

REDEFINING THE BANK SECRECY ACT: CURRENCY REPORTING AND THE CRIME OF STRUCTURING

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I. INTRODUCTION

The Bank Records and Foreign Transactions Act of 1970 (BSA) requires financial institutions to record (Title I) and report (Title II) information about their customers' transactions, particularly those involving large amounts of currency.¹ The requirements rest on the Congressional finding that BSA records and reports have a high degree of usefulness for law enforcement, tax, intelligence, and regulatory authorities. After a prolonged period of inaction that lasted well into the 1980s, financial institutions complied with the BSA's requirements by sending ever-increasing numbers of reports to the government. This widespread compliance in turn led money launderers, tax evaders, and others who did not want the government to know about their financial activities, to "structure" transactions to evade the BSA.²

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1. *See generally* Cal. Bankers Ass'n v. Shultz, 416 U.S. 21 (1974) (examining the BSA's recordkeeping and reporting requirements).

2. The term "structuring" refers to the breaking up of a single transaction into two or more separate transactions, each transaction below a set dollar threshold, for the purpose of evading the BSA's recordkeeping or reporting requirements. *Ratzlaf v. United States*, 510 U.S. 135, 136 (1994) (explaining what it means to "structure" a financial transaction). As will be discussed

The BSA and its anti-structuring provisions were a central focus of reforms enacted in Title III of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (PATRIOT Act) Act of 2001.³ However, outside the financial services community, few commentators noticed. Fewer still paid attention to how, after the events of September 11, 2001, law enforcement agencies made use of a particular kind of BSA report called a suspicious activity report (SAR). Structuring, the breaking up of a single transaction into two or more separate transactions to evade a BSA reporting or record-keeping requirement, is a principal kind of illegal activity disclosed in SARs.

In March 2008, news spread that former New York Governor Elliot Spitzer's downfall was triggered by a SAR that disclosed his unusual transaction activity.⁴ The title of one *Newsweek* story succinctly made the connection most commentators had missed up to that point: *Unintended Consequences: Spitzer Got Snagged by the Fine Print of the*

elsewhere, the anti-structuring law—31 U.S.C. § 5324—forbids two different kinds of transactions: (1) those in which the transactor causes, or attempts to cause, a financial institution to fail in its BSA duty to report or record a transaction; and (2) those in which the transactor structures the transaction so as to circumvent the law. *United States v. Hill*, 171 F. App'x 815, 820 (11th Cir. 2006); *United States v. Vasquez*, 53 F.3d 1216, 1218 (11th Cir. 1995); *see also* *United States v. Phipps*, 81 F.3d 1056, 1059–62 (11th Cir. 1996) (explaining the distinction between § 5324(a)(1) violations and § 5324(a)(3) violations). A third kind of activity—causing or attempting to cause a financial institution to file a report or make a record containing a material misstatement or omission of fact—is outlawed by § 5324(a)(2), but is not topical to this article. *See* 31 U.S.C. § 5324(a)(2) (2006).

3. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, tit. III, §§ 311–13, 319(b), 321, 326, 351–54, 358–59, 361–63, 365–66, 371–72, 115 Stat. 272. The USA PATRIOT Act amended the BSA to require financial institutions to establish anti-money laundering programs that included the development of internal policies, procedures, and controls; the designation of a compliance officer; an ongoing employee training program; and an independent audit function to test programs. 31 U.S.C. § 5318(h) (2006).

4. *See, e.g.*, Mark Hosenball & Michael Isikoff, *Unintended Consequences: Spitzer Got Snagged by the Fine Print of the Patriot Act*, NEWSWEEK, Mar. 24, 2008, at 47; Luke Mullins, *Why Spitzer's Banking May Have Tripped Him Up*, U.S. NEWS & WORLD REP., Mar. 12, 2008, <http://www.usnews.com/articles/business/economy/2008/03/12/why-spitzers-banking-may-have-tripped-him-up.html>; Don Van Natta Jr. & Jo Becker, *Bank Reports, Then Wiretapping, Led to Unraveling of Ring and Its Client 9*, N.Y. TIMES, Mar. 13, 2008, at A20, available at <http://www.nytimes.com/2008/03/13/nyregion/13legal.html>.

PATRIOT Act. The story of a politician with a reputation for fighting crime brought down by something vaguely connected to the USA PATRIOT Act was too rich for bloggers and media commentators to resist. More thoughtful observers, however, pointed to a more interesting story yet to be told about how, in a post-9/11 world, the government now uses BSA data to detect criminal activity.⁵

This article tells that story. It has been approximately twenty years since the BSA and its anti-structuring provision have drawn scholarly attention.⁶ Much has transpired in the intervening time. At a theoretical level, this article challenges policymakers to reexamine the rationale for the BSA. The BSA regulatory scheme rests on Congress's finding in 1970, which it reaffirmed in 2001 with the passage of the PATRIOT Act, that currency reporting has a "high degree of usefulness" in the investigation and prosecution of tax, regulatory, and terrorist related criminal activity.⁷ This finding suffers from a threshold defect: it may no longer be true. Truth be told, there are simply too many currency reports—over 16,000,000 currency transaction reports (CTRs) were filed by financial institutions in the 2007–2008 fiscal year—for the government to make full and effective use of them.⁸ Except for SARs, which most observers agree are

5. See NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 430–31 (Supp. 2008) ("The Spitzer case raises again the question of how SARs are used, and specifically how investigators sift through the large numbers of SARs that are filed each year.").

6. The most comprehensive articles to examine the BSA generally, and the anti-structuring law in particular, date to the late 1980s and early 1990s. See John J. Byrne, *The Bank Secrecy Act: Do Reporting Requirements Really Assist the Government?*, 44 ALA. L. REV. 801, 810–12 (1993); Jonathan J. Rusch, *Hue and Cry in the Counting-House: Some Observations on the Bank Secrecy Act*, 37 CATH. U. L. REV. 465, 476–77 (1988) (discussing structuring crime as part of broader defense of BSA and its value to law enforcement); John K. Villa, *A Critical View of Bank Secrecy Act Enforcement and the Money Laundering Statutes*, 37 CATH. U. L. REV. 489, 495–96 (1988) (discussing the crime of structuring in the context of other BSA provisions and enforcement actions); Sarah N. Welling, *Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions*, 41 FLA. L. REV. 287 (1989).

7. *Cal. Bankers Ass'n. v. Shultz*, 416 U.S. 21, 25 (1974). The Court explained that the currency transaction reporting requirements were enacted in 1970 because "Congress recognized the importance of large and unusual currency transactions in ferreting out criminal activity." *Id.* at 38; see also 31 U.S.C. § 5311 (2006) (setting forth the legislative findings that underlie the BSA).

8. FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF THE TREASURY,

highly useful, law enforcement agencies struggle to measure, much less communicate, the high degree of usefulness of currency reports in criminal investigations.⁹

If we accept the premise that the government underutilizes most BSA records and reports, are they still worth the cost? The answer is “yes,” but only if we are prepared to renew discussions about the rationale for the BSA. Putting aside Congress’s stated rationale, another rationale now better explains how government agencies use BSA data. The BSA’s reporting and recordkeeping requirements make it difficult for crime proceeds or sources of terrorist financing to enter the financial system without creating a paper trail.¹⁰ Fearful of the paper trail left through BSA reports and records, criminals and terrorists engage in evasive and high-risk transactions such as structuring, making it easier for law enforcement agencies to detect their transactions amidst the huge volumes of legitimate transactions that occur each day.¹¹ In order for this rationale to gain acceptance, the relationship between the BSA’s reporting and recordkeeping laws on one hand, and anti-structuring laws on the other, needs to be inverted. Where the anti-structuring statute once existed to buttress the BSA’s recordkeeping and reporting requirements, the latter

FISCAL YEAR 2008 ANNUAL REPORT 6 (2008).

9. U.S. GOV’T ACCOUNTABILITY OFFICE, BANK SECRECY ACT: INCREASED USE OF EXEMPTION PROVISIONS COULD REDUCE CURRENCY TRANSACTION REPORTING WHILE MAINTAINING USEFULNESS TO LAW ENFORCEMENT EFFORTS 5 (2008) (“Linking law enforcement’s use of CTRs to specific impacts is difficult, however, because agencies do not track their use of CTRs, which are typically one of many sources of information used to support investigations.”); *see also* U.S. DEPT OF THE TREASURY ET AL., 2007 NATIONAL MONEY LAUNDERING STRATEGY 2 (2007) (calling for the Financial Crimes Enforcement Network to “promote consistent reporting of how BSA data is used and the value of BSA data to the relevant agencies”).

10. *See* Federal Financial Institutions Examination Council, Bank Secrecy Act Anti-Money Laundering Examination Manual, http://www.ffeic.gov/bsa_aml_infobase/pages_manual/OLM_002.htm (last visited Oct. 11, 2009).

11. This rationale helped inform the U.S. Government Accountability Office’s report on the Bank Secrecy Act. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 9, at 5 (“Law enforcement officials noted that CTR requirements also aid their efforts by making it more difficult for criminals to get their illicit proceeds into the financial system and forcing them to act in ways that increase chances of detection—such as smuggling cash or ‘structuring’ their cash transactions to avoid CTRs, which often prompts depository institutions to file a Suspicious Activity Report.”).

requirements now exist in large measure to steer money launderers and others engaged in crime towards evasive activities such as structuring, thereby increasing their risk of detection.

What this shift in rationale means for the future of the BSA and its enforcement provisions is the unifying question that runs throughout this article. As law enforcement agencies come to place greater emphasis on less morally blameworthy financial crime statutes such as structuring, there is a need to ensure that these statutes are not misused. The crime of structuring is a creature of our increasingly bureaucratized system of government;¹² nothing makes it bad to structure currency transactions, except Congress's finding that the activity frustrates the collection and analysis of information that has a high value to law enforcement—a finding that warrants reexamination. As far as regulatory offenses go, especially one that rests on such a shaky premise, the elements of the structuring offense include very few safeguards against ensnaring innocent conduct. There are few defenses to a structuring charge, and a conviction for structuring carries the potential for tough penalties that do not always bear a correlation to the gravity of the underlying conduct. We should tolerate a relaxed statutory definition of a regulatory offense and tough—verging on disproportional—sanctions only for so long as we are continuously prepared to reaffirm that the anti-structuring law supports a vital regulatory regime worthy of such sanctions.

II. BACKGROUND AND PURPOSE OF ANTI-STRUCTURING STATUTE

This section provides an overview of the BSA's reporting and recordkeeping requirements.¹³ It then discusses how the government's approach to enforcing BSA requirements has evolved in recent years to place increasing emphasis on regulatory offenses, such as structuring, as a means of detecting and prosecuting financial crimes.¹⁴ Understanding

12. See JOHN LUKACS, *A NEW REPUBLIC: A HISTORY OF THE UNITED STATES IN THE TWENTIETH CENTURY* (2004) (arguing that American democracy has been transformed into a bureaucratic system created by and for the dominance of special interest groups).

13. See *infra* Part II.A.

14. See *infra* Part II.B.

how the government's approach towards BSA enforcement has evolved leads into a reexamination of the BSA's purposes.¹⁵

A. An Overview of the Reporting and Recordkeeping Requirements

Grossly simplified, Title II of the BSA requires financial institutions, certain trades and businesses, as well as international travelers, mailers and shippers, to report transactions and movements involving currency, and, in some instances, other kinds of monetary instruments, that exceed \$10,000.¹⁶ In turn, Title I requires financial institutions to verify and record information for certain transactions at or above \$3000.¹⁷ Wherever we find transactions or money movements that implicate these thresholds,¹⁸ we find opportunities for transactors to engage in structuring.

The BSA reporting and recordkeeping requirements are implemented through regulations promulgated by a bureau of the Department of Treasury known as the Financial Crimes Enforcement Network (FinCEN). These requirements are discussed in greater detail below.

1. The Title II Reporting Requirements

The Currency Transaction Reporting Requirement: First, and most importantly, the BSA requires domestic financial

15. See *infra* Part II.C.

16. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

17. Various Anti-Money Laundering/Bank Secrecy Act Examination Manuals contain detailed explanations of the reporting and recordkeeping requirements that apply to different financial services industries. See, e.g., FED. FIN. INST. EXAMINATION COUNCIL, BANK SECRECY ACT/ANTI-MONEY LAUNDERING EXAMINATION MANUAL 60-104 (2007), http://www.ffiec.gov/bsa_aml_infobase/documents/BSA_AML_Man_2007.pdf; FIN. CRIMES ENFORCEMENT NETWORK & INTERNAL REVENUE SERVICE, BANK SECRECY ACT/ANTI-MONEY LAUNDERING EXAMINATION MANUAL FOR MONEY SERVICES BUSINESSES 62-91 (2008), http://www.fincen.gov/news_room/rp/files/MSB_Exam_Manual.pdf.

18. This might occur, for instance, at a bank where a customer seeks to make a large cash deposit, at a car dealership where a customer seeks to purchase a vehicle with currency, at an airport where a traveler boards an international flight with a hoard of monetary instruments, or at a money transmitting business when a person wishes to initiate a wire transfer in a large amount.

institutions and casinos to report to the Department of Treasury any cash transactions that exceed a certain monetary threshold, which is currently set at \$10,000.¹⁹ This is the so-called Currency Transaction Reporting requirement (FinCEN Form 104 for financial institutions and FinCEN Form 103 for casinos).²⁰ In the case of financial institutions, the requirement applies to deposits, withdrawals, and exchanges of currency, or other payments or transfers by, through, or to a financial institution in a banking day involving a transaction (or multiple transactions by or on behalf of the same person) in currency exceeding \$10,000.²¹ If the aggregate amount of cash exceeds \$10,000, then the financial institution must file a CTR. In the case of casinos, it applies to any “cash in” or “cash out” transaction involving more than \$10,000.²² By volume, the approximately 16,000,000 CTRs that are filed each year dwarf all other BSA

19. See Bank Secrecy Act, Pub. L. No. 91-508, § 221, 84 Stat. 1122 (1970) (codified as amended at 31 U.S.C. § 5313(a) (2006)); 31 C.F.R. § 103.22(b)(1), (2) (2008). The term “financial institution” is broadly defined to include, among others, banks, savings and loans, thrift institutions, and entities such as casinos, telegraph companies, brokers or dealers in securities, check cashers, and transmitters of funds. See 31 U.S.C. § 5312(a)(2) (2006); 31 C.F.R. § 103.11(n) (2008).

20. See 31 C.F.R. § 103.22 (implementing the CTR filing requirement for financial institutions). A risk-based version of the CTR requirement was promulgated decades earlier. See *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21, 37, n.11–12 (1974). However, this precursor to the CTR had limited usefulness because of uncertainty as to when the reports were required. *Id.*

The CTR threshold has been set at \$10,000 since it was first given effect by regulations implemented by the BSA. See AM. BANKERS ASS’N, A NEW FRAMEWORK FOR PARTNERSHIP: RECOMMENDATIONS FOR BANK SECRECY ACT/ANTI-MONEY LAUNDERING REFORM app. D at D1 (2008). Recent efforts to raise the threshold have been met by strong resistance from the law enforcement community. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 9, at 18 (“In this regard, many law enforcement officials, including those from ICE, IRS, and the U.S. Attorney’s office, noted that raising the CTR filing threshold of \$10,000 would affect adversely their ability to deter money laundering, because the CTR threshold corresponds to those set in other anti-money laundering provisions.”).

In 1988, Congress granted the Secretary of the Treasury authority to target certain geographic regions or specific financial institutions and require additional reporting below the current \$10,000 threshold. See 31 U.S.C. § 5326 (2006). However, the authority has not been utilized. In this instance, financial institutions complained that the burdens of such targeting orders outweighed their usefulness, and law enforcement agencies substantially agreed. See Byrne, *supra* note 6, at 810–12.

21. See 31 U.S.C. § 5313(a); 31 C.F.R. § 103.22(b)(1).

22. See 31 C.F.R. § 103.22(b)(2)(i), (ii).

reports combined.²³

The completion of a CTR requires a financial institution or casino to verify and report a great deal of information that money launderers, tax evaders and others would just as soon not divulge. In the case of financial institutions, Part I of the CTR requires identifying information about the person or persons involved in the currency transaction(s), including the person(s) conducting the transaction(s) and the person(s) on whose behalf of the transaction(s) is conducted.²⁴ Part II of the CTR report requires details about the transactions itself, such as the date and amount of the transaction.²⁵ Part III requires information about the financial institution where the transaction takes place.²⁶ Importantly, for purposes of identifying structuring offenses, Form 104 requires financial institutions to identify on the CTR form whether it is being filed based upon multiple transactions that aggregate to more than \$10,000.²⁷

So-called “domestic financial institutions” are required to file CTRs²⁸ The term “financial institution” obviously includes “banks,” such as commercial banks, credit unions, and savings and loans.²⁹ Less obviously, the term also encompasses non-bank financial institutions, such as money services businesses, casinos, commodities brokers and merchants, brokers or dealers in securities, and telegraph companies.³⁰

The Form 8300 Requirement: Second, the BSA requires certain nonfinancial trades and businesses to report the receipt of more than \$10,000 in currency in the sale of goods

23. See FIN. CRIMES ENFORCEMENT NETWORK, *supra* note 8, at 6.

24. See FinCEN Form 104: Currency Transaction Report, http://www.fincen.gov/forms/files/fin104_ctr.pdf (last visited Oct. 11, 2009); see also Fin. Crimes Enforcement Network, Treatment of Deposits by Armored Cars for Currency Transaction Report Purposes, FIN-2009-R002 (2009), http://www.fincen.gov/statutes_regs/guidance/pdf/fin-2009-r002.pdf (discussing how the CTR requirement applies in the case where unrelated companies contract with an armored car service to make deposits that collectively exceed \$10,000 in currency).

25. FinCEN Form 104, *supra* note 24.

26. *Id.*

27. *See id.*

28. See 31 U.S.C. §§ 5312(a)(2), 5313(a) (2006).

29. 31 C.F.R. § 103.11(c) (2008).

30. *Id.* § 103.11(n) (defining the term “financial institution”).

or services.³¹ This is the so-called “Form 8300” requirement—a reference to the name of the form commonly used by filers such as automobile dealers, real estate closing agents, and attorneys to report large currency transactions.³² Persons who, in the course of a trade or business, receive more than \$10,000 in currency in one transaction (or two or more related transactions) must file a Form 8300 report with the government.³³ In total, the government received slightly fewer than 185,000 Form 8300 reports in fiscal year 2007–2008.³⁴

The Form 8300 report has four parts. Part I requires the filer to identify the person from whom the cash was received.³⁵ Part II requires information about the person or persons on whose behalf the transaction was conducted.³⁶ Part III requires a description of the transaction itself—i.e., the date, time, nature of the currency, and amount of the transaction.³⁷ Part IV requires information about the business participating in the transaction.³⁸ The Form 8300 is unique among BSA reports in that it doubles as a kind of SAR form as well. A trade or business that believes a customer is attempting to evade a Form 8300, or is providing false information, must file a Form 8300 and designate that it is

31. See 31 U.S.C. § 5331(a) (2006); 31 C.F.R. § 103.30(a) (2008); see also I.R.C. § 6050I (2006).

32. The application of the Form 8300 requirement to attorneys has provoked objections on the grounds that the filing requirement intrudes on the attorney-client relationship. Some attorneys complete the Form 8300 report, but omit identifying the source of the funds. The IRS has responded by issuing a summons to the attorney for information about the source of the funds. In addressing challenges to these summonses, courts have reached different results. See, e.g., *United States v. Blackman*, 72 F.3d 1418 (9th Cir. 1995) (enforcing summons); *United States v. Gertner*, 65 F.3d 963 (1st Cir. 1995) (denying enforcement of summons); *United States v. Ritchie*, 15 F.3d 592 (6th Cir. 1994) (enforcing summons); *United States v. Leventhal*, 961 F.2d 936, 940 (11th Cir. 1992) (enforcing summons). These decisions date to a time when the Form 8300 requirements fell only within Title 26. It is unclear whether the force of these challenges may have been blunted when Congress reenacted the Form 8300 requirement and codified it outside of the tax code. See *infra* note 41.

33. 31 C.F.R. § 103.30(a)(i).

34. FIN. CRIMES ENFORCEMENT NETWORK, *supra* note 8, at 6.

35. FinCEN Form 8300: Report of Cash Payments Over \$10,000 Received in a Trade or Business, <http://www.irs.gov/pub/irs-pdf/f8300.pdf> (last visited Oct. 11, 2009).

36. *Id.*

37. *Id.*

38. *Id.*

being filed because of the suspicious nature of the transaction.³⁹

Whereas most currency reporting requirements derive from the BSA, the Form 8300 requirement has a different origin. When enacted in 1984, the Form 8300 requirement was intended primarily as a means of assisting the IRS in identifying tax evaders, and thus was codified in the Tax Code.⁴⁰ In 1998, Congress authorized the Secretary of the Treasury to disclose Form 8300s to officers and employees of any federal agency for the administration of federal criminal statutes not related to tax administration.⁴¹ However, the requirement remained within the Tax Code, meaning that Form 8300 disclosure for non-tax investigations turned on disclosure rules that apply to tax returns and return information.⁴² In 2001, Congress effectively detached Form 8300s from their tax law origins by reenacting the Form 8300 requirement as part of the BSA. This made it easier for law enforcement agencies engaged in non-tax investigations to access Form 8300 information.⁴³ As of January 1, 2002, Form 8300 disclosures are authorized under the more permissive disclosure provisions of the BSA and accompanying regulations.⁴⁴

The CMIR Requirement: Third, the BSA requires persons transporting, mailing or shipping more than \$10,000 in currency, in or out of the United States to file a FinCEN Form 105 (formerly Customs Form 4790) with Customs and Border Protection (CBP), an agency of the Department of

39. *Id.*

40. See I.R.C. § 6050I (2006); see also U.S. GEN. ACCOUNTING OFFICE, MONEY LAUNDERING: THE USE OF CASH TRANSACTION REPORTS BY FEDERAL LAW ENFORCEMENT AGENCIES 2-3 (1991) (discussing the origins of the Form 8300 requirement).

41. See PETER REUTER & EDWIN M. TRUMAN, CHASING DIRTY MONEY: THE FIGHT AGAINST MONEY LAUNDERING 66 (2004); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

42. See I.R.C. § 6103(i)(8) (2006); see also INTERNAL REVENUE MANUAL §§ 9.5.5.4.8.4, 9.5.5.4.8.5 (2007) (setting forth the elaborate procedures an IRS agent must follow to disseminate a Form 8300 under Title 26 authority).

43. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, tit. III, § 365(a), 115 Stat. 272 (codified as amended at 31 U.S.C. § 5331 (2006)).

44. See INTERNAL REVENUE MANUAL § 9.5.5.4.8 (2007) (“The rules under Title 26 strictly limit [Form 8300] disclosures, whereas the rules under Title 31 are less restrictive.”).

Homeland Security.⁴⁵ FinCEN Form 105 implements the so called Currency and Monetary Instrument Report (CMIR) requirement. Unlike virtually all other BSA requirements, the CMIR requirement imposes obligations directly on the public at large and applies to the physical cross-border transportation, shipment or mailing of monetary instruments in an amount greater than \$10,000.⁴⁶ The government received approximately 177,000 CMIR reports in fiscal year 2007–2008.⁴⁷

The CMIR has four parts.⁴⁸ Part I requires information about the person departing or entering the United States, or shipping, mailing or receiving more than \$10,000 in monetary instruments.⁴⁹ Part II requires information about the person on whose behalf the importation or exportation of the money instruments was conducted.⁵⁰ Part III requires the filer to identify the total amount of currency and monetary instruments subject to reporting;⁵¹ and Part IV requires the filer to attest to the truth of the information contained in the completed CMIR under penalty of perjury.⁵²

Other Reporting Requirements: There are three other

45. 31 U.S.C. § 5316 (2006); 31 C.F.R. § 103.23(a) (2008).

46. *See* 31 U.S.C. § 5316; *see also* 31 C.F.R. § 103.23 (imposing the reporting obligation on the shipper or transporter of currency).

47. FIN. CRIMES ENFORCEMENT NETWORK, *supra* note 8, at 6 n.4.

48. The statute authorizing the filing of CMIRs, 31 U.S.C. § 5316, provides in part:

(a) Except as provided subsection (c) of this section [a provision generally exempting common carriers from the CMIR requirement], a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly—

(1) transports, is about to transport, or has transported, monetary instruments of more than \$10,000 at one time—

(A) from a place in the United States to or through a place outside the United States; or

(B) to a place in the United States from or through a place outside the United States; or

(2) receives monetary instruments of more than \$10,000 at one time transported into the United States from or through a place outside the United States.

31 U.S.C. § 5316.

49. FinCEN Form 105: Report of International Transportation of Currency or Monetary Instruments, http://www.fincen.gov/forms/files/fin105_cmir.pdf (last visited Oct. 11, 2009).

50. *Id.*

51. *Id.*

52. *Id.*

categories of Title II reporting: the Foreign Bank Account Report (FBAR),⁵³ the Foreign Currency Report,⁵⁴ and, most importantly, the Suspicious Activity Report (SAR).⁵⁵ These requirements do not lend themselves to structuring-type behavior. As discussed in Section B below, however, the SAR filing requirement relates closely to the crime of structuring. SARs often report suspected structuring offenses, and thus lead to initiation of investigations into possible structuring activity.

2. *The Title I Recordkeeping Requirements*

Title I of the BSA imposes recordkeeping requirements upon bank and non-bank financial institutions, such as

53. The FBAR requirement applies to each person subject to the jurisdiction of the United States having a financial interest in, or signature authority over, foreign bank accounts containing more than \$10,000 in funds. 31 U.S.C. § 5314 (2006); 31 C.F.R. §§ 103.24, 103.32 (2008). The FBAR is not a currency reporting requirement and, thus, not susceptible to structuring-type conduct. The willful failure to file an FBAR is nonetheless subject to criminal enforcement under 31 U.S.C. § 5322(a)–(b) and subject to civil enforcement by the Internal Revenue Service under 31 U.S.C. § 5321(a)(5) and 31 C.F.R. § 103.56(g).

54. The foreign currency reporting is omitted from this discussion because it is not the subject of structuring-type conduct and, in any event, Congress has not imposed criminal sanctions for violations of the foreign currency reporting requirement. *See* 31 U.S.C. § 5315 (2006); *see also id.* § 5322(a), (b) (excepting violations of § 5315 from the criminal enforcement provisions of § 5322).

55. The SAR filing requirement was first implemented for banks in 1996, and over the ensuing years has been extended to other financial institutions as follows:

Table 1. Expansion of SAR filing requirement.

Type of Financial Institution	Date of Implementation of SAR Requirement	Regulatory Provision
Depository Institutions	April 1, 1996	31 C.F.R. § 103.18
Money Services Businesses	January 1, 2002	31 C.F.R. § 103.20
Broker-Dealers	December 30, 2002	31 C.F.R. § 103.19
Casinos	March 23, 2003	31 C.F.R. § 103.21
Futures Commission Merchants	May 18, 2004	31 C.F.R. § 103.17
Insurance Companies	May 3, 2006	31 C.F.R. § 103.16
Mutual Funds	November 1, 2006	31 C.F.R. § 103.15

From 1986 to 1996, banks reported suspicious transactions by checking a “suspicious transaction” box on a CTR form. *See* IRS.gov, Currency Reporting—Money Laundering, <http://www.irs.gov/compliance/enforcement/article/0,,id=113003,00.html> (last visited Oct. 11, 2009).

money services businesses. Most importantly for purposes of this discussion, the BSA and implementing regulations impose the following two recordkeeping requirements:

Cash Purchases of Bank Checks and Similar Instruments: Financial institutions must identify and record information about transactions involving the purchase of monetary instruments using cash in amounts of \$3000 or more.⁵⁶ To comply, financial institutions record the purchaser's name and address, including certain identifying information such as a driver's license number or date of birth, the date of purchase, the type of instruments, their serial numbers, and in the dollar amount each instrument.⁵⁷

Strictly speaking, 31 U.S.C. § 5325 is a reporting requirement, not a recordkeeping requirement. Section 5325(b) provides that “[a]ny information required to be recorded by any financial institution . . . shall be *reported* by such institution to the Secretary of the Treasury at the request of such Secretary.”⁵⁸ Consistent with this language, the anti-structuring statute⁵⁹ describes § 5325 as a “reporting” requirement.⁶⁰ For purposes of this discussion, at least, § 5325 nonetheless resembles a recordkeeping requirement because, as implemented through regulations, the requirement acts more as a record creation and maintenance requirement than it does as a reporting requirement.⁶¹

Wire transfers: In addition, Title I requires financial institutions to create and retain records relating to domestic and international fund transfers in amounts of \$3000 or

56. 31 U.S.C. § 5325 (2006) (authorizing the Secretary of the Treasury to require financial institutions to verify and record the identity of persons purchasing cashier's checks and similar instruments with currency); 31 C.F.R. § 103.29 (2008).

The impetus for the recordkeeping requirement for cash purchases of monetary instruments emerged out of concern that money launderers were using such instruments to launder their illegal proceeds. *See* Byrne, *supra* note 6, at 809–10 & n.36.

57. 31 C.F.R. § 103.29(a)(2).

58. 31 U.S.C. § 5325(b) (emphasis added).

59. *Id.* § 5324.

60. *Id.* § 5324(a).

61. 31 C.F.R. § 103.29(c) (“Records required to be kept shall be retained by the financial institution for a period of five years and shall be made available to the Secretary upon request at any time.”).

more.⁶² The requirements are detailed and vary depending on whether the wire is conducted through a bank or through a nonbank financial institution.⁶³

Since its inception in the early 1990s, the recordkeeping requirement for domestic and international wire transfers has been the subject of intense debate. Prior to 9/11, the banking industry complained about the lack of consideration Treasury officials had given to the costs of implementing the recordkeeping requirement for wires.⁶⁴ These objections were put on hold after 9/11 and the legislative momentum shifted against the banks. With the Intelligence Reform and Terrorism Prevention Act of 2004, Congress authorized the Secretary to prescribe new regulations requiring financial institutions to report all cross-border wires after submitting a feasibility report to Congress.⁶⁵ Moreover, the United States has been under increased pressure from the Financial Action Task Force (FATF) to either lower the cross-border recordkeeping threshold or eliminate it all together.⁶⁶ So far, the Treasury has done neither.

The BSA's recordkeeping provisions require financial institutions to verify and record certain identifying information about the person conducting a financial transaction at or above a \$3000 monetary threshold. As is true of the reporting requirements, the typical money launderer, tax evader, or terrorist would just as soon not share this information. Thus, both of these recordkeeping requirements are susceptible to structuring-type behavior,

62. See Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, § 1515, 106 Stat. 3672, 4058 (1992) (codified as amended at 12 U.S.C. § 1829b (2006)) (authorizing the Secretary and the Board of Governors of the Federal Reserve to impose recordkeeping requirements on domestic and international funds transfers); see also 12 U.S.C. § 1953(c) (2006) (authorizing the Secretary of Treasury to impose § 1829b wire transfer recordkeeping requirements on "an uninsured bank or financial institution" defined in § 5312(a)(2)); 31 C.F.R. § 103.33(e), (f) (2008).

63. See 31 C.F.R. § 103.33(e)(1), (f) (requirements for banks and non-bank financial institutions).

64. See Byrne, *supra* note 6, at 818.

65. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6302, 118 Stat. 3638 (2004).

66. See FIN. ACTION TASK FORCE, SUMMARY OF THIRD MUTUAL EVALUATION REPORT ON ANTI-MONEY LAUNDERING AND COMBATING TERRORIST FINANCING, THE UNITED STATES OF AMERICA ¶ 20 (2006) (noting that the United States is out of compliance with the FATF wire recordkeeping threshold—currently set at \$1000).

though perhaps not to the same extent as are the BSA Title II reporting requirements.

B. The Resurgence of BSA Enforcement Efforts

Those familiar with the background of BSA enforcement may have been surprised by the media attention drawn to the BSA when the Elliot Spitzer story broke in March 2008. BSA enforcement had spiked in the late 1980s and early 1990s, a time when the government first pursued banks for non-compliance with the BSA's currency transaction reporting requirement and, later pursued their customers for structuring transactions to evade CTRs.⁶⁷ Thereafter, in the years between 1994 and 2002, prosecutions of banks for noncompliance with the BSA were virtually nonexistent and structuring prosecutions were almost as rare.⁶⁸ The perception existed among commentators that government's real anti-money laundering efforts seemed to lie elsewhere. Although there are still some prosecutions for currency reporting violations and for structuring, the major prosecutorial focus is now on the money laundering statutes, 18 U.S.C. §§ 1956 and 1957.⁶⁹ Indeed, prior to the events that led to former Governor Spitzer's downfall, some commentators had grown so doubtful that structuring crimes mattered to anyone that they began to ask whether it was worth the bother for banks to continue to report structuring-like behavior in SAR filings.⁷⁰

But just as commentators were beginning to pronounce

67. See INTERNAL REVENUE MANUAL § 9.5.5.3.6 ("The historical emphasis of the IRS in Title 31 money laundering investigations has related to the failure to file or the false filing of Currency Transaction Reports (CTRs) . . .").

68. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: MONEY LAUNDERING OFFENDERS, 1994-2001 (2003), <http://www.ojp.usdoj.gov/bjs/pub/ascii/mlo01.txt>; see also U.S. DEP'T OF THE TREASURY ET AL., *supra* note 9, at 94 (providing 31 U.S.C. § 5324 prosecution statistics for FY 2004).

69. NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 436 (4th ed. 2006). Money laundering and BSA criminal statutes define overlapping, but different, crimes. Generally speaking, the money laundering statutes criminalize financial transactions involving the proceeds of crime. The BSA enforcement statutes criminalize certain conduct intended to evade the BSA without regard to the source of the funds involved in the transaction.

70. Robert B. Serino, *Viewpoint: SARs Are Useful Only when an Activity Is Illegal*, AM. BANKER, Oct. 6, 2006, at 9 (asking, "[s]hould there really be prosecutions for structuring legal funds?").

the anti-structuring statute to be a “has been” among anti-money laundering laws, events were unfolding that would lead the government away from traditional money laundering enforcement and back towards BSA enforcement. First, aside from cases involving drugs, guns, and violent crime, or those that involve professional money launderers, prosecutions for violations of 18 U.S.C. §§ 1956 and 1957 are not what they used to be. Prior to November 2001, the Federal Sentencing Guidelines (Sentencing Guidelines) meted out far more serious punishment for a § 1956 or § 1957 offense than for the underlying offense that generated the laundered funds.⁷¹ In November 2001, the Sentencing Commission significantly narrowed this sentencing disparity, especially in white collar cases where a defendant launders funds incident to committing the underlying criminal violations. For these kinds of cases, a prosecutor has less to gain by pursuing a money laundering charge above and beyond any underlying charge.⁷² Second, in 2008 a sharply divided Supreme Court ruled in *United States v. Santos* that the term “proceeds,”

71. While there are countless cases that illustrated these former disparities, none was more significant than *United States v. Santos*. *United States v. Santos*, 128 S. Ct. 2020 (2008). Santos was convicted of two counts relating to conducting an illegal gambling business under 18 U.S.C. § 1955 and three counts relating to money laundering offenses under 18 U.S.C. § 1956. *Id.* at 2020. His pre-November 2001 advisory guideline sentence for the gambling offenses was sixty months; yet his guideline sentence for the later offenses was 210 months. *Id.* at 2023. The huge disparity—made possible by pre-November 2001 guidelines—weighed upon Justice Stevens. In concurring in the judgment, he wrote:

Allowing the Government to treat the mere payment of the expense of operating an illegal gambling business as a separate offense is in practical effect tantamount to double jeopardy, which is particularly unfair in this case because the penalties for money laundering are substantially more severe than those for the underlying offense of operating a gambling business.

Id. at 2033 & n.6 (discussing the sentencing disparity between a money laundering conviction and a conviction for the underlying offense, and explaining how prior to November 2001, the disparity was even greater).

72. See U.S. SENTENCING GUIDELINES MANUAL § 2S1.1(b)(2) (2004) (providing for a one level increase for Section 1957 offenses; and providing for a two level increase for Section 1956 offenses). The Sentencing Commission reacted to findings that “from 1992 to 1996, the election to pursue a money laundering charge in addition to an underlying fraud-related offense would raise the guideline penalty in [eighty-five] to [ninety-five] percent of the cases.” U.S. SENTENCING COMM’N, REPORT TO CONGRESS: SENTENCING POLICY FOR MONEY LAUNDERING OFFENSES, INCLUDING COMMENTS ON DEPARTMENT OF JUSTICE REPORT 8 (1997).

under 18 U.S.C. § 1956, refers to “profits” as opposed to “gross receipts,” at least on the facts of that case.⁷³ *Santos* had a short shelf life; Congress rejected the *Santos* holding in the Fraud Enforcement and Recovery Act, enacted in May 2009.⁷⁴ However, Congress tempered its rejection of *Santos* with the statement that the Department of Justice should not charge money laundering on facts similar to those presented in *Santos*. Thus, both *Santos* and Congress’s reaction to it have forced the government to rethink its assumptions about the reach of §§ 1956 and 1957.⁷⁵ The government thought these statutes reached financial transactions involving the gross receipt of crime, but, in fact, they may only reach the profits of crime. For certain white collar offenses such as mail, wire, or bank fraud, it may prove difficult for the government to differentiate between the profits of the scheme and the mere receipts of the scheme.⁷⁶ The practical consequence of these two developments—Sentencing Guideline reforms and *Santos*—is that §§ 1956 and 1957 are no longer the favored

73. *Santos*, 128 S. Ct. at 2020. Because the opinion was so sharply divided, with no one opinion commanding the assent of a majority of the Justices, it remains unclear what the effect of the ruling will be going forward. See, e.g., *United States v. Shelburne*, 563 F. Supp. 2d 601, 607 (W.D. Va. 2008) (rejecting government’s argument that *Santos* is so fractured that it has no precedential effect outside the context of the facts presented in the decision itself); see also *United States v. Van Alstyne*, 584 F.3d 803 (9th Cir. 2009).

74. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 2(f)–(g), 123 Stat. 1617 (2009).

75. See, e.g., *United States v. Grasso*, 381 F.3d 160, 167 (3d Cir. 2004) (stating that “proceeds,” in the context of § 1956, means gross proceeds, not net profits); *United States v. Iacoboni*, 363 F.3d 1, 4 (1st Cir. 2004) (finding that “proceeds” means gross proceeds, not net profits). But see *United States v. Scialabba*, 282 F.3d 475, 478 (7th Cir. 2002).

Five Justices (Justice Stevens, in his plurality decision, joined by the four dissenting Justices) agreed in dicta that the term “proceeds” means “gross receipts” in cases involving the sale of contraband. See *Santos*, 128 S. Ct. at 2032 (Stevens, J., concurring) (agreeing with Justice Alito that “Congress intended the term ‘proceeds’ to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales”).

76. See, e.g., *Van Alstyne*, 584 F.3d 803 (money laundering statute did not apply to courts involving the disbursement of funds back to investors in a fraud scheme); *Shelburne*, 563 F. Supp. 2d at 607 (stating that expenses of Medicaid fraud scheme are not “proceeds” within the meaning of *Santos*); *United States v. Thompson*, No. 3:06-CR-123, 2008 WL 2514090, at *1 (E.D. Tenn. June 19, 2008) (discussing theft of monies violation under 18 U.S.C. § 641); *United States v. Poulsen*, 568 F. Supp. 2d 885, 913 (S.D. Ohio 2008) (finding that even under “profits” interpretation, conviction for laundering Medicare fraud proceeds survived *Santos* challenge).

prosecutorial tools that they once were.⁷⁷

Setbacks for the government in the area of traditional money laundering prosecutions under §§ 1956 and 1957 merely added momentum to policy shifts that were already underway. As mentioned, Title III of the PATRIOT Act included a number of significant reforms to the BSA.⁷⁸ With the passage and implementation of these reforms, financial institutions bore both the added compliance costs and added scrutiny.⁷⁹ Beginning in September 2002, the government returned to enforcing the BSA requirements aggressively, particularly the requirement that banks file suspicious activity reports disclosing crimes such as structuring.⁸⁰ Forced by the PATRIOT Act to bear added BSA compliance burdens, and troubled by the government's increased use of threatened criminal sanctions to coerce BSA compliance, financial institutions began to raise questions in Congress and elsewhere about the value of BSA data to law enforcement. Was the government even looking at the many reports that the BSA required financial institutions to prepare and file?

This pressure prompted the government to disclose a significant law enforcement initiative that involved the use of BSA data. The 2007 National Money Laundering Strategy disclosed that federal law enforcement agencies were "maintain[ing] robust Suspicious Activity Report (SAR) review programs and BSA data analysis in order to initiate and support investigations of attempts to exploit the banking system for money laundering."⁸¹ To achieve that objective,

77. On February 5, 2009, Senators Leahy and Grassley introduced a bill that would amend § 1956 to clarify that the term "proceeds" includes gross receipts. Press Release, Leahy, Grassley Introduce Anti-Fraud Legislation: Bill Would Give Federal Government More Resources to Combat Mortgage Fraud (Feb. 5, 2009), <http://www.leahy.senate.gov/press/200902/020509b.html>.

78. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, tit. III, 115 Stat. 272.

79. One estimate suggests that industry costs for BSA enforcement increased sixty-six percent between 2001 and 2004 and another seventy-one percent between 2004 and 2007. AM. BANKERS ASS'N, *supra* note 20, at 1.

80. See generally Lester Joseph & John Roth, *The Criminal Prosecution of Banks Under the US Bank Secrecy Act of 1970*, 1 J. SEC. COMPLIANCE 298 (2008) (discussing recent criminal investigations of bank and other financial institutions for willful failures to adhere to the BSA).

81. U.S. DEPT OF THE TREASURY ET AL., *supra* note 9, at 2; see also U.S. DEPT OF JUST., NATIONAL ASSET FORFEITURE STRATEGIC PLAN 2008–2012, at

the government promoted the development of SAR review teams—there are now approximately ninety-five such teams—to review SARs filed by banks, money services businesses, casinos, and other financial institutions.⁸² In 2009, the U.S. Department of Justice’s Criminal Division joined when it announced it had formed a National Suspicious Activity Review Team to focus on SARs that showed a significant international nexus.⁸³ BSA/Money Laundering/Structuring offenses, termed “Code A violations” in the parlance of the BSA, are, by far, the most prevalent criminal activity reported in SARs.⁸⁴ Thus, structuring offenses are chief among the kinds of offenses that SAR review teams investigate. In fact, investigations into suspected structuring activity form something of a lowest common denominator. Some SAR review teams may focus on crimes as diverse as identity theft and mortgage fraud, but almost all share an interest in pursuing structuring-type violations.⁸⁵ Eliot Spitzer’s banking activities were detected

49–50 (2008) (calling for efforts to encourage and develop “SAR Review Teams to analyze and target criminal proceeds within the financial system”).

82. See GOV’T ACCOUNTABILITY OFFICE, *BANK SECRECY ACT: SUSPICIOUS ACTIVITY REPORT USE IS INCREASING, BUT FINCEN NEEDS TO FURTHER DEVELOP AND DOCUMENT ITS FORM REVISION PROCESS 26* (2009), available at <http://www.gao.gov/new.items/d09226.pdf>. An early discussion of the SAR Review Team approach appeared in a Department of Justice publication in the late 1990s. See Marion Percell, *Using Suspicious Activity Reports: A Task Force Approach*, USA BULL., July 1999, at 25, http://www.usdoj.gov/usao/eousa/foia_reading_room/usab4703.pdf. Those efforts gathered momentum after the events of 9/11.

83. See U.S. DEP’T OF JUST., *ACCOMPLISHMENTS OF THE U.S. DEPARTMENT OF JUSTICE 2001–2009* 34, <http://www.usdoj.gov/opa/documents/doj-accomplishments.pdf>.

84. FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEP’T OF THE TREASURY, *THE SAR ACTIVITY REVIEW—BY THE NUMBERS* (2008), http://www.fincen.gov/news_room/rp/files/sar_by_num_10.pdf (“BSA/Structuring/Money Laundering continues to be the most prevalent type of suspicious activity reported by depository institutions, increasing [fifteen percent] from 2006. Furthermore, this characterization accounts for 47.56 of activity reported overall since 1996.”).

85. One key to understanding why BSA-type offenses are central to most SAR Review Teams is to understand the mandate of the Internal Revenue Service-Criminal Investigation (IRS-CI). IRS-CI is the lead law enforcement agency on most government SAR Review Teams. However, IRS-CI investigative powers are narrow. The agency may investigate only tax offenses, money laundering offenses under Title 18, and BSA violations under Title 31. INTERNAL REVENUE MANUAL § 9.1.2.2(3) (2008) (“The IRS also has explicit enforcement responsibilities with regard to 18 U.S.C. § 1956 and 18 U.S.C. § 1957, dealing with money laundering, and 31 U.S.C. § 5311 et seq., dealing with

by one of these law enforcement teams.

Not coincidentally, the government's renewed interest in BSA-type offenses complements its post-9/11 emphasis on disrupting suspected terrorist financing activity.⁸⁶ After 9/11, the government turned to financial crime statutes that it had used infrequently in preceding years.⁸⁷ The principal money laundering statutes, 18 U.S.C. §§ 1956 and 1957, remained useful tools, even after sentencing guideline reforms and *Santos*. But in all but one instance, those statutes require proof that the funds involved in the transaction were derived from a "specified unlawful activity."⁸⁸ In international terrorist financing investigations, evidence of "specified unlawful activity" may be located overseas or otherwise difficult to unearth.⁸⁹ Even when found, the evidence may have been obtained using techniques reserved for national security matters and thus not readily admissible in criminal proceedings.⁹⁰ In fact, if the government could marshal the evidence needed to convict someone of laundering money to promote terrorism, it is safe to bet that the government would mind criminal charges more serious than simply money laundering in mind.⁹¹

the Bank Secrecy Act (BSA).")

86. NATIONAL STRATEGY FOR COMBATING TERRORISM 12 (2006), <http://www.cbsnews.com/htdocs/pdf/NSCT0906.pdf> (stating priority of disrupting of funding sources for terrorism); see also FIN. CRIMES ENFORCEMENT NETWORK, *supra* note 8, at 7 (quoting remarks of FBI Deputy Director John S. Pistole on the value of BSA data in terrorism investigations).

87. In August 2004, the Department of Justice published an influential monograph entitled "Terrorist Financing." The monograph includes extended discussions of alternative remittance systems (sometimes prosecuted under 18 U.S.C. § 1960), the currency reporting statutes, and the crime of structuring. See David M. Nissman, *Terrorist Financing*, OLE LITIG. SERIES, chs. 10, 16 (2004); see also Courtney J. Linn, *How Terrorist Exploit Gaps in US Anti-Money Laundering Laws to Secrete Plunder*, 8 J. MONEY LAUNDERING CONTROL 200 (2006) (discussing areas where BSA laws need to be reformed to address the terrorist financing threat).

88. Except in the case of the international transportation of funds to promote specified unlawful activity (18 U.S.C. § 1956(a)(2)(A)), all money laundering offenses require proof that the funds in fact derive from specified unlawful activity. 18 U.S.C. §§ 1956(a)(1)–(3), 1957 (2006).

89. See *United States v. Bajakajian*, 524 U.S. 321, 353–54 (1998) (explaining that Congress shaped the penalties for cash smuggling and reporting offenses because of "problems of individual proof" of another crime).

90. See The Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, § 106(b), 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. § 1806 (2006)).

91. See 18 U.S.C. § 2339A (2006) (providing for a maximum fifteen-year

In contrast, regulatory offenses, such as structuring or unlicensed money transmitting, do not necessarily require proof that the funds involved in the illegal activity derived from crime or were intended to promote crime.⁹² These statutes define serious regulatory offenses; violations carry stiff criminal and civil penalties, including asset forfeiture.⁹³ In prosecuting a domestic regulatory offense like structuring, the government does not need to get drawn into evidence-gathering issues that have the potential to derail almost any international terrorist-financing prosecution.⁹⁴ Conveniently for the government, the best evidence of a structuring violation can often be found in domestic bank records and databases housing BSA information.⁹⁵ In a post-9/11 era, what may begin as a terrorism or terrorist-financing investigation often evolves into an investigation of a possible BSA-type violations.⁹⁶

statutory penalty for providing material support to terrorists); *see also* 18 U.S.C. § 981(a)(1)(G) (2006) (providing for the forfeiture of all assets of a person, entity, or organization engaged in planning or perpetrating a crime of terrorism).

92. *See* Courtney J. Linn, *One-Hour Money Laundering: Prosecuting Unlicensed Money Transmitting Businesses Under 18 U.S.C. § 1960*, 8 U.C. DAVIS. BUS. L.J. 138, 140 (2007) (discussing the government's increased use of § 1960); *see also* United States v. E-Gold, Ltd., 550 F. Supp. 2d 82, 84 (D.D.C. 2008) (examining a situation where the government prosecuted a digital currency payment system operated through the Internet with, among other things, violations of 18 U.S.C. § 1960); United States v. Elfgeeh, 515 F.3d 100, 133–35 (2d Cir. 2008) (affirming in part § 1960 and structuring convictions and forfeitures for individuals operating a hawala that sent money to Yemen).

93. 31 U.S.C. § 5324(d) (2006) (listing criminal penalties); 31 U.S.C. § 5317(c) (2006) (discussing asset forfeiture); 31 U.S.C. § 5321(a)(4)(A) (listing civil penalties).

94. One of the government's earliest post-9/11 "material support" prosecutions floundered after it encountered just such a problem. *See* Philip Shenon, *Ex-Prosecutor Acquitted of Misconduct in 9/11 Case*, N.Y. TIMES, Nov. 1, 2007, at A18, available at <http://www.nytimes.com/2007/11/01/us/01detroit.html> (detailing how a terrorism conviction was thrown out, and a federal prosecutor charged and acquitted of intentionally and illegally withholding photographs of a military hospital in Jordan).

95. *See* Dennis Lormel, *Terrorist Financing: Balancing the Benefits and Burdens of Reporting Requirements*, IPSA INT'L., Feb. 16, 2009, <http://www.ipsaintl.com/news-and-events/articles/pdf/lormel-balancing-the-benefits.pdf>.

96. Consider this example: One of the government's few post-9/11 terrorism prosecutions involved the prosecution of Umer and Hamid Hayat in the Eastern District of California. After a mistrial was declared in the prosecution against Umer Hayat, he entered into a plea agreement in which he pleaded guilty not to making a false statement in connection with a terrorism investigation—as he had been charged—but with making a false statement in connection with his

C. The Rationale for Reporting and Recordkeeping Requirements

A detection rationale underlies each of the reporting and recordkeeping requirements identified in Part II.A. In enacting the BSA, the Congress responded to the increased use of financial institutions by those engaged in criminal activity.⁹⁷ It expressly found that reports and records of certain financial transactions, particularly large and unusual currency transactions, are highly useful to law enforcement agencies and taxing authorities in criminal, tax, or regulatory investigations or proceedings.⁹⁸ In the PATRIOT Act, Congress reaffirmed the finding that currency transaction reporting has a high degree of usefulness and that “the usefulness of such reports has only increased in the years since the requirements were established.”⁹⁹ Congress also expanded the finding by determining that BSA records and reports would have a high degree of usefulness in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.¹⁰⁰ In sum, to assist law enforcement agencies in their efforts to

failure to file a Form 8300. See Don Thompson, *Calif. Man Pleads Guilty in Terrorism Case*, WASH. POST, June 1, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/01/AR2006060100315.html>. What Hayat admitted to having lied about was not terrorism, but rather the fact that he had structured large amounts among different travelers of currency by dividing it into sub-\$10,000 amounts to evade a currency and monetary instrument (CMIR) report when departing abroad. *Id.*

97. See H.R. REP. NO. 91-975, at 10 (1970); S. REP. NO. 91-1139, at 2, 24 (1970); see also *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21, 26–27 (1974).

98. See 31 U.S.C. § 5311 (2006); H.R. REP. NO. 91-875, at 11–12 (“Criminals deal in money—case or its equivalent. The deposit and withdrawals of large amounts of currency or its equivalent . . . under unusual circumstances may betray criminal activity. The money in many of these transactions may represent anything from the proceeds of a lottery racket to money for the bribery of public officials.”); see also *United States v. Bajakajian*, 524 U.S. 321, 351 (1998) (Kennedy, J., dissenting) (“Congress enacted the [CMIR] reporting requirement because secret exports of money were being used in organized crime, drug trafficking, money laundering and other crimes. Likewise, tax evaders were using cash exports to dodge hundreds of millions of dollars in taxes owed to the Government.”) (citations omitted); *Cal. Bankers Ass’n*, 416 U.S. at 37 (explaining legislative history of CTR provisions); see also H.R. REP. NO. 99-746, at 17–18 (1986).

99. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, tit. III, § 366(a)(1), 115 Stat. 335.

100. See *id.* § 358(a), (b).

combat money laundering, the financing of terrorist activities, and other crimes, Congress has mandated the filing of CTRs, Form 8300s, and CMIRs. Congress has also required the maintenance of certain records. These requirements effectively mandate the creation of a paper trail for large currency transactions, giving law enforcement authorities a way to “follow the money” and detect criminal activity.¹⁰¹

The detection rationale for the BSA requirements, particularly the CTR requirement, has been the subject of mounting critical attention.¹⁰² Bankers have long suspected that law enforcement valued CTRs not so much because they helped to detect crime, but because they helped to deter it. In the early years of CTR filings, the banking community criticized law enforcement agencies for not using the data more actively, a task made difficult by the sheer volume of CTR filings.¹⁰³ By 1994, Congress responded to the growing volume of CTRs by directing the Secretary of the Treasury to try to reduce the increasing volume of CTR filings by thirty percent, largely through though the liberalization of provisions allowing financial institutions to exempt certain customers from the filing requirement.¹⁰⁴ Indeed, a key impetus behind the Money Laundering Suppression Act of

101. *See, e.g.*, *United States v. Herron*, 825 F.2d 50, 52 n.1 (5th Cir. 1987) (“The CTR filing leaves the government a ‘paper trail’ in order to follow the unusual movement of large amounts of money.”); *United States v. LBS Bank-N.Y., Inc.*, 757 F. Supp. 496, 510 (E.D. Pa. 1990) (finding, likewise, that the CTR filing leaves the government a paper trail for the purpose of tracking large amounts of money).

102. *See Byrne, supra* note 6, at 803. Some foreign jurisdictions, the United Kingdom, Australia, and Japan for example, have made a studied decision not to impose a currency transaction reporting requirement. In the case of the United Kingdom, this policy decision stems from concerns about the costs implications both to financial institutions, which would bear the cost of generating the data, and law enforcement, which would bear the cost of managing it. *See FIN. ACTION TASK FORCE, THIRD MUTUAL EVALUATION REPORT: THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND* 146 (2007).

103. Henry R. Ray, Dir. Admin. Justice Issues, U.S. Gen. Accounting Office, Testimony Before the House Committee on Banking, Finance, and Urban Affairs: Money Laundering: The Use of Bank Secrecy Act Reports by Law Enforcement Could be Increased 1, 8 (1993); U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 9, at 13; *see also* FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEP’T OF THE TREASURY, REPORT TO THE CONGRESS: USE OF CURRENCY TRANSACTION REPORTS 2 (2002).

104. Money Laundering Suppression Act of 1994, Pub. L. No. 103-325, § 402, 108 Stat. 2160 (1994) (codified as amended at 31 U.S.C. § 5313 (2006)).

1994 was a desire to simplify and streamline the CTR filing process and “reduce the number and size of [CTR] reports consistent with effective law enforcement.”¹⁰⁵

Law enforcement agencies blunted that criticism in recent years by using technology to make better use of the bulk CTR data and by providing more user-friendly web-based access to the database that houses CTR and other BSA data.¹⁰⁶ In these larger bulk data projects, analysts have identified a strong link between, terrorist subjects and CTR and other BSA filings.¹⁰⁷ But even if the government is doing a better job of managing and sharing CTR data, that does not address the fact that the number of CTR filings remains around 16,000,000 each fiscal year. The high volume of CTR filings has led to calls in the BSA-regulated community and in Congress for ideas to decrease the administrative burdens associated with CTR requirements.¹⁰⁸

Various proposals have been circulated to reduce the volume of CTR filings. Congress, for example, has entertained the idea of raising the CTR threshold from \$10,000 to \$30,000.¹⁰⁹ Alternatively, the GAO has recommended that regulators liberalize the provisions authorizing financial institutions to exempt certain customers.¹¹⁰ The banking community leans toward a more risk-based approach that affords it greater deference in

105. AM. BANKERS ASS'N, *supra* note 20, at C20 (citing Money Laundering Suppression Act of 1994, H.R. REP. NO. 103-438, at 10 (1994)).

106. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 9, at 13–15 (discussing newly implemented CTR data management and sharing methods).

107. Robert W. Werner, Dir. of Fin. Crimes Enforcement Network, Prepared Remarks Before the American Bankers Association Money Laundering Enforcement Conference 6–7 (Oct. 9, 2006), *available at* http://www.fincen.gov/news_room/speech/pdf/20061009.pdf.

108. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, tit. III, § 366(b), 115 Stat. 335 (urging the Secretary to study the problem of the underutilization of the CTR exemption process); Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, §1001, 120 Stat. 1966 (2006) (requiring the Comptroller General to study several aspects of CTR filings, including their usefulness to law enforcement and the burdens imposed on financial institutions). *See generally* FIN. CRIMES ENFORCEMENT NETWORK, *supra* note 102 (responding to a provision of the USA PATRIOT Act requiring the Treasury to study the system for exempting certain customers from the CTR filing requirements).

109. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 9, at 10.

110. *Id.* at 7–8.

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deciding how to implement a CTR program.¹¹¹ FinCEN embraced the GAO report's recommendations and responded by implementing regulations intended to liberalize the CTR exemption process.¹¹²

At the same time, bankers continue to press government agencies for more information about the value of BSA reporting and have challenged the government to measure the utility of BSA reports, particularly CTRs.¹¹³ The 2007 National Money Laundering Strategy confronts the bankers' concerns by setting a goal for the Treasury Department to evaluate and report law enforcement's use of BSA reporting in their investigations.¹¹⁴ But even with this goal in mind, the law enforcement and regulatory communities have been unable to do much in the way of linking the use of CTR data to specific case results.¹¹⁵ It may never succeed.

The CTR requirement dates to a time before ATMs, stored value products, virtual currency, and the globalization of banking; it dates to a more quaint time when financial transactions were handled across teller windows. In those days, money flowed through financial institutions that had recurring and personal relationships with their customers. Since 1970, there has been a huge increase not just in the volume of financial transactions, but also in their complexity, making it more difficult for law enforcement agencies to lift meaningful information out of such things as CTRs, Form 8300s, and CMIRs.¹¹⁶ CTRs, for example, are not themselves highly useful any longer, except perhaps in certain broad analytic applications in which government tries to identify

111. AM. BANKERS ASS'N, *supra* note 20, at 24.

112. See Press Release, Fin. Crimes Enforcement Network, FinCEN Announces Final Rule on Currency Transaction Exemptions (Dec. 4, 2008), http://www.fincen.gov/news_room/nr/pdf/20081204.pdf.

113. AM. BANKERS ASS'N, *supra* note 20, at 21–22 (setting forth banking community's recommendations for providing greater feedback on how BSA data is used).

114. See U.S. DEP'T OF THE TREASURY ET AL., *supra* note 9, at 13.

115. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 9, at 24 (“Linking law enforcement's use of CTRs to specific case outcomes measures is difficult because agencies do not track their use of CTRs, which are typically only one of many sources of information used to support investigations.”).

116. See *generally* MOISES NAIM, *ILLICIT: HOW SMUGGLERS, TRAFFICKERS, AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY* 134–36 (2005) (arguing that the increase in the volume and complexity of financial transactions over the past fifteen years has made it difficult for law enforcement agencies to track the movement of illicit funds).

financial crime trends. One value of CTRs is that they provide personal information such as a current address or telephone number. In the absence of a national identification system in the United States, CTRs may provide personal data about a subject that would otherwise be unavailable to an investigator. If today, these reporting requirements were subject to a cost-benefit analysis that measured their usefulness in detecting crime against the regulatory burden they impose, the reporting requirements might endure, but only in a diminished form.¹¹⁷

A new rationale for reporting and recordkeeping requirements is emerging in the fine print of recent government reports. Increased public awareness of the BSA has effectively deterred large currency transactions in, and cross-border movements of, criminally-derived funds. Curtailing the flow of illicit funds is itself a worthy policy objective, and is one that underlies the money laundering statutes, particularly 18 U.S.C. § 1957.¹¹⁸ Yet only recently has the government begun to emphasize a deterrence rationale for the BSA reporting and recordkeeping requirements. When answering recent GAO questions about the continued usefulness of CTRs, law enforcement agencies

117. One bell weather of judicial reaction to reporting requirements—or at least the CMIR requirement—was the Supreme Court's decision in *United States v. Bajakajian*. *United States v. Bajakajian*, 524 U.S. 321 (1998). There, the Court was dismissive of the governmental interest at stake when a traveler fails to file a CMIR:

The harm that respondent caused was also minimal. Failure to report his currency affected only one party, the Government, and in a relatively minor way. There was no fraud on the United States, and respondent caused no loss to the public fisc. Had his crime gone undetected, the Government would have been deprived only of the information that \$357,144 had left the country.

Id. at 339. On the other hand, enforcement of the CMIR reporting requirement has led to the discovery of significant cross-border movements of currency. If it was not for routine CMIR enforcement at the points of entry, movements of currency such as these would be difficult to detect.

118. *See United States v. Castellini*, 392 F.3d 35, 49 (1st Cir. 2004); *United States v. Iacoboni*, 363 F.3d 1, 7 (1st Cir. 2004). Indeed, a key anti-money laundering criminal statute, 18 U.S.C. § 1957, rests primarily on the objective of deterring crime proceeds from entering the U.S. financial system and thereby rendering the funds worthless. *See United States v. Rutgard*, 116 F.3d 1270, 1291 (9th Cir. 1997) (stating that 18 U.S.C. § 1957 is designed to freeze criminal proceeds out of the banking system). There is a logical connection between the rationale for § 1957, which applies to monetary transactions greater than \$10,000 and the CTR, Form 8300, and CMIR reporting requirements, each of which utilize the same dollar threshold.

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defended the CTR requirement on the traditional ground that CTRs help detect criminal activity. But the GAO only paused on that justification and was quick to shift the discussion to a new rationale:

Law enforcement officials noted that CTR requirements also aid their efforts by making it more difficult for criminals to get their illicit proceeds into the financial system and forcing them to act in ways that increase chances of detection—such as smuggling cash or “structuring” their cash transactions to avoid CTRs, which often prompts depository institutions to file a Suspicious Activity Report.¹¹⁹

This deterrence rationale has also begun to find its way into the reports of financial regulators. Today, for example, when FinCEN describes the rationale for the CTR requirement, it is just as likely to speak in terms of crime deterrence as it is to speak in the traditional terms of crime detection.¹²⁰ Although the CTR, CMIR, and Form 8300 reporting requirements address different kinds of activities, they work in tandem; each requires reporting of currency and/or monetary instrument transfers greater than \$10,000. From the perspective of a money launderer, tax evader, or terrorist financier, the requirements form an interlocking barrier to large currency transactions and cross-border movements in tainted funds.¹²¹

What has been described thus far is an emerging rationale for the BSA reporting and recordkeeping requirements. No legislative finding supports it, and it has not been publicly debated.¹²² Under this fledgling rationale,

119. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 9, at 5.

120. FIN. CRIMES ENFORCEMENT NETWORK, *supra* note 8, at 4 (“Currency transaction reporting requirements are a key impediment to criminal attempts to legitimize the proceeds of crime.”); *see also* James H. Freis, Dir., Fin. Crimes Enforcement Network, Prepared Remarks at the ABA/ABA Money Laundering Enforcement Conference 12 (Oct. 22, 2007), http://www.fincen.gov/news_room/speech/pdf/20071022.pdf (“The existence of BSA regulations has a deterrent effect on those would abuse the financial system. The certainty of a CTR filing and the mere possibility of a SAR filing force criminals to behave in risky ways that expose them to scrutiny and capture.”).

121. ABRAMS & BEALE, *supra* note 69, at 436 (“The currency reporting laws have been largely successful in preventing drug traffickers and other money launderers from placing sums of illegally generated cash directly into the U.S. banking system.”).

122. Some, for example, might reasonably question whether as a matter of

the objective of detection carries forward, but with a twist. For instance, CTR requirements deter the cash proceeds of crime from entering the U.S. financial system, driving criminals to act in ways that increase the chance of detection.¹²³ A criminal who structures currency transactions with a bank to evade a CTR risks detection at multiple levels. The person runs the risk that the structured transactions might be captured in an aggregation report and generate a “multiple transaction” CTR—a red flag to investigators of possible structuring activity.¹²⁴ Worse, from the perspective of the would-be-structurer, is the risk that the financial institution or casino will detect the structuring behavior and file a SAR.¹²⁵ The proactive review of SARs by SAR review teams and financial crime task forces is one of the chief means used by law enforcement to detect this kind of high risk behavior.

A main value of the BSA’s reporting and recordkeeping requirements lies in the fact that they drive money launderers, terrorists, and other criminals to evade them and, in doing so, to engage in evasive behavior that increases their risk of detection and prosecution, even if only for a regulatory crime such as structuring.¹²⁶ If the BSA’s reporting and record keeping requirements now rest more on the rationale that they force money launderers to act in ways that increase their risk of detection, and less on the finding that the reports and records are in themselves of high value to law enforcement, then we can expect investigation and prosecution emphasis to fall on the ways that criminals evade

policy it makes sense to drive money laundering and terrorists further underground by erecting obstacles to their use of traditional financial services.

123. James H. Freis, Jr. Director, Fin. Crimes Enforcement Network, The Cambridge International Symposium on Economic Crime 2 (Aug. 31, 2009), available at http://www.fincen.gov/news_room/speech/pdf/20090831.pdf (“The near certainty of a Currency Transaction Report (CTR) filing for cash transactions over \$10,000, . . . deters criminals and forces them to behave in risky ways that expose them to scrutiny and capture.”).

124. An astonishingly high percentage—sixty-five percent—of CTRs filed in 2006 involved multiple currency transaction in a single day that aggregate to more than \$10,000. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 9, at 32.

125. See 31 U.S.C. § 5318(g) (2006); see also 31 C.F.R. § 103.18 (2008) (imposing SAR filing requirements on banks); 31 C.F.R. § 103.20 (imposing SAR filing requirements on most money services businesses); 31 C.F.R. § 103.21 (2008) (imposing SAR filing requirements on casinos).

126. See *supra* note 120.

those requirements.¹²⁷ Chief among those ways is the activity of structuring.¹²⁸

If we discard the old rationale for the BSA, and accept the new one, a couple of things become clear. First, the government is less concerned with detecting large money flows through the review of such things as CTRs, and more concerned with detecting evasions of the CTR requirement. This new reality explains the law enforcement community's stubborn resistance to efforts to raise BSA reporting and record keeping thresholds. From the government's perspective, reporting thresholds should remain relatively low, at around \$10,000, so that they create a firm and interlocking barrier to the entry of crime proceeds into the financial system. Second, this shift in rationale puts more pressure on the government to utilize anti-structuring, bulk cash smuggling, and related criminal laws, to punish those seeking to evade these barriers. Unless it does so, the justification for the new rationale collapses. Finally, the new rationale for the BSA's reporting and recordkeeping requirements shifts the debate over currency reporting onto a different, firmer ground. The government may not be able to quantify the role a particular CTR played in a law enforcement investigation, but it can quantify those instances where a criminal investigation arose from a SAR and resulted in a structuring conviction, the forfeiture of assets, and/or a civil enforcement penalty.¹²⁹ It remains to be seen whether the government will respond by making more robust use of SARs to pursue crimes such as structuring.

127. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 9, at 23 (explaining that there are three primary ways criminals evade the CTR filing requirement: structuring, bulk cash smuggling, and trade-based money laundering).

128. Ironically, in undertaking to evade a CTR, persons often engage in evasive conduct that triggers a different and more serious report, a suspicious activity report. *See id.* at 5.

129. FinCEN periodically publishes The SAR Activity Review—Trends, Tips and Issues. *See* FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEPT. OF THE TREASURY, THE SAR ACTIVITY REVIEW: TRENDS TIPS & ISSUES (2008), http://www.fincen.gov/news_room/rp/files/sar_tti_13.pdf. It provides some feedback to financial institutions about how SARs are being used in criminal investigations.

III. THE BACKGROUND AND DEVELOPMENT OF THE ANTI-STRUCTURING LAW

A. *Events Leading to the Enactment of § 5324*

For many years after the passage of the BSA, there was no urgent need for an anti-structuring law because financial institutions largely ignored the BSA. From April 1972 until the mid-1980s, financial regulators did not emphasize the need for financial institutions to comply with, and, as a consequence, banks did not widely adhere to the CTR requirement.¹³⁰ In the absence of regulatory enforcement, particularly enforcement of the CTR filing requirement, individuals conducting currency transactions with financial institutions had little reason to engage in structuring-type behavior.¹³¹

This all changed in 1985. That February, the Bank of Boston pleaded guilty to and was fined \$500,000 for violations of the Bank Secrecy Act.¹³² In the course of that criminal proceeding, the public learned that that Bank of Boston had exempted a known criminal organization from the CTR filing requirements.¹³³ That event led to Congressional hearings in April 1985 that awakened the banking community and their regulators to the need to enforce BSA requirements.¹³⁴ The

130. "Cash reports continued to be filed in the early 1980s, but the quantities were not significant. It was not until several major institutions were fined for failing to report cash transactions that a dramatic upsurge occurred in filings." Byrne, *supra* note 6, at 804; *see also* United States v. Sans, 731 F.2d 1521, 1530 (11th Cir. 1984) (discussing expert testimony received at trial to the effect that the banking industry had uniformly ignored the reporting requirements in the mid-1970s); Villa, *supra* note 6, at 490 (emphasizing that blame for non-compliance with the BSA rested with regulators who did not prioritize it).

131. By contrast, the government aggressively enforced the CMIR requirement during this time period. Until May 31, 1985, the CMIR reporting threshold was \$5000.

132. Byrne, *supra* note 6, at 804 n.18.

133. *Id.*

134. *The First National Bank of Boston: Hearings Before the Subcommittee on Financial Institutions Supervision, Regulation and Insurance of the Committee on Banking Finance and Urban Affairs*, 99th Cong. 99-118 (1985).

result was a sharp uptick in CTR filings.¹³⁵ The increased attention to the CTR requirement invited structuring-type activity by some bank customers.

Initially, nothing in the BSA specifically forbade structuring.¹³⁶ In some early structuring prosecutions, the government argued that the bank customer was a “financial institution” with a duty to file a CTR.¹³⁷ Alternatively, the government charged structuring as a scheme to defraud the United States of reports to which it was entitled.¹³⁸ But the most prevalent prosecution theory during this era rested on the premise that a person who engaged in structuring aided and abetted a financial institution’s failure to make a report required by 31 U.S.C. §§ 5321 and 5322.¹³⁹

This last prosecution theory strained the limits of aider and abettor liability, the merits of which split circuit courts of appeal.¹⁴⁰ For example, in *United States v. Tobon-Builes*, the

135. The following table shows the increase in CTR filings in the period of time around the enforcement actions of the Mid-1980s:

Year	CTR Filings
1983	513,000
1984	716,000
1985	1,859,000
1986	3,572,000
1987	4,952,000

Byrne, *supra* note 6, at 804–05, n.18.

136. See COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CONGRESS: BANK SECRECY ACT REPORTING REQUIREMENTS HAVE NOT YET MET EXPECTATIONS, SUGGESTING NEED FOR AMENDMENT 23–25 (1981) (noting that the regulations implementing the CTR requirement did not “specifically prohibit dividing a large transactions into several smaller transactions to circumvent the reporting requirement”).

137. See, e.g., *United States v. Schmidt*, 947 F.2d 362, 370–71 (9th Cir. 1991); *United States v. Rigdon*, 874 F.2d 774, 777 (11th Cir. 1989); *United States v. Mouzin*, 785 F.2d 682, 689–90 (9th Cir. 1986).

138. See *United States v. Winfield*, 997 F.2d 1076, 1082–83 (4th Cir. 1993); *United States v. Nersesian*, 824 F.2d 1294, 1309–10 (2d Cir. 1987).

139. *United States v. Lafaurie*, 833 F.2d 1468, 1471 (11th Cir. 1987) (affirming conviction under 18 U.S.C. §§ 2, 1001); *United States v. Heyman*, 794 F.2d 788, 790–93 (2d Cir. 1986) (affirming conviction); *United States v. Anzalone*, 766 F.2d 676, 682–83 (1st Cir. 1985) (reversing convictions under 18 U.S.C. §§ 2, 1001); *United States v. Tobon-Builes*, 706 F.2d 1092, 1096–1101 (11th Cir. 1983) (affirming conviction under 18 U.S.C. §§ 2, 1001).

Due process requires “that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

140. The individual as “financial institution” theory was rejected by the

Eleventh Circuit Court of Appeals embraced the use of 18 U.S.C. §§ 2 and 1001 as a viable basis for prosecuting a defendant who causes or attempts to cause financial institutions to fail to file CTRs on cash purchases of cashier's checks.¹⁴¹ On the other hand, other courts—most notably the First Circuit Court of Appeals in *United States v. Anzalone*—held that the existing statutes, when stretched to meet the exigencies of a structuring prosecution, failed to give fair notice of what the law forbids.¹⁴² The *Anzalone* line of cases had two branches; one branch rejected the imposition of criminal liability for any type of structuring behavior; and the other limited the government to charging only those instances when the transactor's conduct, in fact, triggered a bank's obligation to file a CTR, so-called "imperfect" structuring.¹⁴³

Thus, one key issue that divided the *Tobon-Builes* and *Anzalone* lines of cases was the distinction between "imperfect" and "perfect" structuring. Imperfect structuring occurs when a transactor structures currency transactions in an attempt to evade a currency transaction report, but the transactions, when aggregated, nonetheless trigger a financial institution's duty to file a CTR obligation.¹⁴⁴ Perfect

Seventh Circuit in *United States v. Bucey*. *United States v. Bucey*, 876 F.2d 1297, 1303–07 (7th Cir. 1989) (stating that an individual cannot be an "agency, branch or office" of a financial institution, and is therefore not held to the same requirements as a financial institution). The aiding and abetting the concealment of a material fact theory was sharply limited by the First Circuit in *United States v. Anzalone*. 766 F.2d at 682–83 (explaining that theory works only where an individual triggers financial institution's duty to file a CTR by conducting more than \$10,000 in currency transactions at the same financial institution on the same day).

141. *Tobon-Builes*, 706 F.2d at 1100–01; see also *United States v. Massa*, 740 F.2d 629, 645 (8th Cir. 1984); *United States v. Sanchez Vazquez*, 585 F. Supp. 990, 993 (N.D. Ga. 1984); *United States v. Konefal*, 566 F. Supp. 698, 701 (N.D.N.Y. 1983).

142. See *Anzalone*, 766 F.2d at 680–83; *United States v. Denmark*, 779 F.2d 1559, 1562–64 (11th Cir. 1986); *United States v. Varbel*, 780 F.2d 758, 760–63 (9th Cir. 1986).

143. See *Denmark*, 779 F.2d at 1562–64; *United States v. Cure*, 804 F.2d 625, 629 (11th Cir. 1986) (per curiam) ("Liability . . . depends on whether the bank was required to file a CTR, for . . . a bank customer is not liable merely for structuring his cash transactions so as to create transactions in which the filing of a CTR is not required."). A discussion of this split of authority appears in Justice Blackmun's dissenting opinion in *Ratzlaf v. United States*, 510 U.S. 135, 157–60 (1994).

144. In 1987, the Secretary of the Treasury amended the CTR requirement to impose an obligation on financial institutions the duty to aggregate related currency transactions. Amendments to Implementing Regulations Under the

structuring, in contrast, occurs when the transactor structures his/her currency transactions in such a way as to never trigger the bank's CTR filing obligation. The transactor might, for example, split transactions between different financial institutions such that no one financial institution handles transactions involving more than \$10,000 in a single business day. *Anzalone* was noteworthy because it rejected the government's attempt to prosecute so-called "perfect" structuring using an aider and abettor theory of liability.¹⁴⁵ Under the reasoning of *Anzalone*, the defendant could not be convicted of aiding and abetting the concealment of a material fact if, in fact, the financial institution had no duty to file a CTR on the charged facts.¹⁴⁶

These developments set the stage for legislative action. In the Money Laundering Control Act of 1986, Congress addressed the problem of structuring, and, in particular, addressed the emerging distinction between perfect and imperfect structuring. It did so by enacting an anti-structuring statute, 31 U.S.C. § 5324.¹⁴⁷ The House and

Bank Secrecy Act, 52 Fed. Reg. 11,436 (Apr. 8, 1987) (codified at 31 C.F.R. § 103 (2008)). Under the "aggregation rule," a bank must file a CTR if currency transactions totaling more than \$10,000 are made by a single person, or his/her partners or associates, in a single banking day either in different branches of the same bank or at the same branch of a bank. 31 C.F.R. § 103.22(c) (2008); see also *United States v. Bank of New England, N.A.*, 821 F.2d 844, 850 & n.5 (1st Cir. 1987) (discussing regulation articulating aggregation rule); *United States v. Heyman*, 794 F.2d 788, 789 n.2 (2d Cir. 1986); *United States v. Giancola*, 783 F.2d 1549, 1552 (11th Cir. 1986); Amendments to Implementing Regulations Under the Bank Secrecy Act, 52 Fed. Reg. 11,436 (Apr. 8, 1987) (codified at 31 C.F.R. § 103) (explaining the aggregation rule). Casinos have a similar aggregation requirement. See 31 C.F.R. § 103.22(c)(3) (2008).

145. *Anzalone*, 766 F.2d at 679–83; see also *Denemark*, 779 F.2d at 1561–64 (stating that there was no liability under § 1001 because defendant had no cash transaction over \$10,000 with any one bank).

146. *Anzalone*, 766 F.2d at 683 ("As no such duty existed on behalf of appellant to report to the Secretary either directly or through the financial institution, there can be no concealment in violation of 18 U.S.C. § 1001.").

147. See Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1354(a), 100 Stat. 3207, 3207–22 (1986) (codified as amended at 31 U.S.C. § 5324 (2006)).

While there are few reported cases under this clause of 31 U.S.C. § 5324, it is far from dormant. In 2008, the U.S. Attorney's Office in the Southern District of Florida initiated a significant prosecution in which several defendants, including a check cashing business called "La Bamba," allegedly conspired to cause the filing of materially false CTRs. See Press Release, U.S. Attorney's Office of S. Dist. of Fla., Guilty Verdict Announced Against La Bamba Check Cashing in Connection with \$132,000,000 in Financial Transactions (Jan. 18,

Senate Reports accompanying the Money Laundering Control Act of 1986 suggest that Congress enacted § 5324 because it sought to embrace the *Tobon-Builes* line of cases and reject the *Anzalone* line of cases.¹⁴⁸ To address the problem of “imperfect” structuring, Congress forbade in § 5324(a)(1) the act of causing or attempting to cause the non-filing of a required report—effectively adopting an aider and abetter theory of liability against those transactors who cause or attempt to cause a bank to fail to file a CTR.¹⁴⁹ To address the problem of transactors who cause financial institutions to file reports containing false statements, Congress proscribed in § 5324(a)(2) the causing or attempting to cause the filing of a report that contains material omissions or misstatements of fact.¹⁵⁰ To address the problem of perfect structuring, Congress proscribed in § 5324(a)(3) structuring activity “without regard to whether an individual transaction is, itself, reportable under the Bank Secrecy Act.”¹⁵¹

B. Key Legislative Amendments to § 5324

Since its enactment in 1986, § 5324 has been amended several times. Many of these amendments are technical and non-substantive; but other more substantive amendments merit discussion because they form a basis for understanding current litigation issues in structuring prosecutions. For ease of reference, the text of the current statute is set forth in the appendix to this article.

1. Structuring Statute Expanded to Cover Other Reporting and Recordkeeping Requirements

In its original form, § 5324 reached only evasions of the CTR requirements imposed upon financial institutions.¹⁵² In

2008), <http://www.usdoj.gov/usao/fls/PressReleases/080118-01>. In February 2009, a jury returned a guilty verdict against La Bamba and its owner. *Id.*

148. S. REP. NO. 99-433, at 22 (1986) (“Subsection (h) would codify *Tobon-Builes* and like cases and would negate the effect of *Anzalone*, *Varbel* and *Denemark*.”); H.R. REP. NO. 99-746, at 18–19 (1986) (citing *Tobon-Builes* favorably and explaining that the new provision “would resolve the legal issues raised by the various circuit courts” and “create the offense of structuring a transaction to evade the reporting requirements”).

149. 31 U.S.C. § 5324(a)(1) (2006).

150. *Id.* § 5324(a)(2).

151. See S. REP. NO. 99-433, at 22 (1986); 31 U.S.C. § 5324(a)(3).

152. The text of the original anti-structuring law provided as follows:

Section 5324. 31 USC 5324 Structuring transactions to evade reporting

1992, Congress recodified these offenses as subsections 5324(a)(1)–(3), and added subsection 5324(b) (now recodified as subsection 5324(c)), which makes it a crime to evade CMIR requirements.¹⁵³ Congress made a similar amendment in 2001 when it criminalized structuring to evade Form 8300 reporting requirements.¹⁵⁴ To accommodate the new provision, Congress recodified the CMIR and pushed the penalty provisions back to subsections 5324(c) and 5324(d), respectively.¹⁵⁵

Congress also amended § 5324 to prohibit structuring as a means of evading certain recordkeeping and reporting requirements. In 1992, Congress amended § 5324(a) to make it a crime to structure financial transactions to evade the reporting and recordkeeping requirement relating to the cash purchase of cashier's checks and similar instruments in

requirement prohibited

No person shall for the purpose of evading the reporting requirements of section 5313(a) 31 USC 5313 with respect to such transaction—

- (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
- (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or
- (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

See Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1354(a), 100 Stat. 3207–22 (2986) (internal quotation marks omitted).

153. *See also* United States v. One 1985 Mercedes-Benz, 300D SD, 14 F.3d 465, 467 & n.4 (9th Cir. 1994) (discussing legislative changes); *see also* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, tit. III, § 365(b)(1)(A), 115 Stat. 272, 273 (designating subsections of Section 5324).

154. 31 U.S.C. § 5324(b).

155. *Id.* § 5324(c), (d). The provisions of § 5324(b) are similar to the anti-structuring provisions that remain in Title 26. *See* I.R.C. § 6050I (2006).

As a practical matter, the anti-structuring provisions of I.R.C. § 6050I(f) are now superfluous. To convict a person of a violation of section 6050I(f), the government arguably must prove that the defendant acted willfully. *See* I.R.C. § 6050I(f)(2) (incorporating I.R.C. § 7206 penalty provisions for willfully making a false tax return); *see also* United States v. Rogers, 18 F.3d 265, 267 n.4 (4th Cir. 1994) (finding that conviction under section 7203 requires *Ratzlaf* showing). *But see* United States v. McGuire, 79 F.3d 1396, 1405 (5th Cir. 1996) (stating that the term “willful” in section 7206 must be given same interpretation as Supreme Court gave it in *United States v. Pomponio*, 429 U.S. 10, 11–13 (1976)). As discussed above, the willfulness requirement has been eliminated from structuring prosecutions brought under § 5324, thus prosecutors should prefer the Title 31 means of prosecuting a Form 8300 violation to the Title 26 form.

amounts of \$3000 or greater.¹⁵⁶ In 2001, Congress expanded the reach of § 5324(a) again by prohibiting structuring to evade the recordkeeping requirement relating to wire transfers in amounts of \$3000 and greater.¹⁵⁷

Subsections (b)(1)–(3) and (c)(1)–(3) largely mirror the structuring prohibitions in subsection 5324(a). That is to say, subsection 5324(b) prohibits “imperfect” structuring, material misstatements and omissions,¹⁵⁸ and “perfect” structuring in connection with the Form 8300 requirements imposed upon trades and businesses.¹⁵⁹ The prohibitions of subsection 5324(c) differ slightly. Subsection 5324(c)(1) does not proscribe “imperfect” structuring; it proscribes the failure to file a report for purposes of evading the CMIR.¹⁶⁰ Otherwise, the provisions of subsection 5324(c) mirror those of subsections 5324(a) and (b), and subsection 5324(c)(2) proscribes the filing of a materially false CMIR.

Subsection 5324(c)(3) proscribes structuring to evade a CMIR.¹⁶¹ The prohibitions apply to persons transporting large sums of currency into and out of the United States, including those individuals structuring cash amounts

156. See Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, §§ 1517(a), 1535(a)(1), 106 Stat. 3672 (1992); Money Laundering Suppression Act of 1994, Pub. L. No. 103-325, § 413(a)(2), 108 Stat. 2160 (1994).

157. See 31 U.S.C. § 5324(a) (2006).

158. The provisions of § 5324 dealing with materially false statements and omissions (subsections 5324(a), (b)(2), and (c)(2)) are beyond the scope of this article. They are not structuring provisions. In fact, these offenses are predicated on the filing of the requisite reporting or the maintenance of a requisite record, albeit one containing material false statements or omissions. See INTERNAL REVENUE MANUAL § 9.5.5.3.2.6.

159. The aggregation rule for Form 8300 filers is very broad. It requires Form 8300 filers to aggregate subsequent currency payments within a twelve-month period with respect to a single transaction (or two or more related transactions) when the payments individually or in aggregate exceed \$10,000. See 31 C.F.R. § 103.30(b)(2) (2008). The breadth of this aggregation rule for Form 8300 filers means that most attempts to structure to evade a Form 8300 reporting requirement will be prosecuted as “imperfect” structuring cases under subsection 5324(b)(1).

160. 31 U.S.C. § 5324(c)(1). Subsection 5324 (c)(1) differs from its counterparts in subsections 5324(a) and 5324(b) in that it proscribes the simply failure to report for purpose of evasion; it does not proscribe imperfect structuring.

161. Congress did not need to create a structuring offense (§ 5324(c)(3)) for CMIR violations. Since August 1989, the Treasury Department had defined the phrase “at one time” to impose the reporting requirement even in cases where travelers break down currency among difficult travelers or parcels. See 31 C.F.R. § 103.11(b) (2008).

between different travelers to evade a CMIR filing.¹⁶² While increasing numbers of structuring and civil asset forfeiture prosecutions arise under both § 5324(b) and (c), by far, the most prevalent kinds of structuring prosecutions are those brought under subsections 5324(a)(1) and (3) for evasions of the CTR requirement.¹⁶³

News that Congress expanded § 5324 to include other reporting and recordkeeping requirements beyond simply CTRs has been slow to reach commentators, prosecutors, and the courts. Long after the relevant legislative changes, commentators still ask whether the Supreme Court's decision in *Ratzlaf v. United States* requires proof of a "willful" violation of the Form 8300 reporting requirement without recognizing that, as a practical matter, future Title 26 prosecutions for Form 8300 violations will be rare.¹⁶⁴ Though prosecutors could use either Title 26 or Title 31 to prosecute a Form 8300 violation, most will prefer the Title 31 alternative because it eliminates any issue about the meaning of the term "willful." Moreover, the government continues mistakenly to prosecute CMIR offenses under § 5322. This habit formed in the 1980s and early 1990s when the government prosecuted numerous CMIR offenses under § 5322—the only criminal enforcement statute available for a CMIR violation at the time.¹⁶⁵ However, in 1994, when Congress reacted to the

162. See *Ratzlaf v. United States*, 510 U.S. 135, 139 n.5 (1994) (explaining the 1992 amendments to § 5324).

163. *United States v. Twenty-Three Thousand Ninety Dollars in U.S. Currency*, 377 F. Supp. 2d 1223 (S.D. Fla. 2005), is an example of a forfeiture prosecution premised on a violation of subsection 5324(c)(1) (causing or attempting to cause the failure to complete a CMIR). The case highlights the subtle distinction between structuring to evade a CMIR, and the separate offense of bulk cash smuggling (31 U.S.C. § 5332). Structuring to evade a CMIR entails breaking down monetary instruments into sub-\$10,000 amounts and dividing them between different travelers. *Id.* at 1230–31. Bulk cash smuggling entails concealing the monetary instruments in luggage, merchandise, containers, or on a person. See generally *United States v. Tatoyan*, 474 F.3d 1174, 1179–82 (9th Cir. 2007) (explaining the elements of bulk cash smuggling).

164. See JEROLD H. ISRAEL, ELLEN S. PODGOR, PAUL D. BORMAN & PETER J. HENNING, *WHITE COLLAR CRIME LAW AND PRACTICE* 98 (2d ed. 2003) (asking whether *Ratzlaf* imposes a heightened mens rea element for violations of the Form 8300 requirement codified in I.R.C. § 6050).

165. *United States v. Bajakajian*, 524 U.S. 321 (1998), was a case in which the government correctly charged a CMIR violation under 31 U.S.C. § 5322. The offensive conduct in *Bajakajian* occurred at a time (June 1994) when § 5322 still provided the criminal enforcement mechanism for CMIR violations.

Ratzlaf decision in 1994, it amended § 5322 to exclude from the statute's reach offenses chargeable under § 5324.¹⁶⁶ Because *all* CMIR offenses, i.e., violations of § 5316, are now chargeable under § 5324, it follows that they should no longer be charged under § 5322.¹⁶⁷ Nonetheless, appellate decisions affirming CMIR convictions obtained under § 5322 persist, including at least one decision that engaged in an extended, and probably superfluous, analysis of whether the alleged CMIR violator acted "willfully" within the meaning of § 5322 *Ratzlaf*.¹⁶⁸

2. *Ratzlaf and Its Aftermath*

In the period between the statute's original enactment in 1986, and legislative amendments in September 1994, § 5324 did not include a criminal penalty provision. During this period, the criminal penalties for violations of § 5324 were found first in 31 U.S.C. §§ 1058 and 1059, and later in § 5322.¹⁶⁹ Subsection 5322(a) makes it a crime for a person to "willfully" violate certain provisions of the BSA.¹⁷⁰ Prior to September 1994, § 5322 provided the criminal sanction for violations of § 5324.

166. See *United States v. Pang*, 362 F.3d 1187, 1193 (9th Cir. 2004) ("In response to *Ratzlaf*, Congress excepted violations of § 5324 from the penalty provisions of § 5322, which require willfulness, and added a penalty provision to § 5324 that did not require knowledge that structuring was illegal.")

167. See 31 U.S.C. § 5322(a) (2006) ("A person willfully violating this subchapter or a regulation prescribed or order issued under this subchapter (except section 5315 or 5324 of this title or a regulation prescribed under section 5315 or 5324) . . .").

168. See, e.g., *Tatoyan*, 474 F.3d at 1177–78 (affirming CMIR conviction predicated on a violation of §§ 5316 and 5322 and addressing whether the government had established a "willful" violation under § 5322); *United States v. Ely*, 468 F.3d 399, 401 (6th Cir. 2006) (reciting how the defendant was convicted of three counts including one count of concealing currency in violation of § 5316); cf. *United States v. Jose*, 499 F.3d 105, 107 (1st Cir. 2007) (reciting how the government mistakenly submitted a proposed forfeiture order for a bulk cashing smuggling offense premised on a violation of § 5322 rather than § 5332).

169. The criminal penalty provisions for Bank Secrecy Act violations were originally codified at 31 U.S.C. §§ 1058 and 1059. See *Bank Secrecy Act*, Pub. L. No. 91-508, § 209, 84 Stat. 1121 (1970). In 1982, Congress recodified the provisions at 31 U.S.C. § 5322 without substantive change. See *United States v. So*, 755 F.2d 1350, 1354 (9th Cir. 1985) ("Section 5322(b) is a recodification of 31 U.S.C. § 1059 . . . and was not intended to and did not change the substance of the original section 1059."); see also H.R. REP. NO. 97-651 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 1897.

170. 31 U.S.C. § 5322(a).

In some contexts, courts have construed the term “willfully” to require heightened proof of knowledge; a defendant must know not just the facts that bring his/her conduct within the reach of the statute, but must also know that such conduct is a crime.¹⁷¹ Prior to 1994, defendants engaged in so-called “perfect” or *Anzalone*-type structuring schemes (loosely described as consecutive day structuring as opposed to same day/same bank structuring) began to argue that without a heightened knowledge requirement, a defendant could innocently violate § 5324. The argument had been largely unsuccessful, but nonetheless created a circuit split.¹⁷²

In 1994, the Supreme Court addressed this circuit split when it held in *Ratzlaf* that the term “willfully,” as used in subsection 5322(a), required proof that the “defendant acted with knowledge that his conduct was unlawful.”¹⁷³ *Ratzlaf* can be understood as part of a longer line of recent Supreme Court decisions in which the Court assumes “Congress believes that criminal liability follows moral culpability.”¹⁷⁴ Under this line of cases, if the Court, after construing the statute, is left with the impression that a morally blameless person could violate the statute’s elements, then the Court formulates an additional mental state element “to shield blameless conduct from criminal condemnation.”¹⁷⁵

171. See *Cheek v. United States*, 498 U.S. 192, 201 (1991); *United States v. Bishop*, 412 U.S. 346, 360–61 (1973).

172. Compare *United States v. Scanio*, 900 F.2d 485, 489–92 (2d Cir. 1990) (stating that government was not required to prove that defendant actually knew that structuring of currency transaction was unlawful in order to convict him of willful violation of Section 5324), with *United States v. Aversa*, 984 F.2d 493, 498–99 (1st Cir. 1993), vacated by *Donovan v. United States*, 510 U.S. 1069 (1994) (requiring only a “reckless disregard” of a statute to prove a willful violation).

173. *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994). *Ratzlaf* construed a criminal statute that required proof of a willful violation. *Id.* at 137–38. As such, the decision had no bearing on the government’s ability to use civil forfeiture to enforce Section 5324 because the civil forfeiture statute applicable to structuring violations omits the term “willfully.” *Id.* at 146 n.16. For civil forfeiture actions, the government need only show that the transactor knew of the reporting requirement and intended to evade it. *United States v. Ahmad*, 213 F.3d 805, 809 (4th Cir. 2000); *United States v. One 1991 Chevrolet Corvette Convertible*, 969 F. Supp. 476, 480 (W.D. Tenn. 1997).

174. John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1023 (1999).

175. *Id.*

The majority expressed just such reservations in *Ratzlaf*. What preoccupied the *Ratzlaf* majority was the concern that a person's motive for structuring might be legitimate; a business owner, for example, might structure to reduce the likelihood of a tax audit.¹⁷⁶ Or a person might structure for reasons having nothing to do with a desire to keep his or her financial activities from the government. For example, a person may make small deposits "fearful that the bank's reports would increase the likelihood of burglary, or in an endeavor to keep a former spouse unaware of his wealth."¹⁷⁷

Ratzlaf upset settled case law in every circuit court of appeals that had previously addressed the mental intent element of the structuring statute, except for the First Circuit.¹⁷⁸ The upshot was that it had a dramatic impact not just on the many pending criminal structuring prosecutions that were not yet final for purposes of appeal, but also on finalized convictions.¹⁷⁹ The government's reaction was one of dismay.¹⁸⁰

176. *Ratzlaf*, 510 U.S. at 144.

177. *Id.* at 145.

178. See *United States v. Baydoun*, 984 F.2d 175, 180 (6th Cir. 1993); *United States v. Jackson*, 983 F.2d 757, 767 (7th Cir. 1993); *United States v. Gibbons*, 968 F.2d 639, 643-45 (8th Cir. 1992); *United States v. Shirk*, 981 F.2d 1382, 1389-92 (3d Cir. 1992); *United States v. Rogers*, 962 F.2d 342, 343-45 (4th Cir. 1992); *United States v. Beaumont*, 972 F.2d 92, 93-95 (5th Cir. 1992); *United States v. Brown*, 954 F.2d 1563, 1567-69 (11th Cir. 1992); *United States v. Dashney*, 937 F.2d 532, 537-40 (10th Cir. 1991); *United States v. Scanio*, 900 F.2d 485, 489-92 (2d Cir. 1990); *United States v. Hoyland*, 914 F.2d 1125, 1128-30 (9th Cir. 1990). *Contra* *United States v. Aversa*, 984 F.2d 493 (1st Cir. 1993) (en banc).

179. See, e.g., *United States v. Winn*, 61 F.3d 921 (D.C. Cir. 1995); *United States v. Marshall*, 56 F.3d 1210 (9th Cir. 1995); *United States v. Gray*, 47 F.3d 1359 (4th Cir. 1995); *United States v. Garza*, 42 F.3d 251 (5th Cir. 1994).

180. See U.S. ATTORNEY'S OFFICE, U.S. DEPT' OF JUSTICE, CRIMINAL RESOURCE MANUAL § 2033, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02033.htm ("*Ratzlaf* truly upset the government's criminal prosecutions for structuring currency transactions in order to avoid the CTR reporting requirement. In pending prosecutions involving closed investigations, the agents generally had not obtained evidence, if such evidence existed, that the defendant(s) knew that structuring transactions to avoid the filing of CTRs was illegal. Hence, many pending prosecutions had to be dismissed. Moreover, *Ratzlaf* very clearly applied to all cases not yet final for purposes of appeal (indeed, the Supreme Court vacated and remanded for further proceedings several CTR cases pending on petitions for certiorari at the time that *Ratzlaf* was decided). But to aggravate matters further, *Ratzlaf* was held to apply retroactively and convicted defendants began to flood the courts with habeas corpus and coram nobis petitions.").

Writing for the majority, Justice Ginsberg, in so many words, invited Congress to intervene if it did not like the Court's construction of the statute. "Had Congress wished to dispense with [the willfulness] requirement, it could have furnished the appropriate instruction."¹⁸¹ Congress so wished; within ten months of the ruling, Congress superseded *Ratzlaf*. This legislative reaction—sometimes called the "*Ratzlaf* fix"—had two features. First, Congress amended 31 U.S.C. § 5322 to add a clause exempting violations of § 5324 from that statute's reach. Second, Congress wrote a criminal penalty provision directly into § 5324 that omitted the willfulness requirement.¹⁸² Taken together, these amendments eliminated the basis on which the Supreme Court in *Ratzlaf* had read the statute to require proof that a defendant knew structuring was a crime.¹⁸³

Even though *Ratzlaf* was superseded by statute, the majority and dissenting opinions in that case continue to inform serious discussion about the merits of structuring prosecutions, particularly in cases where the government seeks to use the statute to punish the accused based on circumstantial evidence of knowledge and intent. The legislative response to *Ratzlaf* signals a rejection of the Supreme Court's attempt to ensure that structuring prosecutions target only morally blameworthy conduct—moreover, a rejection of the Court's attempt to resist bureaucratization of a criminal statute. Nonetheless, in cases

181. *Ratzlaf*, 510 U.S. at 146.

182. 31 U.S.C. §§ 5322, 5324 (2006). See *United States v. Morales-Rodriguez*, 467 F.3d 1, 11 (1st Cir. 2006) (discussing *Ratzlaf*); *United States v. Pang*, 362 F.3d 1187, 1193 (9th Cir. 2004) (discussing legislative response to *Ratzlaf*); *United States v. Ahmad*, 213 F.3d 805, 809 (4th Cir. 2000) (explaining the "*Ratzlaf* fix"); *United States v. Griffith*, 84 F.3d 912, 923 n.7 (7th Cir. 1996) (discussing *Ratzlaf*); see also Money Laundering Suppression Act of 1994, Pub. L. No. 103-325, § 411(a), (c)(1), 108 Stat. 2160 (1994) (codified as amended at 31 U.S.C. §§ 5322(a), (b), (d)); H.R. REP. NO. 103-438, at 22 (1994) (stating that after the amendments, the prosecution needs to prove "that there was an intent to evade the reporting requirement," but does not need to also prove "that the defendant knew that structuring was illegal").

183. Some commentators (and even the occasional indictment) treat structuring offenses as though the government must continue to prove that the defendant acted "willfully." JOEL M. ANDROPHY, WHITE COLLAR CRIME § 10:12, 10:15 (2006); see also *Pang*, 362 F.3d at 1193–94 (stating that use of the term "willfully" in an indictment was surplusage in light of *Ratzlaf* fix); *United States v. Manfredi*, 628 F. Supp. 2d 608, 628 (W.D. Pa. 2009). For offenses committed after September 1994, this is no longer the case.

where the government seeks to infer knowledge and intent based upon circumstantial evidence, such as a pattern of high dollar deposits below the CTR threshold, the *Ratzlaf* Court's concern about punishing morally blameless conduct will hover over the prosecution, if not as a question of statutory interpretation then at least in the mind of a trier of fact.

3. *Enhanced Penalties*

As discussed above, the criminal penalty provisions for violations of the BSA were originally codified in 31 U.S.C. §§ 1058 and 1059. Section 1058 proscribed misdemeanor penalties for any person who willfully violates any provision of the BSA.¹⁸⁴ Section 1059, in turn, proscribed felony penalties for certain aggravated violations, including serial misdemeanor violations.¹⁸⁵ In 1982, §§ 1058 and 1059 were recodified as § 5322(a) and (b) respectively without change.¹⁸⁶

In the mid-1980s, Congress abandoned the misdemeanor/felony dichotomy of former law in favor of the felony/aggravated felony dichotomy that exists today. What was formerly punished as a misdemeanor under former § 1058 was, after legislative amendments in 1984, made punishable by a five-year term of imprisonment and a fine of \$250,000.¹⁸⁷ Similarly, what was once punishable by a term of imprisonment of five years and a fine of \$500,000 under § 1059 was, after legislative amendments in 1986, made punishable by a term of imprisonment of ten years and a

184. Section 209 of the Bank Secrecy Act, 31 U.S.C. § 1058, read as follows: "Whoever willfully violates any provision of this chapter or any regulation under this chapter shall be fined not more than \$1000, or imprisoned not more than one year, or both."

185. Section 210 of the Bank Secrecy Act, 31 U.S.C. § 1059, read as follows:

Whoever willfully violates any provision of this chapter where the violation is—

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding \$100,000 in any twelve-month period,

shall be fined not more than \$500,000 or imprisoned not more than five years, or both.

186. 31 U.S.C. § 5322.

187. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 901(b), 98 Stat. 2135 (1984) (striking out misdemeanor penalty provisions and imposing five year term of imprisonment and \$250,000 fine); *see also* *United States v. Bank of New England, N.A.*, 821 F.2d 844, 853 n.6 (1st Cir. 1987).

\$500,000 fine.¹⁸⁸ When, in response to *Ratzlaf*, Congress amended § 5324 to include a separate penalty provision for structuring offenses, it imported into § 5324(d) the same felony/aggravated felony dichotomy that appears in subsections 5322(a) and (b).¹⁸⁹

As will be discussed in Part VI, the Sentencing Guidelines incorporate the BSA's aggravated penalty provisions into the section that governs structuring offenses, United States Sentencing Guideline (USSG) section 2S1.3.¹⁹⁰ But section 2S1.3 invites extraordinarily punitive sentences for aggravated structuring violations, particularly when compared with the recently-revised advisory guidelines for money laundering offenses.¹⁹¹ As discussed below, the advisory guideline for structuring offenses is so punitive that an individual guilty of nothing more than structuring transactions involving a legitimately acquired sum of money may receive a sentence greater than that suggested for more morally culpable crimes such as mail or wire fraud involving a comparable sum of money.

IV. ELEMENTS AND ISSUES OF PROOF

The crime of structuring to evade a CTR under subsection 5324(a)(3), termed “perfect” structuring, occurs when an individual structures cash transactions in such a way that the transactions, taken together or apart, never implicate the financial institution's duty to file a report or keep a record. Perfect structuring typically involves one of two fact patterns:

Fact Pattern No. 1:

The transactor splits currency transactions between two different financial institutions on a single business day such that the aggregate of the two currency transactions exceeds a reporting threshold, but no single transaction

188. Narcotics Penalties and Enforcement Act of 1986, Pub. L. No. 99-570, § 1357(g), 100 Stat. 3207–26 (1986) (increasing the penalty in § 5322(b) from five years to ten years); *see also Bank of New England, N.A.*, 821 F.2d at 853 n.6.

189. *See* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2160, 2253 (1994).

190. U.S. SENTENCING GUIDELINES MANUAL § 2B1.3(b)(2) (November 2008) (providing for a two-level enhancement for Title 31 violations involving a pattern of unlawful activity involving more than \$100,000 in a twelve-month period).

191. *Id.* § 2B1.1.

does so. For example, this would occur when a conductor deposits \$9900 in currency into a branch of the Bank of America, N.A. and, on the same business day, deposits \$9900 into a branch of Wells Fargo Bank, N.A. This is an example of “perfect” structuring because while the total of the deposits exceeds \$10,000, the total amount deposited into each financial institution on a single banking day is under \$10,000. Thus neither Bank of America, N.A. nor Wells Fargo, N.A. has a duty to file a CTR.¹⁹²

Fact Pattern No. 2:

The transactor has a cash hoard of \$19,000.00, which the conductor wishes to deposit into her business bank account. On Monday, the conductor deposits \$9500.00 in currency into the business bank account. The depositor returns to the same financial institution on Tuesday and deposits an additional \$9500.00 into the same business account. Again, the bank did not have a duty to file a CTR because an amount greater than \$10,000 in currency was never deposited on the same day.

Perfect structuring requires proof of four elements: (1) the defendant knowingly structured a currency transaction; (2) the transactions involved one or more domestic financial institutions; (3) the defendant knew of the domestic financial institution’s legal obligation to report or keep a record of transactions above \$10,000, or \$3000 for recordkeeping offenses; and (4) the purpose of the structured transaction was to evade that reporting or recordkeeping requirement.¹⁹³

192. See *United States v. Phipps*, 81 F.3d 1056, 1061 (11th Cir. 1996) (explaining the distinction between perfect and imperfect structuring).

193. See U.S. CT. OF APPEALS FOR THE TENTH CIR., CRIMINAL PATTERN JURY INSTRUCTIONS § 2.96 (2005); JUDICIAL COUNCIL OF THE ELEVENTH CIR., PATTERN JURY INSTRUCTIONS: CRIMINAL CASES § 98 (2003); DIST. JUDGES ASS’N OF THE FIFTH CIR., PATTERN JURY INSTRUCTIONS: CRIMINAL CASES § 2.99 (2001); see also *United States v. Chaudhry*, No. C 03-40210 SBA, 2008 WL 2128197, at *2 (N.D. Cal. May 20, 2008) (setting forth elements); see also *United States v. Trading Post of Pasco, Inc.*, No. 08-46939, 2009 WL 3287881 (9th Cir. October 13, 2009) (unpublished) (describing three elements of structuring offense); *United States v. Manfredi*, 628 F. Supp. 2d 608, 616 n.2 (W.D. Pa. 2009) (same).

Where the government seeks the enhanced penalties provided in subsection 5324(d)(2), it must prove a fifth element: that the defendant violated this law while violating another law of the United States, as part of a pattern of illegal activity involving more than \$100,000 in a twelve-month period. 31 U.S.C. § 5324(d)(2) (2006). If the government seeks such enhanced penalties, the defendant must have a jury trial. See *Apprendi v. New Jersey*, 530 U.S. 466

“Imperfect” structuring, as defined under subsection 5324(a)(1), is similar. “Imperfect” structuring occurs when a transactor attempts to defeat a financial institution’s reporting or recordkeeping requirement in a transaction or series of transactions that nonetheless implicate that duty.¹⁹⁴ This would occur where a customer makes multiple cash deposits into the same or different bank accounts at the *same* bank on the same banking day such that the total of the deposits aggregates to more than \$10,000. This conduct should be charged as a violation of subsection 5324(a)(1)—causing or attempting to cause a financial institution to fail to file a CTR.¹⁹⁵ Rather than require proof that the purpose of the structured transaction was to evade the reporting or recordkeeping requirement, a § 5324(a)(1) offense requires proof that the defendant purposefully caused or attempted to cause a domestic financial institution to fail to file a report [or keep a record] required by law. Likewise, the elements of the subsection 5324(b)(1)(3) and 5324(c)(3) offenses track those set forth above.

A. *The First Element—Structuring*

1. *Definition of Structuring*

The term “structuring” is not defined in § 5324. Treasury regulations define the term broadly. Under the regulations that implement the BSA, structuring occurs when a person “conducts or attempts to conduct one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days, in any manner, for the purpose of evading the reporting requirements.”¹⁹⁶ Most commonly, structuring entails “breaking down . . . a single

(2000).

194. It has been said that the provision proscribing imperfect structuring—now codified as subsection 5324(a)(1)—“is obsolete today” and a historical “anomaly” because it refers to a set of conditions that no longer exist after the implementation of regulations require banks to aggregate related cash transactions conducted in a single banking day. *See* Welling, *supra* note 6, at 305. This is inaccurate. Despite regulations imposing the aggregation requirement, a transactor may still “cause or *attempt to cause*” a financial institution to fail to file a CTR (in other words cause or attempt to cause the bank to fail in its duty to aggregate). *See Phipps*, 81 F.3d at 1059–62 (explaining how a subsection 5324(a)(1) violation occurs).

195. *See generally Phipps*, 81 F.3d 1056.

196. 31 C.F.R. § 103.11(gg) (2008).

sum of currency exceeding \$10,000 into smaller sums” amounting to \$10,000 or less for the purpose of evading the reporting requirements under subsection 5313(a).¹⁹⁷ Though the regulation defining structuring is not essential to the enforcement of § 5324, it has nonetheless been relied upon by courts in defining the reach of § 5324.¹⁹⁸

This regulatory definition broadly covers two different kinds of transactions that the anti-structuring laws aim to prevent (1) those in which a conductor causes or attempts to cause a bank to fail to file a report in transactions that nonetheless implicate a financial institution’s duty to file a currency transaction report, termed “imperfect structuring” and (2) those in which a conductor conducts currency transactions in such a manner as to evade a financial institution’s duty to file a currency transaction report, termed “perfect structuring”.¹⁹⁹ The former violates subsection 5324(a)(1), while the latter violates subsection 5324(a)(3).

The key to understanding the difference between imperfect and perfect structuring is the aggregation rule. For purposes of CTR filings, bank and nonbank financial institutions have a duty to aggregate multiple cash transactions made in a single business day on behalf of the same person, even if made at different branches, and even if made into or out of different accounts of the same person.²⁰⁰ To fulfill their duty to aggregate, larger banks run sophisticated computer programs at the end of each banking day in an attempt to catch currency transactions subject to the aggregation rule and file a CTR where appropriate. These computer-generated CTRs can sometimes be identified from a review of the CTR filing itself. Near the top of the CTR form there appears a box for the financial institution to indicate “multiple transactions.”²⁰¹ When the aggregate amount of such currency transactions exceeds \$10,000.00 in a single banking day, banks must file a CTR.

197. *Id.*

198. *See* United States v. MacPherson, 424 F.3d 183, 188 (2d Cir. 2005); United States v. Cisneros, 169 F.3d 763, 771 (D.C. Cir. 1999) (construing regulatory definition of structuring). Section 5324, unlike § 5313, is self-executing and requires no regulatory implementation. *See* United States v. Paul, 23 F.3d 365, 367 (11th Cir. 1994).

199. United States v. Vasquez, 53 F.3d 1216, 1218 (11th Cir.1995).

200. *See* 31 C.F.R. § 103.22(c) (2008).

201. FinCEN Form 104, *supra* note 24.

2. A Currency Transaction

The overwhelming majority of structuring prosecutions involve structuring to evade the CTR reporting requirements. At the risk of stating the obvious, to be reportable under the CTR requirement, the transaction must involve currency—that is to say, either “cash in” or “cash out.”²⁰² Financial institutions and casinos have no obligation to file CTRs on transactions involving negotiable instruments, such as personal checks, cashier’s checks, or bank drafts, unless those instruments are tendered or received in exchange for cash in the transaction.²⁰³ Consequently, it is legally impossible to commit a structuring violation under either subsection 5324(a)(1) or subsection 5324(a)(3) if the transaction involves only a personal or cashier’s check, even if the instruments are made payable in amounts at or below the \$10,000 threshold.

Most, but not all, transactions subject to CTR requirements involve cash deposit transactions. However,

202. See 31 C.F.R. § 103.22 (discussing the CTR requirement); *id.* § 103.30 (discussing the Form 8300 requirement). The term “currency” refers to:

[C]oin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issuance. Currency includes U.S. silver certificates, U.S. notes and Federal Reserve notes. Currency also includes official foreign bank notes that are customarily used and accepted as a medium of exchange in a foreign country.

Id. § 103.11(h).

203. A recent decision in *United States v. \$1,399,313.74 in U.S. Currency (Currency I)*, 591 F. Supp. 2d 365 (S.D.N.Y. 2008), appears to confuse the distinction between currency and monetary instruments. There, the government sought to forfeit funds under Section 5317(c) of Title 31, United States Code, based on violations of 31 U.S.C. §§ 5313 and 5324(a) (structuring to evade a CTR). *Id.* at 373–74. However, the instruments structured in the transactions were checks, not currency. *Id.* at 375 (“It appeared that each check was for a sum less than ten thousand dollars.”). The district court engaged in an extended analysis of whether the checks were monetary instruments, apparently conflating two different violations: structuring currency to evade a CTR in violation of subsection 5324(a) and structuring “monetary instruments” to evade a CMIR in violation of subsection 5324(c). See *id.* at 373–76. In a second opinion in the same case, the court seemed to remain confused by the distinction. *United States v. \$1,399,313.74 in U.S. Currency (Currency II)*, 592 F. Supp. 2d 495 (S.D.N.Y. 2008) (“The government has not pleaded the existence of unreported cash deposits totaling over \$10,000 in violation of the Bank Secrecy Act. Because every alleged deposit was made by money order, wire transfer or check, each indicating the payer and the payee, the deposits were not ‘monetary instruments’ subject to the reporting laws.”) (emphasis omitted).

the scope of the reporting requirement broadly requires domestic financial institutions to report any transactions involving more than \$10,000 in cash.²⁰⁴ Thus, cash withdrawals are subject to currency reporting, as are transactions involving a customer who exchanges a check for cash.²⁰⁵

The rules pertaining to the Form 8300 requirement define the term “currency” more broadly. The term “currency” refers to cash, cashier’s checks, bank drafts, traveler’s checks, and money orders having a face value greater than \$10,000.²⁰⁶ Similarly, the CMIR requirement applies to “monetary instruments,” a term defined to include currency, traveler’s checks, and certain negotiable instruments.²⁰⁷ Thus, a person who structures travelers checks—say, by dividing them between different travelers with no one traveler holding more than \$10,000 in such instruments—violates subsection 5324(c)(3), even though the same conduct would not be a violation of any provision of subsection 5324(a) if conducted through a financial institution, because it does not involve currency.

B. The Second Element—Involving a Domestic Financial Institution

In a structuring prosecution under subsection 5324(a)(1) or (a)(3), the government must prove that the transaction involved a domestic financial institution. This element of the

204. 31 U.S.C. § 5313(a) (2006); 31 C.F.R. § 103.22 (“Each financial institution other than a casino shall file a report of each deposit, withdrawal, exchange of currency, or other payment or transfer, by, through or to such financial institution which involves a transaction in currency of more than \$10,000”); *United States v. Hurley*, 63 F.3d 1, 12 (1st Cir. 1995).

205. *United States v. Morales-Rodriguez*, 467 F.3d 1, 11–12 (1st Cir. 2006).

206. *See* 31 C.F.R. § 103.30(c)(1) (2008).

207. *See id.* § 103.23 (setting forth CMIR requirement); *id.* § 103.11(u) (defining the term “monetary instruments”); *see also* *United States v. Buendia in the Amount of \$21,128.00*, 835 F.2d 1141, 1142 n.3 (5th Cir. 1988) (reciting the fact that a customs agent returned non-negotiable instruments to a traveler because they were not subject to CMIR reporting); *United States v. Ali*, 561 F. Supp. 2d 269, 274–76 (E.D.N.Y. 2008) (discussing the definition of monetary instrument for purposes of CMIR requirement); Courtney J. Linn, *Regulating the Cross-Border Movement of Prepaid Cards*, 11 J. MONEY LAUNDERING CONTROL 146 (2008) (discussing the CMIR regulatory definition of monetary instruments and advocating that the definition be expanded to include certain prepaid cards).

offense serves two purposes. First, it serves as a jurisdictional element. In much the same way that certain bank fraud statutes require proof that the affected entity was a “financial institution,” this element requires comparable proof to establish federal jurisdiction over the offense.²⁰⁸

Second, the element exists to ensure that the financial institution is one that has a BSA duty to report or record the transaction information that its customer sought to evade by structuring. Under the CTR regulations, only “financial institutions” have an obligation to file a CTR, and only casinos have a duty to file a CTRC, the functional equivalent of a CTR.²⁰⁹ The term “financial institution” refers to each agent, agency, branch, or office within the United States of any person doing business, whether or not on a regular basis or as an organized business concern, in one or more of the following capacities: (1) a bank, (2) a broker or dealer in securities, (3) a money services business, (4) a telegraph company, (5) a person subject to supervision under any state or federal regulatory bank supervisory authority, (6) a futures commodities merchant, or (7) an introducing broker in commodities.²¹⁰ The term “casino,” in turn, generally refers to a casino or card club that is duly licensed or authorized to do business as such in the United States and has gross gaming revenue in excess of one million dollars.²¹¹

C. *The Third and Fourth Elements—Knowledge and Intent*

The *Ratzlaf* fix eliminated the “super” knowledge requirement that the Supreme Court had read into the term “willfully,” as that term is used in § 5322. In other words, it eliminated the requirement that the government prove the defendant knew his or her conduct was unlawful.²¹²

208. See *United States v. Thomas*, 176 F. App'x 626 (5th Cir. 2006) (stating that it is sufficient that expert witness testified that bank met definition of “financial institution” subject to CTR requirement; the government does not have to also prove that bank was FDIC insured).

209. 31 C.F.R. § 103.22(a)(1)–(2) (2008) (dealing with financial institutions and casinos).

210. *Id.* § 103.11(n)(1)–(4), (7)–(9).

211. *Id.* § 103.11(n)(5); see also *id.* § 103.11(n)(5)(iii) (explaining that the term “casino” as used in the regulations includes a reference to “card club” unless otherwise specified).

212. See *United States v. Pang*, 362 F.3d 1187, 1193–94 (9th Cir. 2004); *Blakely v. United States*, 276 F.3d 853, 875 n.10 (6th Cir. 2002); *United States v. Threadgill*, 172 F.3d 357, 371 n.10 (5th Cir. 1999).

However, even after the *Ratzlaf* fix, the government must prove mental state elements; it must prove that the defendant knew of the reporting or recordkeeping requirement.²¹³ And it must prove the defendant acted for the purpose of evading that reporting or recordkeeping requirement.²¹⁴ There are two methods of establishing these mental state elements. First, the government may establish them through direct evidence, such as the defendant's own admissions that he knew of the reporting requirements and broke down cash transactions to evade them. Second, the government may put forward circumstantial evidence from which a jury may find the "requisite knowledge on the defendant's part by drawing reasonable inferences from the evidence of defendant's conduct."²¹⁵ These methods of proof are discussed in the subsections that follow.

1. Direct Evidence

a. Admissions

In a surprising number of instances, subjects in structuring investigations readily admit to law enforcement agents or other witnesses that they conducted financial transactions with the intent to evade the CTR requirement.²¹⁶ Often these admissions are accompanied by explanations for the structuring behavior. Two explanations are typical: "I structured for the sake of convenience" (e.g., "I sought to avoid the delay caused by completing the CTR form") or "I

213. See, e.g., *United States v. Bowman*, 235 F.3d 1113, 1117–19 (8th Cir. 2000) (reversing conviction under structuring prong of subsection 1956(a)(1)(B)(ii) because the stipulated facts did not address defendant's knowledge with respect to any federal transaction reporting requirement). *But cf.* *United States v. Manfredi*, 628 F. Supp. 2d 608, 626 (W.D. Pa. 2009) (stating that a structuring indictment is sufficient notwithstanding the fact that it omits knowledge element).

214. See *United States v. Van Allen*, 524 F.3d 814, 819 (7th Cir. 2008) ("In order to sustain a conviction under 31 U.S.C. § 5324, we have held that the government must prove 'only that a defendant knowledge of the reporting requirements and acted to avoid them.'" (citations omitted); *Regalado Cuellar v. United States*, 128 S. Ct. 1994, 1999 (2008); *United States v. Morales-Rodriguez*, 467 F.3d 1, 11 (1st Cir. 2006); *United States v. MacPherson*, 424 F.3d 183, 189 (2d Cir. 2005) (summarizing the post *Ratzlaf* mental elements).

215. *Ratzlaf v. United States*, 510 U.S. 135, 149 n.19 (1994).

216. See, e.g., *United States v. Hovind*, 305 F. App'x 615, 621 (11th Cir. 2008) (discussing a situation where employees and associates of defendants testified that defendants knew of and complained about reporting requirements).

structured because the bank teller told me to do it.”

Neither explanation rises to the level of a legal justification or defense. The first explanation provides an exculpatory motive for the structurer’s conduct, but proof of a bad motive is not an element of a structuring prosecution.²¹⁷ The second explanation, if true, only serves to reinforce the bank customer’s intent to evade. The fact that he or she was counseled to evade the reporting requirement is not a legal justification.²¹⁸

b. Cash “Pull Backs” and Teller Conversations.

In many structuring prosecutions, the government relies on evidence that the transactor conversed with the teller about the CTR requirements. The government may even introduce evidence that the transactor altered the transaction amount when advised by a teller or branch manager of the currency transaction reporting requirement. A depositor may, for example, present \$15,000 for deposit, and when advised that the transaction amount requires the filing of a CTR, the depositor may “pull back” a portion of the cash to bring the transaction to an amount below the CTR threshold. Such “pull back” evidence is powerful proof of both knowledge and intent to evade.

The difficulty with the aforementioned scenario is that dating back to the time of the fall of 1994 and the *Ratzlaf* fix financial institutions have generally been reluctant to engage a transactor in a dialogue about the crime of structuring for fear that the conversation may cross a line between merely explaining the law, which is permissible, and advising a customer as to how to evade the law, which is not permissible.²¹⁹ Thus, until recently, many customers heard

217. See *MacPherson*, 424 F.3d at 193 (stating that § 5324 makes no reference to the reason why a person structures); *United States v. Gibbons*, 968 F.2d 639, 645 (8th Cir. 1992).

218. Cf. *United States v. Wilcox*, 919 F.2d 109, 113 (9th Cir. 1990) (stating that the fact that the defendant may have been encouraged by bank employees to make a false statement on a loan application was not a defense).

219. Amendment to the Bank Secrecy Act Regulations Relating to Domestic Currency Transactions, 54 Fed. Reg. 3023, 3026 (Jan. 23, 1989) (explaining that financial institutions may explain the reporting requirements to a customer, but may not advise a customer as to how to evade those requirements). Before the *Ratzlaf* fix, some financial institutions viewed it as a good customer service policy to alert clients to the reporting requirements so that they could avoid government reporting.

only part of the story: the customer heard about the requirement to file a CTR, but did not hear about the severe legal consequences that occur when the transactor “pulls back” currency to evade a CTR.²²⁰

The practice of telling the customer only half of the story is changing. The FinCEN recently issued guidance in the form of a pamphlet that financial institutions are authorized to distribute to their customers.²²¹ Among other things, the pamphlet alerts the customer to the CTR requirement and then takes the added step of cautioning the customer about the consequences of structuring transactions to evade that requirement:

Can I break up my currency transactions into multiple, smaller amounts to avoid being reported to the government?

No. This is called “structuring” and may also lead to a required, separate report from the financial institution to the federal government. Federal law makes it a crime to break up transactions into smaller amounts for the purpose of evading the CTR reporting requirement. Structuring transactions at a financial institution to prevent a CTR from being reported can result in imprisonment for not more than five years and/or a fine of up to \$250,000. If structuring involves more than \$100,000 in a twelve-month period or is performed while violating another law of the United States, the penalty is doubled.²²²

220. *Ratzlaf*, 510 U.S. at 140 n.6 (noting that the Secretary of Treasury considered, but did not promulgate, a regulation requiring banks to inform currency transaction customers of § 5324’s proscription); *see also* United States v. Pipkin, 114 F.3d 528, 531 (5th Cir. 1997) (“Much of the public’s ignorance regarding the illegality of structuring must be laid at the feet of the government.”); United States v. Simon, 85 F.3d 906, 912 (2d Cir. 1996) (Winter, J., dissenting) (“The government’s failure to post such requirements is no defense. Nevertheless, the lack of such notices undermines any assumption that the details of the law are widely known.”).

221. This kind of government-sanctioned notice to bank customers about structuring has some precedent. For years, the Internal Revenue Manual authorized agents to distribute during contacts or presentations with financial institutions and trades or business “money laundering posters,” but these posters were designed to be voluntarily displayed in the “employee area” of the business. *See* INTERNAL REVENUE MANUAL § 9.5.5.8 (2004).

222. Notice to Customers: A CTR Reference Guide, <http://www.fincen.gov/whatsnew/pdf/CTRPamphletBW.pdf> (last visited Oct. 13, 2009).

The pamphlet's language reflects a compromise between the banking and law enforcement communities, and perhaps a belated recognition that the government should do more to educate the public about the serious consequences of structuring financial transactions. For years, the IRS—Criminal Investigation (IRS-CI) has used so-called “appointment letters” and “notification letters” to alert individuals engaged in structuring that their conduct is a crime.²²³ In addition to helping to curb structuring activity, the letters and follow-up appointments served to establish knowledge of the BSA's requirements.²²⁴ Financial institutions complained to regulators and law enforcement that these letters often had the unintended effect of alerting their customers to the fact that the financial institution had reported their structuring activity, placing the banks in an awkward position *vis a vis* their customer. FinCEN's Notice to Customers addresses this problem by allowing banks to give notice directly. It also gives financial institutions the latitude to alert their customers to the consequences of structuring activity.

2. *Circumstantial Evidence*

a. *Prior Experience with CTRs/Form 8300s*

In a structuring case, the existence of other CTRs, Form 8300s, or CMIRs filed on transactions in which the defendant was the conductor can be a double-edged sword. In the hands of the prosecutor, prior reports may provide direct evidence that the defendant knew of the reporting requirement and may provide circumstantial evidence he or she acted with the purpose of evading them.²²⁵ However, CTRs and Form 8300s

223. See INTERNAL REVENUE MANUAL § 9.4.1.4.5.2.1 (2005) (authorizing special agents to consult the participants and institutions identified in a currency report to identify the source, disposition, and nature of the currency transaction).

224. See *United States v. Noske*, 117 F.3d 1053, 1058 (10th Cir. 1997) (finding it probative that IRS had notified defendant about CTR reporting requirement prior to the time the defendant engaged in structuring activity).

225. See *United States v. MacPherson*, 424 F.3d 183, 189–95 (2d Cir. 2005); *United States v. Cassano*, 372 F.3d 868, 878 (7th Cir. 2004) (discussing a situation where the defendant's partner in the restaurant business testified that the CTR requirements are “common restaurant knowledge”), *vacated on other grounds*, 543 U.S. 1109 (2005); *United States v. Nesersian*, 824 F.2d 1294, 1314–15 (2d Cir. 1987); *United States v. Hernando Ospina*, 798 F.2d 1570,

can also be a sword in the hands of the defense. If, during the period of the alleged structuring activity, the defendant conducted CTR-generating transactions in which the CTR was filed “with conductor,” meaning in the presence of the person conducting the transaction, such reports tend to negate the inference that the defendant intended to structure. In effect, the presence of CTR reports amidst a pattern of seemingly structured transactions raises a question: why would the defendant contemporaneously conduct transactions that triggered reports in some circumstances but not others?

The leading case discussing the government’s use of previously filed CTRs to prove knowledge and intent is *United States v. MacPherson*.²²⁶ MacPherson was a New York City police officer who, in the course of a four-month period between September 2000 and January 2001, deposited \$258,100 in cash into three bank accounts over the course of thirty-two transactions in which no single transaction

1580–81 (11th Cir. 1986) (finding that knowledge predicated on prior discussion of CTR requirements); *United States v. Ozbay*, No. 1:04-CR-0524, 2007 WL 656049, at *2 (N.D.N.Y. Feb. 27, 2007) (“Where there is evidence of a pattern of structuring as well as evidence of other transactions which generated CTR filings, it is permissible to infer that a person knows of and intends to evade currency reporting requirements.”); *cf.* *United States v. Tatoyan*, 474 F.3d 1174, 1177 (9th Cir. 2007) (relying, in part, on notice of CMIR requirements contained in passport to conclude evidence was sufficient to show knowledge); *United States v. Larson*, 110 F.3d 620, 625 (8th Cir. 1997) (inferring knowledge of CMIR requirement from fact that defendant was an experienced international traveler who had completed and signed the Customs Declaration form (Form 6059B), which details the requirements for filing a CMIR).

In evaluating whether these reports are relevant to prove or negate knowledge or intent, a couple of things need to be kept in mind. First, banks frequently file CTRs “without conductor.” 31 C.F.R. § 103.22 (2008) (setting forth the requirements of the aggregation rule). These CTRs are filed on aggregated transactions, typically outside the presence of the conductor, and thus the conductor does not necessarily have knowledge that the CTR was even filed. Because they may be filed without the knowledge of the transactor, these CTRs are generally not probative of knowledge or intent.

Second, Form 8300s differ from CTRs in that the Form 8300 filer must notify its customer that a Form 8300 has been filed. *See* 26 C.F.R. § 1.6050I(f) (2008). Thus, if it can be proved that the customer was notified about the Form 8300 by the trade or business, then that fact could be probative of knowledge or intent.

Finally, CMIRs differ from both CTRs and Form 8300s because they are filed by the transporter of the currency, not a bank or business. Thus, a previously filed CMIR will be strong evidence that the transporter was aware of at least the CMIR requirements.

226. *MacPherson*, 424 F.3d 183.

exceeded \$10,000.²²⁷ In reversing a judgment of acquittal, the court of appeals discussed evidence showing MacPherson had acquired knowledge of the CTR filing requirements in 1989 and 1999 when he conducted four cash withdrawals, each of which prompted his bank to file CTRs.²²⁸ While no bank employee could specifically recall the transactions, the government elicited testimony from the bank manager who completed the CTRs that her practice was to complete the CTR “sitting across the desk from the customer while she obtained the necessary identifying information from him.”²²⁹

The court held that such testimony, when combined with the pattern of deposits, strongly reinforced the conclusion that the defendant acted with the intent to evade the CTR requirement. In reaching this conclusion, the court rejected the defense argument that the testimony supported only the inference that the defendant knew some sort of form needed to be filled out, not the inference that it was a reporting form required by the government.²³⁰

In *MacPherson*, the evidence establishing defendant’s knowledge of the currency transaction reporting requirement was strong: viewed in the light most favorable to the government, the evidence established that the CTR Form was completed in the defendant’s presence. In *United States v. Baydown*, the evidence of prior knowledge was not as strong.²³¹ There, the defendant presented \$16,700 in cash for deposit.²³² When told by a teller that the transaction required a “form” to be completed, the defendant reduced his transaction to an amount under the CTR threshold.²³³ He then returned over the next couple of days to deposit the rest of the currency.²³⁴ On these facts, the Sixth Circuit Court of Appeals ruled the evidence was insufficient to establish that the defendant had the intent to deprive the government of anything or to structure currency transactions to evade the reporting requirements.²³⁵ In its reasoning, the court

227. *Id.* at 184.

228. *Id.* at 186.

229. *Id.* at 194.

230. *Id.*

231. *United States v. Baydown*, 984 F.2d 175 (6th Cir. 1993).

232. *Id.* at 177.

233. *Id.*

234. *Id.*

235. *Id.* at 180–82.

emphasized that the defendant had been told a “form” was to be completed, but he was not told that the form was a CTR required by federal law.²³⁶

In any structuring prosecution, the government should query the Currency and Banking Retrieval System (CBRS) and identify prior CTRs, Form 8300s, and even CMIRs filed in connection with reportable transactions involving the defendant and produce them in discovery. Currency reports that predate the structuring activity may help the government establish a defendant’s knowledge and intent to evade. Currency reports that fall within the midst of the structuring activity could rise to the level of *Brady* material²³⁷ because they could be favorable to the accused and material to the issue of whether the defendant acted with the intent to evade. If such reports are not produced, good defense practice in most cases would be to request their production.²³⁸

b. Inferring Knowledge and Intent Based on Proof of a Cash Hoard

In many structuring prosecutions, the government can marshal evidence that the defendant had a cash hoard in an amount greater than \$10,000 prior to engaging in a series of sub-reporting threshold transactions. *Ratzlaf* is a perfect

236. *Id.* at 181.

237. *Brady v. Maryland*, 373 U.S. 83 (1963); *see also* *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985) (discussing materiality). The term *Brady* material refers to evidence that is both favorable to the accused and material either to guilty or to punishment.

238. *See United States v. Aversa*, 769 F. Supp. 24, 27 (D.N.H. 1990) (ruling on defense discovery requests in a structuring prosecution). One interesting issue is whether a defendant is entitled to a suspicious activity report (SAR) filed by a financial institution reporting suspected structuring activity. *See generally* FED. R. CRIM. P. 16 (setting forth the government’s discovery obligations in a criminal case). In the context of civil litigation, courts have generally held that SARs are not discoverable. *See Whitney Nat’l Bank v. Karam*, 306 F. Supp. 2d 678, 682 (S.D. Tex. 2004); *Cotton v. PrivateBank and Trust Co.*, 235 F. Supp. 2d 809, 814 (N.D. Ill. 2002); *Weil v. Long Island Sav. Bank*, 195 F. Supp. 2d 383, 389 (E.D.N.Y. 2001) (stating that SAR may not be disclosed in civil discovery). However, the issue is more complicated in a criminal case. A law enforcement agent may be asked questions on cross-examination that call for him or her to disclose the existence of the SAR. Alternatively, the narrative portion of the SAR may include a statement of the defendant made to a bank teller, for example, or may contain exculpatory information. Given that so many structuring investigations emerge from a SAR, the possibility that the SAR might be disclosed in the course of a structuring trial seems very high.

illustration. Ratzlaf lost \$160,000 gambling on credit at a Nevada casino and was given a week within which to pay off the debt.²³⁹ He returned a week later with a \$100,000 in cash, telling the casino's shift manager that he wanted to pay off his markers, but did not want any paperwork filled out.²⁴⁰ When the casino refused the paperless currency transaction, it arranged to have a casino employee accompany Ratzlaf as he went from bank to bank in and around the Stateline, Nevada area purchasing cashier's checks in amounts just below the CTR threshold.²⁴¹ Those cashier's checks were later used to pay off the debt.²⁴²

The facts of *Ratzlaf* represent a sort of "gold standard" in terms of the government's proof that a defendant knew of the CTR requirement and broke up a cash transaction into smaller transactions for the purpose of evading it. Many other appellate decisions present similar facts in which the government proved that the defendant possessed a cash hoard in an amount greater than \$10,000 and then engaged in a series of sub-\$10,000 cash deposits, withdrawals, or exchanges of currency.²⁴³

*c. Inferring Knowledge and Intent Based on Pattern
and Purpose of High-Dollar Cash
Transactions*

Some early appellate decisions addressed situations in which the government could prove the existence of a cash hoard in an amount greater than the CTR threshold and further show the "breaking down" of that cash hoard into two or more financial transactions, which in aggregate exceeded the threshold. *Ratzlaf* was such a case. Mr. Ratzlaf unmistakably had \$100,000 in hand when he began driving around from bank to bank purchasing cashier's checks in sub-\$10,000 cash transactions.²⁴⁴ In these early appellate decisions, courts would sometimes refer to structuring as the

239. *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994).

240. *Id.*

241. *Id.*

242. *Id.*

243. See, e.g., *United States v. Dashney*, 937 F.2d 532, 533 (10th Cir. 1991) (stating that the government proved the defendant won approximately \$92,000, paid out in cash, while gambling); *United States v. Davenport*, 929 F.2d 1169, 1173 (7th Cir. 1991).

244. *Ratzlaf*, 510 U.S. at 137.

breaking down of a *cash hoard* into enough separate deposits to avoid the CTR requirement.²⁴⁵

It would be a mistake, however, to conclude from these cases that the government must prove the existence of a cash hoard greater than \$10,000 in order to sustain a structuring conviction. Proof that the defendant possessed a cash hoard greater than \$10,000 and then broke it down into two or more transactions below the reporting or recordkeeping threshold is just one of many ways the government may prove structuring.²⁴⁶ More recent cases from numerous circuits have sustained structuring convictions in cases based on inferences drawn from a pattern of large cash transactions below the CTR threshold.²⁴⁷ In many of these cases, the

245. See *Davenport*, 929 F.2d at 1173; see also 31 C.F.R. § 103.11(gg) (2008) (defining structuring to include the breaking down of a single sum of currency exceeding \$10,000 into smaller sums, including sums at or below \$10,000).

246. See *United States v. Van Allen*, 524 F.3d 814, 820–21 (7th Cir. 2008) (stating that proof of the breaking down of a cash hoard is just one method of proving structuring; government may also prove it through evidence of a pattern of sub-\$10,000 cash transactions); see also *United States v. Hovind*, 305 F. App'x 615, 619–20 (11th Cir. 2008) (rejecting the argument that the indictment was deficient for failing to allege that the defendant structured more than \$10,000 in currency).

247. See *United States v. Morales-Rodriguez*, 467 F.3d 1, 11–12 (1st Cir. 2006) (“The consistent avoidance of the \$10,000 threshold over a period of almost three years would, in our view, permit a jury to conclude that Morales divided all transactions above the threshold ‘for the purpose of evading the reporting requirements’”); *United States v. MacPherson*, 424 F.3d 183, 189–95 (2d Cir. 2005) (reversing judgment of acquittal in structuring case; defendant’s knowledge of reporting requirement and intent to evade it could reasonably have been inferred by the pattern of large cash transactions and earlier cash withdrawals that generated CTRs); *United States v. Bringier*, 405 F.3d 310, 314–15 (5th Cir. 2005) (affirming conviction based on evidence of pattern of bank deposits, wife’s knowledge of the reporting requirements, and defendant’s knowledge that depositing over \$10,000 would require additional paperwork); *United States v. Cassano*, 372 F.3d 868, 869 (7th Cir. 2004), *vacated on other grounds*, 543 U.S. 1109 (2005); *United States v. Beidler*, 110 F.3d 1064, 1069 (4th Cir. 1997) (holding that “evidence that a defendant has structured currency transactions in a manner indicating a design to conceal the structuring activity itself, alone or in conjunction with other evidence of the defendant’s state of mind, may support a conclusion that the defendant knew structuring was illegal”); *United States v. Marder*, 48 F.3d 564, 574 (1st Cir. 1995); *United States v. Wynn*, 61 F.3d 921, 927 (D.C. Cir. 1995) (finding that defendant’s purpose of multiple cashier’s checks in amounts less than \$10,000 to conduct transactions in larger amounts “created an inference that he was motivated to avoid the reporting requirement”); *United States v. Walker*, 25 F.3d 540, 543, 548 n.8 (7th Cir. 1994); *United States v. Funds in Amount of \$101,999.78*, No. 08 cv 237, 2008 WL 4222248 (N.D. Ill. Sept. 11, 2008) (following *Van Allen*, 524 F.3d 814).

government marshaled other evidence to support the inference of intent. But others, the government's entire case rested on inferences drawn from the pattern of the transaction activity.

Cases in which the government relies on a pattern of deposits to show knowledge and intent present two principal challenges. First, the pattern must be very strong, and even then may not be sufficient. In several pre-*Ratzlaf* fix cases, courts declined to infer knowledge that structuring was a crime based solely on the structuring behavior itself.²⁴⁸ The *Ratzlaf* fix, which eliminates the heightened element of specific intent, increases the risk that a morally blameless person could be convicted of violating the statute if the government's evidence rests exclusively on a pattern of transaction activity.²⁴⁹ Thus, isolated instances of structuring, even when supported by other acts evidence, may not be sufficient to support the requisite inferences of knowledge and intent.²⁵⁰

Second, the trier of fact must be especially wary in cases where the government relies on a strong pattern of sub-\$10,000 cash transactions. Often in precisely those cases where the evidence of structuring pattern may appear strongest—cases involving businesses with large daily cash deposits or withdrawals—the danger exists that the transactor may have conducted transactions below the reporting or recordkeeping threshold for reasons having nothing to do with the currency transaction reporting requirement.²⁵¹ A small business operator may avoid

248. See *United States v. Pipkin*, 114 F.3d 528, 532 (5th Cir. 1997) (collecting cases).

249. See John Shepard Wiley Jr., *Not Guilty By Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1023 (1999) (explaining that the *Ratzlaf* decision is an example of the Court imposing an additional mental state to shield blameless conduct from criminal condemnation).

250. See *Wynn*, 61 F.3d at 928 (representing a pre-*Ratzlaf*-fix decision; evidence insufficient to show knowledge of illegality where defendant structured transactions on only two occasions; fact that on one occasion defendant knew he was dealing with drug proceeds does not alter analysis).

251. Both the majority and dissent in *Ratzlaf* expressed particular concern about the application of § 5324 to individuals who may have legitimate business reasons for engaging in extensive cash deposit activity. Writing for the majority, Justice Ginsberg expressed concern that “under the Government’s construction an individual would commit a felony against the United States by making cash deposits in small doses, fearful that the bank’s reports would

accumulating too much currency at his or her store location for fear of robbery, and thus routinely make large sub-\$10,000 cash deposits.²⁵² The store owner's purpose in such a circumstance is not to evade the currency transaction reporting requirement, but to reduce the risk of robbery.²⁵³

In these cases, if the government relies on a pattern of large cash deposits, it should show some combination of facts that, taken together, eliminate the possibility that some other purpose explains the transactions.²⁵⁴ For example, the government may show some combination of the following factors: extensive transaction activity over a period of months or years; transactions that occur close in time to one another,

increase the likelihood of burglary." *Ratzlaf v. United States*, 510 U.S. 135, 145 (1994). Justice Blackmun, in dissent, answered this argument, but in terms suggesting that the government would have problems if it charged a person who may have legitimate business reasons for conducting frequent cash transactions. *Id.* at 155 n.6 (Blackman, J., dissenting) ("If a person has legitimate business reasons for conducting frequent cash transactions, or if the transactions can genuinely be characterized as separate, rather than artificially structured, then the person is not engaged in 'structuring' for the purpose of 'evasion.'"); see also FED. FIN. INST. EXAMINATION COUNCIL, BANK SECRECY ACT/ANTI-MONEY LAUNDERING EXAMINATION MANUAL app. G (2006), http://www.ffeec.gov/pdf/bsa_aml_examination_manual2006.pdf ("However, two transactions slightly under the \$10,000 threshold conducted days or weeks apart may not necessarily be structuring. For example, if a customer deposits \$9900 in currency on Monday and deposits \$9900 in currency on Wednesday, it should not be assumed that structuring has occurred. Instead, further review and research may be necessary to determine the nature of the transactions, prior account history, and other relevant customer information to assess whether the activity is suspicious."); FIN. CRIMES ENFORCEMENT NETWORK & INTERNAL REVENUE SERVICE, *supra* note 17, at 62–91.

252. There may similarly be instances where a business owner's insurance policy limits the amount of currency that may be maintained at a business location at any one time. The effect of such policies may be to cause business owners to make frequent cash deposits below the reporting threshold rather than accumulate cash and make larger deposits above the reporting threshold.

253. See *Ratzlaf*, 510 U.S. at 155 n.6 (1994) (Blackmun, J., dissenting); see also *United States v. Van Allen*, 524 F.3d 814, 821 (7th Cir. 2008) (suggesting that if there was some business reason for conducting a large cash transaction below the CTR threshold, the court would be more sympathetic to evidence of such a defense); *United States v. Tipton*, 56 F.3d 1009, 1015 (9th Cir. 1995) (Noonan, J., dissenting); *United States v. Trading Post of Pasco, Inc.*, No. 08-35939, 2009 WL 3287881 (9th Cir. Oct. 13, 2009) (unpublished) (appellants raised a genuine issue of material fact defeating summary judgment in civil forfeiture prosecution premised on structuring where appellants offered evidence that transactions were conducted for "legitimate business reasons"); JOHN K. VILLA, *BANKING CRIMES* § 6.44 at 6-125-26 (2006).

254. See, e.g., *United States v. Gomez-Osorio*, 957 F.2d 636, 641 (9th Cir. 1992) (inferring knowledge of CTR because otherwise the defendant's actions make no sense).

e.g., on the same day or on consecutive days; the use of different banks and bank branches; the cashing of multiple checks where one would have been more efficient; and transactions in which the amount of the transaction itself is some indication of intent to structure, e.g., even dollar deposit amounts just below the relevant threshold.²⁵⁵ The key for the government is to show that the defendant sacrificed efficiency and convenience for no justifiable reason.²⁵⁶ In the absence of such evidence, fact finders—or appellate courts—may be sympathetic to what might be termed “business necessity” defenses, particularly those offered by individuals operating smaller, cash-intensive businesses.²⁵⁷ Indeed, with few exceptions, most appellate cases that affirm structuring convictions based on a pattern of high-dollar deposits have also relied upon other evidence tending to show intent or criminal motive.²⁵⁸

d. Other Acts Evidence

In many structuring prosecutions, the government may seek to bolster its proof that the defendant acted with the purpose or intent to evade a reporting or recordkeeping

255. For example, in *United States v. Van Allen*, the defendant argued that the nature of his business—the auto parts business—required him to engage in the pattern of withdrawals and deposits in sub-\$10,000 amounts. 524 F.3d at 820. The court of appeals explained that the jury likely rejected the defense because the defendant’s transactions were irrational and inefficient. *Id.*

256. See *United States v. MacPherson*, 424 F.3d 183, 191 (2d Cir. 2005); *United States v. \$557,933.89, More or Less in U.S. Funds*, 287 F.3d 66, 89 (2d Cir. 2002) (“As to the structuring violation, the probable cause . . . is of course only enhanced by the additional facts of the dates and locations of purchase, which not only indicated the extraordinary effort which went into purchasing the money orders in such small denominations but also eliminated any possibility that the money orders had been received in those denominations in the ordinary course of business.”); *United States v. Gibbons*, 968 F.2d 639, 645 (8th Cir.1992) (stating that because “receipt and cashing of six checks would have been less efficient and convenient than receiving and cashing one, it is difficult to explain this change except that [the defendant] sought to evade the reporting requirements”); cf. *United States v. Funds in Amount of \$101,999.78, No. 08 cv 237, 2008 WL 4222248* (N.D. Ill. Sept. 11, 2008) (stating that facts set forth in civil forfeiture complaint are sufficient to infer knowledge and intent where complaint alleges numerous \$8000 cash deposits, the use of several accounts, and total cash deposited).

257. *Van Allen*, 524 F.3d at 821 (“We would be more sympathetic to this argument had Van Allen cashed only a small handful of sub-\$10,000 checks, or pointed to the unique nature of the auto parts business that, for whatever reason, necessitated transactions under \$10,000.”).

258. See JOHN K. VILLA, *supra* note 253, § 6.43, at 6-114 (collecting cases).

requirement with evidence of other acts that tend to show motive, intent, absence of mistake, identity, or common scheme or plan. The defendant may, for example, structure to evade unwanted attention from his or her creditors.²⁵⁹ Alternatively, the defendant may structure to conceal a tax evasion scheme or the disposition of criminal proceeds.²⁶⁰ As Judge Posner once wrote: “The shadier the source [of the currency], the greater the [defendant’s] motive to conceal the money from authorities by taking measures to thwart the reporting requirements.”²⁶¹ However, evidence that the currency derives from an unlawful source is subject to exclusion under Federal Rules of Evidence 402, 403, and 404(b), particularly where the evidence has only marginal relevance and raises the specter of a mini-trial on uncharged but serious criminal conduct such as drug trafficking.²⁶²

Attempts by defense counsel to put on “innocent source” or “innocent motive” evidence have largely proved unsuccessful. The most common “innocent motive” defense is sometimes called “convenience structuring,” meaning that the

259. *United States v. Garza*, 42 F.3d 251, 254 (5th Cir. 1994) (finding that evidence of lien put on car sold by defendant to a third party’s wife, although she owed no money, was admissible in structuring prosecution to show defendant’s involvement in scheme); *cf. MacPherson*, 424 F.3d at 191 (“Rather, the evidence suggested that the cash was a long-held asset that MacPherson had shielded for some years from a possible tort judgment.”).

260. *See MacPherson*, 424 F.3d at 193 (“Certainly, the criminal origin of funds, to the extent it provides a motive for concealment from government authorities, may constitute an additional circumstance from which a jury can infer a defendant’s knowledge of and intent to avoid CTR filings.”); *United States v. Gomez-Osorio*, 957 F.2d 636, 641–42 (9th Cir. 1992) (finding that the district court properly admitted expert testimony on money laundering under Rule 404(b) in structuring prosecution); *United States v. Davenport*, 929 F.2d 1169, 1173–74 (7th Cir. 1991) (discussing tax evasion motive); *United States v. Conners*, 825 F.2d 1384, 1391 (9th Cir. 1987) (stating that in CMIR, the prosecution district court properly admitted evidence of defendant’s involvement in drug trafficking “to prove [the defendant’s] state of mind, that is, that he had a motive to conceal the currency . . . and to fail to report its transportation into the United States”); *United States v. Chaudhry*, No. C 03-40210, 2008 WL 2128197 (N.D. Cal. May 20, 2008) (denying motion in limine to exclude evidence of tax evasion; such evidence may be probative of motive to engage in structuring).

261. *Davenport*, 929 F.2d at 1174.

262. *See United States v. Oreira*, 29 F.3d 185, 190 (5th Cir. 1994) (stating that evidence that narcotics-detecting dog alerted to currency should have been excluded in prosecution for structuring currency, evidence did little to prove the defendants knew that money was connected to drugs, criminal nexus is not an element of structuring offense, and there was a substantial risk of prejudice).

defendant's motive for evading a currency or reporting requirement was a desire not to be delayed by the process of completing the CTR. Appellate courts have regarded such evidence as irrelevant unless it tends to negate the element of specific intent.²⁶³

e. Occupation / BSA Background Evidence

Some individuals, such as bank employees, are employed in lines-of-work that give them exposure to BSA reporting and recordkeeping obligations. Evidence of such employment or specialized BSA training may be admissible to prove knowledge and intent.²⁶⁴

V. RECURRING ISSUES IN STRUCTURING PROSECUTIONS

A. *Lawful Source of Structured Funds*

It is sometimes said that for purposes of anti-structuring

263. See *MacPherson*, 424 F.3d at 193–94; *United States v. Gibbons*, 968 F.2d 639, 645 (8th Cir. 1992) (“It is immaterial that [the defendant’s] apparent purpose for [structuring] was to prevent his ex-wife rather than the government from tracing the funds. The focus of the statute is on the structuring person’s conduct, not on the reason why he did not want the transaction report filed.”); cf. *United States v. Tatoyan*, 474 F.3d 1174, 1179 (9th Cir. 2007) (“The government, therefore, was only required to prove that the [defendants] knew they were required to file a [CMIR] and that, for whatever reason, they deliberately evaded this requirement. Because motive is neither an element of the crimes nor a defense under either § 5322 or § 5332, the district court was within its discretion to exclude evidence [that funds came from a legitimate source or had a benevolent purpose].”).

264. *MacPherson*, 424 F.3d at 194 (discussing a licensed real estate sales person); *United States v. Cassano*, 372 F.3d 868, 878–79 (7th Cir. 2004), *vacated on other grounds*, 543 U.S. 1109 (2005) (discussing a restaurant owner); *United States v. Scholl*, 166 F.3d 964, 979 (9th Cir. 1999) (citing to defendant’s legal training and career on bench as evidence that supported inference of knowledge); *United States v. Noske*, 117 F.3d 1053, 1058 (8th Cir. 1997) (discussing knowledge inferred from, among other evidence, defendant’s employment as tax return preparer and CPA); *United States v. Simon*, 85 F.3d 906, 911 (2d Cir. 1996) (stating that because defendant was a stockbroker required to file Form 8300s in connection with his own business, “[t]he jury reasonably could have inferred that [he] possessed the knowledge and sophistication to understand that his own conduct was unlawful”); *United States v. Retos*, 25 F.3d 1220, 1231 (3d Cir. 1994) (discussing an attorney); *United States v. Warner*, No. 02 CR 506-1, 02 CR 506-4, 2006 WL 2583722 (N.D. Ill. Sept. 7, 2006) (discussing an officer/director of bank). *But see* *United States v. Pipkin*, 114 F.3d 528, 532 (5th Cir. 1997) (featuring a pre-*Ratzlaf*-fix case; defendant’s prior experience as bank president was insufficient absent evidence to establish that defendant knew of his duty not to structure).

laws it does not matter whether funds derive from a legitimate source. “[I]t would make no difference to the Treasury if someone illegally structured a transaction to avoid reporting an exceptionally generous gift that fell above the \$10,000 threshold, or if she wanted to avoid reporting the receipt of illegal proceeds.”²⁶⁵ This statement is true, at least in so far as it describes the underlying purposes of § 5324. Section 5324 makes no reference to the source of the money or the defendant’s motive; its “singular focus is on the method employed” to evade the reporting requirement.²⁶⁶

However, the source of the funds makes a difference in a structuring prosecution in two ways.²⁶⁷ First, in a structuring prosecution, evidence that funds derived from a criminal source may be admitted to show the defendant had a motive to structure.²⁶⁸ Indeed, a main objective of the reporting laws and, consequently, the anti-structuring laws, is to help law enforcement detect illegally-derived currency when it moves through the financial system.

Second, anti-money laundering laws differentiate between structuring legitimate and illegitimate funds, and the distinction is important to keep in mind in understanding the government’s prosecutorial options. The structuring of illegitimate funds, i.e., funds that derive from a specified unlawful activity, is a violation not just of § 5324, but is also an 18 U.S.C. § 1956(a)(1)(B)(ii) violation.²⁶⁹ Essentially, it is a traditional form of money laundering. In cases where the government can readily prove that the structured funds derived from the proceeds of a specified unlawful activity, the

265. *United States v. Gabel*, 85 F.3d 1217, 1223 (7th Cir. 1996).

266. *MacPherson*, 424 F.3d at 193; *see also* *United States v. Rigdon*, 874 F.2d 774, 777 (11th Cir. 1989); *United States v. Thakkar*, 721 F. Supp. 1030, 1032 n.5 (S.D. Ind. 1989).

267. As explained in Part VII below, the source of the funds also matters in a third way: it impacts upon sentencing and forfeiture issues.

268. *MacPherson*, 424 F.3d at 193.

269. *See* 18 U.S.C. § 1956(a)(1)(B)(ii) (2006); *see also* *United States v. Dinero Express, Inc.*, 57 F. App’x 456, 461 (2d Cir. 2002) (finding that a money laundering conviction premised on structuring behavior is not multiplicitous of structuring offense because the offenses involve different elements); *United States v. Hill*, 167 F.3d 1055, 1069–70 (6th Cir. 1999) (finding that structuring is not a lesser included offense of money laundering charge because the offenses have different scienter requirements); *United States v. Morales*, 108 F.3d 1213, 1221–22 (10th Cir. 1997); *United States v. Griffin*, 84 F.3d 912, 927–28 (7th Cir. 1996); *United States v. Nelson*, 66 F.3d 1036, 1041–42 (9th Cir. 1995); *United States v. Walcott*, 61 F.3d 635, 638 (8th Cir. 1995).

government may elect to charge the offense under § 1956(a)(1)(B)(ii) rather than under § 5324. A conviction under § 1956 should, in theory, provide for more serious penalties than a comparable conviction under § 5324.²⁷⁰ Moreover, because the essence of a § 1956 transaction is a financial transaction involving criminal proceeds, the prosecutor may have broader latitude at trial to admit evidence not just of the underlying criminal activity that generated the funds, but also “other acts” evidence.²⁷¹ Finally, the unit of prosecution under § 1956, each individual financial transaction,²⁷² is usually easy to identify. The unit of prosecution under § 5324(a)(3) is the “structuring” activity itself, which, as discussed in Part V.B, is sometimes difficult to identify.

B. Identifying the Unit of Prosecution

As a general rule, the unit of prosecution is the aspect of criminal activity that the statute aims to punish. When the same statutory violation is charged multiple times, an issue can arise as to whether the indictment or information is multiplicitous.²⁷³ By contrast, when the conduct is charged as one offense, but the statute treats the conduct as involving multiple offenses, an issue can arise as to whether the indictment or information is duplicitous.²⁷⁴ The unit of prosecution in structuring cases can be difficult to identify, particularly in cases in which no single source can be identified for the funds that are structured.

270. Compare U.S. SENTENCING GUIDELINES MANUAL § 2S1.1 (2003) (stating the guideline for § 1956 offenses), with *id.* § 2S1.3 (stating the guideline for § 5324 offenses).

271. See FED. R. EVID. 404(b); see also *id.* at 609 (governing admissibility of prior convictions for purposes of impeaching a witness); *United States v. Oreira*, 29 F.3d 185, 190 (5th Cir. 1994) (excluding narcotics evidence from structuring prosecution in part because proof that the funds derived from a criminal source is not an element of a § 5324 offense).

272. See *United States v. Caldwell*, 302 F.3d 399, 412 (5th Cir. 2002); *United States v. Smith*, 44 F.3d 1259, 1265 (4th Cir. 1995).

273. See e.g., *United States v. Awad*, 551 F.3d 930, 937 (9th Cir. 2009) (“An indictment is multiplicitous if its charges a single offense in more than one count.”).

274. See, e.g., *United States v. Renteria*, 557 F.3d 1003, 1007–08 (9th Cir. 2009) (“An indictment is considered duplicitous if a single count combines two or more different offenses.”).

1. *The Unit of Prosecution in Perfect Structuring Cases*

Early cases addressing the unit of prosecution for perfect structuring follow a pattern. The government could establish that, prior to the structuring conduct, an individual possessed a single cash hoard and subsequently engaged in multiple sub-\$10,000.00 transactions with those funds. In defining the unit of prosecution, appellate decisions in cases such as *United States v. Davenport*, *United States v. Dashney*, and *United States v. Nall* looked to the source of the funds structured. If the funds come from a single cash hoard, the government must charge a single substantive violation of § 5324(a)(3). The alternative, charging one count for each structured transaction, would be multiplicitous.²⁷⁵ Under the “single source rationale,” a defendant who possesses \$100,000 in currency and deposits that currency into a bank account in a series of transactions just beneath the pertinent reporting or recordkeeping threshold commits one § 5324(a) offense.²⁷⁶

The *Davenport-Dashney-Nall* line of cases, though instructive in circumstances where the government can prove a single source for the structured funds, provides little guidance outside that context. For example, a transactor may engage in structured cash withdrawal activity. In the case of structured cash withdrawals, can it be said that there is a single source of funds? What if the bank account steadily replenishes during the time frame in which cash is withdrawn in structured transactions? In the case of deposit transactions, what is the unit of prosecution in cases where the government cannot identify a single source of funds—as is often true in the case of individuals who operate cash

275. See *United States v. Nall*, 949 F.2d 301, 308 (10th Cir. 1991) (discussing a \$26,000 cash hoard); *United States v. Dashney*, 937 F.2d 532, 533 (10th Cir. 1991) (discussing an almost \$100,000 cash hoard exchanged for multiple sub-\$10,000 cashier’s checks); *United States v. Davenport*, 929 F.2d 1169, 1171–72 (7th Cir. 1991) (discussing an \$81,000 cash hoard deposited in ten structured transactions); see also *United States v. Cassano*, 372 F.3d 868, 881–82 (7th Cir. 2004) (breaking two separate cash hoards into multiple parts may be charged as two offenses), *vacated on other grounds*, 543 U.S. 1109 (2005).

276. One alternative to the “single source rationale” is to focus on the disposition of the structured funds. If the government can identify two or more structured transactions, each tied to the same intended disposition, then those transactions group into a single count of structuring. See *United States v. Coney*, No. CR.A. 02-321, 2003 WL 2004437, at *5 (E.D. La. Apr. 3, 2003) (rejecting motion to dismiss an indictment that broke the structuring counts down according to the intended disposition of the funds).

intensive business such as a convenience store or money transmitting business?

When the government cannot prove a single source or disposition for the structured funds, it has struggled to identify the unit of prosecution. In *United States v. Handakas*, for example, the government attempted to define the unit of prosecution by time interval, i.e., one count of structuring for each twelve-month period of structuring activity.²⁷⁷ While this theory of prosecution finds some support in the enhanced penalty provision of § 5324(d), which similarly refers to structuring that occurs across a twelve-month time period, the *Handakas* Court rejected it. “[N]o provision of the statute indicates that a single course of structuring can be segmented based on [twelve]-month intervals (or for any other intervals of time) or by the amount of funds in any interval.”²⁷⁸ The *Handakas* court also rejected the government’s attempt on appeal to bring the facts within the *Davenport-Dashney-Nall* line of cases.²⁷⁹ However, the *Handakas* court did not offer any guidance as to how the government should have defined the unit of prosecution.

Similarly, in *United States v. Catherman*, the government attempted to define the unit of prosecution by looking for logical breaks in the structuring activity, i.e., gaps in time when the structuring activity ceased before resuming again.²⁸⁰ The *Catherman* court rejected this approach. Citing the *Davenport-Dashney-Nall* line of cases, the court held that without proof of multiple sources for the structured funds, the government could not charge multiple counts.

Faced with the *Davenport-Dashney-Nall-Handakas* line of authority, the district court in *United States v. Kushner* offered guidance as to how the government should proceed if it cannot identify a single source of funds for the structured transactions.²⁸¹ In *Kushner*, the defendants operated a check cashing business. Over a period of several years, they deposited \$15,000,000 in funds into several accounts from which they withdrew large amounts of currency in sub-

277. *United States v. Handakas*, 286 F.3d 92, 98 (2d Cir. 2002).

278. *Id.*

279. *Id.* at 98–99.

280. *United States v. Catherman*, No. 4:07-cr-00106-JEG, 2007 WL 2790384, at *2 (S.D. Iowa Sept. 24, 2007).

281. *See United States v. Kushner*, 256 F. Supp. 2d 109 (D. Mass. 2003).

\$10,000 transactions.²⁸² The government charged the defendants with independent structuring counts for each day in which defendants conducted cash withdrawals in structured amounts. The district court concluded that such a charge was multiplicitous because it repeated the error in *Handakas* by arbitrarily attempting to define a time-based unit of prosecution. In dicta, the *Kushner* Court suggested that if the government can identify various sources of money deposited into the defendants' accounts, then the government can attempt to tie individual structuring counts to each source.²⁸³ If the government cannot identify a particular source or sources, then it should charge "one count of structuring that span[s] the relevant time period."²⁸⁴ In *Kushner*, the government could not identify any sources of deposit. "All of the money within the Defendants' accounts was the product of the Defendants' unlicensed business, and it was the sum in its entirety that the Defendants' sought to conceal."²⁸⁵

One by-product of the unit of prosecution problem in structure cases is that it can shape the scope of the trial. If, for example, the government charges too narrow a structuring pattern it may face a Rule 403 or 404(b)-type objection when it seeks to admit evidence of other large sub-\$10,000 transactions. Some courts have allowed the government to charge a group of structured transactions and then use other transactions as circumstantial evidence supporting an overall theory of structuring.²⁸⁶ However, others, most notably the *Kushner* court, appear less sympathetic to this practical problem.

2. *The Unit of Prosecution in Imperfect Structuring Cases*

The unit of prosecution in an imperfect structuring prosecution is comparatively easy to identify. In contrast to the unit of prosecution in a perfect structuring case, which is

282. *Id.* at 111.

283. *Id.* at 114.

284. *Id.*

285. *Id.* at 113.

286. See *United States v. Van Allen*, 524 F.3d 814, 820 (7th Cir. 2008); *United States v. 21090 Boulder Cir.*, No. 92-1589, 1993 WL 432376, at *5 (6th Cir. Oct. 5, 1993) (admitting evidence of prior cash purchases of cashier's checks in structured amounts to refute claims of mistake, inadvertency or lack of knowledge as to the structured nature of the transactions at issue).

defined by the source of the structured funds, the unit of prosecution in an imperfect structuring case is defined by the obligation that the accused sought to evade, i.e., the bank's obligation to file a CTR.²⁸⁷ That obligation in turn is defined by regulation; in any banking day on which a customer conducts a transaction involving more than \$10,000 in currency, the bank has a duty to file a CTR.

Consider this hypothetical. An individual transactor conducts three deposits into a single bank account, each in an amount just below the \$10,000 CTR threshold. Assume further that the transactions were conducted with the purpose of causing or attempting to cause the bank to fail to file a CTR. In that circumstance, for each banking day when the bank had a duty to file a CTR, a transactor who caused or attempted to cause the bank not to file a CTR would violate § 5324(a)(1). In other words, each day of imperfect structuring equals one unit of prosecution.

3. Charging Alternatives in Cases Where the Unit of Prosecution Is Difficult to Identify

Where the government cannot identify the proper unit of prosecution, it has several fall-back positions. It can prove a conspiracy to structure in violation of 18 U.S.C. § 371 by showing the existence of an agreement between two or more persons to engage in structuring and an overt act in furtherance of the conspiracy.²⁸⁸ In this instance, the unit of prosecution is the agreement itself, not the individual transactions that constitute overt acts in furtherance of the agreement. Alternatively, the government can charge the offense under § 1956(a)(1)(B)(ii), which makes it a crime to conduct a financial transaction with the proceeds of a specified unlawful activity with the intent to evade a reporting requirement. Here, the unit of prosecution is each individual financial transaction.²⁸⁹ In other words, each

287. *Cf.* *United States v. Kushner*, 256 F. Supp. 2d 109, 114 n.6 (D. Mass. 2003) (explaining that in the case of a willful failure to file a CTR the unit of prosecution is each day in which a required CTR was not filed); *see also* *Welling*, *supra* note 6, at 324 (stating that in the case of imperfect structuring, the unit of prosecution refers to each instance the bank fails to file a report or the transactor attempts to cause the bank to fail to file the report).

288. 18 U.S.C. § 371 (2006).

289. *See, e.g.*, *United States v. Caldwell*, 302 F.3d 399, 412 (5th Cir. 2002); *United States v. Majors*, 196 F.3d 1206, 1212 n.14 (11th Cir. 1999) (dictum);

individual transaction below the pertinent reporting or recordkeeping threshold conducted with the purpose of evading the BSA is a stand-alone § 1956 violation.

VI. DEFENSES TO STRUCTURING CHARGES

A. *Mistaken Identity—Deposit Transactions*

A latent issue in CTR structuring prosecutions is the problem of identifying the transactor. In a debit transaction, e.g., a currency withdrawal, a jury can reasonably infer that the person(s) who maintain signature authority over the account participated in the structured cash withdrawal. Testimony from a bank employee will readily establish that the bank does not authorize a customer to withdraw cash from an account unless the customer either uses a unique personal identification number (PIN) presumably known only to the customer or, in the case of a withdrawal conducted at a teller window, verifies his or her identity with some acceptable form of photo identification.

A deposit transaction is different. At some financial institutions, a person can deposit currency into a bank account in structured amounts, and precisely because the transaction does not exceed the CTR threshold, there may be no record of who conducted the transaction.²⁹⁰ Banks have no obligation to verify or record the identity of the transactor in the case of deposit transactions under the CTR threshold. Thus, in the case of deposit transactions, evidence identifying the transactor may be more difficult to find. It may take the form of testimony from a bank teller or branch manager who handled the transaction(s) and who can identify the transactor. Alternatively, proof may take the form of surveillance video footage from the branch where the transaction was conducted that corresponds in date and time to that recorded on the deposit slip, assuming the bank has not otherwise destroyed or recorded over the relevant footage.

United States v. Smith, 44 F.3d 1259, 1265 (4th Cir. 1995).

290. See Courtney J. Linn, *How Terrorists Exploit Gaps in U.S. Anti-Money Laundering Law to Secrete Plunder*, 8 J. OF MONEY LAUNDERING CONTROL 200 (2005) (discussing this issue and urging regulators to require banks to verify the identity of persons making large sub-\$10,000 currency deposits).

*B. Negating Knowledge and Specific Intent**1. Bank Policy Defense*

The Bank Policy Defense, which is something akin to a “good faith” defense, has received surprisingly little attention.²⁹¹ Under this defense, the defendant may concede that he conducted transactions in structured amounts, but nonetheless argue that he held a good faith belief that he was evading a bank requirement, rather than a reporting or recordkeeping requirement imposed by federal law.

The leading case exploring this defense is *United States v. Dollar Bank Money Market Account No. 1591768456*.²⁹² There, the district court granted summary judgment in a civil forfeiture action predicated on an allegation that forfeited funds had been involved in structuring violations.²⁹³ The claimant to the seized funds had offered evidence suggesting he was unaware that the CTR was required by federal law.²⁹⁴ He asserted that he had consulted with an attorney who advised him he would need to fill out a report if the transaction exceeded \$10,000, but that it was lawful to avoid filling out the reports by depositing less than \$10,000 at a time.²⁹⁵ Over the course of approximately two weeks, the claimant proceeded to make twenty-six deposits totaling \$199,800 at seven different banks with most deposits ranging from \$8000 to \$9500.²⁹⁶ He maintained that he had asked two bank branch managers whether it was lawful to avoid reporting transactions by depositing amounts under \$10,000. The branch managers said it was lawful, but did not inform him that reporting was required by law.²⁹⁷

291. *United States v. Dollar Bank Money Market Account No. 1591768456*, 980 F.2d 233, 240 (3d Cir. 1992); *see also* *United States v. Baydoun*, 984 F.2d 175, 181 (6th Cir. 1993) (emphasizing that the defendant must know that the CTR requirement is imposed by federal law and acted to evade that requirement); *United States v. 316 Units of Mun. Sec. in the Name of Efrain Gonzalez*, 725 F. Supp. 172, 179 (S.D.N.Y. 1989) (stating that although claimants “had conducted previous transactions in which the bank filed CTRs, there is doubt as to whether [they] knew that it was a federal law that required the reporting”).

292. *Dollar Bank Money Market Account No. 1591768456*, 980 F.2d 233.

293. *Id.* at 236.

294. *Id.*

295. *Id.* at 235.

296. *Id.*

297. *Id.*

On appeal, the defendant argued that this evidence tended to negate the specific intent requirement needed to establish a structuring violation. The Third Circuit agreed, rejecting the government's contention that § 5324 defined a general intent crime for which the claimant's professed belief would be irrelevant. In pertinent part, it ruled that § 5324 requires a specific and precisely defined mens rea: a person must structure for the purpose of evading the reporting requirements of § 5313(a). A person who believes that reporting is required by bank policy, instead of the law, cannot structure for the purpose of evading the requirements of 31 U.S.C. § 5313(a).²⁹⁸ "Proof that the accused structured transactions in amounts under \$10,000 is not enough. It must also be proven that he structured for the specific purpose of evading the federal reporting requirements."²⁹⁹

The "bank policy" defense proves especially problematic for the government in two situations. The first occurs where evidence shows the bank maintained policies that discouraged cash transactions in amounts greater than \$10,000. For example, a particular branch may maintain a policy of disallowing a customer to withdrawal more than \$10,000 without the customer having first placed an order for the currency, or it may charge fees for counting currency when a deposit or withdrawal transaction exceeds certain thresholds. Both sets of facts raise the concern that the transactor may have acted to comply with the bank's policies rather than to evade a reporting requirement required by federal law.³⁰⁰

The second situation where this defense proves problematic involves recordkeeping requirements. In the case of wire transfers, several large money-transmitting businesses impose recordkeeping requirements, as a matter of corporate policy, that are significantly below the \$3000 threshold currently imposed by federal law.³⁰¹ They do so

298. *United States v. Dollar Bank Money Market Account No. 1591768456*, 980 F.2d 233, 239 (3d Cir. 1992).

299. *Id.* at 237.

300. *But see United States v. Vosburgh*, No. 98-30074, 1998 WL 879495, at *1 (9th Cir. Dec. 10, 1998) (rejecting "legal impossibility" defense to structuring prosecution premised on postal service regulations forbidding sale of more than \$10,000; defendant's obligation not to structure is independent from Postal Service's obligation to file CTRs).

301. *See* Letter from Richard Weber, Chief of the Asset Forfeiture and Money

because while the United States retains a \$3000 recordkeeping requirement for international wires, the international standard has dropped to \$1000.³⁰² The imposition of corporate record-keeping policies below the federal threshold raises the specter that an individual who structures wire transfers in amounts below the corporate thresholds does not act with the intent to evade a federal reporting threshold; he or she acts with the intent to evade a threshold imposed as a matter of corporate policy. The Department of Justice has raised this concern with the Director of FinCEN, but thus far, FinCEN has taken no regulatory action to require wire remitters to adhere to a uniform federal threshold.³⁰³

2. *Advice of Counsel Defense*

After the *Ratzlaf* fix, it is no longer relevant whether the defendant knew structuring was illegal. Thus, defendants are foreclosed from introducing evidence that they relied on the advice of counsel that structuring was lawful.

This is not to say that all advice-of-counsel defenses are now foreclosed. Even after the *Ratzlaf* fix, § 5324 requires specific intent to evade, even if this is something less than the specific intent to engage in crime. Thus, the government must prove the defendant acted with the purpose of evading the reporting requirements. A defendant who is advised by counsel that his conduct does not amount to a purposeful evasion of a federal reporting requirement, and in good faith relies upon that advice, would have a defense to a structuring prosecution.³⁰⁴ This defense is likely to be most viable in circumstances where counsel offers advice in the still-existing grey area between structuring business activities to avoid

Laundering Section, to Director of Financial Crimes Enforcement Network, Re: Threshold Requirement to Collect Retain and Transmit Information on Funds Transfers and Transmittal of Funds (June 21, 2006), http://www.fincen.gov/statutes_regs/frn/comment_letters/71fr35564_35567_rin1506_aa86/comment_letter_rin_1506-AA86.pdf.

302. *See id.* (citing the Financial Action Task Force (FATF) Special Recommendation VII—recommending a de minimis threshold no higher than \$1000).

303. *See id.* (“At least in some jurisdictions, such an argument may afford an absolute defense to a structuring charge, notwithstanding the defendant’s obvious intent to structure.”).

304. *See* United States v. Eisenstein, 731 F.2d 1540, 1543–44 (11th Cir. 1984), *cited with approval in* Ratzlaf v. United States, 510 U.S. 135, 141 (1994).

accumulating large amounts of currency and structuring transactions to evade a reporting or record-keeping requirement.

C. Constitutional Challenges

1. Notice/Vagueness

Following the enactment of § 5324, there were a handful of constitutional challenges to the structuring provision of what was then § 5324(3), particularly on vagueness grounds.³⁰⁵ The term “structuring,” as these challenges pointed out, lacked any statutory definition. The challenges did not succeed; given that the Treasury Department promulgated a regulatory definition of the term “structure” in February 1989, any future challenges are not likely to succeed.³⁰⁶

2. Fifth Amendment/Privacy

In early structuring prosecutions, defendants argued that the CTR requirement violated the Fifth Amendment privilege against self-incrimination and/or the privacy rights of the bank customer. Courts rejected the former argument because statements are made by financial institutions, not customers.³⁰⁷ The Supreme Court rejected several variations of the latter argument.³⁰⁸ Congress has addressed the privacy

305. See, e.g., *United States v. Jackson*, 983 F.2d 757, 765–66 (7th Cir. 1993); *United States v. Patrick*, 965 F.2d 1390, 1395 (6th Cir. 1992) (discussing a void-for-vagueness challenge), *vacated on other grounds by Mohwish v. United States*, 507 U.S. 956 (1993); *United States v. Gomez-Osorio*, 957 F.2d 636, 640 (9th Cir. 1992) (discussing a void-for-vagueness challenge); *United States v. Davenport*, 929 F.2d 1169, 1173 (7th Cir. 1991) (arguing statute unconstitutionally vague prior to regulations defining structuring); *United States v. Hoyland*, 914 F.2d 1125, 1130 (9th Cir. 1990) (rejecting self-incrimination and void-for-vagueness challenges); *United States v. Langenberg*, No. 8:09CR183, 2009 WL 3157397 (D. Neb. Sept. 28, 2009) (rejecting arguments currency reporting and structuring statutes constitute unconstitutional delegation of legislative authority to define crimes and that statutes and regulations are void for vagueness).

306. See 31 C.F.R. § 103.11(gg) (2008).

307. *United States v. Mickens*, 926 F.2d 1323, 1331 (2d Cir. 1991); *Hoyland*, 914 F.2d at 1130.

308. *United States v. Miller*, 425 U.S. 435, 443 (1976) (stating that a bank depositor has no constitutionally protected expectation of privacy in contents of original checks and deposit slips); *Cal. Bankers Ass'n v. Schultz*, 416 U.S. 21, 54 (1974) (stating that mere maintenance of records pursuant to requirements of

concerns surrounding bank records in two federal laws.³⁰⁹ The protections of those laws, however, do not extend to the BSA's reporting and recordkeeping requirements.³¹⁰

VII. SENTENCING IN STRUCTURING CASES

Section 5324(d) provides criminal punishment for two categories of structuring offenses: ordinary structuring offenses and aggravated structuring offenses. Under the statute, ordinary structuring offenses, the statute authorizes a fine of up to \$250,000 and a term of imprisonment not to exceed five years.³¹¹ For aggravated cases, the statute provides enhanced penalties:

Whoever violates this section while violating another law of the United States or as part of a pattern of any illegal activity involving more than \$100,000 in a [twelve]-month period shall be fined twice the amount provided in subsection (b)(3) or (c)(3) (as the case may be) of § 3571 of title 18, United States Code, imprisonment for not more than [ten] years, or both.³¹²

The penalty provisions mirror those found in §§ 5322(a) and (b). The Advisory Sentencing Guidelines Manual addresses structuring-type offenses in terms similar to the penalty provisions of § 5324(d).³¹³ As explained below, however, the Sentencing Guidelines are too punitive, particularly when compared to guideline offenses for comparable (but yet more serious) offenses such as fraud or money laundering.

A. *The Base Offense Level*

Courts determining an advisory guideline sentence begin by ascertaining the pertinent guideline applicable to the

BSA does not invade the Fourth Amendment rights of the depositor); *see also* SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 743 (1984) (stating that an individual has no Fourth Amendment privacy interest once he gives his financial information to someone else, "even on the understanding that the communication was confidential").

309. The Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401–3422 (2006); The Gramm-Leach-Bliley Financial Modernization Act, 15 U.S.C. §§ 6801–6809 (2006).

310. *See* 12 U.S.C. § 3413(d) (2006); 15 U.S.C. § 6802(e)(5) (2006).

311. 31 U.S.C. § 5324(d)(1) (2006).

312. *Id.* § 5324(d)(2).

313. *See* United States v. Booker, 543 U.S. 220, 245 (2005).

offense of conviction.³¹⁴ In the case of BSA-type violations, including structuring, the applicable provision is section 2S1.3.³¹⁵ From there, the sentencing court determines the base offense level, and then applies any appropriate special offense characteristics and special instructions contained in the guideline.³¹⁶ Under section 2S1.3(a)(2), the base offense level for a structuring offense is a level six “plus the number of offense levels from the table in section 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the funds.”³¹⁷

In cases involving a small dollar volume of structuring activity, subsection 2S1.3(a)(2) provides for a comparatively low base offense level. Such treatment is consistent with the Sentencing Commission’s general treatment of regulatory offenses. In the case of simple criminal regulatory offenses, i.e., those in which “the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow,” the guidelines provide a low base offense level of six.³¹⁸ However, the greater the dollar volume of structuring activity, the more the guidelines deviate from the premise that structuring offenses, like other regulatory offenses, should begin with a low base offense level. Subsection 2S1.1(a)(2) defines the “value of the funds” as the amount of the funds involved in the structuring or reporting conduct.³¹⁹ This definition refers to the total value of the funds structured, not some fraction of that amount.³²⁰

314. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a) (2008).

315. *Id.* § 2S1.3 cmt. (2008) (referring to various Title 31 offenses to the guideline, including offenses under § 5324).

316. *Id.* § 1B1.1(b).

317. *Id.* § 2S1.3(a)(2); *see also* United States v. Pellegrini, Crim. Action No. 08-210 (GEB), 2008 WL 5061829, at *2 (D.N.J. Nov. 26, 2008). Guideline sentencing entails the computing of offense levels. Generally speaking, the higher the offense level, the greater the sentence of imprisonment.

318. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2008) (discussing the low base offense level in the editorial note at the end of the guideline).

319. *Id.* § 2S1.3 cmt. n.1.

320. *See* United States v. Abdi, 342 F.3d 313, 318–19 (4th Cir. 2003) (stating that the sentence must be based on the entire amount structured, not just on the fractional amount that went over \$10,000 each day); United States v. Beras, 183 F.3d 22, 27 (1st Cir. 1999); *Pellegrini*, 2008 WL 5061829, at *2; United States v. Cooper, No. 06-CR-35-LRR, 2007 WL 2076042, at *3 (N.D. Iowa July 18, 2007); United States v. Builes, 837 F. Supp. 490, 492 (N.D.N.Y. 1993); *cf.* United States v. Elfgeeh, 515 F.3d 100, 138 (2nd Cir. 2008) (affirming guideline analysis that increased a defendant’s base offense level for conspiring to violate

Moreover, the definition does not turn on whether funds were lawfully or unlawfully obtained.³²¹ In a case involving a defendant who structures a large amount of money, the base offense level climbs dramatically above level six. For example, an individual convicted of structuring in an amount more than \$400,000 begins with a base offense level of twenty.³²²

The base offense level for structuring offenses parallels base offenses levels used in the theft and fraud guideline and the money laundering section.³²³ By referencing the value of the funds involved in the transaction, section 2S1.3(a)(2) allows the value of the funds involved in the structuring transactions to drive the base offense level analysis into the sentencing stratosphere.³²⁴ The approach represents a significant departure from the approach taken in other guideline provision addressing regulatory offenses, including those involving recordkeeping requirements.³²⁵ It also represents a significant departure from the approach formerly taken in section 2S1.3.³²⁶ As the guidelines stand,

§ 1960 by sixteen levels based on the total amount of funds transferred during the course of the conspiracy).

321. U.S. SENTENCING GUIDELINES MANUAL § 2S1.3 cmt. n.1 (2008); *Pellegrini*, 2008 WL 5061829, at *2.

322. U.S. SENTENCING GUIDELINES MANUAL § 2S1.3(a)(2).

323. The guideline applicable to structuring offenses specifies a base offense level of six plus the number of offense levels from the table in § 2B1.1 (theft, property destruction, and fraud) corresponding to the value of the funds. U.S. *Id.* Sections 2S1.1 (money laundering) and 2B1.1 (fraud) refer to the same table in computing the base offense level.

324. In *Pellegrini*, the defendant structured approximately \$3 million. 2008 WL 5061829, at *1. His base offense level was twenty-four (six plus eighteen) before any specific offense characteristics were applied. *Id.* at *2.

325. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2Q1.3 (1989) (providing for a base offense level of six); *see also* U.S. SENTENCING GUIDELINES MANUAL § 2N2.1(a) (2008) (discussing “Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product,” which provide for a base offense level of six unless certain aggravating factors are present); U.S. SENTENCING GUIDELINES MANUAL § 2N3.1(a) (2001) (discussing “Odometer Laws and Regulations,” which provide for a base offense level of six unless offense involves more than one vehicle).

326. Prior to November 1, 1993, the base offense level did not turn on the value of the funds involved in the structuring activity. Instead, in structuring cases, section 2S1.3(a) provided a base offense level of thirteen without regard to the total dollar volume of structured funds. *See* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 490 (1993). The Sentencing Commission amended the guideline, effective November 1, 1993, to add the “value of the

subsection 2S1.3(a)(2), when combined with others discussed below, has the potential to produce unjust sentences in certain structuring cases, particularly those involving “serial” structuring.

B. Specific Offense Characteristics

Subsection 2S1.3(b) sets forth three specific offense characteristics a court must examine after determining the base offense level.

1. Dirty Source/Dirty Purpose Enhancement

Subsection 2S1.3(b)(1) provides: “If (A) the defendant knew or believed that the funds were proceeds of unlawful activity, or were intended to promote unlawful activity, or (B) the offense involved bulk cash smuggling, increase by 2 levels.”³²⁷ This subsection effectively amounts to a money laundering enhancement. If a defendant structures funds knowing them to be the proceeds of an unlawful activity, he has engaged in activity comparable to a § 1956(a)(1)(B)(ii) money laundering violation.³²⁸ Similarly, if he structures funds with the intent to promote unlawful activity, the defendant has engaged in activity that resembles “reverse

funds” component to the base offense level computation. *Id.* It did so apparently to “assure greater consistency of punishment for similar offenses and greater sensitivity to indicia of offense seriousness.” *Id.*

327. Subsection (b)(1) originally provided for a five-level enhancement “if the defendant knew or believed that the funds were criminally derived.” Subsequently, the Sentencing Commission reduced the enhancement to four levels unless the resulting offense level was less than thirteen. *See* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 379 (1993). Effective November 1, 1993, the enhancement was modified again to reflect a two-level enhancement. *Id.*

328. *See* 18 U.S.C. § 1956(a)(1)(B)(ii) (2006) (making it a money laundering transaction to engage in a financial transaction involving the proceeds with the intent to evade federal or state reporting requirements); *see also* United States v. Hill, 171 Fed. App’x 815, 820 (11th Cir. 2006); United States v. Vasquez, 53 F.3d 1216, 1226 (11th Cir. 1995) (stating that the defendant’s false explanations for currency provided basis for the court to conclude funds were criminally derived); United States v. Mitchell, 31 F.3d 628, 633 (8th Cir. 1994) (discussing cash received from drug dealer in real estate transaction); *Pellegrini*, 2008 WL 5061829, at *2 (discussing a situation where the defendant received a two level enhancement under section 2S1.3(b)(1)(A) because the defendant knew the structured funds were the proceeds of check kiting or bank fraud scheme); United States v. Cooper, No. 06-CR-35-LRR, 2007 WL 2076042, at *5 (N.D. Iowa July 18, 2007) (discussing cash received from drug dealer in real estate transaction).

money laundering,” a form of which is also a crime under § 1956.³²⁹ The enhancement effects a rough parity between the advisory guideline sentence the defendant would otherwise have received if he or she had been convicted of a money laundering offense based on the same offense conduct.

2. *The Pattern of Unlawful Activity Enhancement*

Second, subsection 2S1.3(b)(2) represents the Sentencing Commission’s attempt to incorporate the aggravated penalty provision from § 5322(b) into the section 2S1.3 guideline.³³⁰ It provides: “If the defendant (A) was convicted of an offense under subchapter II of chapter 53 of title 31, United States Code [the BSA]; and (B) committed the offense as part of a pattern of unlawful activity involving more than 100,000 in a [twelve]-month period, increase by [two] levels.”³³¹ The application note explaining this provision defines the term “pattern of unlawful activity” to mean “at least two separate occasions of unlawful activity involving a total amount of more than \$100,000 in a twelve-month period, without regard to whether such an occasion occurred during the course of the offense or resulted in a conviction for the conduct that occurred on that occasion.”³³²

Although not explicitly addressed in the guideline or its application note, subsection 2S1.3(b)(2) applies to two different kinds of unlawful activity. First, it applies in circumstances where the unlawful activity is separate from the structuring itself. Thus, for example, a defendant may structure cash deposits to facilitate a separate crime, such as a scheme to evade federal and state income taxes. Such conduct, if it involves at least two separate occasions of tax evasion activity involving more than \$100,000 in a twelve-

329. See 18 U.S.C. § 1956(a)(2)(A) (2006).

330. See U.S. SENTENCING GUIDELINES MANUAL app. C amend. 637 (2002). In amending section 2S1.3(b) to provide for a “pattern of unlawful activity enhancement” the Sentencing Commission referenced its intent to incorporate the aggravated penalty provision of section 5322(b), but omitted specific reference to section 5324(d)(2). *Id.* (“The amendment also provides an enhancement in section 2S1.3(b) to give effect to the enhanced penalty provisions under 31 U.S.C. § 5322(b) for offenses under subchapter II of chapter 53 of title 31”). Given that section 2S1.3 explicitly applies to § 5324 offenses, the failure to reference § 5324(d)(2) appears to be an oversight.

331. U.S. SENTENCING GUIDELINES MANUAL § 2S1.1(b)(2) (2008).

332. *Id.* § 2S1.3 cmt. n.3.

month period, triggers the subsection 2S1.3(b) enhancement.

Second, and less intuitively, the enhancement applies when a defendant engages in what has been termed “serial” structuring. Serial structuring refers to a pattern of structuring activity involving more than \$100,000 in any twelve-month period.³³³ The phrase “pattern of illegal activity” appears not just in the sentencing guidelines, but also in § 5322.³³⁴ Courts construing the phrase as it appears in § 5322 have consistently held that it encompasses serial structuring conduct, even in the absence of other criminal activity.³³⁵ Because the Sentencing Commission adopted the “pattern of unlawful activity” enhancement to give effect to this penalty provision, it follows that the phrase “pattern of unlawful activity,” as used in subsection 2S1.3(b)(2), also applies to serial structuring conduct.³³⁶

Viewed in isolation, this enhancement also makes sense. It gives effect to Congress’s manifest intent that cases of structuring involving certain aggravating factors, including serial structuring, be prosecuted more severely than cases of simple structuring. However, as discussed below, this provision has the potential to work perverse results when applied in conjunction with the safe harbor provision discussed below.

333. See *United States v. St. Michael’s Credit Union*, 880 F.2d 579, 586–88 (1st Cir. 1989); *United States v. Bank of New England*, 821 F.2d 844, 853 (1st Cir. 1987) (stating that bank’s repeated failure to file CTRs constituted a pattern of unlawful activity); *United States v. Valdes-Guerra*, 758 F.2d 1411, 1413–14 (11th Cir. 1985) (rejecting argument that the pattern of unlawful activity must refer to illegal activity apart from the reporting violations); *United States v. So*, 755 F.2d 1350, 1354–55 (9th Cir. 1985); *United States v. Dickinson*, 706 F.2d 88, 91–93 (2d Cir. 1982); *United States v. Beusch*, 596 F.2d 871, 878–79 (9th Cir. 1979) (finding that Congress intended more severe penalties in cases involving particularly serious violations, whether violations of the BSA alone, or violations of the Act in conjunction with some other illegal activity); *Soliman v. United States*, 630 F. Supp. 2d 667, 678 (E.D. Va. 2009) (stating that sentencing guideline providing for an increase in the base offense level if the defendant engages in a pattern of unlawful activity involving more than \$100,000 in twelve months was not limited only to terrorist activity, but applied to defendant’s activity in structuring financial transactions).

334. 31 U.S.C. § 5322(b) (2006).

335. See, e.g., *Soliman*, 630 F. Supp. 2d at 678.

336. One possible way for a defendant to escape this enhancement is to refer to the unit of prosecution. A defendant who possesses a cash hoard in excess of \$100,000 and then breaks it into sub-\$10,000 deposits commits only one structuring violation, not a series of violations.

3. The “Safe Harbor” Provision

Section 2S1.3(b)(3) provides a safe harbor for the potentially harsh advisory guideline sentences available in structuring prosecutions.³³⁷ It provides:

If (A) subsection (a)(2) applies and subsections (b)(1) and (b)(2) do not apply; (B) the defendant did not act with reckless disregard of the source of the funds; (C) the funds were the proceeds of lawful activity; and (D) the funds were to be used for a lawful purpose, decrease the offense level to level [six].³³⁸

The safe harbor provision has no application in cases where the defendant receives either the (b)(1) or (b)(2) enhancements. This means that if the government shows the structured funds derived from a criminal source or were intended for a criminal purpose, or that the structuring conduct occurred as part of a “pattern of unlawful activity” involving more than \$100,000 in a twelve-month period, the defendant cannot qualify for the safe harbor.³³⁹ The safe harbor operates to reduce the offense level. As a rule, the defendant must prove by a preponderance of evidence the facts necessary to reduce the base offense level.³⁴⁰ Consistent with that rule, the Fourth Circuit has held that the defendant who seeks a reduction in sentence based upon the safe harbor provision bears the burden of showing that each of the conditions has been met.³⁴¹

337. See *United States v. Abdi*, 342 F.3d 313, 316 (4th Cir. 2003) (referring to subsection 2S1.3(b)(2), the predecessor to subsection 2S1.3(b)(3), as a “safe harbor” provision). The version of the guidelines in effect when the defendants were sentenced in *Abdi* placed the “safe harbor” provision in subsection 2S1.3(b)(2). Amendment 637 re-designated this provision as section 2S1.3(b)(3). See U.S. SENTENCING GUIDELINES MANUAL app. C, vol. II, amend. 637 at 242 (Nov. 2003).

338. U.S. SENTENCING GUIDELINES MANUAL § 2S1.3(b)(3) (2009).

339. *Soliman*, 630 F. Supp. 2d at 678 (stating that a defendant who gets enhancement for structuring more than \$100,000 in a twelve-month period cannot qualify for the safe harbor).

340. See, e.g., *United States v. Leasure*, 319 F.3d 1092, 1096 (9th Cir. 2003); *United States v. Charlesworth*, 217 F.3d 1155, 1158 (9th Cir. 2000) (finding that the party seeking to alter the base offense level bears the burden of doing so); see also *United States v. Solomon*, 274 F.3d 825, 828 n.2 (4th Cir. 2001) (noting that “every circuit to consider [who bears the burden of proof] has assigned to the defendant the burden of proving entitlement to a sentencing reduction”).

341. *Abdi*, 342 F.3d at 317 (“The Government, of course, bears the burden of demonstrating the requirements to increase the base offense level under section 2S1.3(b)(1). Because any reduction in a sentencing level under section

For defendants who collect and structure funds as part of an on-going business activity, subsection 2S1.3(b)(3) assigns to defendants a burden that is almost impossible to overcome. In *United States v. Abdi*, the defendants pleaded guilty to conspiracy to structure approximately \$4.2 million.³⁴² In connection with the defendants' operation of a money transmitting business, the structured funds were wired overseas into the Al-Barakat network, an international money-transmitting exchange headquartered in the Middle East.³⁴³ During sentencing, "the defendants testified that they knew many of their customers and kept records of the transactions they made, but they did not know from where the customers derived the money and they did not know for what [purpose] the money was to be used once it was transmitted overseas."³⁴⁴

The district court determined the defendants were not eligible for the safe harbor and the court of appeals affirmed. The Fourth Circuit ruled that the safe harbor provision required them to affirmatively demonstrate that the structured monies were the proceeds of "lawful activity and were to be used for lawful purposes."³⁴⁵ As the defendants' conceded at sentencing, they could not make that showing.³⁴⁶ Judge Motz concurred in the judgment, but not with the reasoning. She construed the safe harbor provisions to require proof only that defendants' activities and purposes were lawful, not that the activities and purposes of each of their customers were lawful.³⁴⁷

C. Booker Variances in Structuring Prosecutions

Section 2S1.3 has the potential to yield very high advisory guideline sentences in cases involving serial structuring. Courts have begun to balk at these high

2S1.3(b)(3)] can be given only upon demonstration of conditions (A)–(D), it follows that the defendant, not the government, has the burden of showing entitlement to any reduction.”).

342. *Id.* at 315.

343. *Id.*

344. *Id.* at 316.

345. *Id.* at 317.

346. *Id.*

347. *United States v. Abdi*, 342 F.3d 313, 320 (4th Cir. 2003) (Motz, J., concurring) (citing *United States v. Bove*, 155 F.3d 44 (2d Cir. 1998)).

advisory guideline sentences.³⁴⁸ The recent decision in *United States v. Pellegrini* is illustrative. There, the defendant pleaded guilty on the eve of trial to a single count of structuring and fifty-three counts of causing or attempting to cause banks to fail to file a CTR.³⁴⁹ Calculating his sentence, the district court began with a base offense level of six and added the number of levels corresponding to the amount of funds involved in the structuring conduct.³⁵⁰ The value of the structured funds was \$3,000,000, resulting in an eighteen level increase to the base offense level.³⁵¹ The court added an additional two levels pursuant to subsection 2S1.3(b)(1) because the defendant knew the structured funds derived from a check-kiting scheme.³⁵² The court added two more levels under subsection 2S1.3(b)(2) because the defendant committed the offenses as part of a pattern of unlawful activity.³⁵³ Thus, the defendant had an offense level of twenty-six (twenty-eight minus two for acceptance of responsibility). Based on a Category I criminal history, the guidelines advised a sentencing range of between sixty-three to seventy-eight months.³⁵⁴

Consistent with the Supreme Court's decision in *United States v. Booker*, in which the Court held that sentencing guidelines are advisory and that the court must consider statutory sentencing factors, the district court then looked to sentencing factors set forth in 18 U.S.C. § 3553(a).³⁵⁵ Based on those factors the court imposed a sentence of five years probation with a special condition of eight months home confinement and a \$15,000 fine.³⁵⁶ The court justified this radical variance from the advisory guideline by emphasizing

348. See, e.g., *United States v. Feker*, No. 09-CR-138, 2009 WL 3379177 (E.D. Wis. Oct. 19, 2009) (imposing a one-day term of imprisonment based on tax and structuring convictions while the guidelines called for an eight to fourteen month term of imprisonment).

349. *United States v. Pellegrini*, Crim. Action No. 08-210 (GEB), 2008 WL 5061829, at *1 (D.N.J. Nov. 26, 2008).

350. *Id.* at *2.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *United States v. Pellegrini*, Crim. Action No. 08-210 (GEB), 2008 WL 5061829, at *6 (D.N.J. Nov. 26, 2008); see *United States v. Booker*, 543 U.S. 220 (2005).

356. *Pellegrini*, 2008 WL 5061829, at *6.

several considerations, including the defendant's personal history and the fact that he had paid the bank its actual damages prior to sentencing. The defendant's unlawful conduct "was essentially a check kiting scheme" that supported his gambling habit.³⁵⁷ Moreover, the defendant obtained nowhere near three million dollars from the scheme—the bank settled its losses with the defendant for \$56,000.³⁵⁸ The *Pellegrini* Court did not directly criticize the harshness of the advisory guideline sentence. Instead, it did so indirectly by juxtaposing the sentence the defendant would have received if convicted of the underlying check kiting criminal activity:

Had the defendant pleaded guilty to the amount of actual loss that the bank asserted it endured as the result of these unlawful acts, specifically \$45,000, and had the defendant been sentenced accordingly, the Court would have otherwise computed Defendant's offense level under the Guidelines to be fourteen, which instructs that the term of imprisonment under the Guidelines is fifteen to twenty-one months. Although this difference is substantial, the Court is not at liberty to reduce the amount of the funds from the \$3,000,000 figure.³⁵⁹

The drawing of this comparison hints at the court's disapproval of the severity of the applicable guideline sentence.

D. The Need for Guideline Reform

Cases such as *Pellegrini* illustrate how punitive Section 2S1.3 advisory guideline sentences can be, particularly in cases involving massive amounts of structured funds. But even when the dollar amount involved in the structuring is much smaller, the guidelines are still too punitive for serial structuring when compared to advisory guideline sentences for more morally blameworthy conduct.

Take a defendant who swindles his or her victims out of \$125,000. If convicted of mail fraud in violation of § 1341, he or she would be sentenced under § 2B1.1. Assuming no adjustments other than for loss, the defendant would begin with a base offense level of seven, plus ten levels

357. *Id.* at *4.

358. *Id.*

359. *Id.* at *2 n.3.

corresponding to the value of the funds obtained through the fraud, yielding an adjusted offense level of seventeen.³⁶⁰ Now, change the facts. Instead of fleecing fraud victims out of \$125,000, a defendant receives \$125,000 in cash into his business in five equal installments of \$25,000 each. He structures each installment into a bank account such that at the end of a few weeks time he has deposited the entire \$125,000 in a series of structured transactions. The offense is purely one involving structuring; there is no evidence the funds derived from or were intended for anything other than a lawful purpose. Nonetheless, under section 2S1.3, the defendant would begin with a base offense level of sixteen, only one level less than the fraudster. He would then receive a two-level enhancement based on the serial structuring activity, pursuant to § 2S1.3(b)(2). That enhancement would preclude him from qualifying for the safe harbor provision under section 2S1.3(b)(3). The net result would be an adjusted offense level of eighteen, one level higher than the adjusted offense level of the fraudster whose offense involved a comparable sum of money. Under no rational sentencing regime would a court punish a person who commits a purely regulatory violation involving a particular sum of money more severely than an offender who defrauds victims of the exact same sum.³⁶¹ Yet the Advisory Sentencing Guidelines do just that.

One solution to this problem is to eliminate the all-or-nothing approach taken in the safe harbor provision. Under existing law, a defendant either qualifies for the safe harbor, in which case he parachutes down to an offense level six, or he does not. Current law offers no middle ground—an approach that recognizes that in the case of serial structuring, the gravity of the structuring conduct is more

360. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2009).

361. In *Pellegrini*, the facts were even more startling. *Pellegrini* was a case where the defendant engaged in a check kiting scheme, during the course of which he structured approximately three million dollars. *Pellegrini*, 2008 WL 5061829, at *2. However, the actual loss to the bank was \$56,000. *Id.* at *2 n.1. The court observed that had the defendant been convicted of check kiting and sentenced based on that offense, his adjusted offense level would have been fourteen, resulting in a guideline sentencing range of fifteen to twenty-one months. *Id.* at *2 n.3. As it was, he was convicted of structuring the entire three million dollars. *Id.* His adjusted offense level for that conduct was twenty-six, or sixty-three months to seventy-eight months. *Id.* at *2.

serious than for simple structuring, but not as serious as crimes such as fraud or money laundering involving comparable sums of money.

The better approach is one that offers a more calibrated sentencing scheme tied to the rationale for the BSA and the anti-structuring statute. When an individual structures transactions, the harm to the government is that it has been deprived of reports and records that Congress has found highly useful to law enforcement and other agencies. This is a harm, but not a serious one, especially if we concede the government is far more interested in the SAR that will likely be generated by a defendant's structuring behavior than it is the CTR that would have been generated had the defendant not structured (and in the case of imperfect structuring, was most likely generated anyway).³⁶² In the absence of evidence of some other criminal activity, the § 2S1.3 guideline should sentence serial structuring offenses more severely than simple structuring offenses, or at least offer some middle ground sentence.

Now evaluate the harm under the emerging rationale for the BSA. The emerging rationale is that the BSA forces money launderers to engage in high-risk behavior such as structuring, so law enforcement can catch them. Under the emerging rationale, a person who structures has not harmed the government. Rather, the person has risen to take the bait the government set for money launderers, tax evaders, and others engaged in criminal activity. So understood, the central issue in deciding the appropriate punishment should be whether the defendant fits within the class of people the government seeks to identify through the BSA's requirements and its anti-structuring law.³⁶³ If, at sentencing, the government can show by a preponderance of the evidence that the defendant is a money launderer, tax evader, or otherwise engaged in criminal activity, then the structuring guidelines

362. See *United States v. Bajakajian*, 524 U.S. 321, 339 (1998) ("Failure to report his currency affected only one party, the Government, and in a relatively minor way. There was no fraud on the United States, and the respondent caused no loss to the public fisc. Had his crime gone undetected, the Government would have been deprived only of the information that \$357,144 had left the country.").

363. See *id.* at 338 ("Whatever his other vices, respondent does not fit into the class of persons for whom the statute was principally designed: He is not a money launderer, drug trafficker or a tax evader.").

should refer the sentencing court to the guideline applicable to the underlying criminal activity. If, for example, a defendant structured funds to facilitate a tax evasion scheme, then the guideline should refer the court to Chapter Two Part T, which addresses offenses involving taxation.³⁶⁴ The court should then compute the sentence that the defendant would have received had he or she been convicted of the underlying tax crime, and add one or more levels to that adjusted offense level to take into account the structuring conduct.

This approach is consistent with the approach the Sentencing Commission has taken in the section 2S1.1. That guideline applies to money laundering offenses under §§ 1956, 1957, and 1960(b)(1)(c).³⁶⁵ Where a defendant who commits the underlying offense from which the laundered funds were derived, or would be accountable for them under relevant conduct rules, section 2S1.1 directs the court to determine the offense level for the underlying offense conduct.³⁶⁶ For most white collar offenses, section 2S1.1 then directs the court to increase the offense level by one or two levels depending on whether the defendant violated § 1956 or 1957.³⁶⁷ This approach ensures that the defendant's money laundering sentence bears some proportionality to the moral blameworthiness of his or her underlying conduct and yet provides an appropriate enhancement to reflect that the defendant committed additional crimes when he or she laundered the money. The government may support reform of section 2S1.3 to encourage more predictable and calibrated sentencing. Currently, the government has little to offer a defendant in plea negotiations in a structuring prosecution. If the defendant pleads guilty to an offense such as the one in *Pellegrini*, he or she faces an advisory guideline sentence so high it defies common sense.

If the defendant takes the government to trial, the defendant risks little more (in *Pellegrini*, the defendant's guideline range would only have jumped from a level twenty-

364. In the case of structuring involving tax offenses, existing section 2S1.3(c) directs the court to apply the guideline applicable to the underlying tax offense, but only if the resulting offense level is greater than determined under section 2S1.3.

365. U.S. SENTENCING GUIDELINES MANUAL § 2S1.1 cmt. (2009).

366. *Id.* § 2S1.1(a)(1).

367. *Id.* § 2S1.1(b)(2).

six to a level twenty-eight) and gains quite a bit. He or she gains the opportunity to put the government to its burden, to mount a defense, and if convicted, to argue for a *Booker* variance from the advisory guidelines. Given these incentives, it is difficult for the government to resolve structuring prosecutions by plea agreement. Compounding this difficulty is the problem of uniformity of sentences. *Pellegrini* illustrates the problem of imposing uniform sentences when advisory guidelines are too high. There the court imposed a sentence of probation when the guidelines called for as much as seventy-eight months imprisonment. Had the guidelines themselves provided a middle approach (somewhere between seventy-eight months and probation), they would have allowed for a more uniform and finely-calibrated sentence, both of which encourage plea bargaining and the just disposition of criminal cases.³⁶⁸

VIII. OTHER SANCTIONS: ASSET FORFEITURE AND CIVIL PENALTY ENFORCEMENT

A. *Asset Forfeiture*

Subsection 5317(c) authorizes civil and criminal forfeiture for selected violations of the BSA, including structuring offenses under § 5324.³⁶⁹ The criminal forfeiture provision authorizes the court, in the event of structuring conviction, to “order the defendant to forfeit all property, real or personal, involved in the offense and any property traceable thereto.”³⁷⁰ The provision’s language mirrors the criminal forfeiture statute for money laundering

368. In the case of defendants who appear eligible to receive the benefit of the safe harbor, e.g., an offense level six, the government may decide to forego criminal prosecution altogether in favor of some other sanction such as civil asset forfeiture or a civil enforcement penalty.

369. Legislative changes made in the USA PATRIOT Act consolidated the forfeiture provisions for BSA violations into 31 U.S.C. § 5317(c) and expanded them slightly. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, tit. III, §§ 372(a), (b), 115 Stat. 272, 338–39. Former law authorized forfeiture for structuring violations, but the authority was found in 18 U.S.C. §§ 981(a)(1)(A), 982(a)(1). The operative language of the former forfeiture law was similar to the language now found in Section 5317(c).

370. 31 U.S.C. § 5317(c)(1) (2006).

convictions.³⁷¹ Similarly, the civil forfeiture provision authorizes civil forfeiture of “[a]ny property involved in a violation of [§ 5324], or any conspiracy to commit any such violation, and property traceable to any such violation or conspiracy.”³⁷² This mirrors the language in the civil forfeiture statute that applies to money laundering violations.³⁷³ The criminal forfeiture provision incorporates Title 21 criminal forfeiture procedures, and the civil forfeiture provision incorporates Title 18 civil forfeiture procedures.³⁷⁴

It is beyond the reach of this article to engage in an extended discussion of assets forfeiture procedure and practice, as others have covered these topics exhaustively.³⁷⁵ The purpose of this discussion is instead to highlight forfeiture issues unique to structuring offenses.

1. *The Meaning of the Phrase “Involved in”*

Assume Congress enacted the civil and criminal forfeiture provisions in § 5317 against the background of existing law. If so, the scope of what is potentially forfeitable in a structuring prosecution is broad indeed. In the money laundering context, the phrase “involved in” has been construed to refer to property *intrinsic* to the offense (e.g., the laundered funds), and perhaps more controversially, certain property *extrinsic* to the offense (e.g., property used to facilitate the laundering offense).³⁷⁶

Under a broad construction of the phrase “involved in” two different kinds of property are potentially subject to

371. See 18 U.S.C. § 982(a)(1) (2006).

372. 31 U.S.C. § 5317(c)(2).

373. See 18 U.S.C. § 981(a)(1)(A) (2006).

374. See 31 U.S.C. § 5317(c)(1)(B) (“Forfeitures under this paragraph shall be governed by the procedures established in section 413 of the Controlled Substances Act [21 U.S.C. § 853].”); *id.* § 5317(c)(2) (stating that seizures and forfeitures shall be effected “in accordance with the procedures governing civil forfeitures in money laundering cases pursuant to section 981(a)(1)(A) of Title 18, United States Code”).

375. There are several treatises available devoted exclusively to the subject of U.S. asset forfeiture laws. See generally STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES (2006); DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES (1987).

376. See, e.g., *United States v. Huber*, 404 F.3d 1047, 1056–58 (8th Cir. 2005); *United States v. Puche*, 350 F.3d 1137, 1154 (11th Cir. 2003); *United States v. McGauley*, 279 F.3d 62, 76 n.14 (1st Cir. 2002); *United States v. Bornfield*, 145 F.3d 1123, 1135 (10th Cir. 1998); *United States v. Tencer*, 107 F.3d 1120, 1134 (5th Cir. 1997).

forfeiture because they are *intrinsic* to the structuring offense. First, and most obviously, the unreported funds are subject to forfeiture.³⁷⁷ Second, in the case of nonreportable funds (e.g., personal checks) deposited with reportable funds (e.g., currency) in a transaction to evade a CTR, the nonreportable funds are arguably subject to forfeiture because they were in a literal sense “involved in” the violation.³⁷⁸

In the money laundering context, there is a second category of extrinsic property: “facilitating property.” Facilitating property is property that is *extrinsic* to the offense conduct. Extrinsic property includes property that is not part of the financial transaction itself, but nonetheless makes the offense easier to commit or harder to detect.³⁷⁹ Facilitating property can, in limited circumstances, include legitimate funds pooled in the same bank account as illegitimate funds, and may even include a business used to facilitate money laundering.³⁸⁰

The *extrinsic*, or facilitating property theory, may not work as readily in structuring cases as it does in money

377. See *United States v. \$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 88–89 (2d Cir. 2002) (discussing structuring to evade \$3000 recordkeeping threshold for currency purchases of money orders); *United States v. Ahmad*, 213 F.3d 805, 809 (4th Cir. 2000) (discussing a situation in which parties stipulated that property which “is directly traceable to deposits structured so as to avoid reporting requirements” is subject to civil forfeiture); *United States v. 874 Gartel Drive*, 79 F.3d 918, 924 (9th Cir. 1996) (discussing forfeiture of real property purchased with cashier checks, which checks were acquired in structured transactions); *United States v. 1988 Oldsmobile Cutlass Supreme 2 Door*, 983 F.2d 670, 675 (5th Cir. 1993); *United States v. \$23,090.00 in U.S. Currency*, 377 F. Supp. 2d 1223, 1229–30 (S.D. Fla. 2005) (following bench trial, court orders civil forfeiture of funds structured among different travelers to evade the CMIR requirements in violation of 31 U.S.C. § 5324(c)(3)); *United States v. Funds in the Amount of \$170,926.00*, 985 F. Supp. 810, 815 (N.D. Ill. 1997).

378. See *United States v. Elfgeeh*, 515 F.3d 100, 138–39 (2d Cir. 2008); *1988 Oldsmobile Supreme 2 Door*, 983 F.2d at 675 (finding that vehicles purchased in structured transactions to evade Form 8300 requirements are “involved in” offense).

379. *Huber*, 404 F.3d at 1061 n.11; *McGauley*, 279 F.3d at 77.

380. *United States v. Singh*, 518 F.3d 236, 240–41 (4th Cir. 2008) (upholding the forfeiture of a motel where the owner received payment for motel rooms with prostitution proceeds); *United States v. Baker*, 227 F.3d 955, 969–70 (7th Cir. 2000) (upholding forfeiture of business premises because it was the location from which money laundering scheme was directed); *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 487 (2d Cir. 1995) (discussing business used to sell stolen auto parts and launder proceeds forfeited under § 981).

laundering cases. In *United States v. Hassan*,³⁸¹ the government indicted several individuals for structuring transactions to evade recordkeeping and reporting requirements, and sought to seize, restrain, and forfeit various assets it characterized as having been “involved in” the structuring offenses.³⁸² In connection with pretrial motions regarding the seizure and restraint of the assets, the government submitted an affidavit showing defendants purchased numerous official checks from various banks in amounts just below \$3000.³⁸³ The affidavit further described how one defendant had a pattern of depositing cash in amounts just below the \$10,000 CTR threshold.³⁸⁴ These cash transactions occurred in bank accounts controlled by some of the defendants.

One of the assets the government sought to restrain and forfeit as part of its structuring prosecution was a convenience store operated by two of the defendants. The government argued the convenience store was subject to forfeiture because it facilitated the structuring offenses by providing a source of cash revenue subsequently used by the defendants to purchase cashier’s checks in structured amounts.³⁸⁵ The district court rejected the argument. Unlike many cases upholding facilitating property forfeitures in the money laundering context, the convenience store did not generate criminal-derived property.³⁸⁶ Moreover, the convenience store did not make the structuring offenses—which occurred elsewhere—any easier to commit or harder to detect.³⁸⁷

One recurring issue in cases involving structured cash withdrawals from a bank account is whether the funds that remain behind are subject to forfeiture. It is difficult to characterize the funds that remain behind in the account as intrinsically or even extrinsically “involved in” the structured withdrawal. They are not intrinsically involved because they are not themselves structured. Instead, they remain behind

381. *United States v. Hassan*, 439 F. Supp. 2d 903 (E.D. Ark. 2006).

382. *Id.* at 904.

383. *Id.* at 904–05.

384. *Id.* at 905.

385. *Id.* at 906–07.

386. *Id.* at 906–09.

387. *United States v. Hassan*, 439 F. Supp. 2d 903, 906–09 (E.D. Ark. 2006).

in the bank account. Also, they are not extrinsically involved because they do not make the structured withdrawal any easier to commit or harder to detect.³⁸⁸ Perhaps only in the case of aggravated structuring conduct, in which the government shows a broad pattern of structuring behavior involving funds in the account, could the funds that remain behind even arguably be considered “involved in” the structuring offense.³⁸⁹

2. *Tracing, the Fungible Asset Statute, and Substitute Assets*

In any civil forfeiture case, the government must establish the requisite nexus between the property subject to forfeiture and the offense giving rise to forfeiture.³⁹⁰ Without such proof, the “guilty property” fiction upon which in rem forfeiture rests cannot operate.³⁹¹ The forfeiture provision for structuring violations authorizes the civil and criminal forfeiture of property “involved in” the offense as well as property traceable to such property.³⁹² This means that if structured funds are exchanged for another form of property, the property acquired with the structured funds becomes subject to forfeiture. Relying on this principle, courts have sustained the forfeiture of personal and real property acquired with structured funds.³⁹³

388. *Marine Midland Bank, N.A. v. United States*, Nos. 93 Civ. 0307 (RPP), 93 Civ. 0357 (RPP), 1993 WL 158542, at *7–8 (S.D.N.Y. May 11, 1993) (finding that untainted funds in an interbank account used to “clear” structured money orders were not forfeitable under a facilitation theory).

389. *Cf. United States v. Rodriguez*, 430 F. Supp. 2d 388 (D.N.J. 2006) (upholding the forfeiture in an amount beyond the value of the funds involved in the structuring offense of conviction because the government established a pattern of structuring conduct involving more than \$100,000 in funds in a twelve-month period), *vacated in part*, 464 F. Supp. 2d 387 (D.N.J. 2006).

390. *See, e.g., United States v. \$8,221,877.16 in U.S. Currency*, 330 F.3d 141, 158 (3d Cir. 2003). *But see United States v. Mudd*, No. 1:06-CR-00057-R, 2009 WL 197516, at *2 (W.D. Ky. Jan. 26, 2009) (finding that an indictment that charges only \$44,800 in illegally structured transactions cannot support the government’s requested forfeiture money judgment in the amount of \$203,510.10).

391. *See United States v. Bajakajian*, 524 U.S. 321, 340 (1998).

392. *See* 31 U.S.C. § 5317(c)(1), (2) (2006).

393. *See United States v. 874 Gartel Drive*, 79 F.3d 918, 921 (9th Cir. 1996) (affirming a grant of summary judgment in a forfeiture action against real property in which the government predicated forfeiture, in part, on the theory that the property was purchased with ten cashier’s checks acquired in a structuring violation).

The tracing requirement is most problematic for the government in cases involving fungible property such as funds maintained in a bank account. As forfeitable funds are withdrawn, and clean funds deposited, the government's ability to trace breaks down. Some courts allow the government to use forensic accounting principles to overcome these obstacles, particularly in cases involving commingled funds.³⁹⁴ However, accounting rules substitute for tracing only to a limited extent. When the government relies on accounting rules such as "last in, first out" or "first in, first out" it must also satisfy the "lowest intermediate balance rule."³⁹⁵ The lowest intermediate balance rule defeats tracing in cases where a bank account is filled with crime proceeds, emptied, then filled with legitimate funds, because the government cannot trace the dirty money to the funds remaining in the bank account even under these accounting concepts.³⁹⁶

Congress provided the government with a powerful statute to address tracing problems involving bank accounts. That statute, codified as 18 U.S.C. § 984, is tailor-made for forfeiture cases premised on § 5324(a) violations. In general terms, this section provides that where property that is subject to forfeiture is placed in a bank account and subsequently removed, the government can seize and forfeit funds it finds in the bank account at the time of seizure, even though the directly forfeitable funds were previously withdrawn.

This statute, though powerful, has three significant limitations. First, the amount of funds the government can forfeit under § 984 can never exceed the total value of directly forfeitable funds placed into the bank account. In other words, if a person deposits \$50,000 into a bank account in

394. See *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1158–62 (2d Cir. 1986) (stating that the government is entitled to use "first in, first out" or "first in, last out" tracing rules to overcome tracing issues in cases involving tainted funds moving through a volatile bank account).

395. "Under the lowest intermediate balance rule, it is assumed that traced proceeds are the last funds withdrawn from a contested account. Once the traced proceeds are withdrawn, however, they are treated as lost, even though subsequent deposits are made into the account." *Gen. Elec. Capital Corp. v. Union Planters Bank*, 409 F.3d 1049, 1059–60 (8th Cir. 2005) (citation and internal quotation marks omitted).

396. *Id.*

structured transactions, the government cannot use § 984 to seize \$100,000. It must be satisfied with \$50,000 or whatever lesser amount remains in the account at the time of seizure.³⁹⁷ Second, this provision has its own unique statute of limitations. To take advantage of the statute, the government must commence a forfeiture action within one year of the conduct giving rise to forfeiture.³⁹⁸ Finally, § 984 cannot be used as a tracing statute. In other words, if funds forfeitable under § 984, but not forfeitable under a tracing rule, are removed from the account, the government cannot forfeit the removed funds on the theory that they are traceable to property that is forfeitable under § 984. Section 984 only allows the government to seize funds from the account in which the forfeitable property was previously deposited.³⁹⁹

There remains an unresolved issue concerning whether the government may forfeit substitute assets involved in or traceable to structuring violations. The criminal forfeiture statute applicable to money laundering violations authorizes forfeiture of “substitute assets” by incorporating the provisions of 21 U.S.C. § 853, which include the substitute asset provision used in narcotics-related cases under 21 U.S.C. § 853(p).⁴⁰⁰ Subsection 5317(c)(1) also incorporates § 853 using slightly different terms. Yet rather than incorporate the provisions of § 853, it incorporates the

397. *See generally* United States v. U.S. Currency Deposited into Account, 176 F.3d 941, 947 (7th Cir. 1999) (stating that the government must establish the amount of money laundered through the account in the prior year, and that once it does so, that figure sets the cap on the total amount the government can seize and forfeit under § 984).

398. *See* 18 U.S.C. § 984(b) (2006); *see also* United States v. \$8,221,877.16 in U.S. Currency, 330 F.3d 141, 157–61 (3d Cir. 2003) (stating that the forfeiture complaint must be filed within one year; seizure within one year is not an “action” and thus does not stop the running of the statute of limitations). *But see* United States v. Funds Representing Proceeds of Drug Trafficking in Amount of \$75,868.62, 52 F. Supp. 2d 1160, 1166 (C.D. Cal. 1999) (noting that it is sufficient for purposes of § 984 that the government seize the property within one year of the offensive conduct).

399. *See* 18 U.S.C. § 984(a)(1) (“In any forfeiture action in rem in which the subject property is cash, monetary instruments in bearer form, funds deposited in an account in a financial institution (as defined in section 20) or precious metals—(A) it shall not be necessary for the government to identify the specific property involved in the offense that is the basis for forfeiture . . .”).

400. *See id.* § 982(b)(1).

procedures of that statute.⁴⁰¹ Noting the semantic distinction between the terms “provisions” and “procedures,” a district court in New Jersey concluded that substitute assets were not forfeitable for structuring violations because the substitute asset provision of § 853(p) is not a “procedure.”⁴⁰² The court subsequently withdrew and vacated this portion of its decision, leaving the issue for another day.⁴⁰³

3. *Excessive Fines Clause*

The Excessive Fines Clause of the Eighth Amendment to the United States Constitution provides that no excessive fines shall be imposed.⁴⁰⁴ The Supreme Court has held that certain kinds of civil and criminal forfeitures—generally, non-instrumentality forfeitures—are a form of fine or penalty subject to the limitations of the Excessive Fines Clause.⁴⁰⁵

The leading case to test the constitutionality of a forfeiture under the Excessive Fines Clause was *United States v. Bajakajian*.⁴⁰⁶ In *Bajakajian*, a defendant attempted to carry approximately \$357,144 out of the United States without filing a CMIR.⁴⁰⁷ When advised of the CMIR requirement, the defendant lied; he told the customs inspector that he had \$8000 and his wife had \$7000, but that they had no additional currency to declare. After a search of the defendant’s baggage uncovered the undeclared currency, the defendant was taken into custody and the currency was seized.

The defendant was subsequently indicted for failing to file a CMIR report and for making a materially false statement to the United States Customs Service. The indictment also included an allegation seeking forfeiture of the \$357,144 in currency.⁴⁰⁸ The defendant entered a guilty plea to the CMIR violation and the court conducted a bench trial on the forfeiture allegation.⁴⁰⁹ The district court

401. 31 U.S.C. § 5317(c)(1)(B) (2006).

402. *United States v. Rodriguez*, 464 F. Supp. 2d 387, 388 (D.N.J. 2006).

403. *Id.*

404. U.S. CONST. amend. VIII.

405. *United States v. Bajakajian*, 524 U.S. 321 (1998); *Austin v. United States*, 509 U.S. 602 (1993).

406. *Bajakajian*, 524 U.S. 321.

407. *Id.* at 324–25.

408. *Id.* at 325.

409. *Id.*

determined that the seized funds were “involved in” the reporting offense and thus subject to forfeiture under 18 U.S.C. § 982(a)(1), but reduced the forfeiture to \$15,000 based on its determination that the forfeiture of any amount greater than that would violate the Excessive Fines Clause.⁴¹⁰ On appeal, the Ninth Circuit held that the Excessive Fines Clause barred any forfeiture of unreported currency because the currency was not an “instrumentality” of the reporting offense.⁴¹¹

The Supreme Court held that the forfeiture was punitive as opposed to remedial, and therefore susceptible to challenge under the Excessive Fines Clause.⁴¹² The Court further held that the forfeiture of all currency involved in the CMIR offense was constitutionally excessive because it was grossly disproportional to the gravity of the offense.⁴¹³ In reaching this conclusion, the Court relied upon a number of considerations. Most importantly, the defendant’s conduct was unrelated to other criminal activities, and fell outside the class of activities the statute was designed to prevent.⁴¹⁴ The Court also emphasized that the guidelines imposed comparatively modest punishment for the offense.⁴¹⁵ Further, the harm the defendant caused was minimal; he merely deprived the government of information about currency leaving the country.⁴¹⁶

How *Bajakajian* bears upon the government’s ability to use asset forfeiture for structuring violations is an open issue. In *United States v. Ahmad*, the Fourth Circuit held that *Bajakajian*’s gross disproportional analysis applies when determining whether forfeiture premised on a structuring violation is excessive.⁴¹⁷ *Ahmad* addressed a situation in which the government sought to forfeit approximately \$186,587.42 in funds, of which around \$85,000 was traceable to violations of § 5324(a)(3), and the remainder traceable to

410. *Id.* at 325–26.

411. *Id.* at 326–27. Although the reasoning of the court of appeals meant that no forfeiture was permitted, it let the \$15,000 forfeiture stand because the defendant had not cross-appealed. *Id.* at 327.

412. *United States v. Bajakajian*, 524 U.S. 321, 328 (1998).

413. *Id.* at 337–40.

414. *Id.* at 338.

415. *Id.*

416. *Id.* at 339.

417. *United States v. Ahmad*, 213 F.3d 805, 815 (4th Cir. 2000).

customs violations.⁴¹⁸ After determining the \$85,000 was in fact subject to civil forfeiture, notwithstanding the reversal of the structuring conviction in the parallel criminal case, the court turned to whether the forfeiture violated the Excessive Fines Clause in light of the *Bajakajian* decision.⁴¹⁹

Examining the relevant factors identified in *Bajakajian* regarding the gravity of the offense, the *Ahmad* court distinguished the CMIR violation at issue in *Bajakajian* from the structuring violations at issue in the instant case. The court began by noting that *Bajakajian*'s reporting offense was a violation of a "lone reporting duty imposed on him as an individual."⁴²⁰ By contrast, the defendant's structuring violation in *Ahmad* caused a financial institution to fail to comply with its reporting obligations on numerous occasions. "The nature of Ahmad's structuring is thus readily distinguishable from the 'single' reporting offense at issue in *Bajakajian* in which the property owner, out of 'fear stemming from 'cultural differences,' tried to take his own money out of the country without reporting it."⁴²¹

The *Ahmad* court drew a second distinction. While the underlying activities in both the *Bajakajian* and the *Ahmad* cases involved lawful activities, "Ahmad's structuring constituted part of a complicated larger scheme related to customs fraud violations."⁴²² The defendant in *Ahmad* engaged in structuring deposits so that the account holder "could pay Pakistani manufacturers inflated purchase prices for imported surgical equipment."⁴²³ In assessing the harm caused by the offense, the *Ahmad* court noted that in *Bajakajian*, the offense resulted only in a loss of information to the government. "In the present case, Ahmad's deposit structuring activities not only caused the government to lose information, but also implicated an intermediary actor . . . and affected its legal duty to report certain transactions."⁴²⁴

418. *Id.* at 807–09.

419. *Id.* at 808–09.

420. *Id.* at 816.

421. *Id.*

422. *Id.*; see also *United States v. Wallace*, 389 F.3d 483, 487 (5th Cir. 2004) (distinguishing *Bajakajian*: "Obviously, he was operating an unregistered airplane on an ongoing basis, as opposed to the one time violation in *Bajakajian*").

423. *Ahmad*, 213 F.3d at 817.

424. *Id.*

In addition, the structuring behavior subjected to forfeiture the funds of Ahmad's clients, whereas the defendant in *Bajakajian* merely put at risk his own money.⁴²⁵

Some of the distinctions drawn in the *Ahmad* decision between the violation at issue in *Bajakajian* and a structuring violation in *Ahmad* are doubtful. First, the *Ahmad* court repeatedly emphasized that the defendant's conduct in that case caused a financial institution to fail to comply with its reporting obligations. Strictly speaking, this is not so. The defendant in *Ahmad* was convicted of a § 5324(a)(3) violation, as opposed to a § 5324(a)(1) violation.⁴²⁶ The essence of a § 5324(a)(3) offense—"perfect" structuring—is that the defendant's conduct in fact never triggers any bank's reporting obligation, if it had triggered such an obligation, the offense should have been charged under § 5324(a)(1). Thus, it is inaccurate to characterize the defendant's conduct as having caused a bank to fail to comply with the CTR requirement because the essence of a § 5324(a)(3) violation is that conduct completely evaded the reporting obligation.

Second, in distinguishing *Bajakajian*, the *Ahmad* court emphasized that the conduct in *Bajakajian* was a single reporting offense out of fear stemming from cultural differences.⁴²⁷ In contrast, "Ahmad's conduct was not a single, isolated untruth," but rather a series of sophisticated commercial transactions.⁴²⁸ This line of reasoning misstates the legal significance of the facts of both *Bajakajian* and *Ahmad*. The *Bajakajian* majority explicitly rejected the district court's finding that *Bajakajian*'s "cultural differences" mitigated the gravity of the offense.⁴²⁹ Moreover, while the offense conduct in a structuring prosecution may indeed involve a series of transactions, it does not necessarily follow that the defendant in *Ahmad* committed multiple violations of § 5324(a)(3). As discussed in Part V.B, a person who takes a lump sum of currency and breaks it down into multiple transactions only commits one structuring violation under § 5324(a)(3).

425. *Id.*

426. *Id.* at 808

427. *Id.* at 816.

428. *Id.*

429. *United States v. Bajakajian*, 524 U.S. 321, 339 n.12 (1998).

More compelling was the fact that Ahmad's structuring conduct related to a larger scheme involving the evasion of custom tax duties. In *Bajakajian*, the defendant did not "fit into the class of persons for whom the statute was principally designed: He is not a money launderer, a drug trafficker, or a tax evader."⁴³⁰ The funds were lawfully derived and the defendant intended to use the money to repay a legitimate debt.⁴³¹ In contrast, Ahmad acknowledged that he transferred some of the funds from his illegally structured deposits into an account used to further a customs fraud scheme.⁴³² Congress enacted the CTR requirement precisely out of concern that large unreported currency transactions enabled tax evasion and similar crimes. This fact, more than the other marshaled by the *Ahmad* court, distinguishes *Ahmad* from *Bajakajian*. Indeed, the handful of post-*Bajakajian* decisions involving forfeitures for reporting violations can largely be synthesized on this ground. Courts tend to uphold the forfeiture against excessive fines challenges when the reporting violation relates to a central purpose of the BSA and tend to mitigate it when it does not.⁴³³

Beyond those distinctions, there are other factors that may distinguish a structuring offense from the CMIR violation at issue in *Bajakajian*. First, a criminal conviction for an ordinary CMIR violation requires proof the defendant acted for the purpose of evading the CMIR, but it does not require proof the defendant broke down or concealed the monetary instruments subject to the CMIR requirement.⁴³⁴ In other words, the monetary instruments not reported in a CMIR offense are not themselves the instrumentality of the offense.⁴³⁵ On the other hand, a structuring offense, including

430. *Id.* at 338.

431. *Id.* at 326, 338.

432. *Ahmad*, 213 F.3d at 816–17.

433. Compare *United States v. Six Negotiable Checks in Various Denominations*, 389 F. Supp. 2d 813, 823–24 (E.D. Mich. 2005) (stating that forfeiture of \$200,000 in negotiable instruments was not grossly disproportional to CMIR offense where reporting violation related to tax-evasion activity), with *United States v. \$120,856 in U.S. Currency More or Less*, 394 F. Supp. 2d 687, 694 (D.V.I. 2005) (noting that in a situation where the claimant was bringing \$120,856 in legitimately savings into the United States to help his mother buy a house, forfeiture of entire amount for CMIR violation would violate Excessive Fines Clause).

434. See 31 U.S.C. § 5324(c) (2006).

435. See *Bajakajian*, 524 U.S. at 334 n.9.

structuring to evade the CMIR, requires proof of structuring, i.e., a breaking down of the funds to evade the reporting requirement, not merely a failure to report those funds. This added element of concealment or purposeful evasion means that a structuring offense more closely parallels a bulk cash smuggling offense than an ordinary CMIR offense.⁴³⁶ Congress enacted the bulk cash smuggling statute precisely because it wanted to define an offense in which the currency was itself the *corpus delicti*, or instrumentality, of the offense, effectively legislating around *Bajakajian*.⁴³⁷ There are a handful of cases applying the Excessive Fines Clause to a bulk cash smuggling offense, but the law is still developing.⁴³⁸ Even the government's own mitigation guidelines for CMIR offenses do not differentiate between a CMIR offense and a bulk cash smuggling offense.⁴³⁹

There is a second unstated ground for distinguishing *Ahmad* from *Bajakajian*. In *Bajakajian*, the government sought the forfeiture of the entire amount of unreported money. In the case of a CMIR violation, the government will almost always seize the total amount of funds "involved in" the violation because it will literally intercept the traveler on the jetway before he or she has an opportunity to dissipate the forfeitable property. However, in a structuring forfeiture, the government more often than not will be able to seize only

436. See 31 U.S.C. § 5332 (2006) (specifying that a bulk cash smuggling offense includes an element of concealment); *United States v. Tatoyan*, 474 F.3d 1174, 1181–82 (9th Cir. 2007) (explaining the difference between a CMIR offense and bulk cash smuggling offense).

437. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, tit. III, § 371(a)–(b), 115 Stat. 272, 336, 337.

438. See, e.g., *United States v. Jose*, 499 F.3d 105, 108–13 (1st Cir. 2007) (upholding entire forfeiture under § 5332 and distinguishing *Bajakajian*); *United States v. Ely*, 468 F.3d 399, 402 (6th Cir. 2006) (rejecting argument that Excessive Fines analysis for a bulk cash smuggling is different than for a CMIR offense); *United States v. \$293,316 in U.S. Currency*, 349 F. Supp. 2d 638, 643–44, 650–51 (E.D.N.Y. 2004) (acknowledging that forfeiture should be greater for a bulk cash smuggling offense than for a CMIR offense, but nonetheless reducing forfeiture by one half). See generally Stefan D. Cassella, *Bulk Cash Smuggling and the Globalization of Crime: Overcoming Constitutional Challenges to Forfeiture Under 31 U.S.C. § 5332*, 22 BERKELEY J. INT'L L. 98 (2004).

439. See U.S. DEP'T OF THE TREASURY ET AL., *supra* note 9, at 6 (calling on Customs and Border Patrol to promulgate forfeiture mitigation guidelines for bulk cash smuggling offenses that are different than those it currently uses for CMIR violations).

a portion of the structured funds; the other funds may be withdrawn or dissipated weeks and months before the government can execute the seizure warrant against funds in any particular bank account. Thus, we have begun to see lower court decisions distinguishing *Bajakajian* on the ground that the structuring conduct involved a far greater sum of money than the government actually seized for forfeiture.⁴⁴⁰

Finally, the punishment for most CMIR violations is comparatively insignificant. The defendant in *Bajakajian*, for example, faced an advisory maximum term of imprisonment of six months and a maximum guideline fine of \$5000.⁴⁴¹ In contrast, section 2S1.3 locks in harsh advisory guideline sentences in cases involving serial structuring. By way of comparison to *Bajakajian*, had the defendant in *Bajakajian* structured \$357,144 in currency, instead of failing to report it, as part of a pattern of structuring conduct involving more than \$100,000 in a twelve-month period, he would have faced an advisory guideline sentence of as much as thirty months (even after acceptance of responsibility), and a guideline fine as high as the statutory maximum fine of \$500,000.⁴⁴²

4. *Alternative Pretrial Restraint Theories in Structuring Prosecutions*

Both the civil and criminal forfeiture provisions of § 5317(c) incorporate the asset restraint and seizure provisions

440. See *United States v. Rodriguez*, 430 F. Supp. 2d 388, 408–11 (D.N.J. 2006) (following *Ahmad*); *United States v. Contents of Account Number 901121707*, 36 F. Supp. 2d 614, 618 n.5 (S.D.N.Y. 1999) (dictum) (stating that a situation where the claimant structured over twenty million dollars in funds, forfeiture of \$210,000—roughly one percent of the total currency—would not be constitutionally excessive; by contrast, in *Bajakajian* government sought forfeiture of all of the funds involved in the offense).

441. *United States v. Bajakajian*, 524 U.S. 321, 338 (1998).

442. See U.S. SENTENCING GUIDELINES MANUAL § 2S1.3(b)(2) (2003) (applying a two-level enhancement for aggravated Title 31 violations); *id.* § 2S1.3(b)(3) (foreclosing resort to safe harbor in cases where section 2S1.3(b)(2) applies); see also 31 U.S.C. § 5324(d)(2) (2006) (authorizing a \$500,000 fine in the case of aggravated violations); U.S. SENTENCING GUIDELINES MANUAL § 5E1.2(c)(4) (2008) (stating that a fine table does not limit the maximum if the defendant is convicted under a statute authorizing a maximum fine greater than \$250,000); *Rodriguez*, 430 F. Supp. 2d at 410 (explaining how guideline punishment for serial structuring is more serious than for the CMIR violation at issue in *Bajakajian*).

of their money laundering analogs.⁴⁴³ Thus, it is widely understood that a civil seizure or restraint in a structuring case is effected through 18 U.S.C. § 981(b), and a criminal seizure or restraint is effected through 21 U.S.C. § 853(e) or (f). With one exception, every circuit in the country has held that the government may seize or restrain for civil or criminal forfeiture only that property which is involved in or traceable to the violation itself.⁴⁴⁴ In the specific context of criminal prosecutions, this means that the government may not restrain or seize for forfeiture “substitute assets.”

Even if the forfeiture statutes do not allow the government to seize or restrain substitute assets before trial, an underutilized statute—18 U.S.C. § 1345(a)(2)—provides the equivalent authority. It provides in pertinent part:

If a person is alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of a banking law violation (as defined in section 3322(d) of this title)⁴⁴⁵ . . . or property which is traceable to such violation, the Attorney General may commence a civil action in any Federal court—

- (A) to enjoin such alienation or disposition of property; or
- (B) for a restraining order to—
 - (i) prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any such property or property of equivalent value; and
 - (ii) appoint a temporary receiver to administer such restraining order.⁴⁴⁶

What is extraordinary about this provision is the clause

443. 31 U.S.C. § 5317(c)(1)(B) (2006) (discussing incorporated criminal forfeiture procedures of 21 U.S.C. § 853); *id.* § 5317(c)(2) (discussing incorporating civil forfeiture procedures governing forfeitures under 18 U.S.C. § 981(a)(1)(A)).

444. *See, e.g.*, *United States v. Wingerter*, 369 F. Supp. 2d 799, 806–10 (E.D. Va. 2005) (summarizing case law).

445. The term “banking law violation,” as that term is used in, 18 U.S.C. § 3322 includes a “violation of, or a conspiracy to violate . . . any provision of subchapter II of chapter 53 of Title 31, United States Code.” 18 U.S.C. § 3322(d)(1) (2006). In other words, it includes the offense of structuring in violation of 31 U.S.C. § 5324.

446. 18 U.S.C. § 1345(a)(2).

that appears in § 1345(a)(2)(B): “or property of equivalent value.” That phrase authorizes the government to do what it cannot do in the forfeiture context outside the Fourth Circuit—restrain “equivalent value” assets (i.e., “substitute assets”).

Despite this extraordinarily broad grant of authority, the government has seldom used § 1345(a)(2) outside the health care fraud context. Outside the health care fraud cases, the leading case under § 1345 involved an action under § 1345(a)(1) to restrain the proceeds of a consumer fraud scheme.⁴⁴⁷ That provision also authorizes injunctions against banking law violations and may even authorize the pretrial restraint of assets, but it does not include the all-powerful “equivalent value” restraining authority.

B. Civil Penalty Enforcement

Subsection 5322(a)(4) authorizes the Secretary of the Treasury to impose a civil money penalty on any person who violates any provision of § 5324. Civil penalty referrals for structuring violations are rare. The government usually reaches for the civil forfeiture tool before it reaches for the civil sanctions tool. One advantage of civil forfeiture is that the government prosecutors can more freely share grand jury information with civil forfeiture prosecutors than they can with Treasury or Justice Department authorities pursuing civil enforcement remedies.⁴⁴⁸ A second advantage is that the government can seize and restrain property involved in a structuring offense *ex parte* under civil forfeiture laws while it must proceed to an early adversarial hearing under the fraud injunction statute.⁴⁴⁹ As of this writing, there is no

447. *See* *United States v. Payment Processing Ctr., LLC*, 435 F. Supp. 2d 462 (E.D. Pa. 2006).

448. *Compare* 18 U.S.C. § 3322 (2006) (authorizing a federal prosecutor to share grand jury materials for use in civil forfeiture actions), *with* INTERNAL REVENUE MANUAL § 9.5.5.3.5 (requiring civil penalty referrals to be “sanitized” of grand jury information).

449. *Compare* 18 U.S.C. § 981(b) (2006) (authorizing civil seizures issued in the same manner as search warrants under FED. R. CRIM. P. 41), *with* § 1345(a)(2) (authorizing FED. R. CIV. P. 65 injunctions if a person alienates or disposes of property obtained as a result of a “banking law” violation), *and* *United States v. DBB, Inc.*, 180 F.3d 1277 (11th Cir. 1999) (stating that the term “restraining order” in § 1345(a)(2)(B) refers to any injunctive relief, including preliminary injunction, and was not limited to temporary restraining order).

reported judicial decision in which the government sought a civil enforcement penalty under § 5322(a)(4).

IX. CONCLUSION

A central premise of the BSA is that law enforcement agencies review documents such as CTRs to detect criminal activity. That may have been true forty years ago when the volume of CTR filings was comparatively low and large currency transactions stood apart from other financial transactions. Today, the volume of reports filed by financial institutions, especially CTRs, is simply too great, and large cash transactions too common, for this rationale alone to support the entire artifice of the BSA. If the BSA is to remain viable in the face of increasingly vocal criticism from the banking community and others, Congress needs to embrace a new rationale. The BSA acts as a barrier that criminals seeking to move illegitimate funds must confront and avoid; it forces criminals to act in ways that increase their risk of detection.

Structuring is the principal method of evading the BSA. The anti-structuring statute emerged in the mid-1980s to plug a hole in the BSA's reporting and recordkeeping requirements. Today, the structuring offenses exist as a sort of trap set for money launderers, tax evaders, and others engaged in criminal activity. Those bent on avoiding the paper trail that the BSA's requirements create will be tempted to resort to increasingly high-risk behavior such as structuring and bulk cash smuggling. From a law enforcement perspective, this is desirable; such high-risk behavior makes it easier to separate out financial crime from an otherwise large volume of ordinary financial transactions.

The government's renewed emphasis on crimes such as structuring invites a reexamination of the structuring statute and its criminal, civil forfeiture, and civil enforcement mechanisms. This article has undertaken that examination in terms that emphasize the current legal issues facing prosecutors and defense lawyers. Structuring is a regulatory crime. Like other regulatory crimes, structuring has the potential to ensnare innocent or morally blameless conduct. When Congress overruled *Ratzlaf* and relaxed the mens rea elements of the structuring offense, it increased the danger that the structuring statute could be misused. Moreover, the

existing sentencing law places the statute in some peril of public and judicial disfavor because advisory guideline sentences for many structuring cases are far too punitive. Likewise, courts may have to mitigate certain forfeitures premised on structuring violations under the Excessive Fines Clause lest the government extract too much punishment.

Importantly, if the rationale for the BSA shifts from one that places emphasis on detection to one that places emphasis on deterrence, then the rationale for punishing crimes such as structuring also shifts. Today, we punish crimes such as structuring not so much because structuring deprives the government of BSA reports and records, although that remains a consideration, but rather because structuring is a good indicator of other criminal behavior. Our experience is that those who risk detection by engaging in crimes such as structuring are also often engaged in hard-to-prove crimes such as money laundering and tax evasion. In that case, sentencing and asset forfeiture in structuring cases need to be tied closely to whether the structurer had an underlying bad purpose or motive for engaging in structuring behavior. The government may not be able to prove the underlying criminal activity beyond a reasonable doubt at trial, but it may be able to prove it by a preponderance of the evidence at sentencing. Thus, the issue of motive should be a key inquiry at sentencing in structuring prosecutions.

APPENDIX**31 U.S.C. § 5324. Structuring transactions to evade reporting requirement prohibited.**

(a) **Domestic Coin and Currency Transactions Involving Financial Institutions.**—No person shall, for the purpose of evading the reporting requirements of section 5313(a) or 5325 or any regulation prescribed under any such section, the reporting or recordkeeping requirements imposed by any order issued under section 5326, or the recordkeeping requirements imposed by any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508—

(1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313 (a) or 5325 or any regulation prescribed under any such section, to file a report or to maintain a record required by an order issued under section 5326, or to maintain a record required pursuant to any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508;

(2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) or 5325 or any regulation prescribed under any such section, to file a report or to maintain a record required by any order issued under section 5326, or to maintain a record required pursuant to any regulation prescribed under section 5326, or to maintain a record required pursuant to any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508, that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

(b) **Domestic Coin and Currency Transactions Involving Nonfinancial Trades or Businesses.**—No

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person shall, for the purpose of evading the report requirements of section 5331 or any regulation prescribed under such section—

- (1) cause or attempt to cause a nonfinancial trade or business to fail to file a report required under section 5331 or any regulation prescribed under such section;
- (2) cause or attempt to cause a nonfinancial trade or business to file a report required under section 5331 or any regulation prescribed under such section that contains a material omission or misstatement of fact; or
- (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with 1 or more nonfinancial trades or businesses.

(c) **International Monetary Instrument Transactions.**—No person shall, for the purpose of evading the reporting requirements of section 5316—

- (1) fail to file a report required by section 5316, or cause or attempt to cause a person to fail to file such a report;
- (2) file or cause or attempt to cause a person to file a report required under section 5316 that contains a material omission or misstatement of fact; or (3) structure or assist in structuring, or attempt to structure or assist in structuring, any importation or exportation of monetary instruments.

(d) **Criminal Penalty.**—

- (1) **In general.**— Whoever violates this section shall be fined in accordance with title 18, United States Code, imprisoned for not more than 5 years, or both.
- (2) **Enhanced penalty for aggravated cases.**— Whoever violates this section while violating another law of the United States or as part of a pattern of any illegal activity involving more than \$100,000 in a 12-month period shall be fined twice the amount provided in subsection (b)(3) or (c)(3) (as the case may be) of section 3571 of title 18, United States Code, imprisoned for not more than 10 years, or both.