

Justice Department Guidelines Seek To Focus Enforcement Of Structuring Law On Most Serious Cases

June 8, 2015 | [Department Of Justice, The GEE Blog](#)

Prosecutorial discretion is a powerful and necessary component of our justice system. Prosecutors exercise charging decisions with few limits and often use their charging discretion to extract valuable information from targets. Nevertheless, the Department of Justice (DOJ) has recently implemented a number of high-profile initiatives aimed at directing the exercise of prosecutorial discretion in a manner that focuses enforcement actions on the most serious violations of federal law. One of the DOJ's initiatives limits the use of asset forfeiture in connection with the federal structuring law found at [31 U.S.C. § 5324](#). The Bank Secrecy Act requires banks to report cash transactions over \$10,000. The structuring law prohibits individuals from structuring banking transactions in order to evade that reporting requirement. Congress passed the law to target individuals seeking to shield transactions that fund (or are funded by) other illegal activity. The structuring law allows prosecutors to target, for instance, a drug dealer depositing just less than \$10,000 in cash or a potential terrorist dividing withdrawals into small amounts. But the law also criminalizes individuals seeking to shield their transactions for non-criminal reasons. In the attorney general's [March 31, 2015, memorandum](#) limiting the use of asset forfeiture in structuring cases, he recognized the importance of focusing "use of our asset forfeiture authorities against actors that structure financial transactions to hide significant criminal activity" In cases not involving a criminal indictment, the attorney general announced, the DOJ would not seek to seize structured funds absent probable cause that the funds "were generated by unlawful activity or that the structured funds were intended for use in, or to conceal or promote, ongoing or anticipated unlawful activity." The attorney general's structuring memorandum may in part seek to combat criticism recently levied upon its criminal charging practice in structuring cases. Last year, the Seventh Circuit reversed a structuring conviction of a defendant who did not use the structured funds for an illegal purpose. The dissenting judge, despite voting to affirm the conviction, criticized the government's charging decision, writing that "this shows every sign of being an overzealous prosecution for a technical violation of a criminal regulatory statute—the kind of rigid and severe exercise of law-enforcement discretion that would make Inspector Javert proud." *United States v. Abair*, 746 F.3d 260, 269 (7th Cir. 2014) (Sykes, J., dissenting). The federal structuring law is one of many federal criminal statutes that grant substantial discretion to prosecutors. While many federal structuring indictments involve the use of structured funds for an illegal purpose, the DOJ retains authority to use the law to charge otherwise innocent conduct. However, the attorney general's memorandum may indicate that the DOJ is seeking to curb the exercise of discretion in some circumstances. Going forward, it will be interesting to see how the DOJ exercises its discretion and whether the DOJ alters its criminal charging practices in response to the criticism of Judge Sykes and others.

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