return of illegally seized or wrongfully detained property.[32] The current view is that claimants cannot bypass administrative remedies or judicial procedures by proceeding under Fed. R. Crim. P. 41(e) in lieu of the specific provisions of the forfeiture statutes.[33] Similarly, a claimant who chooses not to file a claim and a cost bond after receiving notice of an administrative forfeiture, and who pursues only his administrative remedy of petition for remission, may not obtain judicial review of the seizing agency's denial of the petition.[34]

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[31](...continued)
constitutes 1989 amendment). Prior to the rule change, in *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555, 569 (1983), the Supreme Court suggested that a claimant may file a Rule 41(e) motion for return of property as a means of asserting his right to a prompt post-seizure hearing.

[32] A motion for relief from judgment under Fed. R. Civ. P. 60(b) will not result in the return of the forfeited property to the movant. *See, e.g., United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1356 (5th Cir. 1972).

[33] *See, e.g., United States v. Price*, 914 F.2d 1507 (D.C. Cir. 1990); *United States v. Hernandez*, 911 F.2d 981 (5th Cir. 1990). *See also Shaw v. United States*, 891 F.2d 602 (6th Cir. 1989); *United States v. Castro*, 883 F.2d 1018 (11th Cir. 1989) (both citing cases); *In re Harper*, 835 F.2d 1273 (8th Cir. 1988). In *Floyd v. United States*, 860 F.2d 999 (10th Cir. 1988), the Court of Appeals explained that a Rule 41(e) motion should be dismissed if the plaintiff has an adequate legal remedy, i.e., the ability to challenge the forfeiture in a pending administrative or judicial proceeding.

[34] *In re Sixty Seven Thousand Four Hundred Seventy Dollars*, 901 F.2d 1540, 1545 (11th Cir. 1990).

Chapter 9

Petitions for Remission or Mitigation of Civil or Criminal Forfeiture

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Chapter 9

Petitions for Remission or Mitigation of Civil or Criminal Forfeiture

I. Definition

The remission or mitigation of a civil or criminal forfeiture is a process designed to ameliorate the harshness of the forfeiture sanction. It is an act of pardon by the executive branch of the Government, and prior to the enactment of the first statutory innocent owner provision in 1978, this was the primary remedy available to innocent owners of property that had been forfeited.

An individual with an interest in the forfeited property petitions the Attorney General for remission or mitigation of the forfeiture, hence the procedure is commonly referred to as "petition for remission or mitigation of forfeiture," "petition for remission," or simply "petition." Where the ruling is favorable, remission usually takes the form of a return of the petitioner's interest in the property, while mitigation takes the form of a return of the property, along with the possible imposition of a monetary payment or other condition of mitigation.

If the petitioner requests remission of the forfeiture and the ruling official finds insufficient basis to warrant remission, the official will also consider any claim for mitigation that is addressed in the petition.

The statutory basis for petitions for remission or mitigation ruled on by the Attorney General can be found in the Tariff Act of 1930 at 19 U.S.C. §§ 1613 and 1618, as well as in other forfeiture statutes. The regulations governing remission and mitigation as discussed in this chapter are at 28 C.F.R. Part 9. Specific agencies have their own regulations located at other parts of the Code of Federal Regulations.

The regulations governing remission or mitigation of civil and criminal forfeitures were revised in 1993.[1] The new regulations apply to the Criminal Division of the Department of Justice, the Drug Enforcement Administration, the Federal Bureau of Investigation, the Immigration and Naturalization Service, and the United States

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[1] At the time of publication, these regulations were in draft form but had received preliminary Justice Department clearance prior to review by the Office of Management and Budget and submission for public comment. The citations used in this chapter are to the proposed 1993 regulations in the form they were in as of June 30, 1993.

Marshals Service. It is contemplated that these regulations will govern petitions for remission in forfeiture cases handled by Justice Department agencies. The Postal Inspection Service, the Internal Revenue Service, the Bureau of Alcohol, Tobacco, and Firearms, the Customs Service, and the Secret Service each have separate regulations for their administrative forfeitures in separate portions of the Code of Federal Regulations.

In addition to establishing a consistent process and procedure, the proposed regulations seek to: (1) clarify ambiguities in the former regulations, (2) distinguish between the bases for remission of forfeiture as contrasted with the mitigation of forfeiture, and (3) recognize the interests of non-owner victims of crime in forfeited monies and other properties where authorized by statute.

II. General Principles

The Supreme Court has held that "...remission proceedings are not necessary to a forfeiture determination, and therefore are not constitutionally required."[2] An individual or business entity with a sufficient legal interest in the property seized for forfeiture can contest the forfeiture, file a petition for remission or mitigation, or do both. However, the filing of a petition does not waive or suspend any time limits imposed for filing a claim to contest the forfeiture. Further, the courts are without authority to review the action of the Attorney General in denying the remission or mitigation of the forfeiture.[3]

No specific time limits are established by statute or case law for the processing of petitions by the Government. However, because it has not yet been definitively determined whether a petitioner has a constitutional right to a prompt decision, the agents and officials involved in the investigation and decision should act without unreasonable or undue delay.[4]

Even though 19 U.S.C. § 1618 permits an agency to take testimony regarding requests for remission or mitigation of the forfeiture, doing so is solely at the discretion of the agency. Neither the Constitution nor statutes compel an agency to hold a

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[2] *United States v. VonNeumann*, 474 U.S. 242, 250 (1986).

[3] *See United States v. One 1961 Cadillac*, 337 F.2d 730 (6th Cir. 1964).

[4] *See United States v. VonNeumann*, 474 U.S. at 251 (holding that even if petitioner has a due process right to a prompt decision, a delay of thirty-six days does not violate that right); *Willis v. United States*, 600 F. Supp. 1407, 1417 (N.D. Ill. 1985) (holding that a delay of four months between the filing of a petition and its disposition was "not so egregious as to amount to a constitutional violation").

hearing. The Attorney General's petition for remission or mitigation regulations explicitly state that no hearing will be held.[5]

The Attorney General's regulations state that the ruling official, in ruling on a petition for remission, shall not consider whether the evidence is sufficient to support the forfeiture but shall presume, for purposes of the petition for remission, that the forfeiture is valid.[6] This presumption applies only to the petition process and has no effect on any judicial proceeding.

III. Filing the Petition

A. Form

There is no prescribed form for a petition. However, it must contain a sworn affidavit[7] and include:[8]

(1) the name, address, and social security number of the person claiming an interest in the seized property;

(2) the name of the seizing agency, the asset identifier, and the date and place of seizure;

(3) a complete description of the property including its address or its make, model, and serial numbers, if any; and

(4) a description of the interest of the petitioner in the property, as owner, lienholder, or otherwise, to be supported by original or certified bills of sale, contracts, deeds, mortgages, or other satisfactory documentary evidence.

B. Prerequisites to obtaining remission

If the petition seeks remission of the forfeiture, there are five specific prerequisites, all of which the petitioner must establish:

(1) that the petitioner has a valid, good faith interest in the seized property as owner or otherwise;

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[5] 28 C.F.R. §§ 9.3(g) and 9.4(g) [proposed].

[6] *Id.* § 9.5(a)(4).

[7] 28 U.S.C. § 1746 and *id.* §§ 9.3(c) and 9.4(c).

[8] *Id.* §§ 9.3(c) and 9.4(c).

(2) that the petitioner had no knowledge that the property in which petitioner claims an interest was or would be involved in any violation of the law;

(3) that the petitioner had no knowledge of the particular violation that was the underlying basis for the property being subjected to forfeiture;

(4) that the petitioner had no knowledge that the user of the property had any record for violating laws of the United States, or of any state, for a related crime; and

(5) if the petitioner's interest is that of an owner who has allowed another to use the forfeited property, or is that of a lienholder, the petitioner must show, in addition to (1) through (4) above, that all reasonable steps were taken considering the information that was known or should have been known to the petitioner at the time, to prevent the illegal use of the property.[9]

If the petition seeks mitigation of the forfeiture, the petition must set forth details regarding any extenuating circumstances establishing that relief should be granted.[10] Mitigation is available to a party not actually involved in the commission of an offense, but who had knowledge of it, to avoid extreme hardship.[11] It is also available to a party involved in the commission of an offense for a variety of special reasons listed in the regulations.[12] In either situation, a ruling official may impose a monetary or other condition of mitigation.[13]

C. *Procedure for filing*

A petition for remission or mitigation must be filed before the disposition of the forfeited property (usually by sale or by placing the property into use by a government agency, commonly referred to as official use).[14] Petitioners are, however, encouraged to file the petition within thirty days after they receive notice of the intent of the Government to forfeit the property so as not to delay the disposition of the property in the event of its forfeiture.

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[9] *Id.* § 9.5(a)(1).

[10] *Id.* § 9.5(b).

[11] *Id.* § 9.5(b)(1)(i).

[12] *Id.* § 9.5(b)(1)(ii).

[13] *Id.* § 9.5(b).

[14] 19 U.S.C. § 1618 and *id.* §§ 9.3(a) and 9.4(a). Petitions for restoration of property after its disposition must be filed within ninety days of its sale or placement into official use. *See* 19 U.S.C. § 1613 and *id.* §§ 9.3(n) and 9.4(m) for further details.

Petitions for administratively forfeited property should be addressed to either the head of the seizing agency, or to the person in charge of the agency's local or regional office, depending upon which agency seized the property.[15] Petitions for judicially forfeited property – civil or criminal – should be addressed to the Attorney General, and submitted to the United States Attorney for the district where the forfeiture proceedings are brought, with a copy to the seizing agency.[16]

D. Standing to file petitions

Petitions for remission or mitigation may be filed by owners, lienholders (including certain judgment creditors), and certain victims.[17] In order to qualify as an owner or lienholder, the petitioner in question would have to qualify as a party entitled to file a claim as an innocent owner or bona purchaser for value in the related forfeiture proceeding.[18] To this extent, standing to file a petition is no greater than standing to appear in the forfeiture action and file a claim. However, members of the other two classes of potential petitioners would not have standing to file a claim in the forfeiture action unless, of course, they otherwise qualified as owners or lienholders. (A victim could be an "owner" if he or she has an ownership interest in the actual property forfeited.) The type of victims who qualify for remission are described in part V., *infra*. The special rules applicable to general creditors and judgment creditors are described next, followed by a discussion of who may file on behalf of a particular petitioner.

1. General creditors

General creditors do not have standing to file petitions under the new regulations.[19] However, the United States Marshals Service, as custodian of seized property, has the authority to pay the claims of general creditors of an on-going business for debts incurred within thirty days before seizure, and to pay the ordinary and necessary expenses of the business incurred thereafter, including salaries,

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[15] *Id.* § 9.3(e).

[16] *Id.* § 9.4(e).

[17] *Id.* § 9.2(o).

[18] *Id.* § 9.5(a).

[19] *Id.* § 9.6(a). Under the 1987 regulations, 28 C.F.R. § 9.6(a), a limited class of general creditors – typically persons who supplied goods or services to a business within 120 days before a seizure – had standing, but the Department has concluded there is no legal basis for making payments to general creditors through the remission process.

payments to third party suppliers, and payments to utilities.[20] Such payments are made by the Marshals Service independent of the petition process.

2. Judgment creditors

The term "judgment creditor" means one who has obtained but not yet received full satisfaction for a judgment against the owner of the forfeited property and, by virtue of the judgment, becomes entitled to enforce it.[21] Only a limited class of judgment creditors are entitled to remission. A judgment creditor could qualify as a lienholder entitled to remission if: (1) the judgment was duly recorded before the seizure of the property for forfeiture; (2) under local law the judgment is considered to have attached to the property being forfeited before the seizure of the property for forfeiture; and (3) the creditor had no knowledge of the commission of the offense underlying the forfeiture at the time the judgment became a lien on the property.[22] If a particular judgment creditor qualifies as a lienholder under these criteria, he or she is treated like a lienholder and receives equal priority. However, if the property in question is stolen property, or other property of which the judgment debtor may not claim valid ownership under applicable state or other local law, the judgment creditor will not be considered a lienholder and he or she will not be entitled to remission (unless, of course, he or she otherwise qualifies as a petitioner).[23]

3. Who may file a petition for a petitioner

A petition may only be filed by the petitioner himself, a legal guardian, or an attorney for the petitioner.[24] As a general rule, separate petitions must be filed by individual petitioners. However, in limited circumstances, and with the consent of the

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[20] This authority derives from the statutory authority to make payments from the Assets Forfeiture Fund for expenses incurred to safeguard and maintain seized property. *See* 28 U.S.C. § 524(c)(1)(A).

[21] *Id.* § 9.2(g). A lien creditor could be a "judgment creditor" if the lien was established by operation of law or contract (*e.g.*, a mechanic's lien), was created as a result of an exchange of money, goods, or services, and, under applicable local law, is considered to have been perfected against the particular property subject to forfeiture.

[22] *Id.* § 9.6(f).

[23] *Id. See United States v. Benitez*, 779 F.2d 135 (2d Cir. 1985) (federal interpleader action in which the court held that where stolen property was concerned, the victims of the theft or fraudulent scheme had priority over judgment creditors either on a constructive trust theory (majority opinion) or because the judgment debtor simply had no valid ownership interest to which a judgment could attach (concurring opinion)).

[24] 28 C.F.R. § 9.9(g). The attorney must show he has written authority to file the petition.

ruling official, consolidated petitions may be filed.[25] This may be done by one party who is already entitled to file a petition, filing the petition on behalf of other similarly situated potential petitioners. The petitioner must demonstrate that he has the authority to file the petition on behalf of the other petitioners in question. This authority may be implied by the existence of written authority to file claims or lawsuits related to a particular course of conduct on behalf of the other petitioners.[26] This authority is most likely to be used by insurance companies or other benefit providers who have the authority to file claims on behalf of beneficiaries of an employee benefits plan against parties who defraud them. Note that the insurance company or other benefit provider would have to have standing to file a petition itself, typically as a victim of the offense underlying the forfeiture. If remission is granted in such cases, the payments must be made directly to those on whose behalf the petition was filed.[27]

IV. Decision on Petitions

A. Investigation

Once a petition for remission or mitigation has been filed, the agency that seized the property is responsible for investigating the merits of the petitioner's claim and submitting a report on the investigation to the ruling official (administrative forfeitures) or to the United States Attorney (judicial forfeitures).[28]

1. Administratively forfeitable property

A petition for property subject to administrative forfeiture by the DEA or the FBI, along with the report of the investigation, is to be submitted to the ruling official for review and consideration. No hearing shall be held.[29]

2. Judicially forfeitable property

A petition for property subject to judicial forfeiture and the report of the investigation by the seizing agency must be submitted by the United States Attorney,

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[25] *Id.* § 9.9(h).

[26] *Id.*

[27] *Id.*

[28] *Id.* §§ 9.3(f) and 9.4(f).

[29] *Id.* § 9.3(g).

along with his or her recommendation as to allowance or denial, to the Asset Forfeiture Office for a final determination.[30]

B. Considerations for ruling official

Because a petition for remission or mitigation presumes a valid forfeiture, the ruling official need not be concerned with or give consideration to attacks on the merits of the Government's case. Thus, challenges to such matters as the admissibility of evidence, the legality of seizure, or the existence of probable cause, are misplaced in a petition that is, in essence, requesting an executive pardon. Therefore, the petition itself, along with the results of the required investigation, must convince the ruling official that the petitioner is entitled to or deserves the relief requested.

Specific decision-making guidelines regarding particular classes of petitioners (general creditors,[31] rival claimants, lessors, voluntary bailors, straw owners, judgment creditors,[32] and victims[33]) are also set forth in the regulations.[34]

C. Terms and conditions of remission

The regulations also describe the appropriate terms and conditions of remission,[35] including such matters as the retention or recoupment of the Government's expenses for seizure and forfeiture, the return of property or sale proceeds to an innocent owner, and the payment, to the extent possible, of a lienholder's net equity.[36]

D. Notice of decision and reconsideration

The petitioner will be advised in writing of the granting or denial of a petition. Notice of a decision on a petition involving property judicially forfeited is sent by the Asset Forfeiture Office to the petitioner, the appropriate United States Attorney, the

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[30] *Id.* § 9.4(f), (g).

[31] See discussion on general creditors in part III.D.1., page 5, *supra*.

[32] See discussion on judgment creditors in part III.D.2., page 6, *supra*.

[33] See discussion on victims in part V., pages 10 to 17, *infra*.

[34] *See generally id.* §§ 9.6(a)-(f), 9.8.

[35] *See generally id.* § 9.7.

[36] *See id.* § 9.7(b). Pursuant to *id.* § 9.2(j), net equity is the amount of a lienholder's monetary interest in the property. Net equity is computed by determining the amount of unpaid principal and unpaid interest at the time of seizure, and by adding to that sum unpaid interest calculated from the date of seizure through the last full month prior to the date of the decision.

seizing agency, and, if the decision is favorable, to the United States Marshals Service.[37] Notice of a decision on a petition involving property administratively forfeited is sent to the petitioner and to the United States Marshals Service.[38]

If the petition is denied, the petitioner is advised of this fact and the fact that one request for reconsideration of the denial will be considered. A request for reconsideration must be based on evidence not previously considered that is material to the basis of the denial, or presents a basis clearly demonstrating that the denial was erroneous.[39] If the forfeiture is judicial, the petitioner should file the request with the Asset Forfeiture Office but submit a copy of the request for reconsideration to the United States Attorney where the judicial forfeiture proceedings were brought.

The decision of the Attorney General is an act of grace, and generally not subject to judicial review.[40] There are, however, very limited exceptions in which judicial review is warranted. One such exception is when executive branch officials arbitrarily refuse to consider a petition. In order to invoke this exception, a petitioner would have to allege either the agency's refusal to consider a petition or that the agency had a formalized policy to deny petitions for remission.[41] In such cases, while the court may require the ruling official to decide the petition, there is no independent review of the decision on the merits.[42] Limited judicial review may also be appropriate where it is alleged that the agency violated its own regulations,[43] where the forfeiture itself was procedurally deficient,[44] or when a constitutional challenge to the forfeiture is raised.[45]

E. Priority of payment

Before remission may be granted, the Government will deduct its costs incident to the forfeiture, sale, or processing of the petitions in the case. Such costs include

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[37] *Id.* § 9.4(i).

[38] *Id.* § 9.3(i).

[39] *Id.* §§ 9.3(j), 9.4(k).

[40] *Ivers v. United States*, 581 F.2d 1362, 1371 (9th Cir. 1978).

[41] *One 1977 Volvo 242 DL v. United States*, 650 F.2d 660, 662 (5th Cir. 1981).

[42] *In re Sixty Seven Thousand Four Hundred Seventy Dollars*, 901 F.2d 1540, 1543-44 (11th Cir. 1990).

[43] *Sammons v. Taylor*, 967 F.2d 1533 (11th Cir. 1992).

[44] *Onwubiko v. United States*, 969 F.2d 1392 (2d Cir. 1992).

[45] *Marshall Leasing, Inc. v. United States*, 893 F.2d 1096, 1101-02 (9th Cir. 1990).

court costs, storage costs, brokerage and other sales related costs, payments made to employees or suppliers of a seized business, the amount of any liens paid by the Government on the property, awards, and costs related to the investigation, such as travel and deposition expenses.[46] (However, when property is restored to an owner, only the sales related costs are routinely deducted. Other costs may be waived.)[47] After the deduction of such costs, petitions are granted in the following order of priority:[48]

(1) owners;

(2) lienholders;

(3) federal financial institution regulatory agencies (if not entitled to greater priority as owners or lienholders);[49] and

(4) victims (not constituting owners or lienholders).

A ruling official, in exceptional circumstances, however, may alter the priority between petitioners in classes (3) and (4). Of course, no petitions may be granted in excess of the total amount forfeited less the deduction of the costs described above.[50]

V. Victim Restitution

A. Use of forfeited assets for restitution in general

There is express statutory authority to use forfeited assets to make restitution to victims under the major criminal forfeiture statutes,[51] but only under one of the major civil forfeiture statutes – forfeitures pursuant to 18 U.S.C. § 981(a)(1)(C) (FIRREA and

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[46] 28 C.F.R. § 9.9(a).

[47] *Id.* § 9.5(a)(3).

[48] *Id.* § 9.9(a).

[49] See discussion of transfers to federal financial regulatory institutions in FIRREA cases, pursuant to 18 U.S.C. § 981(e)(3), in chapter 10, part VI., pages 10–18 to 10–21. These transfers are actually being made pursuant to the statutory authority to make such transfers outside of the formal remission process.

[50] 28 C.F.R. § 9.9(a).

[51] *See, e.g.*, 18 U.S.C. § 982(b) (by cross-reference to 21 U.S.C. § 853(i)); 18 U.S.C. § 1467(h)(1); 18 U.S.C. § 1963(g), (h) (pursuant to remission regulations only); 18 U.S.C. § 2253(h)(1); and 21 U.S.C. § 853(i)(1).

miscellaneous other violations).[52] Prior to 1993 and the effective date of the revised regulations on remission and mitigation, there was no way for victims to obtain forfeited assets as restitution unless, of course, they had a traceable ownership interest in the specific property forfeited. The revised regulations specifically authorize the filing of petitions for remission by victims who lack such a traceable ownership interest where the statute under which the forfeiture occurs explicitly authorizes the restoration or remission of forfeited property to victims. The applicable provisions are to be found in new 28 C.F.R. § 9.8.

Absent the use of the remission process, there are only limited ways in which assets can be transferred to so-called non-owner victims. Even where express statutory authority exists to make such transfers of forfeited assets, there are no implementing regulations or delegations of authority in place, so only the Attorney General personally has the authority to order such a transfer once a forfeiture becomes final. It is both possible and permissible, though, to transfer assets seized for forfeiture to victims for restitution purposes, provided the correct mechanism is used. In criminal cases, the correct mechanism would be the use of the Victim and Witness Protection Act.[53] The court, with the Government's consent, could appropriately order that all or a portion of the seized assets be applied to restitution. Where this procedure is followed, it is important that it be clear that the assets are otherwise forfeitable to the Government, and that any claims by creditors or others to the property be resolved through the ancillary hearing process first. Further, such a disposition is subject to the normal consultation or approval requirements for settlements involving forfeitures above a certain amount (see chapter 7). The policies and limitations on the use of forfeited assets for restitution purposes set forth in the remission regulations as described below must be followed. Important among these policies and limitations are the rules that the victim not have already received compensation from another source, that there not be alternative assets readily available for this purpose, and that restitution only be made for pecuniary losses, not physical injuries or damage to (as opposed to loss of) property. It is important to remember that this mechanism is only available prior to the entry of a final order of forfeiture. Once a final order of forfeiture is issued by the court, the forfeited property may not be transferred to a non-owner victim except pursuant to the remission process or a personal order of the Attorney General.

There is no equivalent to the Victim and Witness Protection Act in civil cases. Consequently, in civil forfeiture cases the only available mechanism for transferring property seized for forfeiture outside of the remission process is dismissal of all or a portion of the action — that is to say, dismissal of all or a portion of the action upon the agreed condition that the assets will be transferred in a specified amount to

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[52] 18 U.S.C. § 981(e)(6).

[53] 18 U.S.C. §§ 3663-64. Under this Act, however, restitution is limited to victims of the offense of conviction, so the only way to transfer forfeited assets to victims of related offenses would be through the remission process. *See Hughey v. United States*, 495 U.S. 411 (1990). *Cf.* 28 C.F.R. §§ 9.2(s), 9.8, discussed on page 13, *infra*.

particular victims by the person whose property is being forfeited. Again, such an action is subject to the normal policies on settlements described in chapter 7, and is also subject to the policies and limitations applicable to the remission process. This mechanism obviously requires the cooperation of the person whose property is being forfeited. Where a forfeiture is contested until final judgment, or the property owner is otherwise not cooperative, this mechanism is unavailable. The remission process will have to be utilized.

B. What constitutes a "Section 9.8 victim"

Victims who have a present ownership interest in property seized for forfeiture are, and always have been, entitled to file petitions just like any other owners.[54] If they have such a traceable ownership interest, they will have certain advantages that non-owner victims filing under 28 C.F.R. § 9.8 lack. It makes no difference whether they have been compensated by insurance or another third party source for the loss, because the property *belongs* to them and thus they are entitled to it, not the Government.[55] They do not have to show that they lack an alternative recourse for restitution for the same reason. If they are truly owners, their claims will take full priority over other claims. If they are victims of an offense for which there is no explicit statutory authority for remission to victims, they will still be able to get remission (*e.g.*, victims in civil forfeitures pursuant to 18 U.S.C. § 981(a)(1)(A)). However, that leads to the real problem of trying to establish a traceable ownership interest in cases involving multiple victims. Others will be able to show a similar traceable interest. Consequently, under the new regulations, most victims in multi-victim cases will have to file pursuant to Section 9.8. Section 9.8, by its terms, applies in multiple victim cases to victims of an offense "who do not have a present ownership interest in the forfeited property which is clearly superior to that of other petitioner victims."[56]

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[54] See definition of "owner" at 28 C.F.R. § 9.2(l). A "present ownership interest" may be established by tracing. *Id.*

[55] However, if the owner-victim has received compensation for his loss from the wrongdoer, he or she will be treated as having effectively sold the property in question to the wrongdoer and will, as a matter of policy, no longer be treated as an owner-victim of that property entitled to its remission. It is also possible that under applicable local law, the compensator is deemed to have received an assignment of the claim and thus be the true owner entitled to file a petition. An owner-victim may assign his right to file a petition to another. A non-owner victim filing under § 9.8 may not.

[56] As a matter of policy, in determining whether someone has a "superior" present ownership interest vis-a-vis other victims, ruling officials will normally apply the first in, first out rule in tracing situations. As a practical matter, though, this rule will not be easily applied in cases involving large numbers of victims and/or complex fraud or money laundering schemes.

Section 9.8 is only available to victims who have suffered a "pecuniary loss."[57] It must be a pecuniary loss of a specific amount that can be demonstrated by documentary evidence like invoices or receipts. Section 9.8 is not available for persons who suffer physical injuries or property damage (as opposed to property loss).[58] The reason for this limitation is that insurance is almost universally available for those types of events. Even if a victim lacks health insurance to cover medical costs resulting from a physical injury (the criminal violation being a predicate offense for the RICO count underlying the forfeiture), almost all states have state victim compensation funds for this purpose.

Section 9.8 is also only available to victims who have not received compensation from other sources for their loss, like the wrongdoer himself or an insurance company.[59] Unlike the owner-victim who actually owns the property in question, this victim lacks a present legal right to the property. He or she should not receive double compensation for the loss. Even more important, since in most cases the victims will only be receiving partial compensation out of the forfeited property, as much money as possible should be made available for other victims who did not receive such compensation. Similarly, in order for the petition to be granted, the victim must make a showing that he does not have recourse reasonably available to other assets from which to obtain compensation for the wrongful loss of the property.[60]

Section 9.8 is not only available for victims of the offense underlying the forfeiture, but also for victims of a "related offense." The term "related offense" is defined in the regulations as:

(1) any predicate offense charged in the RICO count underlying the forfeiture,[61] or

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[57] 28 C.F.R. § 9.8(a)(1).

[58] *Id.* § 9.8(c).

[59] *Id.* § 9.8(a)(4). The regulations also provide that if a victim later receives compensation from any source for the loss, he must reimburse the Assets Forfeiture Fund. *Id.* § 9.8(f).

[60] *Id.* § 9.8(a)(5).

[61] As a practical matter, the predicate offense would have to be one for which the victim suffered a pecuniary loss. However, this clause enables a victim of a scheme unrelated to the scheme from which property was recovered, but which is part of the same "pattern of racketeering activity," to seek remission from the forfeited assets.

(2) an offense committed as part of the same scheme or design, or pursuant to the same conspiracy, as was involved in the offense for which forfeiture was ordered.[62]

The reason for this policy is that the Department does not want to force government attorneys to base charging or case settlement decisions on victim restitution considerations. The Department does not want to force a government attorney to file all available charges, or secure convictions on all available charges, in order for there to be a basis for giving a particular victim or group of victims access to the forfeited assets for restitution.

C. *Priority of remission for Section 9.8 victims*

Persons who can establish that they are owners or lienholders will get priority over victims in the granting of remission petitions.[63] As a practical matter, this means that Section 9.8 victims are most likely to obtain remission from the forfeiture of facilitating property, as proceeds property will often go to the actual owners, assuming a superior ownership interest in particular proceeds property can be established. Under the regulations, Section 9.8 victims will also have to yield to the claims of financial institution regulatory agencies in FIRREA cases, as such agencies in fact represent the interests of a larger class of victims.[64] It is unlikely, though, that there would be many FIRREA cases with a separate class of individual victims.

On the other hand, Section 9.8 victims will generally have priority over equitable sharing with domestic law enforcement agencies and, of course, over the Assets Forfeiture Fund.[65] However, ruling officials in consultation with senior Department officials may give priority to requests for sharing from foreign governments, at least in those situations where there would have been no assets to seize and forfeit but for the cooperation of the foreign government.[66]

Between victims themselves, the regulations provide that remission will generally be granted on a pro rata basis.[67] However, ruling officials have discretion to grant

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[62] *Id.* § 9.2(s).

[63] *Id.* § 9.9(a).

[64] See discussion of handling of FIRREA cases in chapter 10, part VI., at pages 10–18 to 10–21, *supra*.

[65] 28 C.F.R. § 9.9(a). See discussion of general creditors in part III.D.1., page 5, *supra*.

[66] *Id.* § 9.9(f).

[67] *Id.* § 9.8(c).

remission on other bases, or give priority to particular victims, in individual cases. In doing so, they are authorized to consider the following factors, among others:

(1) the specificity and reliability of the evidence establishing a loss;

(2) the fact that a particular victim is suffering an extreme financial hardship;

(3) the fact that a particular victim has cooperated with the Government in the investigation or litigation; and

(4) in the case of petitions filed by multiple victims of related offenses, the fact that a particular victim is a victim of the actual offense underlying the forfeiture.[68]

The third listed factor is designed to cover situations where one or more victims are affirmatively non-cooperative. Their petitions could be rejected in whole or in part on that basis. Individual victims should not be rewarded in relation to other victims because they went out of their way to be particularly helpful. The term "cooperation" refers only to doing what would be expected of any citizen — providing information when requested and being available as a witness.

D. Discretion to deny remission to Section 9.8 victims

The regulations recognize that in many cases it simply will not be worth the trouble to grant remission because of the limited availability of assets to satisfy individual petitions. A ruling official has discretion to deny remission where:

(1) there is substantial difficulty in calculating the pecuniary loss incurred by a victim or victims;

(2) the amount of any remission would be small in comparison with the expenses incurred by the Government in determining whether to grant remission; or

(3) the total number of victims is so large in relation to the potential amount of remission that granting it would be impractical.[69]

Government attorneys are encouraged to consult the Asset Forfeiture Office early in a case where victim restitution is contemplated so this issue can be addressed and promises are not made to potential petitioners that can not be later fulfilled.

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[68] *Id.*

[69] *Id.* § 9.8(d).

E. Notice to victims on filing claims

The regulations require that a notice of seizure and intent to forfeit only be sent to a person who has a traceable ownership interest in the property.[70] There is no specific requirement that all potential petitioners be notified; only those who might have the right to file a claim in a civil forfeiture proceeding or in a criminal forfeiture ancillary hearing. However, government attorneys should develop a system for notifying potential victim petitioners of their right to file a petition. The notice should provide relevant information on when and where to file the petition, what information to include, and what rules must be followed in filing a petition. In cases involving large numbers of victims, it is recommended that the Asset Forfeiture Office be consulted about an appropriate and efficient mechanism for accomplishing this objective. At a minimum, there should be notice by publication in a newspaper of general circulation in the area where such victims are likely to live.

F. Victims in civil forfeiture cases

As explained above, Section 9.8 applies only to victims of offenses for which the restoration or remission of forfeited property is authorized by statute. Absent such authorization, standing to file for remission or mitigation is governed by the provisions of 19 U.S.C. §§ 1613 and 1618, which limit standing to those with an "interest" in forfeited property. The Department takes the position that the term "interest" means an interest that is legally recognizable in specific property (including so-called equitable interests like a constructive trust). The major criminal forfeiture statutes authorize restoration or remission of forfeited property to victims.[71] The only civil forfeiture statute that contains similar authority is 18 U.S.C. § 981(a)(1)(C), one of the two FIRREA forfeiture statutes that was amended in 1992 to cover a series of miscellaneous offenses typically investigated by Treasury Department agencies.[72]

Consequently, unless and until Congress amends the law, remission pursuant to Section 9.8 will not be available to victims in most civil forfeiture cases, most notably, victims in civil money laundering forfeiture cases. Government attorneys need to be aware of this fact when making forfeiture filing decisions. If there is a basis for civilly forfeiting property pursuant to 18 U.S.C. § 981(a)(1)(C), that provision should be utilized. If the property can be forfeited as part of a criminal prosecution pursuant to 18 U.S.C. § 982(a)(1), it should be. Of course, if particular victims can establish that they have a present ownership interest in the forfeited property based on their being able to trace the wrongdoer's acquisition of the property to the property of which they were wrongfully deprived, they could file as owners and not worry about the

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[70] *Id.* §§ 9.3(a), 9.4(a).

[71] See note 51, *supra*.

[72] This authority is contained in 18 U.S.C. § 981(e)(6).

limitations of Section 9.8. This alternative is not likely to be applicable, though, in most situations involving large numbers of defrauded victims because no one victim or group of victims is likely to be able to trace the forfeited property exclusively to the property taken from them. Ruling officials will, however, apply the first-in, first-out tracing principle where feasible, particularly with the forfeiture of bank accounts. Government attorneys should consult the Asset Forfeiture Office about other possible alternatives if none of these are feasible in particular cases.

G. Use of trustees or other outsiders in remission process

The regulations permit the use of trustees or other non-government personnel to assist in the processing and determination of remission claims, particularly in cases involving large numbers of victims.[73] The decision to use outside assistance will be made by the ruling official after receiving approval from the Executive Office for Asset Forfeiture. If a government attorney believes that he or she needs such assistance, either at the notification or processing stage in a judicial forfeiture case, he or she should advise the Asset Forfeiture Office so the necessary arrangements can be made. The actual decision on remission, however, cannot be delegated to a trustee or other outsider.

[73] 28 C.F.R. § 9.9(c).

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Chapter 10

Disposition of Forfeited Property

I. In General

The disposition of forfeited property plays an integral part in fulfilling the goals of the Department of Justice asset forfeiture program. Moreover, the integrity of the entire forfeiture program depends upon the faithful stewardship of forfeited property and proceeds.[1]

The Attorney General has authority to share forfeited property and cash equitably with state and local agencies that participate directly in the law enforcement effort leading to a federal forfeiture. *See* 21 U.S.C. § 881(e)(3)(1)(A), 18 U.S.C. § 981(e), and 19 U.S.C. § 1616a(c)(1)(B)(ii). This authority is discretionary. The Department has always required that the equitable share approved have a value that bears a reasonable relationship to the degree of direct participation of the state or local agency in the law enforcement effort resulting in the forfeiture.[2] This requirement is based on the statutory language contained in 21 U.S.C. § 881(e)(3), which states that:

> The Attorney General shall assure that any property transferred to a State or local law enforcement agency under paragraph (1)(A)–
>
> (A) has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based...

The Attorney General, if he or she is to transfer property under Section 881(e), must undertake to assure that there is an equitable distribution between those agencies

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[1] *The Attorney General's Guidelines on Seized and Forfeited Property* [Vol. III, Tab 10] [hereinafter *Guidelines*] articulate the three primary goals and purposes of the asset forfeiture program as: (1) to punish and deter criminal activity by depriving criminals of property used or acquired through illegal activities; (2) to enhance cooperation among foreign, federal, state, and local law enforcement agencies through the equitable sharing of assets recovered through the program; and, as a by-product, (3) to produce revenues to enhance forfeitures and strengthen law enforcement.

[2] *Guidelines* § V.A.7.

who directly participated in the entire investigation. To do so, the Attorney General is required by statute to look at the "degree of direct participation" by the state or local law enforcement agency, matched, obviously, by the "degree of direct participation" by the federal agencies. This is most typically accomplished by using a time/manpower mathematical allocation. The statute provides "equity" by placing the affirmative duty on the Attorney General to conduct this mathematical exercise, while also undertaking the effort to assure that the sharing distribution will "serve to encourage further cooperation between the Federal Government and the participating agencies."

Section 1616a(c)(2) of Title 19, as enacted by the Anti-Drug Abuse Act of 1988, allows for the transfer of forfeited property to any foreign country that participated directly in the seizure or forfeiture of the property. A transfer to a foreign country is authorized only where it has been agreed to by the Secretary of State, is authorized by an international agreement between the United States and the foreign country, and is made by a country which, if applicable, has been certified under Section 481(h) of the Foreign Assistance Act of 1961.[3]

The Attorney General's Guidelines on Seized and Forfeited Property (Guidelines) were first published in May 1985. The *Guidelines* were most recently revised in July 1990. They set forth the procedures for the retention of forfeited property for official use, the equitable transfer of forfeited property to state or local law enforcement agencies, and the use of monies deposited into the Department of Justice Assets Forfeiture Fund.

II. Federal Retention and Use of Forfeited Property

While 21 U.S.C. § 881(e) sets out the statutory authority to permit federal retention and use of forfeited property, the *Guidelines* establish procedures and criteria governing official use policy.

A. Property subject to official use

With the exception of currency or proceeds from the sale of forfeited property, forfeited real and personal property may be retained for official use by any federal agency.[4] Neither cash nor the proceeds from the sale of forfeited property may be transferred to or retained by any federal agency except as provided by statute or in

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[3] Further information regarding the law on transfers to foreign countries is contained in chapter 11 of this Manual.

[4] Federal agency recipients of forfeited assets need not have participated in the forfeiture investigation. *See Guidelines* § IV.D.4. However, participating agencies will generally be given priority in the event of competing requests.

part X of the *Guidelines*. A Department component may request authority to place real property into official use only if the proposed usage of that property would be and remain thereafter consistent with a law enforcement purpose. Transfers of real property to other federal components may be considered if such transfers will serve a significant and continuing federal purpose.[5]

Written notice to the Director, Executive Office for Asset Forfeiture, is required if property valued at $50,000 or greater is placed into official use.[6]

B. Retention by investigating agency

The head of the seizing agency determines whether that agency or another federal agency that participated in an investigation should place forfeited property into official use. When a participating agency seeks to place forfeited property into official use, and a federal, state, or local law enforcement agency has filed a request for an equitable share, the seizing agency must consider the equities of the various requests before making a determination, but a decision to override equitable sharing and retain the property is permitted.[7] Within certain limitations, liens on personal property may be paid from the Fund.[8]

C. Transfers to other federal agencies

If the property is not subject to an equitable sharing request and no participating agency chooses to place it into official use, it is generally left to the United States Marshals Service to determine, after consultation with the seizing agency, whether the property should be transferred to another investigative agency, other department components, or other federal agencies.[9] Expenses of forfeiture are to be paid by the recipient agency. Liens may be paid by the Fund if the recipient agency is an

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[5] *Guidelines* § IV.B.

[6] *Guidelines* § IV.

[7] *Guidelines* § IV.F.

[8] *See Guidelines* § IV.G. Liens may be paid if the property is intended for official use for at least two years, the amount is less than one-third of the appraised value of the property, and the liens are less than $25,000. These limitations may be waived by the Director of the Executive Office for Asset Forfeiture. Liens and mortgages on real property placed into federal official use or transferred to a state or local agency are not payable from the Fund unless expressly approved by the Director of the Executive Office for Asset Forfeiture. *See Guidelines* § VII.C.1.

[9] *See Guidelines* § IV.D.4. The United States Marshals Service must consult with the investigative agency responsible for the investigation which led to the forfeiture. Careful consideration should be given to the value of the property, its potential benefit to the United States for law enforcement purposes, and the impact of the transfer on the Fund.

"investigative bureau" or the United States Marshals Service. Otherwise the recipient must pay them.[10]

D. Required approval for official use placements

Each investigative agency and Department component must promulgate internal guidelines consistent with the *Guidelines* governing the placement of property into official use.[11] Requests for official use by a United States Attorney's Office should be submitted to the Facilities Management and Support Services staff in the Executive Office for United States Attorneys.[12]

Requests for personal property valued at $25,000 or more by federal agencies other than participating investigative agencies must be approved by the Director of the Executive Office for Asset Forfeiture.[13] Otherwise, they may be approved by the Director of the United States Marshals Service.

All transfers of real property to federal agencies require the personal approval of the Attorney General.[14]

Property under seizure and pending forfeiture may not be utilized for any reason by Department personnel, including for official use, until such time as the final decree or court order of forfeiture is issued.[15]

Likewise, Department personnel may not make such property available for use by others, including person(s) acting in the capacity of a substitute custodian, for any purpose prior to completion of the forfeiture. However, exceptions may be granted by the United States Marshals Service in situations such as the seizure of a ranch or business where use of equipment under seizure is necessary to maintain the ranch or business.

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[10] *Guidelines*, § IV.G. See note 8, *supra*. The same limitations apply as in official use placements by the seizing agency.

[11] *Guidelines* § IV.E.

[12] *See United States Attorneys' Manual* § 3-4.352.

[13] *Guidelines* § IV.D.4.

[14] *Guidelines* § IV.B.

[15] *See* Executive Office for Asset Forfeiture Memorandum entitled "Use of Property Under Seizure," dated Apr. 9, 1991 [Vol. III, Tab 22].

E. *Purchase or personal use of forfeited property by Justice Department employees*

Department of Justice employees are generally prohibited from purchasing property that has been forfeited to the Government and is being sold by the Department of Justice or its agents.[16] This policy is intended to ensure that there is no actual or apparent use of inside information by employees wishing to purchase such property. The purpose of this policy is to protect the integrity of the asset forfeiture program.

III. Equitable Sharing with Participating State and Local Law Enforcement Agencies

A. *General overview*

Since the enactment of the Comprehensive Crime Control Act of 1984,[17] the Attorney General has been empowered to transfer forfeited property to state or local law enforcement agencies that participated in the seizure or forfeiture of the property.

The *Guidelines* implement federal statutes authorizing the Attorney General to effect an equitable transfer of forfeited property. The equitable transfer of proceeds to a law enforcement agency serves three major purposes: (1) to provide state and local law enforcement agencies with a meaningful incentive to work in partnership with federal law enforcement agencies; (2) to provide an incentive for law enforcement agencies to undertake the additional investigative effort and paperwork necessary to secure a forfeiture; and (3) to supplement the resources of the receiving agencies, thus enhancing the ability of those agencies to initiate further seizures and forfeitures.

Among the laws enforced most frequently by the Attorney General that permit equitable sharing of forfeited property are the Comprehensive Drug Abuse Prevention and Control Act and the Racketeer Influenced and Corrupt Organizations Act.[18]

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[16] *See* Executive Office for Asset Forfeiture Memorandum entitled "Forfeiture Policies," part B, dated July 3, 1990 [Vol. III, Tab 9].

[17] Pub. L. No. 98-473 (1984).

[18] Equitable sharing is authorized for a great variety of offenses including the following: the transportation of gambling devices (15 U.S.C. § 1177); illegal gambling businesses (18 U.S.C. § 1955); the interception of wire and oral communications (18 U.S.C. § 2513); copyrights (17 U.S.C. § 509); child exploitation (18 U.S.C. §§ 2253, 2254); motor vehicle theft (18 U.S.C. § 512); prison-made goods (18 U.S.C. § 1762); the exportation of war materials (22 U.S.C. § 401); the transportation and harboring of undocumented aliens (8 U.S.C. § 1324); as well for all violations covered by the general criminal law forfeiture statutes (18 U.S.C. §§ 981, 982).

B. Eligibility requirements

After forfeiture, tangible property, cash, and proceeds from the sale of forfeited property may be equitably shared with state and local agencies that directly participated in the law enforcement effort leading to the seizure and forfeiture of the property. Department policy and legislation require that an appropriate recipient have law enforcement as its mission. Hence, at a minimum, an agency must have a law enforcement component. The difficult cases arise in situations involving state statutory schemes which give police powers to entities not traditionally viewed as law enforcement, such as Amtrak or a pharmacy board. In these instances, if the entity can demonstrate that it has traditional law enforcement powers like arrest authority and authority to investigate crimes and present them directly to prosecutorial bodies for action, the Department has no objections to equitable sharing. Consult the Asset Forfeiture Office if in doubt.

The *Guidelines* define law enforcement as "the investigation or prosecution of criminal activity and the execution of court orders arising from such activity."[19] Under this definition, state and local prosecutors may now receive an equitable share from forfeitures in which they assisted. In all cases, efforts must be made to promote realistic expectations and ensure shares that are equitable to the investigative agencies, the prosecutors, and the United States.[20]

State and local law enforcement agencies may participate in a seizure or forfeiture by joining forces with a United States Department of Justice investigative agency (FBI, DEA, or INS) in an investigation or by asking one of the federal investigative agencies to "adopt" a seizure they have already made.[21] For purposes of adoption, federal investigative agencies also include the investigative units of the United States Postal Inspection Service, Internal Revenue Service, Secret Service, and the Bureau of Alcohol, Tobacco, and Firearms.[22]

C. Uses of shared property

The shared property must be used for the law enforcement purposes specified in the DAG-71 form, "Application for Transfer of Federally Forfeited Property." If shared monies or property are not used for the purposes stated in the DAG-71, the recipient must obtain written approval for the change in use from the original decision maker or the Asset Forfeiture Office.

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[19] *Guidelines* § II.I.

[20] *Guidelines* § V.B.

[21] A request for federal adoption should be submitted (using a designated form) within thirty days of the date the property was seized.

[22] *Guidelines* § II.G.

It was envisioned when Congress passed the enabling legislation in 1984 that shared funds would be used primarily to augment the budgets of the particular law enforcement agency to enhance their actual enforcement efforts. Such funds have been typically used by local police agencies for the following purposes:

- purchase of vehicles and equipment necessary for law enforcement functions;
- purchase of weapons and protective equipment;
- purchase of investigative communications equipment;
- payment of salaries for new or temporary positions for up to one year and for overtime;
- purchase of ADP equipment and software to be used in support of law enforcement purposes;
- payment of expenses for training law enforcement personnel;
- payment of expenses for travel of law enforcement personnel;
- use as reward and "buy" money;
- costs associated with construction, expansion, improvement, or operation of detention and other agency facilities.

The *Guidelines* also incorporate the concept of reinvesting forfeiture proceeds in law enforcement activities by expressly providing that federal forfeiture proceeds shared with state and local law enforcement agencies shall be used for law enforcement purposes, and that sharing shall occur "only where it will increase and not supplant law enforcement resources of the specific state or local agency that participated in the forfeiture."[23] This "no supplantation" requirement is in addition to the requirement that shared property be used for law enforcement purposes.

Law enforcement agencies in some areas have come under pressure from their governing bodies to use sharing monies for non-law enforcement purposes. In other areas, the budgets of law enforcement agencies have been reduced by the amount of federal sharing received. Such deductions are contrary to the Department's policy that shared forfeiture proceeds must supplement and not supplant law enforcement resources.

For this reason, the use of federal sharing monies to fund basic administrative expenses should be discouraged. For example, any salaries paid out of sharing funds

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[23] *Guidelines* § V.A.

should be for additional personnel (*e.g.*, additional officers for a task force) and then only for a limited time period of about one year. Allegations of diversion or supplantation in connection with equitable sharing should be brought to the attention of the Asset Forfeiture Office.

All Assistant United States Attorneys should be mindful of the existence of state statutes which restrict how equitable sharing proceeds may be spent. Such a statute was once passed by a state that required equitable sharing proceeds be paid directly to a state fund, with a percentage directed to "community preventative education programs." Consequently, under that state's legislative scheme, law enforcement agencies were effectively disqualified from further participation in the federal equitable sharing program. A legislative amendment was ultimately enacted which rectified the conflict with federal law.

It is important to note that the *Guidelines* are not based merely upon policy. Rather, federal law requires at 21 U.S.C. § 881(e) that the "Attorney General shall assure that any [federally forfeited] property transferred to a [s]tate or local law enforcement agency...will serve to encourage further cooperation between the recipient [s]tate or local agency and [f]ederal law enforcement agencies." Obviously, to the extent that property shared with state or local law enforcement agencies is diverted to non-law enforcement uses or to the extent that a local law enforcement agency's normal budget is offset by the amount of the federal sharing payment, the local law enforcement agency has less incentive to cooperate with federal agencies. In a jurisdiction where such diversions or offsets occur, the Attorney General cannot assure that the purposes of sharing are being met, and may not, therefore, appropriately share with law enforcement agencies in that jurisdiction.

Vehicles and other tangible property may be equitably shared with state or local agencies when the intent is to place the property into official use for a period of two years. Such property must be utilized in the manner indicated on the DAG-71. However, earlier liquidation of vehicles and other tangible property that have become substantially damaged or have proven to be no longer useful for their original purpose is permissible. As a matter of policy, firearms may not be transferred to state or local law enforcement agencies.

Transfers of real property to state and local agencies is strictly governed. Compelling evidence of the need for and the suitability of particular real property for law enforcement use must be presented before such a transfer will be approved, though transfers for use in certain crime prevention projects are also currently permitted.[24] In addition, the Attorney General may transfer real property forfeited under the Controlled Substances Act to a state for recreational or historic purposes or

[24] *See* Memorandum from Associate Deputy Attorney General Jeffrey Howard entitled "Weed and Seed Initiative; Transfers of Real Property," dated May 26, 1992 [Vol. III, Tab 38].

for the preservation of natural conditions.[25] All requests for real property transfers should contain a detailed description of the property. Additionally, title to any real property transferred to a state or local agency must contain a reverter clause to return title to the United States should the property cease to be used for the agreed upon purpose. Ultimately, such transfers must be approved by the Deputy Attorney General.

Recipient agencies may "pass-through" transferred real property to other government entities or non-profit organizations for certain crime prevention projects, if approved by the Deputy Attorney General. Otherwise, Department policy currently prohibits any pass-throughs of shared assets to other organizations. However, there is a pending proposal to permit pass-throughs: (1) in windfall situations to other government agencies;[26] or (2) to another law enforcement agency in any situation if specifically identified in the DAG-71 or subsequent amendment.[27]

D. Sharing percentages

Equitable sharing is to be based upon the net proceeds realized from the sale of property after costs and expenses of forfeiture are deducted.

For seizures occurring after September 1, 1990, the following principles are applicable:[28] In cases involving adoptive seizures where the property is forfeited administratively or in uncontested judicial proceedings, fifteen percent of the total net proceeds must be allocated to the United States in order to take into account the costs incurred in the Government's administrative role.[29] In cases involving adoptive seizures that are forfeited in contested judicial proceedings, twenty percent of the net proceeds must be allocated to the United States. In non-adoptive uncontested cases, the federal share must be at least fifteen percent. In non-adoptive contested judicial cases, the federal share must be at least twenty percent.

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[25] 21 U.S.C. § 881(e)(4)(A), (B).

[26] A "windfall" occurs when equitable shares exceeds twenty-five percent of a recipient agency's annual budget. Under the proposal, the excess may be transferred to other government agencies for Weed and Seed Program projects.

[27] The proposed changes in the pass-through policy are set forth in a proposed new edition of the *Federal Guide to Equitable Sharing for State and Local Law Enforcement Agencies*. The current version can be found in Volume III at Tab 21.

[28] *Guidelines* § V.C.

[29] A judicial forfeiture action is considered contested if it is the result of the filing of a claim and a cost bond in an administrative proceeding, or if a claim is filed by any party in a judicial proceeding. A twenty percent minimum share may be required in both contested and uncontested cases in the near future.

For seizures occurring prior to September 1, 1990, a minimum of ten percent must be allocated to the Federal Government. In cases where the investigative effort is ten percent or less, the determining official must allocate ten percent to the United States and divide the state and/or local agency shares from the remaining ninety percent. Where the federal investigative effort is more than ten percent, the sharing percentages are based strictly on the relative investigative effort expended by the various agencies. The federal equitable share may be satisfied through the placement of one or more items forfeited into official use or by a transfer of a portion of the proceeds to the Assets Forfeiture Fund.

Sharing in joint cases is determined on a case by case basis. The federal decision-maker's most critical action is to apportion equitable shares to federal, state, and local law enforcement agencies based on the relative time each devoted to the investigation in the case in which the federal forfeiture occurs. Consequently, it is critical that the DAG-71 or DAG-72, "Decision Form for Transfer of Federally Forfeited Property," show the number of manhours devoted to a particular investigation by all participating agencies, both federal and local. If for some reason these figures do not properly indicate the actual relative contributions, an explanation should be attached. The federal decision-maker then must decide whether this apportionment should be adjusted because the nature of the contribution to the forfeiture was such that a strict time apportionment does not adequately reflect the true relative value of the contribution.

The following factors are to be considered by the federal decision-maker in determining the amount of the equitable sharing:

- ☐ the degree of direct participation of the state or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort (this is normally determined by comparing the number of hours expended by both the state or local law enforcement officers and federal agents);

- ☐ whether the agency originated the information leading to the seizure, and, if so, whether it obtained this information fortuitously or by extensive use of its investigative resources;

  Example: This factor would be applicable where, as part of its normal intelligence gathering activities, a local law enforcement agency has been monitoring the illegal activities of drug organization X. One day the agency learns specific information regarding the location of a forfeitable asset belonging to X. It shares this information with a federal agency and they both assign two agents to do a short-term joint investigation of one of X's drug dealers before making the seizure. The local agency merits a larger share of the proceeds of the sale of the asset than the fifty percent it would get based strictly on the time given to the joint

investigation. The fact that this seizure was the indirect result of long term intelligence gathering activities should be made known in submitting a request for equitable sharing.

- ☐ whether the agency provided unique or indispensable assistance;

  Example: This factor would be applicable when an agency is asked to provide assistance that only it is in a position to give. This might include a seizure of property in its jurisdiction, which may be many hundreds of miles away from the area where the investigation is being conducted; the development of a very significant informant who has access to documents that are essential to securing a conviction; or the recovery of relevant information from a target that only the agency can obtain without making the target suspicious that he is under investigation (*e.g.*, a state wildlife agency gets information about a ranch's operations from its owner as part of what appears, to the owner, to be part of its normal regulatory inquiries). Such an agency would merit a relatively large share of a particular seizure even though its contribution to the overall investigation on a time and effort basis was relatively small. The provision of services many agencies typically can provide, such as a drug detection dog, a laboratory analysis, an aerial surveillance, or an undercover operative, would not normally be considered unique.

- ☐ whether the agency initially identified the asset for seizure;

  Example: This adjustment would apply only when the agency, as part of its own activities, identified the asset. It would not apply, for example, when an agent, who belongs to a specific police department, identifies the asset while working on a joint investigation with members of other agencies. A small percentage adjustment would be allocated for information learned fortuitously, such as in a traffic stop. A substantially larger adjustment would be allocated for information learned non-fortuitously, such as through a long term internal intelligence analysis.

- ☐ whether the agency seized other assets during the course of the same investigation and whether such seizures were made pursuant to state or local law;

  Example: An agency's percentage share is to be reduced if the agency benefited from a non-federal forfeiture related to the present investigation and if the reduction will result in a more significant sharing by other requesting agencies. For instance, if a state agency participated fifty percent in an investigation based on a

manpower/time allocation but received proceeds from a state forfeiture that causes its share in the investigation to rise to seventy-five percent of the total forfeitures, that agency's share should be changed to twenty-five percent in the federal forfeiture to maintain its overall equitable share in the investigation at fifty percent.

- ☐ whether the agency could have achieved forfeiture under state law but instead joined forces with the United States to make a more effective investigation.

  Example: This factor would be applicable when a local agency has done an investigation on its own that has led to the identification of certain assets for seizure. Rather than effecting an immediate seizure, the agency joins forces with a federal agency to conduct a broader investigation, which, while it results in more arrests, does not lead to the identification of significant additional assets. Should this fact be set forth in the request, the local agency would likely receive most of the proceeds of the forfeited assets, regardless of the relative time and effort contribution of the federal agency to the overall investigation.

The Asset Forfeiture Office has internal guidelines available for how to make adjustments to tentative manpower/time sharing allocations if any of the above factors apply.

Many task forces involving federal, state, or local law enforcement agencies have pre-agreed upon equitable sharing distribution arrangements based upon personnel and other contributions to the task force operation. There are two situations when such distribution arrangements will be honored. First, such distribution arrangements are honored by the Department of Justice when the task force itself is a legal entity entitled to receive and spend money. Single checks will be issued to the task force and/or its constituent members, pursuant to their internally agreed sharing percentages, in such situations when the agreed percentages fairly reflect overall agency contributions to the task force. The National Crime Information Center (NCIC) number of the task force must be indicated on the DAG-71.

Second, even when the task force is not a legal entity entitled to receive and spend money, these percentages will be honored when: (1) the decision-maker is satisfied that the percentages agreed upon continue to reflect the true overall agency contributions to the task force; (2) the task force has a well-defined but specific subject area or organization target as its focus; and (3) it may be legitimately claimed that the specific seizures, which are the subject of the request, are part of the much broader, overall investigation of this target (*e.g.*, an airport seizure by an airport interdiction task force is part of an investigation of airport drug smuggling, not simply an investigation of a particular smuggler).

The United States Marshals Service does not routinely deduct the minimum fifteen or twenty percent of the appraised value of all assets transferred to a state or local law enforcement agency for the federal administrative share. Therefore, it is important that both the investigative and litigative costs and the federal share amount be indicated on the DAG-72. Absent specific information from the United States Attorney's Office and the investigative agency, the Marshal deducts only its own actual costs from the total amount to be shared.

In administrative cases appraised at below $1,000,000, the investigative agency headquarters is responsible for determining the federal share. Likewise, in judicial cases appraised at below $1,000,000, the United States Attorney is responsible for determining the federal share. In judicial and administrative cases appraised at $1,000,000 or more, cases involving real property transfers, and multi-district cases, the United States Attorney should recommend the amount to be allocated for the federal share. In these cases, the Deputy Attorney General determines the amount to be allocated.

If a requesting agency is unable to pay the costs and the federal share in a case in which it is requesting the transfer of a single asset (*e.g.*, a plane), the property is to be sold by the United States Marshals Service and the proceeds equitably distributed *unless* an exception is granted by the decision-maker. Exceptions to this requirement are to be liberally granted by the decision-maker upon assurances that the requesting state or local agency lacks funds or authority to make such payments, and that the forfeited item itself will fill a demonstrable need of the requesting agency.[30]

E. Sharing with state and local prosecutors' offices

The *Guidelines* permit direct sharing of forfeited assets with state and local prosecutors' offices. There are four ways in which such offices may qualify for equitable sharing:

1. They may provide assistance in the preparation of search and seizure warrants, wiretap warrants, or other documents relating to a forfeiture investigation. This type of assistance is considered to be investigative-type assistance and warrants sharing based on the time and manpower provided in relation to other participating agencies.

2. They may provide a key informant or provide other unique investigative-type assistance. This type of assistance could fall in the category of "unique and indispensable assistance" (*see Guidelines* § V.B.) with the amount of the share to be determined as it would be if the assistance came from an investigative agency.

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[30] *Guidelines* § V.C.3.

3. They might cross-designate an attorney to handle a federal forfeiture or related proceeding in federal court. Typically, this cross-designation would occur in an adoptive case. If there is a cross-designation, the minimum federal share may be reduced by up to five percent depending on whether the state prosecutor handled the forfeiture proceeding by himself or with one or more federal prosecutors. The local prosecutor's office would get its pro rata share of this five percent, as well as any additional share earned by virtue of any assistance provided in the investigative stage of the case (see #1 and #2 above). The five percent figure represents the difference in the minimum federal share between a contested and uncontested case.

4. They might prosecute a criminal case under state law directly related to a federal forfeiture. Where this is done in lieu of a federal prosecution, the local prosecutor's office may receive a share of five percent if the litigation is part of a long-term joint (over three months) investigation, or ten percent if it is part of a short-term or intermediate-term joint investigation (under three months), or an appropriate intermediate figure between those two percentages. This policy would normally not apply in the case of an adoptive forfeiture where eighty or eighty-five percent goes directly to the state seizing agency and the rest to the federal government. However, the local prosecutor's office might be entitled to a portion of the state agency's share where additional evidence was uncovered as a result of its litigative work or where it otherwise would be entitled to an equitable share under #1 or #2 above. The amount of the five or ten percent potential share which the state or local prosecutor's office might get in an investigation depends on the time involved in the litigation (*e.g.*, plea vs. short or long trial), and the number of other requesting local agencies.

IV. Processing of Applications for Equitable Sharing

A. Applications

Any federal, state, or local law enforcement agency, including the offices of state or local prosecutors, that directly participated in the criminal investigation leading to the seizure and forfeiture, may request an equitable share or transfer of the forfeited property. Requests by the state or local law enforcement agency must be submitted to the investigative agency no later than sixty days following seizure. Before making a sharing request to the Department of Justice, the participating agency should ensure that the following required conditions have been or will be met:

- ☐ the federal forfeiture must arise from a statute that is enforced by the Department of Justice;

- ☐ the requesting state or local agency must be designated as a law enforcement agency under applicable state law;
- ☐ all transferred or shared property must be used by the participating agency for the law enforcement purposes specified in the request;
- ☐ the requesting agency must designate how the agency participated directly in the law enforcement effort that resulted in the forfeiture; and
- ☐ cash and property equitably shared must increase and not supplant law enforcement resources of the specific requesting agency.

If all of these conditions are satisfied, the participating state or local law enforcement agency should complete the DAG-71 and file it with the local or regional office of the investigative agency that handled the forfeiture within sixty days following seizure. In adoptive cases, the sixty days begins to run from the date the federal agency adopts the case. In real property cases, the sixty days begins to run from the date of the probable cause hearing when one is required. Both the DAG-71 and the DAG-72 provide detailed instructions for completing and processing the equitable sharing request. Waivers of the sixty-day filing requirement are available only in exceptional circumstances and require the approval of either the Asset Forfeiture Office or the federal seizing agency.[31]

B. Responsibilities of investigative agency field offices

Upon receiving a sharing application, the investigative agency field office must complete part I of the DAG-72. The field office must ensure that the share recommended bears a reasonable relationship to the degree of direct participation of the requesting agency.

Once the DAG-72 has been completed, it should be attached to the DAG-71 submitted by the requesting agency and forwarded to the appropriate investigative agency headquarters in Washington, D.C. Information concerning federal agency activity must be included on the DAG-72 or on an attachment thereto.

C. Responsibilities of investigative agency headquarters

If property subject to administrative forfeiture has an appraised value of less than $1,000,000, the head of the seizing investigative agency has the responsibility for

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[31] *See* Executive Office for Asset Forfeiture Memorandum entitled "Clarification of AFO Authorities," dated Feb. 20, 1992 [Vol. III, Tab 35], which requires Asset Forfeiture Office approval. This requirement will probably be modified by the new edition of the *Federal Guide to Equitable Sharing for State and Local Law Enforcement Agencies* to permit seizing agency approval.

making the decision on how the property will be equitably distributed.[32] At the conclusion of the administrative forfeiture, the completed DAG-72 and declaration of forfeiture is forwarded to the appropriate United States Marshals office. In administrative cases involving property of any kind valued in excess of $100,000, the seizing agency field office is to notify the United States Attorney of its recommendation on equitable sharing. The seizing agency field office is to provide a copy of the DAG-71 and the "preliminary" DAG-72 to the pertinent United States Attorney for all administrative forfeiture actions in this category. The originals of these forms should be concurrently forwarded to the agency's headquarters decision-maker. Written notification of this decision to the seizing agency is required for its records.

In an administrative forfeiture action (for property valued in excess of $100,000) where the United States Attorney does not agree with the seizing agency's sharing decision, the United States Attorney must notify the appropriate headquarters unit of the seizing agency within ten working days of receipt. If no agreement can be reached within five working days, the headquarters unit will forward the DAG-71 and DAG-72 to the Executive Office for Asset Forfeiture for resolution.

If the property is subject to administrative forfeiture and has an appraised value of $1,000,000 or more, if the request involves the transfer of real property, or if the property is subject to judicial forfeiture,[33] the head of the seizing investigative agency must review the DAG-71 request and make a recommendation as to equitable sharing on the DAG-72 form. The DAG-71 and DAG-72 are then forwarded to the Asset Forfeiture Office where they are entered into the Computerized Asset Remission and Transfer System (CARTS)[34] and then forwarded to the appropriate United States Attorney for decision or for a recommendation to the Deputy Attorney General.

D. Responsibilities of the United States Attorney

If the property is subject to judicial forfeiture and has an appraised value of less than $1,000,000, the United States Attorney has the responsibility for making the decision on equitable shares.[35] The DAG-72 must be completed and returned, along with the original package of forms, to the Asset Forfeiture Office. The final decision

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[32] *Guidelines* § V.D.1.

[33] *Guidelines* § V.D.2; § V.D.3.

[34] The CARTS system data base tracks all judicial equitable sharing matters in the United States. This system will be replaced by the CATS system (Consolidated Asset Tracking System) sometime in 1994.

[35] *Guidelines* § V.D.2. The United States Attorney must personally sign the DAG-72 unless he has previously delegated this responsibility in writing. A copy of any delegation must be sent to the Asset Forfeiture Office. *See* Executive Office for Asset Forfeiture Memorandum entitled "Forfeiture Policies," dated Feb. 14, 1990 [Vol. III, Tab 7].

is entered into the CARTS master data base and then forwarded to the United States Marshals Service, which will prepare a check for presentation to the requesting state or local agency.

If the property forfeited has an appraised value of $1,000,000 or greater, if it is a multi-district case, or if it involves the transfer of real property,[36] the United States Attorney must review the DAG-71 and DAG-72 and make a recommendation as to equitable sharing. The entire sharing package is then sent to the Asset Forfeiture Office, whose recommendation is forwarded through the Assistant Attorney General of the Criminal Division to the Deputy Attorney General or his designee for a final decision.

E. Responsibilities of the Deputy Attorney General

If property has an appraised value of $1,000,000 or more, if it is a multi-district case, or if it involves the transfer of real property, the Deputy Attorney General or his designee (typically an Associate Deputy Attorney General) makes the final sharing determination.[37] The decision document and final order of forfeiture is returned to the Asset Forfeiture Office. After the case is closed in CARTS, the sharing documents are sent to the United States Marshals Service so a check for the appropriate amount can be issued. In administrative cases, the check is sent to the investigative agency for distribution. In judicial cases, it is sent to the L.E.C.C. coordinator in the United States Attorney's Office.[38]

V. Monitoring Uses of Shared Assets

A. Accounting for shared cash, proceeds, and tangible property

To enhance the integrity in the sharing program and to deter diversion of sharing monies to non-law enforcement uses, all participating state and local law enforcement agencies should implement standard accounting procedures and internal controls to track equitably shared monies and tangible property. Those procedures should be consistent with those set forth in the pamphlet entitled *Accounting for Federal Asset Forfeiture Funds,* U.S. Department of Justice (1991).

In addition, state and local law enforcement agencies that receive shared cash, proceeds, or tangible property valued at over $100,000 in a single year, or that

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[36] *Guidelines* § V.D.3; § V.D.4.

[37] *Id.*

[38] *See* Executive Office for Asset Forfeiture Memorandum entitled "Equitable Sharing Protocol," dated Sept. 25, 1990 [Vol. III, Tab 13].

maintain a federal forfeiture fund account balance of over $100,000, will likely be required starting sometime in 1993 to ensure that a standard financial audit is performed annually, consistent with the Justice Department Office of Inspector General's audit requirements. An independent accounting firm may be engaged to perform the required audit, in which case the audit may be paid for with equitable sharing monies.

B. Certification requirement

An annual certification requirement by requesting agencies will likely be required starting sometime in 1993. This requirement is also intended to enhance program integrity and deter diversion of sharing monies. The certification report certifies what equitable funds were received and expended during the reporting period. At the conclusion of the fiscal year, each state or local agency receiving any shared property or proceeds must execute a Federal Equitable Sharing Agreement and Annual Certification Report. The agreement provides that the recipient agency agrees to be bound by the statutes and guidelines that regulate shared assets. In particular, it cautions that misuse, misapplication, or supplanting of existing resources is strictly prohibited and that failure to comply will result in sanctions being imposed. In addition, each agency must agree to an annual audit.

C. Sanctions for non-compliance

Non-compliance with Department regulations and guidelines concerning the equitable sharing program may subject the recipient agency to one or more of the following sanctions: (1) being barred from further participation in the sharing program; (2) civil enforcement actions in U.S. District Court for breach of contract; or (3) federal prosecution for false statements under 18 U.S.C. § 1001 or fraud involving federal program funds under 18 U.S.C. § 666.

VI. Disposition of Forfeited Property in FIRREA Cases

At the time of publication, the Department of Justice, the Department of the Treasury, and the various federal financial institution regulatory agencies were considering a proposed Memorandum of Understanding Governing FIRREA Forfeiture Cases. The following is a synopsis of the provisions of that proposal pertaining to the disposition of the proceeds of FIRREA forfeitures.

As used in the proposed Memorandum of Understanding Governing FIRREA Forfeiture Cases, the term "FIRREA forfeiture" means forfeiture of any property, real or personal, which: (1) is forfeitable under 18 U.S.C. § 981(a)(1)(D), or (2) is forfeitable under 18 U.S.C. § 981(a)(1)(C) as proceeds traceable to a federal financial institution fraud violation, where the financial institution affected by the underlying violation has

been under the supervision of a regulatory agency[39] in its receivership, conservatorship, liquidating agency, or corporate purchaser capacity. This definition includes forfeiture of property which is forfeitable under 18 U.S.C. § 981(a)(1)(C) or (D), regardless of whether forfeiture is actually sought or obtained under 18 U.S.C. § 981(a)(1)(C) or (D), or under some other statute, as long as such designation is made before the property is forfeited.

In administrative forfeitures under other statutory authority, *e.g.*, 18 U.S.C. § 981(a)(1)(A) (forfeiture of property "involved in" money laundering offenses), the agency conducting the forfeiture will determine if the forfeiture is a "FIRREA forfeiture." In judicial forfeitures under other statutory authority, that determination will be made by the United States Attorney's Office conducting the forfeiture (or, where appropriate, by the Fraud Section in the Criminal Division). The Department of Justice Executive Office for Asset Forfeiture or the Department of the Treasury Executive Office for Asset Forfeiture will resolve any challenges to these determinations by other entities.

The final Declaration of Forfeiture in an administrative FIRREA forfeiture case involving non-cash property and any rulings on petitions for remission or mitigation will be forwarded by the seizing agency to the applicable regulatory agency. In judicial FIRREA forfeiture cases involving non-cash property, the Order of Forfeiture and any rulings on petitions for remission or mitigation will be forwarded by the Department of Justice to the applicable regulatory agency. Upon receipt of the Final Order or Declaration of Forfeiture of cash in a FIRREA forfeiture, the Marshals Service will transfer the forfeited cash to the agency. Disposition of the forfeited property and the proceeds of the liquidation of such property will be carried out by the regulatory agency consistent with the provisions of 18 U.S.C. § 981(e)(3), (4), or (7).

Under the Memorandum of Understanding, there will be no equitable sharing in FIRREA cases. If a regulatory agency is entitled to an equitable share of net proceeds pursuant to the provisions of 18 U.S.C. § 981(e)(5) in non-FIRREA cases, it must make a request to obtain such a share. The decision to make such a transfer pursuant to 18 U.S.C. § 981(e)(5) will be made by the official entitled to make transfer decisions for equitable sharing purposes in such cases under the *Guidelines*, or other applicable guidelines, or at such higher level as may be required by the Department of Justice Executive Office for Asset Forfeiture or by the Department of the Treasury Executive Office for Asset Forfeiture. Requests for such transfers must be made in writing to the appropriate official, and decisions granting or denying such requests will also be made in writing.

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[39] Under the Memorandum of Understanding, the term "regulatory agency" means a federal financial institution regulatory agency, i.e., the Board of Governors of the Federal Reserve System, the Farm Credit Administration, the Farm Credit System Insurance Corporation, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, or the Resolution Trust Corporation.

Additionally, the Memorandum of Understanding provides that seizing agencies may retain office and electronic communications equipment valued at less than one thousand dollars ($1,000) and motor vehicles from FIRREA forfeitures for official use pursuant to the policies and procedures set forth in part IV of the *Guidelines*. No other property or proceeds from FIRREA forfeitures may be retained for official use by a federal agency, and no property or proceeds from FIRREA forfeitures will be transferred to state or local agencies.

In disposing of forfeited property in FIRREA forfeiture cases, as defined in the Memorandum of Understanding, property will be distributed in the following order of priority, unless compelling circumstances dictate otherwise:

(i) first, as provided by any Order or Declaration of Forfeiture, or any order or declaration amending an Order or Declaration of Forfeiture, or any order granting a petition for remission or mitigation that specifies the disposition of assets or the distribution of proceeds;

(ii) second, to any federal agency (including both the regulatory and seizing agencies) that incurred expenses incident to the seizure, forfeiture, or sale of the property, as appropriate, and consistent with the decisions of a ruling official in granting remission or mitigation of the forfeiture of the property;

(iii) third, to any regulatory agency that acted or is acting as receiver, conservator, liquidating agent, or corporate purchaser of the financial institution affected by the underlying violation, to reimburse the agency for payments to claimants or creditors of the institution and to reimburse the appropriate insurance fund for losses suffered by the fund as a result of the receivership or liquidation, pursuant to 18 U.S.C. § 981(e)(3) or (7);

(iv) fourth, as provided by any outstanding order issued by any regulatory agency to a financial institution, pursuant to 18 U.S.C. § 981(e)(4); and

(v) fifth, to the extent that there are any proceeds remaining in FIRREA forfeiture cases after disposition of such proceeds has been made by the regulatory agency in accordance with the provisions of 18 U.S.C. § 981(e)(3), (4), or (7), such proceeds shall be returned to the Marshals Service for disposition to any victims pursuant to 18 U.S.C. § 981(e)(6) and then for deposit into the Department of Justice Assets Forfeiture Fund or the Department of the Treasury Forfeiture Fund.

In cases involving the forfeiture of property which is forfeitable under the provisions of 18 U.S.C. § 981(a)(1)(C) but which are not classified as FIRREA forfeiture cases (i.e., in cases involving a financial institution that has *not* been under the supervision of a regulatory agency in its receivership, conservatorship, liquidating agency, or corporate purchaser capacity), if a regulatory agency is entitled to remission

or mitigation of forfeited assets because of an interest that is recognizable under the regulations governing petitions for remission or mitigation of forfeiture or is eligible for such transfer as a victim pursuant to 18 U.S.C. § 981(e)(6), the decision to make such transfer will be made in writing by the official entitled to make transfer decisions for remission or mitigation purposes in such cases under 28 C.F.R. Part 9 or other regulations applicable to petitions for remission or mitigation of forfeiture, after receiving a request in writing for such transfer from a regulatory agency that contains the information required for such petitions under the regulations.

Note that until this Memorandum of Understanding or an alternative is adopted, the Attorney General has not delegated his or her authority to make transfers under 18 U.S.C. § 981(e)(3)-(7). Requests for transfers to financial regulatory agencies, financial institutions, or individual victims in FIRREA cases must be made by filing petitions for remission, which will be processed and decided like petitions filed by owners and secured creditors. See generally the discussion on victim restitution in chapter 9.

VII. Department of Justice Assets Forfeiture Fund

A. Composition and management

As part of the Comprehensive Crime Control Act of 1984, Congress established the Department of Justice Assets Forfeiture Fund, into which all forfeited cash and proceeds from the sale of property are to be deposited. Expenses of forfeiture are paid from the Fund.[40] Interest from the investment of Assets Forfeiture Fund balances and interest from the Seized Asset Deposit Fund are also deposited into the Fund. Management and oversight of the Fund has been assigned to the Executive Office for Asset Forfeiture.[41] Administration of the Fund has been delegated to the United States Marshals Service.[42]

The Assets Forfeiture Fund is available for use only to the extent considered and approved by the Office of the Deputy Attorney General. Requests for monies are to be directed through normal agency administrative channels for seeking budgetary allocations. There are numerous statutory and policy limitations on the use of the Fund monies that must be observed.

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[40] 28 U.S.C. § 524(c), as most recently amended by P.L. 102-393, 106 Stat. 1729 (Oct. 6, 1992). *Guidelines* § VI.B.1.

[41] *See* Memorandum from Deputy Attorney General to Attorney General entitled "Reorganization of the Asset Forfeiture Program," approved May 29, 1991.

[42] *Guidelines* § VII.A.I. *See* USMS *Seized Asset Management Handbook* (Oct. 1990) for detailed procedures concerning the disposition of property.

B. Deposits into Fund

In the case of either a consent judgment or a default judgment, the Marshals Service immediately transfers any forfeited cash to the Assets Forfeiture Fund, unless the United States Attorney determines that execution of the judgment should be delayed. In the case of a judgment after trial or upon summary judgment, there is an automatic stay of execution of the judgment of ten working days. If the United States Attorney's Office indicates that no motions or requests for additional stays have been filed, then any forfeited cash will be transferred to the Assets Forfeiture Fund on the eleventh working day following a summary judgment or a judgment after trial.[43]

C. Permissible uses of the Fund

Payments and reimbursements are permitted in six general categories.[44] The categories, listed in order of their priority, are as follows:

1. Asset management expenses

These expenses are those incurred in connection with the seizure, inventory, appraisal, storage, maintenance, security, and disposition of the asset.[45] Asset management expenses include payments for contract services and the employment of outside contractors to operate and manage properties. For example, if the asset is an on-going business, the normal expenses of operating the business would be considered an asset management expense, but only to the extent that the expenses are not covered by the income of the seized business.

2. Case-related expenses

These expenses are those incurred in connection with normal proceedings undertaken to perfect the United States' interest in the seized property.[46] These expenses include the costs of advertising, court and deposition reporting costs, expert witness fees, employment of attorneys proficient in state real estate law, and travel and subsistence. This category does not include routine investigation expenses nor the litigative costs of prosecuting the offense underlying the forfeiture. The Fund may also, with the approval of the Executive Office for Asset Forfeiture, pay awards ordered under the Equal Access to Justice Act (EAJA) (28 U.S.C. § 2412(d)), relating to a

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[43] *See* Executive Office for Asset Forfeiture Memorandum entitled "Forfeiture Policies," part D, dated July 3, 1990 [Vol. III, Tab 9].

[44] *Guidelines* § VII.B.

[45] *Guidelines* § VII.B.1.

[46] *Guidelines* § VII.B.2.

forfeiture proceeding or seizure for forfeiture, unless the agency or prosecutorial component involved acted in bad faith or intentionally disregarded applicable law or Department policy. Copies of such orders should be sent to the Executive Office for Asset Forfeiture within five days of the orders being signed, and advance notice should be given to the Executive Office of any proposed settlement involving an EAJA award.

3. *Payment of qualified third party interests*

These are expenses incurred in the payment of valid liens, secured mortgages, and debts owed to qualified creditors pursuant to a court order or a favorable ruling on a petition for remission or mitigation of the forfeiture.[47]

4. *Equitable sharing payments*

Equitable sharing payments are those payments that represent amounts paid directly to foreign governments or agencies and state or local agencies.[48] Pursuant to 21 U.S.C. § 881(e)(3)(A), which is incorporated by reference in 18 U.S.C. § 982(b)(1)(A), these amounts must bear a reasonable relationship to the degree of direct participation in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based. The law enforcement effort includes investigative and litigative activities, as well as the execution of court orders arising from those efforts.

5. *Program management expenses*

Program management expenses are those expenses incurred in conducting program responsibilities that are not related to any specific asset or forfeiture.[49] Authorized program-related expenses include the purchase or lease of ADP equipment and related expenses;[50] contracting for services directly related to the processing,

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[47] *Guidelines* § VII.B.3.

[48] *Guidelines* § VII.B.4.

[49] *Guidelines* § VII.B.5.

[50] ADP equipment purchased with Assets Forfeiture Fund monies must be used a majority of the time for asset forfeiture work and shall retain any statutory conditions or limitations on its use until: (1) the equipment fails or suffers serious performance degradation and it is economically impractical to invest in equipment repair; or (2) the equipment is rendered functionally obsolete for forfeiture program purposes of the using office, *and* no other agency participating in the Justice Department Assets Forfeiture Fund within a reasonable radius can use the equipment for forfeiture program purposes, *and* the Executive Office for Asset Forfeiture is provided thirty days written notice of the intent to redirect the equipment out of the asset forfeiture program with a brief

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data entry, and accounting for forfeiture cases;[51] printing and graphic services reasonably necessary to effectuate forfeiture program goals; training of Department components in all aspects of asset seizure and forfeiture; and payments for services of experts and consultants to assist in carrying out asset seizure and forfeiture duties.

6. Investigative expenses

These are expenses that are normally incurred in the identification, location, and seizure of property subject to forfeiture.[52] These expenses include such items as awards for information concerning violations of criminal drug laws, awards for information leading to forfeitures, purchase of drug violation evidence, contract services to identify potentially forfeitable property, the equipping of conveyances for federal, state, and local agencies, and the storage, protection, and destruction of controlled substances.

Annual allocations in these categories are given to those agencies, including the United States Attorneys' Offices, participating in the Department's forfeiture program.[53] Most items in the last category of expenses are subject to an annual appropriations limitation.

D. Distribution of surplus funds

The asset forfeiture program has often generated more in revenues than was needed to fund the above expense categories. The disposition of this end-of-year surplus is directed by statute. Since the inception of the Assets Forfeiture Fund, the statutory treatment of the surplus has been changed several times.

The first priority for use of any end-of-year surplus is to retain sufficient funds to ensure that initial costs for the next fiscal year can be paid, such as storage and

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[50](...continued)
explanation of the attendant circumstances. *See* Executive Office for Asset Forfeiture Memorandum entitled "Disposition of ADP Equipment Purchased with Assets Forfeiture Fund Allocations," dated Feb. 11, 1991 [Vol. III, Tab 18].

[51] *See* Executive Office for Asset Forfeiture Memorandum entitled "Points to Remember Regarding Work with Ebon Contract Employees," dated May 20, 1991 [Vol. III, Tab 25], for a detailed discussion on proper and improper use of contract employees.

[52] *Guidelines* § VII.B.6.

[53] Through FY 1993, the participating agencies included three Treasury Department agencies: the Internal Revenue Service; the Bureau of Alcohol, Tobacco, and Firearms; and the Secret Service. Starting in FY 1994, these agencies will participate in the new Treasury Department Forfeiture Fund. The United States Postal Inspection Service and the United States Park Police participate in the Justice Fund along with Justice Department agencies.

security contracts, and equitable sharing. Currently, the Attorney General may retain up to $15 million (or, if necessary, up to one-tenth of the prior year's obligations) to cover initial expenses for the following year. The Department has generally tried to retain about $10 million for this purpose.

Once immediate needs are covered, the Department may transfer a statutorily limited amount in surplus funds to the Special Forfeiture Fund. The Special Forfeiture Fund was created by the Anti-Drug Abuse Act of 1988 to serve as a source of funds to implement the National Drug Control Strategy, including education, treatment, and law enforcement. While the Special Forfeiture Fund is administered by the Office of National Drug Control Policy, it is available only to the extent appropriated. Thus, Congress exercises substantial control over the use of the Special Forfeiture Fund. Surplus funds from the Assets Forfeiture Fund are the only source of funding for the Special Forfeiture Fund, although, starting in FY 1994, the Treasury Forfeiture Fund will also be responsible for transferring surplus monies to the Special Forfeiture Fund.

If additional surplus monies are available, Congress has empowered the Attorney General to use these funds for the law enforcement, prosecutorial, correctional, and related training functions of any federal agency. These funds are available until expended for the authorized purposes.

VIII. Department of Treasury Forfeiture Fund

Starting in FY 1993, the separate United States Customs Forfeiture Fund became the Department of the Treasury Forfeiture Fund.[54] The Treasury Department acquired the right to use the Fund for the same purposes as the Justice Department uses its Fund; and, since it contains the proceeds of Coast Guard seizures, the Treasury Department also may transfer an amount equal to the net proceeds of such seizures to the Coast Guard for certain designated purposes. Effective with the start of FY 1994, the proceeds of all administrative forfeitures conducted by any Treasury Department agency will be placed into this Fund (previously they went into the general treasury, except for Customs forfeitures). In addition, the proceeds of all judicial forfeitures will go into this Fund when the underlying seizure is made by an officer of a Treasury Department law enforcement organization or when the property is maintained by a Treasury Department law enforcement organization pending forfeiture. In joint cases involving Treasury Department agencies and agencies participating in the Justice Department Assets Forfeiture Fund, provisions are included to ensure sharing between the Funds.[55]

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[54] 31 U.S.C. § 9703.

[55] *Id.* § 9703(n). In judicial forfeiture cases conducted prior to FY 1994, a Memorandum of Understanding between the DEA and the Customs Service authorizes a transfer of ninety percent

(continued...)

IX. Postal Service Fund

The United States Postal Service maintains a revolving fund for the proceeds of administrative forfeitures which the Postal Inspection Service conducts. By separate Memorandum of Understanding, the Postal Fund also receives eighty percent of the net proceeds of any judicial forfeiture from the Justice Fund when the Postal Inspection Service is the exclusive investigative agency. When it participates in an investigation with other agencies, it receives a proportional amount (up to eighty percent) of the net proceeds. These shares are offset against allocations from the Justice Fund. Requests for such inter-fund transfers are processed like equitable sharing requests, using a DAG-71 and DAG-72 form. Transfer decisions are made by the same official entitled to make equitable sharing decisions in the particular case. Deposits into the Postal Fund are used to support Postal Service operations.

X. Special Problems in Disposing of Forfeited Property

A. *Warranting title to transferred property*

Under Section 2002 of the Crime Control Act of 1990, codified at 28 U.S.C. § 524(c)(10), the Attorney General has the authority to warrant clear title upon the transfer of forfeited property to a new purchaser. Section 524(c)(10) reads as follows:

> Following the completion of procedures for the forfeiture of property pursuant to any law enforced or administered by the Department, the Attorney General is authorized, at his discretion, to warrant clear title to any subsequent purchaser or transferee of such forfeited property.

To expand and clarify this new authority, the Department Policy on the Attorney General's Authority to Warrant Title was issued in the form of a special directive on February 12, 1992.[56] The Department's general policy is that quitclaim deeds are to be used whenever practical. These deeds are executed by the United States Marshals Service.[57] However, the Department recognizes certain situations where a quitclaim deed will not be sufficient for a title company to insure title. The limited circumstances include situations where:

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[55](...continued)
of the net proceeds of a forfeiture investigated exclusively by the Customs Service from the Justice to the Treasury Funds. See Volume II, page 4–23.

[56] *See* Executive Office for Asset Forfeiture Memorandum entitled "Departmental Policy on Attorney General's Authority to Warrant Title," dated Feb. 12, 1992 [Vol. III, Tab 34].

[57] The authority of the Attorney General to execute deeds has been delegated to the Director of the Marshal's Service by 28 C.F.R. § 0.111(i), and redelegated to Deputy United States Marshals by 28 C.F.R. § 0.156.

a. the owner of the defendant property is a fugitive and the Government cannot prove the fugitive was served in the forfeiture action;

b. the owner of the defendant property is a fugitive and title to the property is held by a constructive trustee;

c. one of the owners of the defendant property is a fugitive who holds title to the property in a cotenancy with innocent owners;

d. the owner of the defendant property dies before or during the forfeiture process and there is some question of proper service or substitution of the successors or representatives of the deceased party;

e. the owner of the defendant property is a United States or foreign corporation and the United States cannot prove that the corporation was properly served in the forfeiture action;

f. the forfeiture is subject to a pending appeal; or

g. such other situations in which a special warranty deed with certain indemnification provisions or a separate indemnification agreement is appropriate.

If such special circumstances exist, the Marshal, in consultation with the United States Attorney and with approval from the Seized Assets Division of the United States Marshals Service, may do one of the following:

First, the Marshal may execute a special warranty deed warranting against claims arising from the applicable circumstances as enumerated in (a) through (g) above.

Second, the Marshal may provide the buyer with an indemnification agreement in order to obtain title insurance.

Third, the Marshal may execute a general warranty deed under certain conditions and limitations provided in the Department's policy directive.[58]

Government attorneys should consult this policy directive when confronted with situations where potential buyers will not accept quitclaim deeds or where it is anticipated that title insurance cannot be obtained without a special or general warranty deed.

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[58] The Marshals Service has the authority to take any of these three steps by virtue of 28 C.F.R. § 0.156.

Chapter 11

Policies and Practices of International Forfeiture

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Chapter 11

Policies and Practices of International Forfeiture

I. General Overview

The chapters of this Manual on civil and criminal forfeitures focus generally on procedures to forfeit assets found in the United States that were used in or derived from illegal activities undertaken in this country. Criminals, however, do not necessarily keep their ill-gotten gains in the country where those monies were generated. Instead, with increasing frequency, criminals are attempting to hide and protect their illegal profits by depositing or investing them in foreign countries. This chapter of the Manual discusses methods of identifying, immobilizing, and forfeiting American criminal assets located abroad and foreign criminal assets located in this country.[1]

II. American Criminal Assets in Foreign Countries

Because of their growing awareness of the potency of American forfeiture laws, criminals who generate potentially forfeitable profits in this country often transfer them elsewhere in an effort to put them beyond the reach of the confiscatory authority of the United States. Under current law, such a transfer of assets does, in fact, present the United States with substantial difficulties in its efforts to deprive wrongdoers of the fruits of their criminal conduct.

A. Investigation and assistance

Obviously, one of the first steps to be undertaken in the forfeiture process is to identify and locate assets that may be forfeitable. In the past, the United States has been hampered in its attempts to obtain information about potentially forfeitable assets that have been transferred abroad because of the frequent reluctance of foreign governments to provide official or judicial assistance to the United States in the enforcement of its criminal laws.[2]

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[1] *See also International Forfeiture: Federal Prosecutor's Manual* (Oct. 1991), published jointly by the Asset Forfeiture Office and the Office of International Affairs, Criminal Division.

[2] *Restatement (Second) of Foreign Relations Law of the United States* § 341 (1965). *See Brokaw v. U.K. Ltd.*, [1971] 2 Q.B. 476 (refusal to seize property of American citizens in English (continued...)

To overcome this problem and to facilitate the exchange of drug-related or other criminal offense information, the United States currently has in force mutual legal assistance treaties (MLATs) that provide for forfeiture-related assistance with fifteen foreign jurisdictions: Anguilla, Argentina, the Bahamas, the British Virgin Islands, Canada, the Cayman Islands, Italy, Mexico, Montserrat, the Netherlands, Spain, Switzerland, Thailand, Turkey, and the Turks and Caicos Islands.[3] The United States has also signed a drug-specific executive agreement with the United Kingdom which provides for cooperation between the two countries in forfeiture matters. Additionally, the United States has entered into an executive agreement with Hong Kong regarding the forfeiture of instrumentalities and proceeds of drug crimes. A comprehensive forfeiture assistance agreement has been finalized with the Netherlands, Netherlands Antilles, and Aruba. Furthermore, the United States is a party to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention), which requires member countries to assist one another in narcotics cases, including forfeiture matters.

MLATs addressing forfeiture matters usually contain a general provision relating to the seizure and forfeiture of assets at the request of the treaty partner. These agreements generally allow the parties to obtain documentary evidence and other forms of assistance, like facilitating depositions, from one another that can be used in investigations, trials, and other ancillary proceedings in the requesting country. To ensure that the forfeited property does not dissipate during the course of the proceedings, one party to the MLAT usually may request that the other issue a freeze order immobilizing the property.[4] MLATs and executive agreements expedite the exchange of information and assistance between countries because the requests are made directly from the "central authority" of one country to the "central authority" of another.[5]

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[2](...continued)
Brokaw v. U.K. Ltd., [1971] 2 Q.B. 476 (refusal to seize property of American citizens in English port for Internal Revenue Code violation based on the principle of international law that courts of one country are generally prohibited from aiding in the enforcement of the penal or revenue laws of another).

[3] The forfeiture provisions of the Italian treaty, however, are not in force pending enactment by Italy of the necessary implementing legislation. For a general discussion on the forfeiture provisions found in mutual legal assistance treaties, *see* Knapp, *Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy*, 20 Case W. Res. L. Rev. 405, 422-24 (1988).

[4] Government attorneys wishing to make use of the information-gathering provisions of these MLATs in forfeiture matters should contact the Asset Forfeiture Office and the Office of International Affairs in the Criminal Division.

[5] The Office of International Affairs acts as the "central authority" for the United States. Foreign "central authorities" are usually prosecutorial entities in the foreign government.

If no treaty or executive agreement exists with a given country, forfeiture-related assistance may generally be sought from that country through letters rogatory.[6] It should be noted, however, that, unlike requests made under a treaty or an executive agreement, there is no formal obligation on the part of the country to which letters rogatory are issued to provide assistance. Moreover, letters rogatory are typically more time consuming than MLAT and executive agreement requests because they are made through diplomatic channels, rather than through direct communications between the Justice Department and its foreign counterpart.

B. Civil forfeiture actions

Once forfeitable assets derived from criminal activities committed in the United States have been located in another country, it must be determined whether it is still possible to institute forfeiture proceedings that will result in the owner/wrongdoer's losing his or her interest in such property.

As explained at the beginning of this Manual, civil forfeiture is an *in rem* proceeding against the property itself,[7] and the jurisdictional authority of the district court to enter a civil forfeiture order depends upon the control of the property by the court hearing the civil forfeiture case.[8] However, effective October 28, 1992, 28 U.S.C. § 1355 was amended to permit United States courts to civilly forfeit assets located in another country. A civil forfeiture action may be brought in the District of Columbia, in the district in which any of the acts giving rise to the forfeiture occurred, or in any other district where venue is specially authorized by statute.[9] Because the nationwide service of process provision in 28 U.S.C. § 1355(d) does not apply to foreign countries, and because of the sovereignty issues involved in taking action against property located in other countries, the Government must continue to rely upon mutual legal assistance treaties, other international agreements, or the laws of a particular country to actually seize and/or repatriate assets to the United States. The United States may, pursuant to a treaty or letter rogatory, request the country in which the property is located to seize the property in question, and even repatriate it to the United States. The requested country will, of course, take such action according to its own laws and procedures. Government attorneys wishing to proceed civilly against property located abroad must first notify the Office of International Affairs, which in

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[6] *See* 28 U.S.C. §§ 1781-1782; Fed R. Civ. P. 28(b).

[7] *Pelham v. Rose*, 76 U.S. (9 Wall.) 103, 106 (1869); Supplemental Rule C(2), (3); 28 U.S.C. § 1395(b), (c).

[8] *See United States v. U.S. Funds in the Amount of $3,035,648.50*, No. Civ-91-217E (W.D.N.Y. Nov. 4, 1991) (unpublished opinion). *But see United States v. Certain Funds*, No. 91-647-CIV-J-16 (M.D. Fla. Feb. 5, 1992) (unpublished opinion), which allowed the default forfeiture of certain foreign bank accounts where the account holder was a fugitive in related criminal proceedings.

[9] 28 U.S.C. § 1355(b)(2).

turn will work with the Asset Forfeiture Office and other United States and foreign authorities, as appropriate, to ensure that such an action would be consistent with both United States and foreign law enforcement interests.[10] Within ten days of such notification, the affected government attorney will be informed of the results of any consultations with foreign authorities that may have occurred.

Additionally, it may be possible for foreign governments to use their own forfeiture laws to confiscate and condemn the assets of United States crimes, particularly drug offenses, that have been deposited or invested inside their borders. Switzerland and Canada, for instance, currently have laws which, under certain circumstances, allow the forfeiture of such assets. Other jurisdictions (*e.g.*, United Kingdom, Hong Kong) have the statutory authority to enforce United States civil forfeiture orders against property located within their territory. Similarly, the foreign country where the property is located may agree to transfer control of the property to the United States to enable a civil forfeiture action to occur here. Contacts with foreign authorities to request that they take any of these steps must be made through the Office of International Affairs.[11]

C. *Criminal forfeiture actions*

Criminal forfeiture cases are *in personam* actions, brought against the criminal defendant rather than against his property. Once the defendant is convicted, all of the named assets may be included in the forfeiture order, regardless of where they are located.[12]

The challenge to the United States in criminally forfeiting foreign assets, then, is not so much the ability to obtain a judgment, but the ability to enforce that judgment abroad. As noted earlier, one of the basic principles of international law is that nations will generally refuse to give effect to the penal or revenue laws of other countries, except as specifically provided by a treaty, other international agreement, or as authorized by the requested country's domestic laws.[13] Historically, forfeiture orders have fallen within this basic proscription because they are considered to be criminal penalties. However, evidence of continuing efforts to encourage international forfeiture can be found in the recent Vienna Convention that calls for international recognition of forfeiture orders relating to drug trafficking. As mentioned above, the United Kingdom and Hong Kong will directly enforce a United States forfeiture judgment.

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[10] *See* Bluesheet entitled "Civil Forfeiture of Assets Located in Foreign Countries," USAM 9-13.526 [Vol. II] for list of information that must be provided as part of this notification.

[11] *Id.*

[12] *See, e.g.*, 18 U.S.C. § 1963(j); 21 U.S.C. § 853(1).

[13] *Restatement (Second) of Foreign Relations Law of the United States* § 341 (1965).

Moreover, other methods can be used to accomplish forfeitures in the United States without requiring foreign courts to enforce American penal judgments. One such method is to require the defendant to repatriate the forfeitable or forfeited assets pursuant to a restraining order or as part of a plea agreement.[14] Once the property is back in the United States, the forfeiture order can be enforced by American courts using normal civil or criminal forfeiture procedures.

Plea agreements could also provide that the defendant liquidate his or her foreign property and surrender the proceeds to the United States by actually signing over the deed,[15] ownership papers, or stock certificates to the Government. Once the United States holds title to the foreign assets or is listed as the owner of shares in a corporation with foreign assets, it may be able to retain local counsel to oversee or liquidate its property interest in the country where the assets are located. Retention of foreign counsel for this purpose requires the approval of the Office of International Affairs in criminal cases and the Office of Foreign Litigation of the Civil Division in civil cases.

Finally, if the defendant is unwilling to repatriate or transfer title to his foreign assets through a plea arrangement, it may be possible to have the district court order the defendant to transfer ownership or to have stock in a corporation with overseas properties reissued in the name of the United States. Again, once the United States is vested with title through a forfeiture judgment, local counsel may be hired to dispose of the foreign property in accordance with the laws of the country where it is located. Retention of foreign counsel for this purpose likewise requires the approval of the Office of International Affairs in criminal cases and the Office of Foreign Litigation of the Civil Division in civil cases.

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[14] Although there is little precedent for requiring a defendant to repatriate foreign assets, there is statutory language that clearly supports imposition of this requirement. In addition to the entry of restraining orders, injunctions, and performance bonds, the court is authorized to "take any other action to preserve the availability of property" that is forfeitable. 18 U.S.C. §§ 982(b)(1) and 1963(d)(1), 21 U.S.C. § 853(e)(1). This language, combined with the jurisdictional statute that permits courts to enter such orders "without regard to the location of any property which may be subject to forfeiture," appears to support the issuance of orders that require the defendant to repatriate to the court any of the defendant's foreign assets that are subject to forfeiture. 18 U.S.C. §§ 982(b)(1) and 1963(j), 21 U.S.C. § 853(l). *See also United States v. Lopez*, 688 F. Supp. 92 (E.D.N.Y. 1988) (defendants ordered to execute a release and transfer of foreign funds subject to forfeiture). One method for accomplishing such repatriation is to have the defendant execute a power-of-attorney to his lawyer or other representative, who can then withdraw or liquidate the assets in the foreign country and transfer the monies or proceeds back to the United States.

[15] No United States law prohibits the United States from owning real property in its own name overseas. Moreover, a majority of the nations of the world allow foreign governments to own realty in fee simple. However, some countries have laws restricting the transfer of property or view the acquisition of significant realty by the United States or another country as a threat to their sovereignty.

In sum, the approach to be taken in obtaining the forfeiture of assets located abroad will depend on a number of variables, including whether the United States and the country where the assets are located have entered into a treaty or executive agreement providing for mutual forfeiture cooperation, the legal system and requirements of the country where the assets are found, and the willingness or ability of the defendant/owner to repatriate forfeitable property to the United States. Government attorneys attempting to reach forfeitable assets that have been transferred to, or invested in, foreign countries should, in the first instance, consult with the Asset Forfeiture Office, which will closely work with the Office of International Affairs of the Criminal Division in such matters.

III. Foreign Criminal Assets in the United States

Foreign criminals, no less than their United States counterparts, often attempt to remove their illegally-obtained profits from the reach of their own countries' laws by transferring them elsewhere, sometimes to the United States. To address this problem, the United States has enacted legislation authorizing the seizure and forfeiture of assets within our borders that represent the proceeds of drug-related crimes against foreign authorities.[16] The United States has also expanded the scope of the money laundering statute to provide for the forfeiture of the proceeds of a number of foreign offenses when the proceeds are laundered here.[17] Additionally, the Attorney General or the Secretary of Treasury is authorized, with the concurrence of the Secretary of State, to share forfeited property with foreign countries that have assisted the United States in forfeiture cases that yielded such property.[18]

A. Forfeiture under 18 U.S.C. § 981(a)(1)(B)

Section 981(a)(1)(B) of Title 18 provides that the United States may forfeit property within its borders that represents the proceeds of a violation of a foreign drug law.[19] The offense must also be one that would be a felony drug violation under United States law if the offense had occurred within the jurisdiction of the United States. While not explicitly stated, the provision allows the Government to forfeit the proceeds of a foreign drug violation and any property derived therefrom.[20] The provision does not

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[16] *See* 18 U.S.C. § 981(a)(1)(B).

[17] *See* 18 U.S.C. § 1956(c)(7) and discussion in part B below.

[18] *See* 18 U.S.C. § 981(i)(1).

[19] The foreign drug law must involve the manufacture, importation, sale, or distribution of a controlled substance (as that term is defined by the Controlled Substances Act) and be punishable in the foreign country by death or imprisonment for a term exceeding one year.

[20] *Cf.* 21 U.S.C. § 853(a)(1).

currently authorize the seizure and forfeiture of instrumentalities, i.e., property that was used or intended to be used in the violation of a foreign drug law.

The procedures for seizure and forfeiture under this statute are, with a few minor exceptions, identical to the civil forfeiture provisions codified at 21 U.S.C. § 881. Certain statutory presumptions and rules of admissibility relating to foreign forfeiture orders and judgments of conviction are found at 18 U.S.C. § 981(i)(3)-(4). These evidentiary rules greatly enhance the ability of the United States to use foreign orders and judgments to prove its domestic forfeiture case.

Specifically, pursuant to Section 981(i)(3), a certified copy of a foreign forfeiture order or judgment encompassing the subject property is admissible and "shall constitute probable cause" in the civil forfeiture action against such property brought under Section 981(a)(1)(B). Section 981(i)(3) is particularly helpful in the case where the owner or claimant is a fugitive. In such a case, the government attorney may attach a certified copy of the foreign forfeiture order to the civil forfeiture complaint. If a claim and answer are not filed within the requisite period after the filing of the complaint, the government attorney may then file a motion for a default judgment.

Similarly, Section 981(i)(4) authorizes the admission into evidence of a certified foreign judgment of conviction for a felony offense involving the manufacture, importation, sale, or distribution of a controlled substance giving rise to the proposed forfeiture under Section 981(a)(1)(B). The certified foreign judgment of conviction creates "a rebuttable presumption that the unlawful drug activity giving rise to the forfeiture" has occurred.

Department policy currently requires government attorneys to consult with the Asset Forfeiture Office before filing a civil forfeiture action pursuant to 18 U.S.C. § 981(a)(1)(B).[21] See chapter 1, part IV.B., pages 1–29 to 1–30, for a further discussion of this statute, and a brief discussion of other methods for forfeiting United States-based assets of foreign criminal offenses.

B. Forfeiture under 18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1)

The commission of a foreign offense involving the manufacture, sale, importation, or distribution of a controlled substance has been a predicate offense for a violation of 18 U.S.C. §§ 1956 and 1957 since these statutes were enacted in late 1986.[22] Effective October 28, 1992, the list of predicate offenses was expanded to include a number of additional offenses committed in violation of foreign law. The statutes now permit prosecution for violations involving the proceeds of foreign fraud offenses committed by or against a foreign bank, and for foreign kidnapping, robbery, and

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[21] *See* Department of Justice *Handbook on the Anti-Drug Abuse Act of 1986*, at page 50.

[22] *See* 18 U.S.C. § 1956(c)(7)(B).

extortion offenses. In all such cases, while the underlying offense may have violated only foreign law, the laundering offense must be shown to have occurred at least in part in the United States or to have involved a United States citizen.[23]

Any property involved in such a money laundering transaction or attempted transaction, including the proceeds of the underlying foreign offense, are subject to civil or criminal forfeiture under 18 U.S.C. § 981 or § 982 respectively. Consequently, both facilitation and proceeds forfeiture is available, unlike under 18 U.S.C. § 981(a)(1)(B).

C. *Forfeitability of proceeds of foreign fraud law violations*

Except in cases of fraud by or against a foreign bank, which are discussed immediately above, there is no single statute squarely providing for the forfeiture of the proceeds of foreign fraud violations. Nonetheless, there is a basis through which the United States may seek to confiscate proceeds derived from violations of foreign fraud statutes. This statutory scheme — as yet relatively untried by government attorneys — relies on a linkage of 18 U.S.C. § 2314, 18 U.S.C. § 1961 (RICO), 18 U.S.C. § 1956 (money laundering), and, finally, 18 U.S.C. §§ 981 and 982.

Section 2314 proscribes transporting, transmitting, or transferring "in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted, or taken by fraud."[24] The RICO statute (at 18 U.S.C. § 1961(7)) lists Section 2314 violations as a predicate offense.

The money laundering statute (at 18 U.S.C. § 1956(c)(7)(A)) makes all of the RICO predicate offenses, including Section 2314, "specified unlawful activities."[25] In turn, 18 U.S.C. § 1956(a)(1)-(3) prohibits engaging in certain financial transactions, i.e., money laundering activities, with the proceeds of specified unlawful activities. Thus,

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[23] *See* 18 U.S.C. § 1956(f).

[24] *United States v. Braverman*, 376 F.2d 249, 251 (2d Cir.), *cert. denied*, 389 U.S. 885 (1967), held that federal courts have jurisdiction over § 2314 offenses wholly committed outside the United States if the foreign acts were intended to have an effect in the United States. *See also United States v. Goldberg*, 830 F.2d 459, 463 (3d Cir. 1987). A strong argument can be made that importing foreign fraud proceeds into the United States — to be laundered in our domestic financial institutions — would have a detrimental effect in the United States. Therefore, it is logical that Congress intended to prohibit the importation of such foreign fraud proceeds under § 2314.

[25] Moreover, like § 2314, 18 U.S.C. § 2315 is listed as a "specified unlawful activity." Section 2315 prohibits receiving, possessing, concealing, storing, bartering, selling, or disposing of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more "which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken."

it is a violation of United States criminal law to launder the proceeds of a foreign fraud or theft offense, when such proceeds are brought into the United States. These proceeds are subject to civil and criminal forfeiture under 19 U.S.C. §§ 981 and 982, respectively.

IV. International Sharing of Forfeited Assets

It is the policy of the Department of Justice, in accordance with United States law and established procedures, to share the proceeds of successful forfeiture actions with countries that facilitate the forfeiture of assets under United States law. International forfeiture sharing is premised on the realization that such transfers provide an incentive for further international cooperation, particularly in the fight against drug trafficking. There are three statutory provisions authorizing the Attorney General or the Secretary of the Treasury, with the concurrence of the Secretary of State, to transfer forfeited property to a foreign country: 18 U.S.C. § 981(i)(1), 19 U.S.C. § 1616a(c)(2), and 21 U.S.C. § 881(e)(1)(E).

Section 981(i)(1) of Title 18 authorizes the Attorney General or the Secretary of the Treasury to transfer property forfeited under 18 U.S.C. § 981 or § 982 to a foreign country that participated directly or indirectly in acts leading to the seizure and forfeiture of the property.[26] Section 1616a(c)(2) of Title 19 authorizes the Secretary of the Treasury to transfer forfeited property that has been seized by a United States Customs Service officer under a statute administered or enforced by the Department of Treasury or maintained in the custody of the Customs Service pending forfeiture, to a foreign country that participated directly or indirectly in the seizure or forfeiture of the property. Section 881(e)(1)(E) of Title 21 authorizes the Attorney General to transfer forfeited property to a foreign country that participated directly or indirectly in the seizure or forfeiture of drug-related property under 21 U.S.C. §§ 801-971.

All three provisions condition such a transfer upon: (1) approval by the Secretary of State; (2) authorization for such a transfer in an international agreement between the United States and the foreign country to which the property would be transferred;[27] and (3) if applicable, certification of the foreign country in question under 22 U.S.C. § 2291(h) (Section 481(h) of the Foreign Assistance Act of 1961).[28]

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[26] Section 981 contains subsections, providing, *inter alia*, for the forfeiture of: (A) assets traceable to, or involved in, money laundering violations; (B) proceeds of foreign drug felonies; and under subsections (C) and (D), property constituting, or derived from, proceeds traceable to a violation of various fraud statutes, mostly affecting financial institutions.

[27] Such an agreement may be contained in a mutual legal assistance treaty, in an executive agreement, or in a case-specific agreement to share proceeds.

[28] Generally, 22 U.S.C. § 2291(h)(1) provides for withholding United States economic assistance

(continued...)

Representatives of foreign governments are not required to submit a sharing request, *e.g.*, a DAG-71 form, "Application for Transfer of Federally Forfeited Property," so they should not be asked to submit one. However, foreign governments may request to share in assets forfeited under United States law through applicable MLATs, executive agreements, or diplomatic channels. Whether or not a foreign government has made such a request, the United States Attorney's Office prosecuting the case or the lead agency that investigated the matter should initiate the international sharing process by providing the Asset Forfeiture Office with a memorandum detailing the foreign assistance provided, recommending the amount to be transferred, and, if available, transmitting a copy of the forfeiture order or judgment.[29]

Until an international forfeiture sharing agreement and transfer commitment have been approved by the Departments of Justice and State, or the Departments of Treasury and State, no commitment should be made to share forfeited or forfeitable proceeds with a foreign government. It must be made clear to foreign officials during discussions about sharing that the final decision on the percentage to share lies with the Attorney General or the Secretary of Treasury and the Secretary of State. Furthermore, unlike equitable sharing in domestic forfeiture cases, there is no requirement that shared property be allocated by the foreign country for any specific purpose, including law enforcement. Such a requirement may be inserted in a sharing agreement governing a specific transfer, however.

The United States encourages foreign jurisdictions that confiscate assets under their laws with our assistance to recognize the United States contribution through asset sharing. In October 1991, the law governing the Department of Justice Assets Forfeiture Fund was amended to allow the deposit into the Fund of such shared foreign proceeds.[30] In May 1993, the United Kingdom and Switzerland shared forfeited assets with the United States, while Hong Kong has promised to do so before the end of 1993.

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[28](...continued)
to "each major illicit drug producing country or major drug-transit country" unless the President, under Section 2291(h)(2), determines and certifies to the Congress that the country in question has taken adequate steps to combat drug production, drug exports into the United States, money laundering, and drug-related public corruption.

[29] *See* Executive Office for Asset Forfeiture Memorandum entitled *Repatriation of Foreign Assets and International Sharing of Forfeiture Proceeds*, part IV., dated Sept. 7, 1990 [Vol. III, Tab 11].

[30] *See* 28 U.S.C. § 524(c)(4)(B).

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TO EXPEDITE YOUR REQUEST

Some requesters cause needless delay in the procuring of records pertaining to themselves by indiscriminately requesting search of systems of records they know, or should know, contain no subject matter relating to themselves. To avoid that delay to yourself, please read the description of matter contained in each system of records before checking and requesting search. Feel free to request search of any system you reasonably think may contain records relating to yourself. Avoiding unnecessary searches of records systems will expedite the Criminal Division's efforts in the processing of your request.

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