (11th Cir. 2000) (Alternative grounds set forth in §§ 853(n)(6)(A) & (B) are the only grounds for recovery in ancillary proceedings, and one of them “is emphatically not that the criminal defendant gave the third party a gift.”).

Following the sentencing court’s disposition of all petitions filed in the ancillary proceedings, or if no petitions are filed following the expiration of the requisite time periods, the court enters a final order of forfeiture and the United States has clear title to the property. *See* 21 U.S.C. § 853(n)(7) (2013); FED. R. CRIM. P. 32.3(b)(3) & (c)(2); *United States v. Rashid*, 373 F. App’x 234, 238-39 (3d Cir. 2010) (even if time for filing was tolled until claimants reached the age of majority, petition was untimely followed and therefore claimants did not have a legitimate interest in the property); *United States v. Grossman*, 501 F.3d 846, 848 (7th Cir. 2007). The order may be amended at any time to include subsequently located property or property qualifying as substitute assets. *See* FED. R. CRIM. P. 32.2(e).

C. Unsecured creditors cannot challenge the forfeiture proceedings or distribution of assets to victims

Aside from the ancillary proceedings, there is no procedure for a third party to claim an interest in property subject to forfeiture, in any forum. Indeed, § 853(k), entitled “bar on intervention,” explicitly provides:

Except as provided in subsection n of this section [*i.e.*, through the ancillary proceedings described above], no party claiming an interest in property subject to forfeiture under this section may—

- (1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or
- (2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

21 U.S.C. § 853(k) (2013). *See, e.g., United States v. Cone*, 627 F.3d 1356, 1358 (11th Cir. 2010); *United States v. Cox*, 575 F.3d 352, 358 (4th Cir. 2009); *United States v. Holy Land Found. For Relief and Dev.*, 493 F.3d 469, 477 (5th Cir. 2007) (*en banc*); *United States v. Puig*, 419 F.3d 700, 703 (8th Cir. 2005). Under subsection (1), no third party has standing to intervene in the criminal case (except by filing a third party petition pursuant to § 853(n)), and under subsection (2) no party may challenge the forfeiture or otherwise assert an interest in the property subject to forfeiture in any other forum, once the defendant has been indicted and notice of forfeiture given.

The force of the § 853(k) bar in bankruptcy proceedings has been litigated extensively. For example, in the Global Vending bankruptcy in the Southern District of Florida, the Government indicted, among others, the debtor’s president and sole shareholder on charges of mail fraud, money laundering, and structuring money transactions. The Government included forfeiture allegations, contending that real

property, vehicles, bank accounts, and jewelry were traceable to the charged offenses. Subsequently, the Chapter 7 trustee attempted both to challenge the forfeitures in the criminal case and to seek a turnover of the forfeited assets in the bankruptcy. In rejecting such attempts, the bankruptcy court's reasoning was clear: "The sole remedy in which a third party such as the Bankruptcy Trustee may assert its alleged interest in property subject to forfeiture is to file a claim in the ancillary proceedings in the manner provided under 21 U.S.C. § 853(n)." *Osborne v. United States (In re Global Vending, Inc.)*, 2005 WL 2451763, at *2 (Bankr. S.D. Fla. June 1, 2005).

Other courts have uniformly held that creditors, trustees, plan administrators, and the like have no ability to challenge any aspect of forfeiture proceedings, except in the context of ancillary proceedings pursuant to § 853(n)(6). *See, e.g., United States v. Cambio Exacto, S.A.*, 166 F.3d 522 (2d Cir. 1999) (person to whom a money transmitter owes money lacks standing as a general creditor to contest forfeiture of money transmitter's account); *United States v. Lazarenko*, 476 F.3d 642 (9th Cir. 2007) (liquidators appointed by High Court of Antigua in bankruptcy-like proceeding have no standing to contest criminal forfeiture). The en banc Fifth Circuit recently summarized the effect of § 853 as follows:

We can understand [judgment creditors'] frustration at having to await the completion of the Government's case, but we are readily satisfied that the system set out in § 853 provides them with due process. To be sure, the [creditors] will have their day in court, but under the scheme set forth in § 853, they cannot have it today, and they cannot have it in this Court. They must wait for the criminal prosecution to conclude, and, if [the defendant] is convicted, they must make their arguments to that district court in the first instance.

United States v. Holy Land Found. for Relief and Dev., 493 F.3d 469, 478 (5th Cir. 2007) (en banc). *See also, e.g., United States v. Assets of Revere Armored, Inc.*, 1997 WL 794460, at *2 (2d Cir. Dec. 30, 1997) (finding it was reasonable for Government and trustee to settle the forfeiture case by splitting funds between bankruptcy and forfeiture); *In re Petters Co., Inc.*, 440 B.R. 805, 809-10 (Bankr. D. Minn. 2010).

D. Bona fide purchaser for value

Forfeiture law defines which third parties have an interest in forfeited assets that trump a forfeiture. Congress gave priority to "bona fide purchasers for value" (BFP), such that the Government forfeits property subject to the rights of BFPs and not to the detriment of the BFP. 21 U.S.C. § 853(n)(6) (2013). Generally, when a trade creditor is a "secured" creditor, the secured creditor will have priority, even over victims. However, when the trade creditor is merely a general, unsecured creditor, the trade creditor does not meet the legal definition of a BFP and would not defeat a forfeiture. *See, e.g., United States v. Watkins*, 320 F.3d 1279, 1283-84 (11th Cir. 2003) (unsecured creditors lack standing to contest the forfeiture in the ancillary proceeding because they have no interest in the particular assets subject to forfeiture). So the real test is: Does the trade creditor have the type of legal interest in the defendant's property that Congress chose to protect? If not, the defendant's property can be forfeited and, consistent with Department policy, will typically be restored to the victims of defendant's criminal conduct.

IV. Questions and best practices for consideration between bankruptcy and forfeiture

While we have set forth some questions to help the practitioner analyze cases where the forfeiture case is certain to intersect with a bankruptcy trustee, liquidator, and/or receiver, it is important to approach this assessment with some overarching principles in mind. Government attorneys seeking forfeiture and those tasked with administering a bankruptcy estate have similar overarching goals that, if allowed to guide the decision-making process, can lead to a successful resolution. First, both regimes are focused on the return of assets to their respective parties in a fair, equitable, orderly, and cost-effective

manner. Second, each regime should recognize that the other has powerful tools that enable them to provide for the return of assets. In order to create an atmosphere where both regimes can co-exist and maximize the return to respective parties and minimize protracted, costly litigation, each regime must undertake a candid and frank assessment of the available assets and each regime's tools for liquidating and distributing those assets.

It is important to keep in mind that the two worlds have come together because a crime occurred. As a result, there may be victims for whom the law has placed additional protections and requirements in terms of priority and recovery of losses. Below are some questions that may help you analyze your case in order to facilitate conversations with your bankruptcy trustee, liquidator, and/or receiver counterpart. You will likely find that the best result varies depending on the type of assets recovered, nature of the crime, and position of the victims.

A. Timing: questions to consider

At what stage is each proceeding? If the civil or criminal forfeiture case is in the early stages and the bankruptcy trustee has already invested significant time and resources into recovering assets, it may be preferable to have the trustee go forward with liquidation and distribution of those assets, separate from and independent of the Government's forfeiture action. This may also prevent an unreasonable delay in an equitable distribution to the victims who are often also the creditors in the bankruptcy. This can be facilitated through a coordination agreement with the trustee, specifying which assets the trustee will pursue and which the Government will pursue.

On the other hand, if the civil or criminal forfeiture case has been progressing for some time and a significant number of the assets have already been restrained and/or seized, it would not make sense to have the trustee go forward with liquidation and distribution of those assets, separate from and independent of the Government's forfeiture action. However, the Government should consider the class of victims and the assets involved (see questions below) before making this determination. Again, allocation and distribution of the assets can be facilitated through a coordination agreement with the trustee, specifying which assets the trustee will pursue and which the Government will pursue.

Who is better poised to seize and control the assets? If the case involves significant illicit transfers to third parties (for example, to "winners" in a Ponzi scheme), the trustee may be better positioned to recover such assets through claw-back litigation and other avenues of recovery that are not generally available to the Government through forfeiture. On the other hand, the Government may be better positioned to seize and take custody of assets that remain under the direct control of the defendant.

What government entities are involved in the case? Government or industry regulators—such as SEC, CFTC, SIPC, and others—are often parties in large fraud cases. These regulators should be consulted to determine what, if any, actions they have taken to recover assets and compensate victims.

Have receivers already been appointed in federal, state, or foreign proceedings? Federal, state, or foreign receivers should be consulted in connection with any previous efforts to recover assets associated with the fraud.

B. Timing: best practices

- Consider the amount of work, resources, and effort already expended by the Government, bankruptcy trustee, other receivers, and regulatory agencies when determining allocation and distribution of assets.
- Ensure that the goals for distribution by the Government and the trustee/receiver are timely, cost-effective, non-duplicative, and equitable.

- Take advantage of the tools provided for seizing and collecting assets under all statutory schemes.
- Consider having the trustee/receiver distribute the assets if significant delays arise (several years) in the conviction/exhaustion of appeals by the defendant that necessarily delay any criminal forfeiture. A cooperation agreement between the Government and the trustee can address the victims of the criminal offense who do not have a present ownership interest in the assets, the victims who are secured and unsecured creditors, and the victims who have filed claims in the bankruptcy. The agreement should also address the costs and payments to a trustee/receiver.

C. Assets: questions to consider

What assets are directly traceable to the criminal activity? The Government will aggressively seek to forfeit assets that are directly traceable to the criminal activity. In particular, 18 U.S.C. § 981(a)(1)(C) subjects to civil forfeiture:

[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to . . . any offense constituting “specific unlawful activity” (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense.

18 U.S.C. § 981(a)(1)(C) (2013). The term “specific unlawful activity” includes, among other things, wire fraud and securities fraud. *See* 18 U.S.C. § 1956(c)(7)(A) (2013) (“specified unlawful activity” includes “any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under [31 U.S.C. §§ 5311–5332]”); 18 U.S.C. § 1961(l) (2013) (includes “section 1343 (relating to wire fraud)” and “fraud in the sale of securities”).

Although § 981 is a civil forfeiture provision, 28 U.S.C. § 2461 provides that criminal forfeiture is required where federal law provides for civil forfeiture but there is no parallel criminal forfeiture provision. *See* 28 U.S.C. § 2461(c) (2013). In addition to the statutory provisions described above, there are other forfeiture provisions that provide for the forfeiture of directly traceable assets and that the Government will vigorously pursue even in the face of a parallel bankruptcy.

What criminal assets are commingled with legitimate assets? One of the most difficult challenges of any criminal case is the tracing of criminal proceeds that have been commingled with legitimate assets. The amount of criminal proceeds that have been infused into the legitimate assets and the Government’s ability to trace and prove are questions of fact and law. Depending upon the amount of criminal proceeds, the level of difficulty, and the facts involved in the case, it may be more cost-effective and efficient for the Government to transfer those assets to the bankruptcy trustee for distribution.

Is the asset a complex asset? The forfeiture and sale of complex assets can pose significant challenges for the Government. For example, the forfeiture of a business can be problematic to the Government if the business is ongoing and conducts legitimate business. Under these circumstances, it can be difficult to trace the criminal proceeds into the business and forfeit all or a portion of the business. Even with a successful forfeiture of all or a portion of the business, it can be difficult for the Government to unwind and liquidate an ongoing business. Consequently, the Government may consider directing this type of asset to the bankruptcy trustee.

What assets are located in a foreign jurisdiction? With increasing frequency, countries are able to afford full faith and credit to U.S. forfeiture judgments affecting property within their borders. Because a foreign government and its law enforcement infrastructure are typically more receptive to assisting with a law enforcement task like forfeiture rather than a purely civil function such as a bankruptcy, a criminal order of forfeiture is more easily enforced in other countries than a bankruptcy court order. However, it is also essential that the Government focus on what may happen to assets that are located in foreign jurisdictions and rely on the judgment of foreign counterparts as to whether the assets will be released or

continue to be restrained if foreign liquidators go to courts to gain control of the assets. One should also inquire if, under the applicable foreign law, forfeiture orders take priority over foreign liquidation proceedings.

Are there substitute assets? The term “substitute assets” refers to property that may be forfeited if the directly forfeitable property cannot be located or is otherwise unavailable. *See* 21 U.S.C. § 853(p)(2) (2013) (providing, for example, that if the directly forfeitable property is unavailable, substantially diminished, or commingled with other property as a result of an act or omission of the defendant, the court “shall order” the forfeiture of substitute property up to the value of the directly forfeitable property). Substitute assets can provide the Government with some flexibility when negotiating with the bankruptcy trustee regarding the allocation of those assets directly traceable to the criminal activity or involved in the criminal activity versus those assets that are not.

D. Assets: best practices

- Allocate resources between the forfeiture case and the bankruptcy proceeding by retaining the directly traceable assets for the forfeiture and directing the commingled assets to the bankruptcy estate.
- Consider directing the complex business assets to the bankruptcy trustee, who is in a better position to unwind these assets in the bankruptcy proceeding.
- Rely upon MLATs, multilateral conventions, and forfeiture agreements with other countries when seeking to restrain and/or seize foreign-based assets. However, if faced with challenges by foreign liquidators, consider (1) the likelihood that we will lose control over the assets if we litigate, (2) the speed at which assets can be returned to victims through non-forfeiture methods, (3) the total costs/fees that liquidators/receivers/trustees will generate if they litigate against us for control over the money, and (4) the possibility that we can establish a framework to give this money to foreign trustees/liquidators to distribute while ensuring that very little of it is used for non-distribution purposes.
- Consider the transfer of substitute assets to the bankruptcy trustee when negotiating a cooperation agreement involving the allocation of assets and resources.

E. Victims: questions to consider

Are all the victims in the criminal case in the same class of creditors? Forfeited funds cannot generally be returned to unsecured creditors unless they are also the direct victims of the fraud underlying the forfeiture. For example, remission is not available to vendors to whom the bankrupt entity may owe money. Such general creditors must normally recover, if at all, through the bankruptcy proceeding.

Are the victims of the criminal case also the secured creditors in the bankruptcy proceedings? If the victims in the criminal case are also secured or unsecured creditors of the bankrupt entity (for example, lenders or bondholders), it may be more cost-effective and efficient to have the trustee determine the victims’ losses and priorities of distribution in the bankruptcy proceeding. However, the Government has authority to remit forfeited funds to secured creditors (for example, lenders and lienholders) who are also victims. 28 C.F.R. § 9.8 (2013) (preamble). If the victims are not secured or unsecured creditors, the Government may be better positioned to protect the interests of victims because in the remission process the victims do not compete with general trade creditors for a defendant’s limited assets.

Are the victims located in a foreign jurisdiction? If the case involves a foreign receiver or trustee, the Government should consider the location of the assets being liquidated and whether that foreign jurisdiction has reliable processes. Depending upon the answers to these initial inquiries, it may

be more efficient to allow the foreign receiver/trustee to distribute forfeited funds in accordance with laws of the foreign jurisdiction. Any such arrangement must be conditioned on the receiver/trustee's agreement to comply with U.S. regulations regarding remission.

Are the victims identified in a restitution order? If the victims are already identified in a court restitution order, the U.S. Attorney's office (USAO) may elect to request restoration to have the forfeiture proceeds turned over to the court for distribution. However, a restitution order must accurately reflect the total population of victims and otherwise comply with the remission regulations.

Is the victim an individual or a business? A business may be a victim of the crime underlying the forfeiture and consequently be forced into bankruptcy. If the business requests remission, the Asset Forfeiture and Money Laundering Section (AFMLS) and USAO must determine whether the business was innocent of the fraud or was complicit or willfully blind to the offense.

Is the victim part of a class of victims represented by counsel? In large fraud cases, victims may bring a class action against the bankrupt business or entity. Class counsel and/or the applicable creditors' committee should be consulted in determining whether to enter into a coordination agreement with the bankruptcy trustee.

Is the fraud such that certain victims in the bankruptcy will reap unfair benefits? Certain classes of victims may be entitled to distributions in a bankruptcy or a class action settlement that are not available to other classes of victims. To ensure a fair and equitable distribution of funds, the Government should determine which victims have received, or are expected to receive, distributions from the bankruptcy or other collateral sources. When appropriate, such collateral recoveries should be deducted from the victims' recognized losses for purposes of remission. For example, the bankruptcy regime can allow for promised pre-petition matured interest pursuant to § 502(b).

F. Victims: best practices

- Direct the seized and/or forfeited assets to the bankruptcy estate when the victims are also the secured creditors in the bankruptcy proceeding.
- Retain forfeited assets for the victims who are not secured creditors.
- Share documentation, when possible, in order to more accurately ascertain the victims.

G. Tools: questions to consider

Seizure: Are there assets that can be recovered from claw-back litigation? There are three main types of claw-back litigation that a bankruptcy trustee may engage in: an action to recover preferential payments (generally, the trustee gets a presumption that any funds withdrawn within 90 days of the bankruptcy filing are automatically presumed to be an improper preference and the defense is that the transaction occurred in the ordinary course of business), fraudulent transfers (trustee is allowed to go after a wider range of transfers than preferences—up to two years prior—but the burden is on the trustee to show the debtor had the intent to “hinder, delay, or defraud” creditors or that the transfer was made while the transferor was under financial distress without receiving equivalent value for the transfer), and non-bankruptcy law actions based on applicable statutes to recover fraudulent transfers. The ability of the trustee to engage in these actions, particularly preference actions, may be affected by the seizure of assets for forfeiture.

Seizure: Are there avoidance actions, tort claims, or assigned claims that could be pursued? These actions are of the type that the trustee is best suited to pursue.

Seizure: What is the most effective way to recover losses for victims? The answer to this question requires an evaluation of the circumstances on a case-by-case basis. The Government has powerful tools to secure assets for forfeiture and to compensate victims for their losses. It bears repeating

that the focus should always be on the solution that is in the best interest of the victims and there will be times that certain assets, in certain circumstances, can be better pursued by the trustee for distribution to victims.

Preservation: Who is better suited to fight constructive trust claims? The answer to this question will be dependent on the timing of the bankruptcy vis-à-vis the forfeiture, the circuit in which the cases are pending, and the information available to each side.

Liquidation: Is the asset easily liquidated? Occasionally there are assets that the Government does not have much experience in liquidating. For example, there are times when we will be faced with the potential forfeiture of a defendant's interest in a business entity. While these interests have the potential to be valuable assets, valuation typically requires a detailed review of the businesses records. If the business activity was sustained or supplemented by criminal activity, the value of the interest could be even less once it is operated in accordance with law. The defendant could also have a minority interest in the company or an interest that requires a capital contribution. Assets that are particularly difficult to value or that may require significant asset management on the part of the Government may be better handled by a trustee.

Liquidation: Who is better equipped to administer and/or sell the asset? The U.S. Marshals Service has taken steps to make the liquidation of diverse assets easier through www.bid4assets.com. This site has enabled the U.S. Marshals Service to liquidate high-end vehicles, collector cards, real estate (residential, commercial and agricultural), timeshares, sport-fishing vessels, aircraft, artwork, jewelry, financial instruments, and much more. However, there may be assets that the bankruptcy trustee is particularly well-poised to liquidate. We should consider who has the better infrastructure to handle the sale of unusual assets (for example, promissory notes). Is the asset realty or personalty? If it's a business, which assets are necessary to operate the business? What are the costs of winding down a business, handling the administration of the business, and managing the sale? If we anticipate that the trustee is better poised to liquidate the business, the Government should ensure that those assets necessary to run the business are made available to the trustee.

Liquidation: Will the liquidation of the asset require costly litigation? The litigation costs associated with the forfeiture of assets are not deducted from forfeited funds, whereas bankruptcy trustees are able to recoup litigation costs through their fee petitions. Though this appears to weigh in favor of forfeiture, we must also determine whether the litigation is of the type that the Government is prepared to undertake.

Liquidation: Does the debtor have exemptions available to him in the bankruptcy that reduces the trustee's recovery for victims? The bankruptcy code contains a variety of exemptions in order to provide the debtor with a "fresh start." These exemptions are state-specific. Some states have adopted the federal exemptions, while some states allow those exemptions provided for by state law. For example, imagine a state provides for a \$3,000 exemption in a vehicle. This means that if the defendant owns a car valued at \$20,000 with a \$10,000 car loan, in the bankruptcy, the trustee would be able to liquidate that vehicle, and from the net proceeds, pay the secured creditor, give the debtor the \$3,000, and retain the approximately \$7,000 leftover for distribution to creditors. However, in forfeiture, we would be able to liquidate the vehicle, pay off the loan, and retain the net proceeds for distribution to victims, without any deduction for the defendant's interest. There are a variety of assets subject to exemptions.

Liquidation: Will the creditors in the bankruptcy be paid in full? Unlike in forfeiture, if a bankruptcy trustee recovers assets sufficient to compensate each of the debtor's creditors in full, the remainder is returned to the debtor.

H. Distribution: questions to consider

What is the most effective way to return losses to the victims? AFMLS has initiated a claims administration process that can handle claims and distribute funds to large numbers of victims at minimal cost. In most cases, the AFMLS process will be more cost-effective. However, if the case involves numerous victims and the trustee has already established a claims administration process, it may be preferable to use the trustee's process if costs are reasonable and it conforms to the applicable regulations. Transfer of forfeited assets to the trustee for distribution to victims should be conditioned on an express limitation on the trustee's fees and costs.

V. Cooperation agreements

In several recent large Ponzi schemes and related bankruptcies, the Government has cooperated or attempted to cooperate with the bankruptcy trustees. Whenever feasible, the Government should attempt to work with bankruptcy trustees, receivers, and liquidators to ensure that the maximum amount of forfeited funds is returned to innocent victims, while at the same time accommodating the trustee's fiduciary duty to secured and unsecured creditors who are not direct victims of the crime underlying the forfeiture. In some cases, trustees have attempted to defeat the Government's forfeiture action in an effort to control the funds derived from victims for the benefit of shareholders and creditors, to the detriment of victims and other innocent parties. In such cases, the Government has zealously litigated against the trustee or receiver in order to protect the interests of crime victims and others.

Cooperation agreements between the bankruptcy trustee and the Government regarding the allocation and distribution of assets have proven to be very successful. These agreements are important because they require the parties to discuss, identify, and allocate assets between the two proceedings, to determine which proceeding is most effective in acquiring and liquidating assets for distribution, and to coordinate the distribution of assets between the two proceedings so that no one receives a double recovery or more than their fair share.

Factors to consider when negotiating and drafting a cooperation agreement include:

- Early coordination and communication in the case between the Government and the bankruptcy trustee is essential.
- Who initiates legal action first may be a factor in determining allocation and distribution of assets.
- Substitute assets can provide the Government with some flexibility when negotiating with the bankruptcy trustee regarding the allocation of those assets directly traceable to the criminal activity or involved in the criminal activity, versus those assets that are not.
- Forfeiture is *generally* the better mechanism for directly traceable proceeds of crime.
- The bankruptcy trustee may be better suited to deal with certain assets such as complex businesses.
- Work as a partnership—the Government and the bankruptcy trustee—to coordinate the proceedings.
- Judges can facilitate and support cooperation among the parties.
- Every case is different—*flexibility is the key*.

When drafting a cooperation agreement, it is important to remember that each case is unique and fact specific. One size does not fit all and each agreement must be customized to address the particular assets, evidence to support the criminal offenses, and petitioners in each case. Recent cases involving successfully negotiated coordination agreements between the Government and the bankruptcy trustee

include: *Picard v. Picower* (S.D.N.Y.), *United States v. Dreier* (S.D.N.Y.), *United States v. Petters* (D. Minn.), and *United States v. DeMiro* (E. D. Mich.).

Before reviewing the cooperation agreement in *United States v. Dreier*, 682 F. Supp. 2d 417 (S.D.N.Y. 2010), District Court Judge Jed Rakoff observed:

An under-appreciated evil of substantial frauds like those of Marc Dreier is how they pit their victims against one another. Where, as here, the funds remaining after the fraud is uncovered are insufficient to make whole Dreier's numerous victims and creditors, these unfortunates are left to squabble over who should get what. In this case, moreover, resolution of these competing claims involves consideration of three bodies of law—criminal law, securities law, and bankruptcy law—that cannot always be reconciled without some friction.

Drier, 682 F. Supp. 2d 418.

This “evil” was demonstrated in the case against Scott Rothstein, which originated in the Southern District of Florida and was recently heard at the Eleventh Circuit Court of Appeals. *See In re Rothstein, Rosenfeldt, Adler, P.A.*, 717 F.3d 1205 (11th Cir. 2013). There, the U.S. Attorney sought the criminal forfeiture of Rothstein's interest in numerous properties, including his law firm's bank accounts, while the firm's bankruptcy trustee moved to block that forfeiture on the grounds that the bank accounts were part of the firm's bankruptcy estate. The Eleventh Circuit eventually found that Rothstein's funds had become commingled within the firm's bank accounts to the extent that the accounts could not be forfeited as proceeds, but this decision was entered only after multiple years of litigation. *Id.* at 1213-14. As Judge Rakoff wrote, “these inherent tensions are best addressed through coordination and cooperation by all concerned” in order to avoid unnecessarily complex situations like *Rothstein. Dreier*, 683 F. Supp. 2d at 417.

VI. Conclusion

Despite separate and distinct bodies of law and underlying principles, there are important similarities in the bankruptcy and forfeiture proceedings that make cooperation important. First and foremost, prosecutors and bankruptcy counsel both have an obligation to uphold their respective statutory responsibilities and to serve the claimants and petitioners in their respective proceedings. If unnecessary litigation results in costly fees, which ultimately diminishes the assets available for distributions, then all parties lose. It would be a tragedy to compound the injustice that occurred through the initial fraud with legal battles that pit victims against one another. Second, there are fundamental principles of fairness and equity that guide both bankruptcy and forfeiture proceedings. As a general rule, both processes seek to make a fair and equitable distribution among the respective claimants and to prevent outcomes that result in some claimants receiving more than their fair share of a limited pie. This all goes to say that when we work in concert, and not in conflict, everyone benefits. ❖

ABOUT THE AUTHOR

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The Structure and Operations of the Department of Justice Assets Forfeiture Fund

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I. Introduction

The Comprehensive Crime Control Act of 1984 (P.L. 98-473), codified in 28 U.S.C. § 524(c), established the Department of Justice (the Department) Assets Forfeiture Fund (AFF) as a special fund within the Treasury to receive the proceeds of forfeitures pursuant to any law enforced or administered by the Department. The law authorized the Attorney General to use the AFF to finance expenses associated with the execution of asset forfeiture functions and, with specific limitations, certain general investigative costs.

At the time the Fund was created, asset forfeiture was recognized as a highly effective law enforcement tool to combat and deter drug trafficking and other crimes, but the limitations of operating budgets discouraged agencies from attempting the often expensive and sometimes uncertain asset forfeiture process. The problem was scalable: the more effective an agency was in seizing property, the greater the demand on its appropriated funding from Congress. The creation of the AFF eliminated these economic disincentives, provided law enforcement agencies with the funding necessary to seize and forfeit assets responsibly under a well-regulated national asset forfeiture program framework, and thereby ensured that law enforcement effectiveness, not agency financial limitations, remained the paramount consideration of law enforcement and prosecutors in choosing to pursue forfeiture.

Today, under the direction of the Justice Management Division's Asset Forfeiture Management Staff (AFMS), the AFF supports a multi-billion dollar Department of Justice Asset Forfeiture Program that provides participating agencies with the tools, policies, and funding to maximize the law enforcement power of the forfeiture sanction. This article will attempt to explain what the AFF is, how it functions, the types of expenses the fund can support under 28 U.S.C. § 524(c), and how funding is requested and approved for agency use.

II. Overview of the Assets Forfeiture Fund

The AFF is widely known throughout the federal law enforcement community as an important source of funding, but the precise mechanics of how it functions remain less well understood.

A. AFF deposits and property

In general, only the proceeds of property that is forfeited “pursuant to any law enforced or administered by the Department” are deposited into the AFF, and only if (1) the property is administratively forfeited by a Justice agency, or (2) the property is judicially forfeited and either the underlying seizure was made by a law enforcement agency participating in the Fund or the property was

maintained by the U.S. Marshals Service. 28 U.S.C. § 524(c)(11) (2013). Other types of revenue to the AFF include interest generated from investment in U.S. Treasury instruments and reverse sharing money arising from an AFF member agency's relative participation in a case that resulted in the federal forfeiture property whose proceeds are not deposited into the AFF (that is, the Treasury Forfeiture Fund).

Forfeited property that has not yet been disposed of by the U.S. Marshals Service is also considered to be property of the AFF and is accounted for on the annual financial statement. Property that has been seized for forfeiture or the satisfaction of an open forfeiture judgment is considered "fund related property" and is accounted for as seized property on the annual financial statement until the property is forfeited, released, or no longer being pursued for forfeiture.

B. Agency participation in the AFF

An agency is by definition a participating member of the Fund if the forfeited proceeds of its seized (or adopted) assets are deposited into the AFF. Only member agencies that contribute to the Fund in this way are eligible to receive an annual allocation of resources from it. AFF membership used to include nearly every federal law enforcement agency until 1992, when the Treasury Forfeiture Fund (TFF) was established. Participating members of the TFF—managed as a separate program by the Treasury Executive Office for Asset Forfeiture—include the IRS, the U.S. Secret Service, and the Department of Homeland Security agencies: U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection, and the U.S. Coast Guard. Current AFF participants include the Asset Forfeiture Management Staff of the Justice Management Division; Asset Forfeiture and Money Laundering Section of the Criminal Division; Drug Enforcement Administration; FBI; U.S. Marshals Service; U.S. Attorneys' offices; Bureau of Alcohol, Tobacco, Firearms and Explosives; U.S. Postal Inspection Service; Food and Drug Administration, Office of Criminal Investigations; Defense Criminal Investigative Service; Department of Agriculture, Office of the Inspector General; Department of State, Bureau of Diplomatic Security; and INTERPOL.

C. Deposit of seized property proceeds

In scenarios where the Government seizes funds or liquidates a seized asset prior to forfeiture, the proceeds are deposited into the Seized Asset Deposit Fund (SADF). The SADF is a holding account established administratively by the Department to receive seized cash, proceeds of sale from seized property, and receipts from income producing assets seized for forfeiture pursuant to any law enforced or administered by the Department. In general, title to funds on deposit in the SADF is still in dispute. Thus, these funds are considered "non-public" monies and are not available for governmental purposes.

III. Expenses authorized under 28 U.S.C. § 524(c)

AFMS is responsible for interpreting 28 U.S.C. § 524(c) in order to determine what types of expenses requested by agencies are eligible for AFF funding. These authorized uses of the Fund are commonly referred to as "AFF-able expenses" and are usefully divided into two primary categories: forfeiture-related expenses and general law enforcement expenses.

A. Forfeiture-related expenses

Consistent with the purpose of the AFF, Congress provides broad authority to the Attorney General to use the Fund to finance costs directly related to the execution of forfeiture functions, including costs of:

- Contract services to identify and locate forfeitable property
- Pre-seizure and post-seizure assessment of property to determine if forfeiture of the property should be pursued

- Seizure of property subject to forfeiture
- Investigative costs leading to seizure
- Detention, storage, management, protection, and maintenance of Fund-related property
- Notification, advertisement, transcripts, travel, and other case-related activities associated with accomplishing the legal forfeiture of the property
- Compromise and satisfaction of valid liens, mortgages, and other claims of innocent third parties, including return of assets to the victims of crime through the remission and restoration processes, once forfeited
- Disposition of the property
- Distribution of part of the net proceeds from the forfeiture to state and local law enforcement agencies (through equitable sharing) that directly contributed to the seizure or forfeiture of the property, and
- Administration of a national asset forfeiture program including the costs of training, printing, information systems, accounting, audits, management, and other administrative matters

The forfeiture related expenses above constitute the substantial majority of all costs paid from the Fund.

B. General law enforcement expenses

Recognizing that competent performance of these asset forfeiture functions is likely to produce revenues that exceed forfeiture related costs, Congress has provided the Attorney General authority to use Fund receipts for general law enforcement needs, subject to specific limitations. The Attorney General may use Fund receipts to finance (1) certain costs of state and local officers participating in joint investigations with an investigative agency participating in the Fund; (2) the storage, protection, and destruction of controlled substances; and (3) subject to an annual statutory limitation, costs of awards to informants, purchases of evidence under certain statutes, and equipping of conveyances for law enforcement use. 28 U.S.C. § 524(c) (2013). These discretionary uses are not central to the purpose for the Fund, and the level of funding available for these uses varies from year to year depending on program performance.

C. Surplus balances

Section 524(c) of Title 28 also authorizes the Attorney General to use the AFF to cover a broad array of law enforcement expenses by declaring a balance surplus in the Fund, commonly known as “Super Surplus.” After a fiscal year closes, once all forfeiture related expenses have been covered and any reserve necessary to support ongoing operations for the next fiscal year has been established, the Attorney General may use—subject to Congressional notification—any excess unobligated balance remaining from the prior year’s operations for any federal law enforcement, litigative or prosecutive, or correctional activity, or any other authorized purpose of the Department. Excess unobligated balances may not be available every year. Once the notification to Congress is accomplished, the Attorney General may use the surplus balance for approved uses until it is expended.

D. AFF usage limitations

AFMS is always eager to provide the Attorney General with the broadest possible interpretation of the AFF statute and regulations in order to meet agency funding requirements. However, usage of the AFF is limited. Items not payable from the Fund, by law or policy, include:

- Expenses that are expressly limited by statute. Federal law prohibits the use of

appropriations for certain activities unless expressly authorized in agency appropriations acts.

- Personnel expenses (for example, salaries, overtime, and benefits) for employees of the United States, except where the Attorney General has specifically waived this policy
- Purchase of real property or any interests therein, except to acquire full title to or to satisfy liens or mortgages on forfeited property
- Expenses in connection with the seizure, detention, and disposition of property where the seizure was effected for debt collection, preservation of evidence of a crime, protection of the property, non-forfeiture related judgment enforcement, restitution, or other non-forfeiture purposes, unless the property also qualifies as Fund-related property, and
- Payments that would effectively supplant an appropriation made by Congress

IV. The allocation of AFF resources to participating agencies

Several months before the start of each fiscal year, participating member agencies of the Fund submit their annual budget requests to AFMS for consideration. AFMS then determines the total level of AFF resources that will be available to allocate to agencies, analyzes all budget requests, decides which requested agency activities or programs can be supported, prioritizes funding in accordance with the AFP strategic plan, and finally recommends AFF funding for agencies in an allocation package sent through the Department's Controller to the Office of the Deputy Attorney General for approval. Funding level decisions are made based on the availability of AFF resources and the forfeiture operation requirements specific to each agency.

V. AFF valuation and inherent uncertainty

The AFF acts in many ways like a revolving fund. Forfeited proceeds are being deposited throughout the year to replenish the funds that are simultaneously flowing out of the AFF to pay for approved agency expenses. For this reason, the value of the AFF fluctuates from day to day.

While the balance of the AFF at any particular moment is simple to determine, predicting its future value remains a challenge due to the unknown timing and outcome of the judicial and related forfeiture processes that drive these revenues and expenses. For example, a federal judge's final order of forfeiture or a deferred prosecution agreement can suddenly increase the value of the AFF by hundreds of millions of dollars without much notice. Likewise, the timing of payments to victims of crime or innocent third parties, particularly in large cases with complex disbursement schemes, often remains uncertain until a few weeks before the money is to be distributed. Finally, even when the outcome of the forfeiture is known, the property disposal process may be subject to a variety of delays that cannot be easily anticipated. These and other factors create significant uncertainty regarding the future value of the AFF.

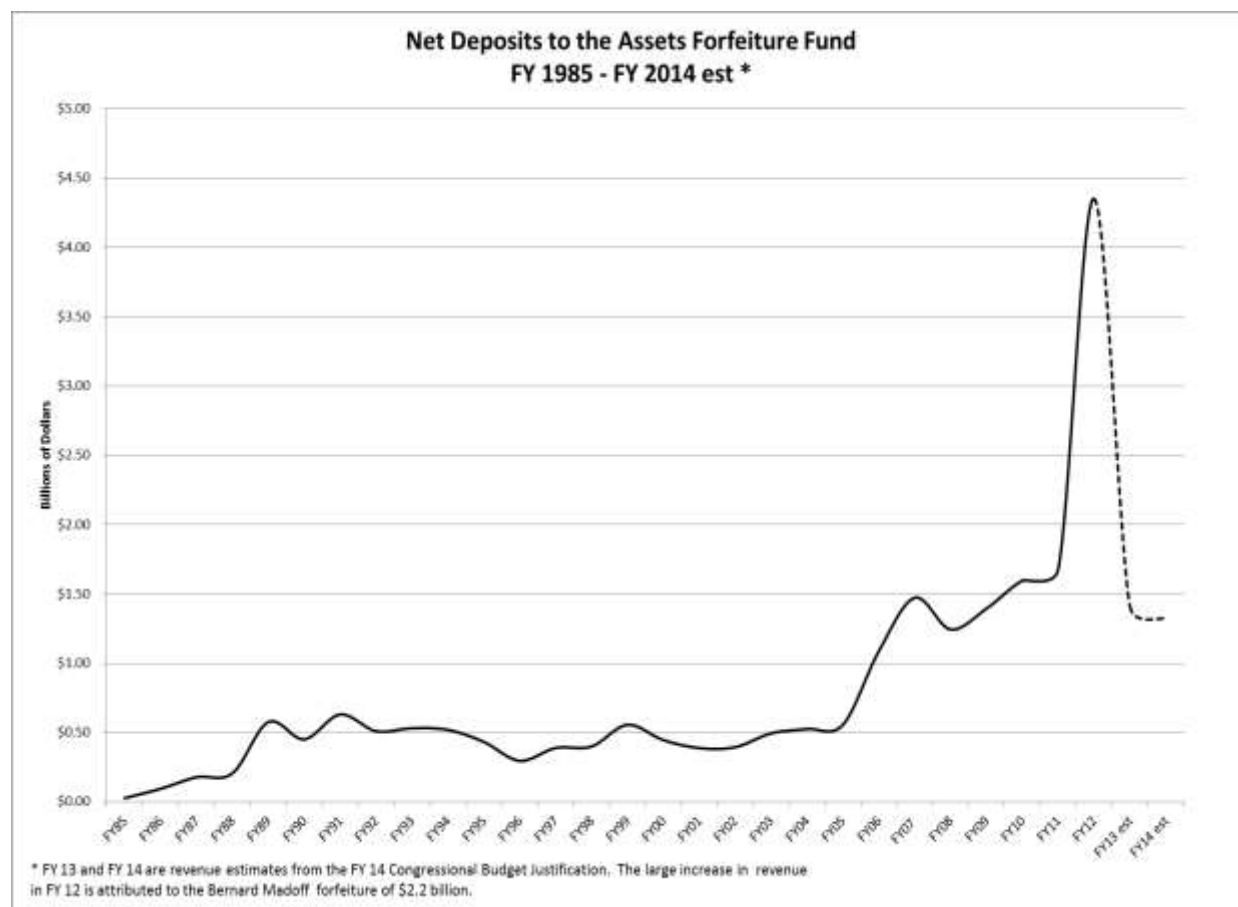
Beyond the financial accounting challenges of managing the AFF under such conditions, this inherent uncertainty has real implications for the Fund's annual budget process. Recall that the AFF is not just a place to deposit forfeiture proceeds. It is also the financial source of an annual allocation for member agencies of the Fund. Accurately predicting the right mix of revenues and expenses that are likely to occur over the balance of the year becomes important because it will dictate the level of resources that can safely be made available for these allocations at the beginning of the fiscal year. Each year, AFMS estimates the availability of AFF resources by gathering information from law enforcement and prosecutors about future large forfeiture cases, extrapolating AFF and SADF historical financial trends, assessing data from the Consolidated Asset Tracking System, and conducting other forms of analysis. The importance of receiving timely and accurate information about future large forfeiture cases

cannot be overstated. AFMS welcomes the direct input from Assistant U.S. Attorneys and special agents with knowledge of specific forfeiture events that will impact the AFF.

Although great care is taken to ensure that the full level of funding allocated at the beginning of the fiscal year will still be available in September, the AFF cannot be considered a stable source of funding from year to year and agencies are ill advised to treat it as such. Indeed, the funding of a program in one year is no guarantee that monies will be available to fund it in subsequent years. The AFF is not a limitless resource.

VI. Trends

The size of the AFF has grown considerably over the past several years. Annual net deposits increased from \$556 million in fiscal year 2005 to \$4.35 billion in fiscal year 2012. Much of this growth can be attributed to a number of large forfeiture cases, especially cases where sizable assets have been seized and forfeited in order to compensate innocent victims of crime. The chart below shows the AFF's annual net deposit totals since inception.



This large growth in deposits in recent years has allowed AFF to increase allocations to agencies, thus elevating the profile of the forfeiture program within the Fund's participating agencies that rely on this resource to supplement Congressional appropriations that continue to decline.

At the same time, a substantial portion of AFF forfeiture revenue is eventually returned to victims of crime and never becomes available for agency use. In order to maximize the amount that can be recovered for these innocent parties, and at significant cost to the AFF, the often substantial program overhead expenses incurred by the forfeiture remission and restoration processes are not deducted from

final payment amounts for victims. From fiscal year 2007 to fiscal year 2012, the Asset Forfeiture Program was able to return over \$3 billion to victims.

As the Department's asset forfeiture program continues to grow in size and complexity, AFMS has redoubled its efforts to safeguard and ensure the proper use of the Fund, validate internal controls and processes, and conduct comprehensive program performance evaluations to ensure the efficient and effective use of AFF resources.

VII. Conclusion

As one of the leading non-appropriated sources of funding for federal law enforcement today, the AFF plays a major role in upholding the critical work of participating investigative agencies, the U.S. Marshals Service, and the U.S. Attorneys' offices. While the AFF may be self-sufficient, it is not an inexhaustible resource and its funding authorities are specifically limited by statute. AFMS, as a partner in law enforcement, must balance responsibility for the financial stewardship of the AFF with an eagerness to support, whenever possible, agency requests for funding. Working with its law enforcement partners, the AFF will continue to help achieve the immediate and long-term law enforcement objectives of the Asset Forfeiture Program and its member agencies. ❖

ABOUT THE AUTHOR

❑ **Jeffrey G. Snyder** joined the Justice Management Division in 2009. At AFMS, he holds a diverse range of responsibilities which include drafting policy, developing statistically valid methodologies for analysis, reviewing agency budget requests, and leading management reviews and performance evaluations of complex and sensitive law enforcement programs funded by the AFF. ❖

AFMLS Training and Publications Resource Highlights

Craig Newell
Assistant Deputy Chief
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Asset Forfeiture and Money Laundering Section

Money laundering and asset forfeiture law can be an exceedingly complicated area in which to practice. Thus, the Asset Forfeiture and Money Laundering Section's (AFMLS) Training Unit has created a number of publications and training products to help not only those who are new to asset forfeiture and money laundering but also those who have many years of experience.

The Training Unit uses adult learning methodologies to design, develop, deliver, and maintain innovative and interactive asset forfeiture, money laundering, and financial investigations publications, training courses, and training tools. These interconnected resources support the law enforcement and legal professionals of the asset forfeiture and money laundering communities within the Department of Justice and elsewhere. For each publication, course, or tool, AFMLS performs ongoing needs and task analyses to identify performance gaps, recommend long and short-term training solutions, and generate and meet measurable objectives.

The publications that AFMLS produces serve as invaluable resources for prosecutors and agents. These publications give the law enforcement community the best and most timely information and advice in money laundering and asset forfeiture law and practice. For a quick glance at some of the publications produced by AFMLS, visit <http://www.justice.gov/criminal/afmls/pubs/>.

One of AFMLS premiere training courses is the Financial Investigations Seminar, which is co-sponsored by the Executive Office of the Organized Crime Drug Enforcement Task Forces. The Financial Investigations Seminar is a three-day, interactive training program where participants conduct an in-depth simulated financial investigation involving targets of illegal drug distribution. The objectives of the seminar are to enable participants to apply financial investigative techniques and strategies, to identify and track assets for seizure and forfeiture, and to determine which money laundering statutes, if any, have been violated and should be charged in the case. More than 7,000 participants have completed the seminar.

AFMLS is also responsible for a number of instructor-led training courses that are delivered at the National Advocacy Center in Columbia, South Carolina. Courses include introductory and advanced level money laundering and asset forfeiture sessions. These highly effective courses provide new and experienced attorneys and support staff with the knowledge and skills necessary to include money laundering and asset forfeiture in their cases.

In addition, AFMLS has developed and continues to develop job aids, such as checklists, charts, and wallet cards, which provide easy to read and understand information on money laundering statutes, Bank Secrecy Act reporting requirements, and asset forfeiture processes.

Finally, in an effort to reach a larger audience, AFMLS is in the design and development stages of creating video-based lessons as well as eLearning modules that can be delivered electronically. Electronic delivery of financial investigations, money laundering, and asset forfeiture concepts will allow users to access these innovative learning experiences at any time and from any place. Lessons will be shorter and targeted to specific content and objectives, allowing users to build courses of learning that

meet their specific needs. Moreover, because lessons and modules can be viewed and experienced multiple times, users can get immediate remediation and reinforcement for more difficult content.

It is the goal of the Training Unit and AFMLS to provide products and tools that demystify and simplify the complex area of financial investigations, asset forfeiture, and money laundering. ❖

ABOUT THE AUTHOR

❑ **Craig Newell** is the Assistant Deputy Chief of the Training Unit in the AFMLS. He is an instructional designer with 17 years of progressive experience in the analysis, design, development, and delivery of training systems. Mr. Newell has extensive knowledge of distance, Web-based, blended, synchronous, asynchronous, self-study, and classroom training, using Instructional Systems Design principles and adult learning methodology. He is adept in gathering information to create detailed job, task, and needs analyses used to identify performance gaps, training solutions, and measurable and observable objectives. ✎