

Proposed IRS Civil Asset Forfeiture Bill Has Bail-Like Hearing

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A bill approved by the House Ways and Means Committee that would codify the recent IRS policy to refrain from civil asset forfeiture in cases involving solely "structuring" of deposits provides for a swift hearing, similar to a bail hearing, for those whose property has been seized.

The bipartisan Clyde-Hirsch-Sowers Restraining Excessive Seizure of Property Through the Exploitation of Civil Asset Forfeiture Tools Act (RESPECT Act) (H.R. 5523 ) , introduced by Ways and Means Oversight Subcommittee Chair Peter J. Roskam, R-Ill., and subcommittee member Joseph Crowley, D-N.Y., would codify the IRS's October 2014 announcement that it would refrain from using civil asset forfeiture in cases involving solely structuring of transactions in violation of 31 U.S.C. section 5324 without either illegal source funds or intent to conceal some other crime. Structuring transactions is a crime when a series of transactions are organized to avoid reporting requirements of the Bank Secrecy Act (BSA). The BSA requires reporting of cash deposits over \$10,000. Someone looking to prevent the filing of those reports could make repeated deposits of \$9000, rather than a single larger deposit. (Prior coverage )

Along with removing structuring from the civil asset forfeiture provision of the BSA (31 U.S.C. section 5317(c)(2)), the RESPECT Act would create a new post-seizure hearing similar to the general civil asset forfeiture release of property hearing under 18 U.S.C. section 983(f), but with a few noteworthy differences.

While both the existing section 983(f) and the proposed RESPECT Act provisions allow for submission to a court and 30 days for the court to rule, section 983(f) requires an administrative request before submission. The RESPECT Act would require an adversarial hearing during those 30 days. While both provisions include extensions of the 30-day time limit, section 983(f) requires consent of the parties or good cause. The RESPECT Act would only require court action following a request by either party. Section 983(f)(8) excludes seizures of currency while the RESPECT Act post-seizure review would not.

Michael J. Desmond of the Law Offices of Michael J. Desmond said it would be easy to see the extension becoming the rule for the RESPECT Act hearing. For example, "automatically, the Service invokes the extension in every single [Freedom of Information Act] request," he said. "That's often a consequence of putting relatively short time frames in statutes."

According to Robert Everett Johnson of the Institute for Justice, the most notable difference "is the substance of the court's determination."

Section 983(f) only allows for return of the property on a showing of a claimant's substantial

hardship and that that hardship outweighs the risk that the seized property will later be unavailable in the forfeiture case, among other requirements. Conversely, at the RESPECT Act's hearing, the government would instead have the burden of showing "that there is probable cause to believe that there is a violation of section 5324 involving such property and probable cause to believe that the property to be seized was derived from an illegal source or the funds were structured for the purpose of concealing the violation of a criminal law or regulation other than section 5324."

Jenny L. Johnson of Johnson Moore LLC said the shift of the burden from the claimant proving hardship and other issues to the government proving probable cause "would be radically different."

Robert Johnson said the IRS has up to 150 days before it must make its case to a judge under normal civil asset forfeiture proceedings. The expedited procedures, including the hearing proposed under the RESPECT Act, can be compared to a bail hearing in a normal criminal case, he said. With the expedited post-seizure hearings, people whose property had been seized would have a much earlier opportunity to present an innocent explanation, he said. The swift hearing can alleviate the pressure a person could face by having her bank account seized, pressure that might otherwise force the person to settle with the government and give up a portion of the money, Johnson said, adding, "It's really a very important change to the law."

Like in the arrest context, the government can take time to put together its case for trial but must give the accused some showing and opportunity to respond concerning incarceration in the meantime, Robert Johnson said. "I think the same applies to property," he said. "The government can have more time to prepare for the final civil forfeiture hearing, but it can't just hold your property indefinitely without giving you any kind of opportunity to have a hearing on the merits before a judge."

"You can have all kinds of reasons for intending to keep your bank deposits under \$10,000 and not all of those reasons are illegitimate," Robert Johnson said.

While section 983(f) specifies that a petition goes to a U.S. district court, the RESPECT Act refers only to "a court of competent jurisdiction." Desmond said the court would have to be clarified, along with jurisdiction and venue rules, and noted that there is no specific grant of jurisdiction to the Tax Court in the RESPECT Act. Robert Johnson said the RESPECT Act hearings should be in the district courts because the issue is not really a tax issue even though the RESPECT Act only concerns IRS seizures.

Jenny Johnson said the RESPECT Act hearing should also be compared to jeopardy assessment and levy procedures under [section 7429](#) and to motions for return of property seized under Federal Rule of Criminal Procedure 41(g). "When the government goes out and seizes a bunch of property or money from our clients, they have a few different things that they can use to hang onto it, and we have different counterarguments that we can make to get it back," she said. "It's like there are all of these different pieces on the chessboard that each operate differently, and the moves we make depend on the moves the government makes." Each procedure is different and has different pros and cons for the government and the clients, she said.

Desmond said the rules around jeopardy levy and assessment review are more comprehensive

than the proposed rules under the RESPECT Act and that jeopardy reviews can turn into "mini-trials."

[Sections 6331\(a\)](#) and [6861](#) provide for expedited levy and assessment of tax liabilities if the government fears that the normal delay in assessment and collection will jeopardize the ultimate possibility of collection. These jeopardy levies and assessments come with special review procedures under section 7429.

Like section 983(f), section 7429 requires taxpayers to first submit a request for review to the IRS before filing suit in U.S. district court. Section 7429 has the shortest time limit on the court, 20 days, but the period cannot end on a holiday or weekend and there is no adversarial hearing requirement. Only the taxpayer can request an extension of the time limit on the court and must show reasonable grounds for an extension.

Like the proposed RESPECT Act review, the section 7429 judicial review addresses the merits of the jeopardy assessment or levy, determining whether the assessment of levy was "reasonable." While the IRS bears the burden of proving jeopardy, the taxpayer bears the burden of proving the correct amount.

Jenny Johnson said the jeopardy review also includes "lots of expedited discovery, which can be an incredibly useful tool for the defense."

Motions for return of property under rule 41(g) have fewer specific provisions, but also allow for review of factual evidence. Under rule 41, the government can seize, via warrant, property that is either evidence or fruit of a crime. Rule 41(g) provides for a motion to return property to someone "aggrieved by an unlawful search and seizure of property or by the deprivation of property," but does not specifically allocate burdens of proof.