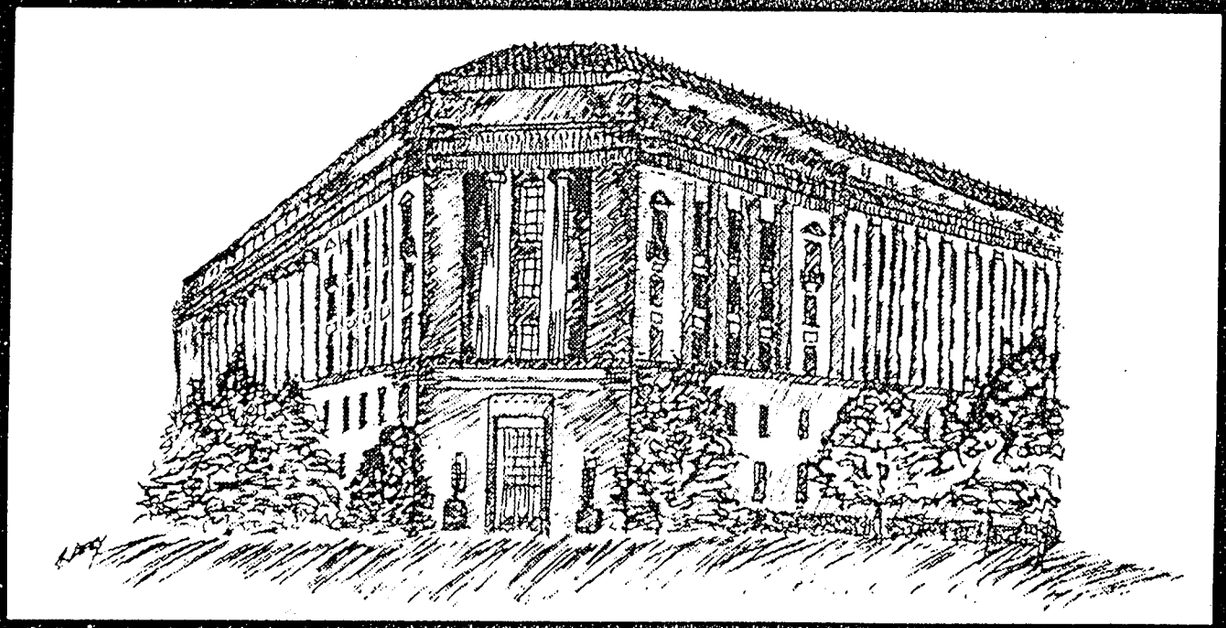
U.S. Department of Justice
Criminal Division
Asset Forfeiture and Money Laundering Section

ASSET FORFEITURE POLICY MANUAL



Forward

This is the *Asset Forfeiture Policy Manual*, published by the Asset Forfeiture and Money Laundering Section, Criminal Division. It is meant to replace the *Asset Forfeiture Manual, Volume III: Policy Compendium* (1993).

The *Asset Forfeiture Policy Manual* does not state new policy or change existing policies. Instead, it reorganizes the policies to make it easier to locate the policies that relate to specific issues, such as the seizure, forfeiture, disposition, and sharing of assets and forfeiture proceeds. Thus, the policies in the *Asset Forfeiture Policy Manual* are organized by topic rather than chronologically by date of issuance as they were in the *Policy Compendium*. Policies that are superseded or obsolete are not in the *Asset Forfeiture Policy Manual*, even though they were in the *Policy Compendium*.

In the miscellaneous section, the *Asset Forfeiture Policy Manual* contains a list of approval and consultation requirements as well as reprints of the chapters from the United States Attorneys' Manual on attorney-fee forfeitures and money laundering prosecutions and forfeiture; the FIRREA Memorandum of Understanding; the Memorandum of Understanding Regarding Money Laundering Investigations; and policy concerning working with DynCorp contract employees.

With the exception of the Attorney General's Guidelines on Seized and Forfeited Property, the *Asset Forfeiture Policy Manual* does not contain policies set out in their own publications such as the *Expedited Forfeiture Settlement Policy for Mortgagees and Lienholders* (revised October 1993).

The *Asset Forfeiture Policy Manual* is being published in loose-leaf form, with the date of issuance on each page, because we anticipate that amendments to the *Manual* will be distributed as policies are revised or new policies issued. Amendments to the *Manual* will be issued with instructions indicating where the amendments should be placed in the *Manual*.

We recommend that when citing to the *Asset Forfeiture Policy Manual*, the following format be used:

Asset Forfeiture Policy Manual (1996), Chap. ___, Sec. ___ at p. ___.

We hope that this new publication of forfeiture policies makes forfeiture policy more accessible and easier to ascertain and follow. We welcome any questions, comments or suggestions concerning any of the materials contained in this volume.

Gerald E. McDowell, Chief
Asset Forfeiture and
Money Laundering Section

The policies contained herein do not create or confer any rights, privileges, or benefits for or on any prospective or actual claimants, defendants, or petitioners. *See United States v. Caceres*, 440 U.S. 741 (1979).

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Seizure

Chapter 1 - Seizure

I. Guidelines for Pre-Seizure Planning[1]

Background: These guidelines are intended to encourage practices that will minimize or avoid the possibility that the government will assume unnecessarily difficult or insurmountable problems in the management and disposition of seized assets. In particular, they are meant to ensure that the United States Marshals Service is consulted prior to the seizure and forfeiture of assets.

These guidelines direct the United States Attorneys, or in administrative forfeitures, the agents in charge of a field office, to establish specific procedures to be followed in their respective districts or offices to ensure that critical financial and property management issues are addressed prior to seizing real property, commercial enterprises, or other types of property that may pose potential problems of maintenance and/or disposition (*e.g.*, animals and aircraft). These guidelines are intended to be flexible enough to enable each United States Attorney, or in administrative matters, the agent in charge of a field office, to establish and utilize procedures which clearly define pre-seizure planning responsibilities in his or her district or office.

Although these guidelines were first issued in 1994, the Marshals Service has reported that many of its districts have not been consulted prior to the seizure or forfeiture of assets. The Marshals Service notes that there has been a lack of inter-agency communication in cases involving "posted" real property, multi-district seizures, and criminal forfeiture.

As discussed *infra,* the Marshals Service should be advised promptly prior to all significant seizures, the filing of civil forfeiture complaints, or the return of indictments containing forfeiture counts.

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[1] The text for part I. is derived from Dir. 94-2, issued by the Department of Justice on February 16, 1994, and effective March 1, 1994, its implementation memorandum issued on April 19, 1994, and Dir. 96-3, issued by the Department of Justice on March 15, 1996, and effective the same day.

A. *Scope of Assets Covered by Guidelines*

These guidelines cover all assets considered for federal forfeiture, including those assets that have been seized by a state or local agency and adopted by a federal agency for purposes of federal forfeiture.

Except in the most unusual of circumstances, pre-seizure planning as outlined herein shall occur prior to the seizure of all assets specified below for federal forfeiture. The degree and nature of pre-seizure planning will depend directly upon the circumstances and complexity of each case.[2]

The United States Marshals Service should be promptly advised of all agency seizures and civil complaints filed by a United States Attorney's Office. In addition, formal pre-seizure planning, either in the form of a meeting or telephone call, must occur at least once prior to the seizure (including adoptive federal seizure) of the following types of assets:

* Real Property of all types
* Businesses
* Animals
* Large quantity assets involving potential storage problems, *e.g.*, 50 vehicles
* Unusual assets (*e.g.*, leasehold agreements, partnership interests, valuable art and antiques)

The United States Marshals Service should be given adequate advance notice of the government's intent to seize, generally 5 or more days notice in ordinary cases and at least 10 days notice in complex seizure cases. Depending upon the complexity and scope of the cases, continued pre-seizure planning (meetings, conference telephone calls, etc.) shall occur, as required by the United States Attorney or his or her representative in charge of the forfeiture matter.

B. *General Policy Guidelines*

What follows are broad pre-seizure planning policy guidelines for all agencies participating in the Asset Forfeiture Program. Minor

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[2] An independent contractor, EG & G, will serve as property manager in Treasury cases and will need to participate in pre-seizure planning. However, to the extent an Assistant United States Attorney feels that the pre-seizure information is too sensitive, the pre-seizure meeting may be bifurcated to limit the information discussed with EG & G.

variations and exceptions to the mandatory aspects of these guidelines are permitted only with the explicit approval of the Asset Forfeiture and Money Laundering Section.

1. ***Lead Responsibility.*** The United States Attorney, or in administrative forfeiture cases, the agent in charge of a field office, is responsible for ensuring that proper and timely pre-seizure planning occurs in the appropriate asset forfeiture cases within that federal judicial district. All pre-seizure planning meetings will include, at a minimum, as applicable, the Assistant United States Attorney or investigative agent in charge of the forfeiture matter (and, if applicable, the Assistant United States Attorney in charge of the related criminal matter), investigative agents, and the appropriate United States Marshals Service representative (which should include a representative from the district where the property is to be seized if different than the district where the action is to be filed). A federal regulatory agency representative will also attend in FIRREA forfeiture cases.

   For asset forfeiture cases involving more than one federal judicial district, the United States Attorney instituting the forfeiture action has the primary responsibility to ensure that all Asset Forfeiture Program participants are notified, and that proper and timely pre-seizure planning occurs in those districts where assets will be seized as a result of that asset forfeiture matter.

2. ***Pre-seizure Planning Defined.*** Pre-seizure planning consists of anticipating and making intelligent decisions about ***what*** property is being seized, ***how*** and ***when*** is it going to be seized, and, most important, ***whether*** it should be seized.

   a. ***What is being seized?*** Determine the full scope of the seizure to the extent possible. For example, if a house is being seized, are the contents also to be seized? If a business, are the building in which it operates, and the accounts receivable, accounts payable, etc., also being seized? All ownership interests to be seized should be identified to the extent possible.

   b. ***How and when is the asset going to be seized?*** The type and content of the seizing instrument and authority to enter or cross private property shall be communicated or provided, in advance, to both the investigative agency

and the United States Marshals Service to ensure that each has the necessary information and legal authority to carry out its respective seizure and post-seizure responsibilities. Determine whether seizure is necessary now or if it can be postponed safely. (*See* discussion in part I.E., *infra*.)

c. ***Whether the asset should be seized.*** If the asset has a negative net equity, should it be seized? What law enforcement benefits are to be derived from seizure under the circumstances? Can any losses be mitigated by careful planning on the part of the participants?

d. ***What management and disposition problems are anticipated, and how will they be resolved?*** Any expected logistical problems involved in the maintenance, management, or disposition of the asset should be identified and solutions for them should be planned.

e. ***Is publicity anticipated?*** If publicity or public relations concerns are anticipated, appropriate public affairs personnel should be advised and consulted.

C. *Planning Checklists and Financial Analysis Worksheet*

Whether a property should be seized must be documented during the pre-seizure process.

1. ***Net Equity Values.*** These guidelines set minimum net equity levels that generally must be met before federal forfeiture actions are instituted. The net equity values are intended to decrease the number of federal seizures, thereby enhancing efforts to improve case quality and to expedite processing of the cases we do initiate. The thresholds are also intended to encourage state and local law enforcement agencies to use state forfeiture laws. These thresholds are to be applied in adoptive cases. In general, the minimum net equity requirements are:

   a. ***Real Property*** - minimum net equity must be at least 20 percent of the appraised value, or $20,000, whichever is greater.[3]

[3] As a general rule, the Department of Justice does not seize or adopt contaminated real properties. *See* section IV., Contaminated Real Property, *infra*.

b. ***Vehicles*** - minimum net equity must be at least $5,000. However, if the person from whom the vehicle was taken was or is being criminally prosecuted by state or federal authorities for criminal activities related to the property[4] and there is justification for a downward departure, such as the vehicle being used to facilitate criminal activities, the minimum net equity is $1,000[5];

c. ***Cash*** - minimum amount must be at least $5,000, unless the person from whom the cash was taken was criminally prosecuted or is being prosecuted by state or federal authorities for criminal activities related to the property, in which case, the amount must be at least $1,000;

d. ***Aircraft*** - minimum net equity must be at least $10,000;

e. ***Vessels*** - minimum net equity must be at least $10,000;

f. ***All Other Personal Property*** - minimum net equity must be at least $5,000 in the aggregate. Downward departures should not be made for any individual item if it has a value of less than $1,000. Exceptions can be made if: (a) the seizure will have a substantial law enforcement effect, *e.g.*, a computer is seized to disrupt a major fraud scheme; or (b) practical considerations support the seizure, *e.g.*, 20 items of jewelry, each valued at $500, might be seized as the total value of the items is $10,000 and the cost of storing 20 small items of jewelry is not excessive.

Heads of investigative agencies may continue to establish higher thresholds for seizures made by their agencies. If an investigative agency head establishes higher monetary thresholds than those set out in the directive, the Asset Forfeiture and Money Laundering Section shall be advised in writing of the change.

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[4] The arrest of the person from whom the property is taken, for an offense related to the illegal use or acquisition of the property for which a forfeiture action may be brought, satisfies the condition of criminal prosecution.

[5] This restriction does not apply in the case of seizures by the Immigration and Naturalization Service of vehicles used in the smuggling of aliens or in the case of vehicles modified or customized to facilitate illegal activity.

Each United States Attorney may institute higher district-wide thresholds for judicial forfeiture cases. In doing so, United States Attorneys should confer with the seizing agencies affected by the change and develop in concert with those agencies written district-wide guidelines for implementation. Written notice of such higher thresholds shall be provided to the Asset Forfeiture and Money Laundering Section. Any threshold higher than those identified in the directive shall not be the basis for failing to assist in seizing property when requested to do so by another district with lower monetary thresholds where the requesting district intends to file the judicial action.

It is understood that in some circumstances the overriding law enforcement benefit will require the seizure of an asset that does not meet these criteria. In individual cases, these thresholds may be waived where forfeiture will serve a compelling law enforcement interest, *e.g.*, forfeiture of a "crack house," or of a conveyance with hidden compartments. Any downward departure from the above thresholds must be approved in writing by a supervisory-level official and an explanation of the reason for the departure noted in the case file.

2. ***Planning Checklists.*** Either the personal property pre-seizure checklist[6] or the real property/business pre-seizure checklist[7] is to be used for pre-seizure planning. The planning checklists and financial analysis worksheets identified in these guidelines are to be used where formal pre-seizure planning is required, *e.g.*, in all cases involving the seizure of improved real property, ongoing businesses, or live animals. They are not required for seizures presenting no significant seizure or management difficulties.

   a. ***Personal Property Pre-seizure Checklist.*** This form is to be used to collect the necessary information to make informed pre-seizure planning decisions involving personal property seizures.

[6] *See* Appendix, page 1-1.

[7] *See* Appendix, page 1-5.

b. ***Real Property/Business Pre-seizure Checklist.*** This form is to be used for residential, business, and commercial realty seizures.

Individual offices may supplement these forms as they see fit. However, the basic information called for in these forms is required and may not be eliminated.

3. ***Financial Analysis Worksheet.*** A written financial analysis is required to facilitate and to document pre-seizure planning decisions. In cases where information relating to titles and liens cannot be acquired without compromising the investigation, the financial analysis may be completed post-seizure. (*See* part 3.b.2., *infra*.) (*See* sample financial analysis worksheets, Appendix, page 1-12, *et seq*.) A United States Attorney may adopt these forms or develop his or her own.

a. ***Ownership and Encumbrances.*** The investigative agency is responsible for ensuring that current and accurate information on the ownership of, and any encumbrances against, personal property targeted for forfeiture is compiled prior to the seizure of the property and is made available to the United States Marshals Service and the United States Attorney prior to seizure. In instances where real property and businesses are targeted for seizure, the Marshals Service will have primary responsibility for conducting a title search prior to seizure unless otherwise agreed in individual cases.

b. ***Financial Analysis; Avoiding Liability Seizures.*** When real property and businesses are targeted for asset forfeiture, the potential net equity must be calculated. (*See* financial worksheets, Appendix, page 1-12, *et seq*.)

(1) ***Pre-seizure.*** If the financial analysis indicates that the aggregate of all liens (including judgment liens), mortgages, and management and disposal costs approaches or exceeds the anticipated proceeds from the sale of the property, the United States Attorney will either:

(a) determine not to go forward with the seizure (*see* Alternatives to Seizure, part I.E., *infra*.), or

(b) acknowledge the potential financial loss and document the circumstances that warrant the continuation of the seizure and institution of the forfeiture action.

(2) ***Post-seizure.*** In cases where the integrity of the investigation could be compromised resulting in a seizure without any pre-seizure planning, the seizing agency shall be responsible for custody and maintenance of the property until the United States Marshals Service has had an opportunity to respond. The Marshals Service shall complete a pre-seizure checklist and financial analysis worksheet within 5 business days of the seizure. If the financial assessment indicates that the aggregate of all liens, mortgages, and management and disposal costs approaches or exceeds the anticipated proceeds from the sale of the property, the United States Attorney will either:

(a) take action to dismiss the forfeiture action, and to void any expedited settlement agreements (if any have been entered into), or

(b) acknowledge the potential loss and document the circumstances that warrant the continuation of the forfeiture action.

In making decisions whether and how to proceed with the seizure and forfeiture of assets identified during the pre-seizure phase in judicial forfeitures, the United States Attorney or his or her designee, in consultation with the seizing agency and the United States Marshals Service, and in administrative forfeitures, the agent in charge of the field office responsible for the administrative forfeiture, or his or her designee, in consultation with the Marshals Service, shall evaluate and consider the forfeitable net equity and the law enforcement purposes to be served in light of the potential problems and estimated costs of post-seizure management and disposition.

4. ***Business Seizures.*** Due to the complexities of seizing an ongoing business and the potential for substantial losses from such a seizure, a United States Attorney's Office shall obtain the

concurrence of the Asset Forfeiture and Money Laundering Section prior to initiating a forfeiture action against, or seeking a temporary restraining order affecting, an ongoing business.

Note: The Asset Forfeiture and Money Laundering Section and the Seized Assets Division of the United States Marshals Service are available to organize a "Business Evaluation and Seizure Team" to go on-site to participate in pre-seizure planning.

5. ***Documentation.*** The Assistant United States Attorney (or the agent in charge of the field office responsible for an administrative forfeiture case) is responsible for ensuring that all pre-seizure planning checklists and financial analysis worksheets (including those prepared by the Marshals Service) are complete and placed, at a minimum, in the case file.

   If the financial analysis worksheet shows that the property targeted for forfeiture has marginal or negative anticipated net sale proceeds, the United States Attorney's Office (or agency field office conducting an administrative forfeiture) must document a plan to protect innocent lienholders and to dispose of the property in a manner that will minimize potential loss to the United States Government (*e.g.*, an immediate motion for interlocutory sale or stipulated sale of the property, thereby minimizing asset management costs.) A copy of this plan, along with the financial analysis worksheet, is to be sent to the Asset Forfeiture and Money Laundering Section.

D. *Pre-Indictment and Other Forfeiture Coordination*

1. ***Criminal Forfeitures.***

   a. The United States Attorney will ensure proper and timely pre-indictment coordination with the United States Marshals Service to prepare for and assess the property management and financial needs of those assets subject to criminal forfeiture.

   b. The United States Attorney should consult with the United States Marshals Service prior to the submission of any proposed orders to a court that impose any restraint, seizure, property management, or financial management requirements relating to any property that is or will be in the Marshals Service's custody.

2. ***Use of Seizure Warrants on Real Property.***

As a general rule, warrants of arrest *in rem* signed by a judicial officer or seizure warrants will be used for the seizure of all real property. At the very least, the execution of the warrant of arrest *in rem* must be accomplished within 5 days of the seizing agency's seizure of real property pursuant to a seizure warrant.

Unless exigent circumstances are present, the Due Process Clause of the Fifth Amendment requires the government to afford notice and a meaningful opportunity to be heard before seizing actual control of real property pending forfeiture. *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993)[8]. To establish exigent circumstances justifying an *ex parte* warrant for actual seizure and control of real property pending forfeiture, the government must show that less restrictive measures (*e.g.*, a *lis pendens*, restraining order, or bond) would not suffice to protect the government's interests in preventing the sale, destruction, or continued unlawful use of the real property. *Id.* Additionally, the *Good* decision makes clear that the government can avoid the hearing requirement if it refrains from seizing actual control of the property but instead merely posts the property with the warrant of arrest *in rem* and leaves a copy of the process with the occupant in order to provide the court with the constructive control of the *res* required for the initiation of an *in rem* forfeiture.

When there are exigent circumstances, affidavits submitted in support of *ex parte* warrants for actual seizure and control of real property pending forfeiture should set forth the relevant facts establishing the exigent circumstances, and a specific finding of the exigent circumstances justifying the government's seizure of actual control of the real property prior to notice and an opportunity for an adversary hearing should be included in the *ex parte* warrant. If there is a finding of exigent circumstances, the *ex parte* warrant should be executed promptly.

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[8] *United States v. James Daniel Good Real Property* and procedures to be used in real property forfeitures are discussed in section III, Real Property Seizures, *infra*.

E. *Alternatives to Seizure*

1. The primary goal of the Asset Forfeiture Program is to deprive criminals of property used or acquired through illegal activities. Depriving an individual of an asset derived from or used in a crime can be achieved by means other than federal forfeiture. Alternatives include:

   a. In negative or minimal net proceeds cases, allow the mortgage holder to foreclose on the mortgage, targeting the defendant's equity, if any, for seizure from the escrow account.[9]

   b. In certain high crime areas, low value real estate (*e.g.*, "crack houses") may be removed from the violator by working with the local authorities to have the building condemned based on health and sanitation code violations, or as a public nuisance.

   c. In instances where a violator may be behind on local or federal taxes, work with the local or federal taxing authorities to have the property seized for back taxes.

   d. Where warranted, allow the violator to post a substitute *res* bond in lieu of seizure of the asset.

   e. In instances where the property is being marketed for sale, allow the sale to continue and seize the net proceeds. *Cf.* footnote 9.

2. In certain instances, costs and problems can be minimized without necessarily foregoing the forfeiture. Short of deciding to seize a particular asset immediately for forfeiture, there are other possibilities to be considered.

   a. In certain circumstances, it may be advisable not to seize and take actual possession of the property, but only to "arrest" it for forfeiture by execution of a Warrant of Arrest under Rule C(3) of the Supplemental Rules for Certain Admiralty and Maritime Claims.

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[9] This alternative is available only when the relevant statute authorizes the forfeiture of "proceeds" traceable to the property originally subject to forfeiture.

b. In some cases, use of court-ordered restraints on property subject to criminal forfeiture (18 U.S.C. § 982(b)(1), 18 U.S.C. § 1963(e), 21 U.S.C. § 853(e)) pending the outcome of a criminal forfeiture case may obviate the need for a parallel civil forfeiture case in which the United States must take custody of the property.

c. An interlocutory sale (19 U.S.C. § 1612) or a stipulated sale may be appropriate, particularly when the projected management costs of the property are disproportionate to the potential sale value at the time of forfeiture. The United States Marshals Service should be consulted to assess the economic feasibility of using an interlocutory or stipulated sale.

d. It may be possible to proceed with the criminal forfeiture of substitute assets where, for example, the defendant has transferred forfeitable property to a third party or commingled the property subject to forfeiture with other property that cannot be divided without difficulty. *See* 18 U.S.C. § 982(b)(1); 18 U.S.C. § 1963(m); 21 U.S.C. § 853(p).

e. It may be decided that the forfeiture of a particular asset is not desirable or practical after consideration of the potential problems, the available solutions, the projected costs, and the law enforcement purpose that would be served by the forfeiture should it occur.

F. *Dispute Resolution*

In instances where a dispute concerning whether or not certain property should be seized for forfeiture cannot be settled between the concerned agencies or other components, alternatives to seizure should be utilized until the issue is resolved. Dispute resolution may be sought from the Asset Forfeiture and Money Laundering Section. Timely resolution of disputes is critical.

II. *Ex Parte Pre-Seizure Judicial Review and Other Procedures*[10]

A. *Notification By Seizing Agency*

In order to keep United States Attorneys' Offices (USAO) apprised of pending forfeiture activity in their judicial districts, seizing agencies are to forward a copy of the seizure form for all seizures to the pertinent USAO within 25 days of the seizure.

A United States Attorney may choose not to receive copies of all the seizure forms. Written notification of this decision to the seizing agency is required for the seizing agency's records.

B. *Pre-Seizure Judicial Review*

1. ***Pre-seizure judicial authorization of property seizures*** serves multiple purposes, including the following:

   a. allows neutral and detached judicial officers to review the basis for seizures before they occur;

   b. enhances protection for Departmental officers against potential civil suits claiming wrongful seizures; and

   c. reduces the potential that the public will perceive property seizures to be arbitrary and capricious.

2. ***Pre-Seizure Judicial Review Favored for Seizure of Personal Property:*** Whenever practicable, Department of Justice officials should obtain *ex parte* judicial approval prior to seizing personalty.[11]

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[10] The text for Part II. is derived from Dir. 90-1, issued by the Department of Justice on January 11, 1990, and effective the same day, Dir. 91-11, issued July 5, 1991, and effective the same day, and Dir. 96-5, issued by the Department of Justice on May 20, 1996, and effective the same day.

[11] This policy does not apply in circumstances where the owner of the property has consented to forfeiture of the property, *e.g.*, if the owner has agreed to the forfeiture in connection with a plea agreement. Neither does it apply to the adoption for federal forfeiture of property previously seized by state or local law enforcement agencies.

C. *Forms of Process To Be Used*

1. *Warrant of Arrest In Rem*[12]

The historic form of process used to initiate the civil judicial forfeiture of property is the verified complaint. The warrant of arrest *in rem*, normally filed with or after the filing of a verified complaint, gives the court jurisdiction over the property to be seized. It has not, however, historically included a judicial finding of probable cause.

Warrants of arrest *in rem*, as a general rule, must be served within the district of issue. However, there is an exception provided by 21 U.S.C. § 881(j) and 18 U.S.C. § 981(h). Where either of these subsections are employed along with a separate warrant of seizure, some AUSAs and seizing agents may be unaware that, while these subsections permit the service of the warrant of arrest outside the judicial district of issue, the expanded venue does not apply to the warrant of seizure. (*Cf.* discussion of 28 U.S.C. § 1355(d), *Asset Forfeiture Manual, Vol. I., Law and Practice.)*

A form of warrant of arrest *in rem* has been developed that combines the historic form with a probable cause finding; *see* Appendix, page 1-14. As this combined warrant of arrest *in rem* and determination of probable cause accomplishes two purposes with one filing, it should be used for real property seizures as well as for seizures of personalty that can only be forfeited *judicially*.[13]

2. *Warrant of Seizure*

A second and newer form of process for seizing forfeitable property is the warrant of seizure authorized by 21 U.S.C. § 881(b) and 18 U.S.C. § 981(b)(2). This form of process

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[12] A sample warrant of arrest *in rem* is provided in the Appendix, page 1-15.

[13] In some districts, courts have reportedly been reluctant to review the attached form of combined warrant of arrest *in rem* and probable cause determination simply because they have not been used in the past. In such districts, the warrant of seizure may be used in concert with the traditional warrant of arrest *in rem* but the United States Attorney in each such district should meet with the Chief Judge to point out the advantages and propriety of the combined form of warrant of arrest *in rem*.

secures a judicial determination of probable cause but does not confer jurisdiction upon the court issuing the warrant. The Administrative Office of United States Courts has issued a form of Warrant of Seizure and application therefor. These forms should be used for seizure of personalty that may be subject to *administrative* forfeiture.

D. ***Responsibility for Execution of Process.***

Generally, the U.S. Marshals Service has primary responsibility for execution of warrants of arrest *in rem*. Generally, the pertinent Department of Justice investigative agency has primary responsibility for execution of warrants of seizure.

E. ***Practice and Procedure Points.***

As noted *supra*, warrants of arrest *in rem*, as a general rule, must be served within the district of issue. Where a district is employing section 881(j) or section 981(h) to arrest property outside the district, there are two remedies that can be employed. First, the U.S. Attorney's Office commencing the action may obtain the warrant of arrest and the U.S. Attorney's Office where the property is located may obtain the warrant of seizure.

A second approach is to have a judicial officer in the district commencing the forfeiture action sign the warrant of arrest *in rem*. This dispenses with the need for a separate warrant of seizure.

F. ***Obtaining Criminal Forfeiture Seizure Warrants for Property Located Outside Districts***

1. ***Background***: Seizing agencies and prosecutors have sought the opinion of the Asset Forfeiture and Money Laundering Section on the following question: must a seizure warrant for property subject to criminal forfeiture be issued in the district where the property is located, or may it also be issued by the court in the district where the criminal indictment is pending. We have concluded that when property subject to criminal forfeiture is located in one district and the indictment is pending in another district, a seizure warrant may be obtained in either district.

   The most commonly used criminal forfeiture statutes authorize the issuance of a warrant for the seizure of property subject to

criminal forfeiture "in the same manner as provided for a search warrant."[14] In turn, Fed. R. Crim. P. 41(a), which governs the procedure for the issuance of search warrants, provides that warrants may be issued for property that is "within the district."[15] This suggests that seizure warrants for criminal forfeiture may be issued by the court in the district in which the property to be seized is located at the time the warrant is sought.

This authority, however, may not be exclusive. The "Jurisdiction to enter orders" provision in all of the criminal forfeiture statutes that authorize seizure warrants provides as follows:

> The district courts of the United States shall have jurisdiction to enter orders as provided in this section *without regard to the location of any property* which may be subject to forfeiture under this section or which has been ordered forfeited under this section.[16]

Seizure warrants are court orders. Consequently, district courts have jurisdiction to issue seizure warrants for property subject to criminal forfeiture "without regard to the location" of the property, at least to the limited extent necessary to allow the court that has jurisdiction for the criminal forfeiture to issue seizure warrants for property located in other districts. Such jurisdiction is consistent with the jurisdiction of the district courts for the issuance of warrants of arrest *in rem* in civil forfeitures of property in other districts.[17]

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[14] 18 U.S.C. § 1467(d) (obscene material); 18 U.S.C. § 2253(d) (sexual exploitation of minors); 21 U.S.C. § 853(f) (controlled substances); and, by incorporation of 21 U.S.C. § 853(f) by reference, 18 U.S.C. § 982(b)(1)(A) (money laundering) and 18 U.S.C. §§ 793(h)(3) and 794(d)(3) (espionage).

[15] Fed. R. Crim. P. 41(a).

[16] 18 U.S.C. § 1467(j); 18 U.S.C. § 2253(k); 21 U.S.C. § 853(l); and, by incorporation of 21 U.S.C. § 853(l) by reference, 18 U.S.C. § 982(b)(1)(A) and 18 U.S.C. §§ 793(h)(3) and 794(d)(3). Emphasis added.

[17] See 28 U.S.C. § 1355(d) (authorizing nationwide service of "process" by district courts with jurisdiction over a civil forfeiture action "as may be required to bring before the court the property that is the subject of the forfeiture action"); *compare*, 18 U.S.C. § 981(b)(2)(b), 21 U.S.C. § 881(b) (civil forfeiture seizure warrants "pursuant to" and "in the same manner as provided for a search

The conservative approach would be to seek criminal forfeiture seizure warrants in the district court for the district in which the property is located. That approach, however, frequently causes logistical and procedural problems, especially when multiple properties to be seized are scattered around the nation in multiple districts.

2. ***Policy***: In light of the above analysis, Assistant U.S. Attorneys seeking seizure warrants for the criminal forfeiture of properties located in districts outside of the district where the indictment is pending are authorized to request such warrants either from the district court that has jurisdiction over the indictment or from the district court in the district where the property is located.

   When requesting a seizure warrant for the criminal forfeiture of substitute assets located outside of the district where the indictment is pending, Assistant United States Attorneys should consider the applicability of Third, Fifth, Eighth or Ninth Circuit law holding that the pre-trial restraint of substitute assets is not permitted.

3. ***Procedures***: Because Fed. R. Crim. P. 41(e) provides that a motion for the return of property *may* be made in the district court for the district in which the property was seized, it is recommended that seizure warrants state that any questions concerning the property which is the subject of warrant should be directed to the United States Attorney's office or the seizing agency in the district where the indictment is pending.

   As always, when requesting a warrant in one district that is to be executed in another district, it is incumbent on the prosecutor requesting the warrant to advise the United States Attorney and the United States Marshal for the district where the property is located that a seizure in that district is contemplated, and to coordinate the seizure with those offices.

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warrant under the Federal Rules of Criminal Procedure").

III. *Real Property Seizures*[18]

Background: The *Good* Decision

In *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993), the United States Supreme Court held that real property[19] may not be seized, except in exigent circumstances, without giving a property owner notice of the proposed seizure and an opportunity for an adversarial hearing.[20] In light of the *Good* decision, the United States now generally commences forfeiture actions against real property through "posting" rather than seizure.

The Court also addressed a number of issues in the context of this ruling that, taken together, significantly change the way in which the government conducts civil forfeiture proceedings. First, in addition to its ruling that any seizure of real property must first be accompanied by notice and an opportunity to be heard, the Court endorsed a method, previously approved by the First Circuit[21], in which a civil *in rem* proceeding is initiated by "posting" the property under the Admiralty Rules.[22] Under this method, the actual "seizure" of the property takes place upon or after forfeiture. Second, the Court addressed procedures for preserving property during the pendency of the forfeiture case. If, for example, there is evidence that an owner is likely to destroy his or her property when advised of the pending action, the Court stated that the government may obtain an *ex parte* restraining order. Third, the Court determined that the government may seize real property without a hearing upon a showing of exigent circumstances. Such a showing requires that the government demonstrate that a less restrictive measure will not be sufficient to protect the government's interest in preventing the sale,

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[18] The text for Part III. is derived from Dir. 94-8, issued by the Department of Justice on November 11, 1994, and effective the same day.

[19] "The constitutional limitations we enforce in this case apply to real property in general, not simply to residences." James Daniel Good, 114 S. Ct. at 492, 505.

[20] Good, 114 S. Ct. at 492. This hearing is referred to as a "pre-seizure hearing."

[21] United States v. TWP 17 R 4, Certain Real Property in Maine, 970 F.2d 984 (1st Cir. 1992.)

[22] Rule E(4)(b) states: "(b) Tangible Property. ...If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal shall execute the process by affixing a copy thereof to the property in a conspicuous place and by leaving a copy of the complaint and process with the person having possession or the person's agent...."

destruction, or continued unlawful use of the real property.

Prior to the *Good* decision, the government "seized" property in every instance. Now, as a result of *Good*, the determination of whether to initiate civil forfeiture through a "seizure," or a "posting," requires an exercise of discretion by the attorney for the government taking into account the circumstances and facts of each case. The purpose of this policy is to describe some of the alternatives available to the government to effect civil forfeitures and still protect real property during the pendency of the forfeiture action. The policy is divided into three sections: 1) posting; 2) seizure with notice and an opportunity to be heard; and 3) exigent circumstances, or seizures without a hearing. Each of the three alternatives has different consequences that should be addressed at the pre-seizure planning stage and the decision should be made in consultation with the U.S. Marshals Service.

A. *General Policy*

1. *Posting Real Property Without Taking Actual Custody and Control (Continued Occupancy).*

This procedure is to be preferred and utilized in every case *unless* a balancing of the interests weighs in favor of a pre-seizure hearing or exigent circumstances dictate immediate seizure without a pre-seizure hearing.

a. ***General.*** The clerk of the court may issue a warrant of arrest *in rem* pursuant to Rule C(3) of the Supplemental Rules for Admiralty and Maritime Claims, which is then posted upon the real property by the U.S. Marshal. "Posting" consists of placing a copy of the complaint and the clerk's warrant upon the defendant *in rem*. In the case of unoccupied land, process consists of tacking the arrest warrant in a visible location on the property. Where a structure is involved, the complaint and arrest warrant is tacked upon the outside of the structure.[23] This process establishes the jurisdiction of the court.

b. ***Warrant of Arrest In Rem.*** A warrant of arrest *in rem* without a finding of probable cause may be signed by the

[23] United States v. TWP 17 R 4, Certain Real Property in Maine, 970 F.2d 984, 986 n.4 (1st Cir. 1992).

clerk of the court. The warrant of arrest *in rem* must contain the word "arrest" on its face so as to meet the requirements of the Admiralty Rules and actually establish the jurisdiction of the court.[24] Use of the words "arrest" and "seize," however, should be avoided in the section of the warrant containing directions to the U.S. Marshal.[25] The warrant should:

(1) Include direction to the U.S. Marshal to "post" the warrant by affixing it to the structure to effect service of process on the defendant *in rem*; and

(2) Contain a statement that the property is not being seized or otherwise taken into custody and that the U.S. Marshals Service is not responsible for the care or maintenance of the property during the pendency of the forfeiture action.

Copies of sample warrants of arrest *in rem* can be found in the Asset Forfeiture Bulletin Board (AFBB) Civil Forms section, Warrant topic.[26]

c. ***Probable Cause.*** A finding of probable cause, or advance *ex parte* judicial approval is *not* required. It is recommended, however, that districts continue the practice of obtaining advance *ex parte* approval where magistrates and judges are willing to make a finding of probable cause in the context of directing the clerk to issue a warrant of arrest *in rem* for posting.

d. ***Lis Pendens.*** Where state law allows, the simultaneous

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[24] Under the Admiralty Rules, initiation of civil forfeitures requires the use of the "Warrant of Arrest In Rem." This document fulfills the purpose that a summons does in ordinary civil actions and should be considered the "process" used to establish the jurisdiction of the court.

[25] Case law on this subject indicates that for purposes of the Admiralty Rules, the term "arrest" means "seize." See Yokohama Specie Bank v. Wang, 113 F.2d 329 (9th Cir.), *cert denied*, 311 U.S. 690, 61 S. Ct. 71, 85 L.Ed. 446 (1940).

[26] The Asset Forfeiture Bulletin Board (AFBB) is the Department of Justice on-line repository of information on asset forfeiture. It contains, among other things, pleadings, indictments, jury instructions, briefs, newsletters, current case summaries, and policies. For copies of sample pleadings relative to procedures outlined in this policy, contact the AFBB Systems Operator in the Asset Forfeiture and Money Laundering Section, Criminal Division, at 202-514-1263.

filing of a complaint and a *lis pendens* should occur to prevent the transfer or encumbrance of the real property subject to forfeiture.

e. ***Notice.*** The government must continue to provide all known persons or entities that may have a possessory or ownership interest in, or claim against, the defendant real property with notice of the government's intent to forfeit regardless of whether the property is "seized" or "posted."

f. ***Service of Process.*** Service of process, whether by personal service or mail, is still required.

g. ***Appraisals.*** The U.S. Marshals Service requires that formal appraisals be obtained for all real properties targeted for forfeiture in civil forfeiture actions. Appraisals must be ordered within 10 days after seizure, or 10 days after posting the warrant of arrest *in rem.* Entry into the property may be obtained only by permission or writ of entry.[27]

h. ***Forfeiture Orders.*** Forfeiture orders in cases where the property has been "posted" should provide notice to the occupants to vacate the premises by a date certain and include authorization allowing the U.S. Marshals Service to evict the occupants, if necessary. A copy of a forfeiture order containing this type of language can be located in the AFBB Civil Forms Section, Disposition topic.

i. ***Protective Orders-Agreements with Owner(s) and/or Occupant(s).*** A protective order or an agreement should accompany every civil complaint for forfeiture of real property. This order or agreement should ensure that the property is maintained in the same or better condition as when seized. (This includes, but is not limited to, ordinary and routine maintenance; the procurement of casualty, fire, and liability insurance; the timely payment of any and all mortgage, loan, rent, utilities, tax and/or other obligations; and the continual

[27] If permission or writ of entry is not obtained, the U.S. Marshal may order an appraisal without an interior inspection of the property.

maintenance of quiet title to the property.) For example, the District of Alaska typically applies for a "Writ of Waste." A sample "Writ of Waste" can be found in the AFBB Civil Forms Section, Orders Preserving Property topic.

j. ***Restraining Orders.*** Restraining orders are available prior to seizure but will serve only to secure the property until a hearing can be held. If there is evidence, in a particular case, that an owner is likely to destroy his or her property when advised of the pending action, the government may obtain an *ex parte* restraining order, or other appropriate relief, upon a proper showing in the district court. A sample restraining order can be found in the AFBB Civil Forms Section, Orders Preserving Property topic.

2. ***Notice and an Opportunity for a Hearing Required Before Seizure (No Exigent Circumstances; Possible Continued Occupancy).***

a. ***General.*** Despite the presence of the "posting" procedure outlined in section A.1., *supra*, there will be frequent situations where a full seizure should occur, and a pre-seizure hearing held, if requested.

(1) ***Recommended Situations for Use.*** When a balancing of the government's and the owner's interests in the property suggest that an actual seizure should occur, the government should proceed to give notice and provide an opportunity to be heard. Examples of situations that might weigh in favor of an actual seizure include:

(a) The property is improved property that is vacant or appears to be abandoned and there is a likelihood that vandalism will result if the U.S. Marshal does not take custody and control over the property.

(b) The real property is a residential single family unit that is rented and there is reason to believe that the owner is not applying rental proceeds to payment of the mortgage,

allowing the property to deteriorate.

(c) The real property involved is an apartment complex or other income-producing multi-unit housing complex where there is reason to believe the property owner will fail to apply rental proceeds to payment of the mortgage, taxes, utilities, and repairs; or where the property is being allowed to deteriorate; or where rental income is likely to be misappropriated or absconded.

(d) The real property involves a business and the income is necessary to continue the operation of the business for sale as a going concern; or where the income is likely to be misappropriated or absconded.

b. ***Rights in General.*** Any deprivation or interference with rights associated with the ownership of real property (*e.g.*, the collection of rents, the setting of the terms and conditions of continued occupancy, and the eviction of occupants) requires notice and an opportunity for a pre-seizure hearing.

c. ***Timing and Procedure.*** The most common examples of pleadings are found in the AFBB Civil Forms section, Complaint topic. The notice is to state that the government intends to seize the property on a specified date subsequent to the service of the notice. The notice also advises the potential claimant that he or she has the right and opportunity to request a hearing prior to that date and gives information as to the location of the courthouse for the filing of the request for hearing.

d. ***Warrant of Arrest In Rem.*** Once a pre-seizure hearing has been provided, a warrant of arrest *in rem* is issued directing the U.S. Marshal to seize the property. A traditional form of warrant of arrest *in rem* is found in the AFBB Civil Forms section, Warrant topic.

e. ***Probable Cause.*** Judicial approval including a finding of probable cause is required following the pre-seizure hearing.

f. ***Lis Pendens.*** Where state law allows, the filing of a complaint and a *lis pendens* should occur to prevent the transfer or encumbrance of the real property subject to forfeiture.

g. ***Notice.*** The government must continue to provide all known persons or entities that may have a possessory or ownership interest in, or claim against, the defendant property with notice of the government's intent to forfeit regardless of whether the property is "seized" or "posted."

h. ***Service of Process.*** Service of process, whether by personal service or mail, is still required.

i. ***Appraisals.*** The U.S. Marshals Service must acquire an appraisal within 10 days of seizure.

j. ***Occupancy Agreements.*** Occupancy agreements should be obtained in every case where the occupants continue to occupy the real property during the pendency of the case. Such agreements should take the form of a protective order or stipulated occupancy agreement by containing the appropriate style and heading of the case and should be signed by the court.[28] A copy of the appropriate form of occupancy agreement can be found in the AFBB Civil Forms section, Pre-seizure topic.

k. ***Removal of Occupants.*** Removal of occupants is a substantial form of intrusion that may be undertaken by the government. Therefore, removal of occupants should *not* be sought at the outset of a case unless exigent circumstances exist and less intrusive measures (*e.g., lis pendens,* restraining order, or bond) have been tried and have failed, or a case can be made that such measures would prove ineffective (*e.g.*, search and arrest warrants have been executed previously and the illegal activity continues).[29] In such cases, the occupants are likely to

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[28] See Chapter 5, Section II.C., *Use of Seized Real Property By Occupants, infra.*

[29] Examples of exigent circumstances that may require immediate removal of occupants include: (1) danger to law enforcement officials or the public health and safety; (2) the continuation of illegal activity on the premises; or (3) the government is unable to prevent destruction or sale of the property.

have a right to a prompt post-eviction hearing.

l. ***Protective Orders/Restraining Orders.*** In cases where an occupancy agreement or *lis pendens* would not be sufficient, protective and/or restraining orders should be pursued.

3. ***Seizure Upon Exigent Circumstances Without Notice and an Opportunity for a Pre-Seizure Hearing (Possible Removal of Occupants).***

a. ***General.*** Real property may be seized without notice and a pre-seizure hearing upon a showing of exigent circumstances. Seizure of property without a pre-seizure hearing, however, requires that the government show that a less restrictive measure, *e.g.*, a *lis pendens*, restraining order, or bond, will not suffice to protect the government's interests in preventing the sale, destruction, or continued unlawful use of the real property.

b. ***Rights in General.*** *See* A.2.b., *supra.*

c. ***Probable Cause.*** Advance *ex parte* judicial approval including a finding of probable cause is required.

d. ***Warrant of Arrest In Rem.*** A warrant of arrest *in rem* together with supporting affidavits must set forth facts relevant to the existence of exigent circumstances. A sample warrant of arrest *in rem* setting forth exigent circumstances can be found in the AFBB Civil Forms section, Warrant topic.

e. ***Lis Pendens.*** Where state law allows, the filing of a complaint and a *lis pendens* should occur to prevent the transfer or encumbrance of the real property subject to forfeiture. If advance notice is a concern, the *lis pendens* need not be filed simultaneously with the filing of the complaint.

f. ***Notice.*** The government must continue to provide all known persons or entities that may have a possessory or ownership interest in, or claim against, the defendant property with notice of the government's intent to forfeit regardless of whether the property is "seized" or "posted."

g. ***Service of Process.*** Service of process, whether by personal service or mail, is still required.

h. ***Appraisals.*** The U.S. Marshals Service must acquire an appraisal within 10 days of seizure.

i. ***Occupancy Agreements.*** *See* A.2.j., *supra.*

j. ***Removal of Occupants.*** *See* A.2.k., *supra.*

k. ***Protective Orders.*** *See* A.1.i., *supra.*

l. ***Restraining Orders.*** *See* A.1.j., *supra.*

B. *Retroactivity*

The *Good* case arguably applies in all pending civil forfeiture cases that are not yet final for purposes of direct appeal. However, because the seizure will already have occurred in most of these cases, the only thing that should be required at this point is that property owners be permitted to request a prompt "probable cause" hearing to determine if the property should remain under seizure pending the outcome of the forfeiture action. There is no requirement that property owners be advised of the *Good* decision or the opportunity to request a hearing.

If the government loses at the hearing, the only remedy is for the property to be returned to the custody of the owner pending final forfeiture order. Dismissal of the action is not an appropriate remedy. To avoid a hearing in a case in which a seizure has already occurred, the government may simply "undo" the seizure and rely on prior service of process and the *lis pendens.* However, this requires removing all *indicia* of the seizure (*e.g.*, vacating the occupancy agreement (unless the occupants consent to a continuation), returning net[30] rents collected post-seizure, etc.)

In cases where the government elects to "undo" a seizure previously made, it should apply to the court for an order vacating the seizure warrant. Such warrants typically order the U.S. Marshal to take custody of the property. If the government unilaterally abandons custody without obtaining such an order, the marshal may risk

[30] If rents are to be returned to owners, AUSAs should make some effort to recoup management expenses (*i.e.*, to deduct these expenses from the rents collected) and provide the owner with a detailed accounting.

contempt should anything untoward and reasonably preventable happen on the property following such abandonment.

IV. *Contaminated Real Property*[31]

Background: Congress enacted the Superfund Amendment and Reauthorization Act of 1986 (SARA)[32] to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq*. Section 120(a) of the Act, 42 U.S.C. § 9620(a), imposes the liability provisions of Section 107, 42 U.S.C. § 9607, upon the United States. Section 129(h), 42 U.S.C. § 9620(h), of the Act sets forth notice and warranting requirements that apply whenever any agency, department, or instrumentality of the United States enters into a contract for the sale or other transfer of real property that is owned by the United States and on which any hazardous substance[33] either (1) has been stored[34] for more than 1 year; (2) is known to have been released[35]; or (3) is known to have been disposed[36] of[37].

It is the policy of the Department of Justice that real property that is

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[31] The text for Part IV. is derived from Dir. 90-3, issued by the Department of Justice on June 29, 1990, and effective the same day.

[32] Public L. No. 99-499, 100 Stat. 1966.

[33] Hazardous substance means that group of substances defined as hazardous under CERCLA (42 U.S.C. § 9601(14) and 40 C.F.R. § 300.6, and that appear at 40 C.F.R. 302.4. *See also* 40 C.F.R. 261, 40 C.F.R. 373.4(a). The requirements for reporting hazardous substances in connection with the sale or transfer of federal property are in 40 C.F.R. Part 373, which is reprinted on the Asset Forfeiture Bulletin Board.

[34] Storage means the holding of hazardous substances for a temporary period, at the end of which the hazardous substance is either used, neutralized, disposed of, or stored elsewhere. 40 C.F.R. 373.4(b).

[35] The term "release" is broadly defined to include, *inter alia,* any spilling, leaking, pouring, emitting, escape, leaching, or dumping of hazardous substances into the environment. *See* 42 U.S.C. § 9601(22). The term encompasses both the intentional and unintentional (*e.g.*, accidental) release of hazardous substances.

[36] The term "disposal" is broadly defined to include, *inter alia*, any "spilling, leaking, or placing" of any hazardous waste into or on any land or water. *See* 42 U.S.C. § 9601(29) (incorporating the definition of "disposal" under 42 U.S.C. § 6903(3)).

[37] The Land and Natural Resources Division, now the Environment and Natural Resources Division, issued a memorandum dated May 16, 1990, providing guidance to federal agencies involved in forfeitures regarding notice and liability under the statute. This memorandum is reprinted in the Appendix, page 1-23.

contaminated or potentially contaminated with hazardous substances may in the exercise of discretion be seized and forfeited upon a determination by the United States Attorney (USA), in the district where the property is located, in consultation with the seizing agency and the Marshals Service, that such action is appropriate. If the USA chooses to delegate this authority to an Assistant United States Attorney, provision should be made for review by a supervisor.

This policy is applicable regardless of the type or source of the hazardous substance(s).

This policy is applicable to all cases referred to the Department by any agency of the United States.

This policy is based on the ability of the United States to invoke an "innocent owner" defense from liability for hazardous substance contamination found on real property, if such contamination resulted from a prior owner's activities, when the real property is acquired through involuntary means (this includes seizures and forfeitures, which are involuntary to the owner) if that federal agency (1) exercises due care once it takes possession of the property, (2) secures the property from other third party actions, and (3) provides notice[38] of those hazardous substance conditions about which the United States knows when it transfers or sells the property.[39]

To ensure that the United States can avail itself of the "innocent owner" defense in cases involving this class of real property, once the property is seized, federal law enforcement agencies will exercise due care in relation to the property and take precautions against foreseeable acts or omissions of possible third parties. Furthermore, such real property that is forfeited will only be transferred or sold with notice of the potential or actual

[38] Specifically, ...whenever any department, agency, or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is owned by the United States and at which, during the time the property was owned by the United States, any hazardous substance was stored for 1 year or more, known to have been released, or disposed of, the head of such department, agency, or instrumentality must include in such contract notice of the type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent such information is available on the basis of a complete search of agency files. 40 C.F.R. 373.1.

[39] 42 U.S.C. §§ 9601(35) and 9607(b)(3).

contamination.[40] Notice must be based on information that is available on the basis of a complete search of agency files.[41] This notice will be included in the contract of sale and the deed. A proposed notice is in the Appendix, page 1-30, *et seq.*

In light of the "innocent owner" defense, real property that is contaminated or potentially contaminated with hazardous substances due to the activities of a prior owner, should be transferred or sold "as is" and an environmental assessment and/or remediation of the contamination need not be undertaken.[42] Whenever possible, a commitment from the buyer to clean up the property should be obtained as a part of the contract of sale.

However, if the real property becomes contaminated with a hazardous substance *after* the United States becomes the owner,[43] then the "innocent owner" defense is inapplicable to that contamination. This situation normally will arise when the United States operates a business or activity on the property that results in the storage, release, or disposal of hazardous substances (*e.g.*, gasoline stations, metal plating shops, dry cleaners, printers, etc.) In this circumstance, the United States is responsible for (1) all costs of

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[40] The notice required...for the storage for 1 year or more of hazardous substances applies only when hazardous substances are or have been stored in quantities greater than or equal to 1000 kilograms or the hazardous substance's CERCLA reportable quantity found at 40 C.F.R. 302.4, whichever is greater. Hazardous substances that are also listed under 40 C.F.R. 261.30 as acutely hazardous wastes, and that are stored for 1 year or more, are subject to the notice requirement when stored in quantities greater than or equal to 1 kilogram. 40 C.F.R. 373.2. The notice required for the known release of hazardous substances applies only when hazardous substances are or have been released in quantities greater than or equal to the substance's CERCLA reportable quantity found at 40 C.F.R. 302.4

[41] 42 U.S.C. § 9620(h)(3); 40 C.F.R. 373.1. It is envisioned that this search will involve the seizing agency's casefile(s) relating to the real property. Additionally, the search must include any documentation generated from an environmental assessment or the removal of hazardous substances from the real property.

[42] In cases involving illegal drug laboratories, the laboratories should be dismantled and all chemicals and equipment should be seized and removed in accordance with the *DEA Agents Manual*, Section 6674.0 *et seq.*

[43] For purposes of liability under CERCLA (42 U.S.C. § 9607), the United States is considered an owner of real property after a final judgment of forfeiture is entered. Ownership is not construed as including the interest that vests in the United States pursuant to the "Relation Back" doctrine. (*See, e.g.*, 21 U.S.C. § 881(h)).

hazardous substance removal and/or remedial action[44]; (2) providing notice of the hazardous substance to a subsequent transferee or purchaser; (3) a warranting covenant to a subsequent transferee or purchaser[45]. Because of the potential resulting liability and expense, the USA should approve the operation of such a business or activity only in unusual circumstances.

This policy envisions United States Attorneys exercising discretion in the seizure and forfeiture of real property that is contaminated or potentially contaminated with hazardous substances. Normally, such properties should not be forfeited unless there is at least $30,000 in net equity belonging to the defendant. **Furthermore, such properties should not be forfeited when there is reason to believe the property is substantially contaminated with hazardous substances and that such contamination would render the property unmarketable.** Clean-up costs can be considerable, particularly when the water table is involved. In making this determination, the USA may order an environmental assessment that will be paid from the Assets Forfeiture Fund.[46]

If at any point the USA elects, in the exercise of his or her discretion, not to proceed because significant contamination renders the property unmarketable, the USA should consider the following alternatives:

1. the filing of a release of *lis pendens* (assuming a *lis pendens* had been filed) containing notice of the reason (significant contamination) for dismissal of the forfeiture suit;

2. the filing of some other document in the county deed records

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[44] Normally, the costs of removal and/or remedial action must be borne from funds available to the agency conducting operations on the property. EPA's funds, to include the Superfund, are generally not available for remedial actions on federally owned property. *See* 42 U.S.C. § 9611(e)(3). Short term or emergency responses, known as removal actions, may be undertaken by the Superfund at federally owned properties at the discretion of the EPA.

[45] The covenant must warrant that:

(1) all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer, and,

(2) any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States. 42 U.S.C. § 9620(h)(3)(B).

[46] The Chief, Environmental Quality Section, Tulsa District, U.S. Army Corps of Engineers (918-581-7877), has agreed to conduct environmental assessments for the Department on a cost basis.

containing notice of the significant contamination, (if such filing is permitted under the law);

3. notification of a federal, state, or local environmental agency of the significant contamination for purposes of appropriate enforcement action;

4. notification of any lienholders of the significant contamination for such action as they may want to take; and

5. consideration of prosecution, civilly or criminally, for violations of the environmental laws by the private owners, the U.S. Attorney's Office should contact the Environmental Division (Environmental Crimes or Environmental Enforcement Sections.)

None of these alternatives are mandatory. Ultimately, it is within the discretion of the USA to decide how best to proceed when an election not to proceed with forfeiture is made.

V. *Financial Instruments*

The following describes procedures and responsibilities for handling financial instruments seized for forfeiture.[47]

A. *Postal Money Orders*

1. ***Seizing Agency*** - Immediately following seizure, the seizing agency should:

   a. send a list of

      (1) the serial numbers,

      (2) the amount of each money order, and

      (3) a statement that the government has received the money orders and is entitled to them under forfeiture laws,

      to the - National Money Order Coordinator
      St. Louis Postal Data Center
      P.O. Box 388
      St. Louis, MO., 63166-0388; and

   b. provide the Marshals Service with a copy of this letter at the time the money orders are transferred to the Marshals Service for custody.

2. ***Marshals Service.*** Upon forfeiture of the money orders, the Marshals Service will:

   a. complete a Domestic Money Order Inquiry, PS Form 6401, for each money order;

   b. return the form via registered mail with the original money order to the National Money Order Coordinator

[47] The text for Part V. is derived from Dir. 90-11, issued by the Department of Justice on October 15, 1990, and effective the same day. These procedures were prepared by the U.S. Marshals Service and incorporate comments from the various seizing agencies.

along with the appropriate legal documentation showing that the government is entitled to receive the proceeds.

B. *Personal and Cashiers Checks*

1. ***Seizing Agency*** - Immediately following seizure, the seizing agency should:

   a. notify the bank upon which the check is drawn that the check has been seized for forfeiture;

   b. direct the financial institution to take whatever steps are necessary to prevent the withdrawal or transfer of funds necessary to pay the government after forfeiture; and

   c. provide a copy of this notice to the Marshals Service at the time the check is transferred for custody.

2. ***Marshals Service*** - The Marshals Service will:

   a. accept custody of all checks as to which the investigative agency has contacted the bank on which they were drawn;

   b. negotiate the checks after receipt of a declaration or order of forfeiture, in accordance with established procedures.

C. *Certificates of Deposit*

1. ***Seizing Agency*** - Immediately following seizure, the seizing agency should:

   a. notify the bank that issued the certificate of deposit (CD) that it has been seized for forfeiture;

   b. instruct the bank officials to take whatever steps are necessary to freeze the funds covered by the certificate so the CD will be negotiable by the Marshals Service after forfeiture.

2. ***Marshals Service*** - The Marshals Service will take appropriate action, in accordance with established procedures, to liquidate the CD after forfeiture.

D. *Travelers Checks*

1. ***Seizing Agency*** - Immediately following seizure, the seizing agency should:

   a. notify the company issuing the checks that they have been seized for forfeiture;

   b. determine what procedures will be required in order to redeem the checks.

      (1) If they can be redeemed prior to forfeiture:

         (a) take appropriate steps to liquidate the checks;

         (b) have the issuing company issue a cashier's check to the Marshals Service.

      (2) If liquidation cannot occur until after forfeiture, turn the checks over to the Marshals Service with verification that the issuing company has been notified.

2. ***Marshals Service*** - The Marshals Service:

   a. will accept custody of all traveler's checks that cannot be liquidated until after forfeiture.

   b. Upon receipt of a declaration of forfeiture, liquidate the asset in accordance with established procedures.

E. *Stocks and Bonds*

1. ***Seizing Agency*** - Immediately following seizure, the seizing agency should contact a certified stock broker (state and national) to establish the fair market value (FMV) of the asset and determine how the instrument is traded.

   The Marshals Service will not accept custody of any financial instrument with a FMV equal to $0, or any stocks or bonds that are privately or closely held, or were issued by a "shell corporation," and are not traded on the open market. Stocks and bonds of privately or closely held corporations should be

"quick released" unless the seizing agency can document that they have a significant value.

2. ***Marshals Service*** - The Marshals Service will accept custody of all stocks and bonds for which the seizing agency can document a significant worth. As a general rule, the Marshals Service will try to liquidate stocks and bonds through interlocutory sale whenever possible.

F. ***U.S. Savings Bonds***

1. ***Seizing Agency*** - Immediately following seizure, the seizing agency should:

   a. notify the Department of Treasury, by certified letter, listing:

      (1) serial numbers;

      (2) the bond denominations;

      (3) to whom payable; and

      (4) the reason for which they were seized.

   b. Send this information to:

      Bureau of Public Debt
      Savings Bond Division
      Parkersburg, W.V. 26106

   c. Provide the Marshals Service with a copy of this letter at the time the savings bonds are transferred for custody.

2. ***Marshals Service*** - The Marshals Service will:

   a. accept custody of all savings bonds;

   b. maintain such bonds until forfeiture;

   c. dispose of such bonds in accordance with established procedures.

G. *Airline Tickets*

1. ***Seizing Agency*** - Immediately upon seizure, the seizing agency should:

   a. notify the issuing carrier of the government's intention to forfeit;

   b. determine what procedures will be required in order to redeem the tickets.

      (1) If they can be redeemed prior to forfeiture:

         (a) take appropriate steps to liquidate the tickets;

         (b) have the issuing carrier secure a cashier's check made payable to the U.S. Marshals Service.

      (2) If liquidation cannot occur until after forfeiture, turn the tickets over to the Marshals Service with verification that the issuing company has been notified.

2. ***Marshals Service*** - The Marshals Service will:

   a. accept custody of all airline tickets that cannot be liquidated until after forfeiture;

   b. upon receipt of a declaration or order of forfeiture, liquidate the tickets in accordance with established procedures.

VI. *Seized Cash Management*[48]

The security, budgetary, and accounting problems caused by retention of large amounts of cash has caused great concern within the Department and the Congress. In the past, agencies participating in the Department's asset forfeiture program have held tens of thousands of dollars in office safes and other locations throughout the country. This raises both financial management and internal controls issues. The Department must report annually to Congress on the level of seized cash not on deposit.

The Attorney General has established the following policy on the handling of seized cash:

> Seized cash, except where it is to be used as evidence, is to be deposited promptly in the Seized Asset Deposit Fund pending forfeiture. The Chief, Asset Forfeiture and Money Laundering Section, may grant exceptions to this policy in extraordinary circumstances. Transfer of cash to the United States Marshal should occur within 60 days of seizure or 10 days of indictment. Paragraph (VII (1), *Attorney General's Guidelines on Seized and Forfeited Property*, July 1990.)

This policy applies to all cash seized for purposes of forfeiture. Therefore, all currency seized that is subject to criminal forfeiture or to civil forfeiture, must be delivered to the United States Marshals Service (USMS) for deposit in the USMS Seized Asset Deposit Fund either within 60 days after seizure or 10 days after indictment, whichever occurs first[49]. Where appropriate, photographs or videotapes of the seized cash should be taken for later use in court as evidence.

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[48] The text for Part VI. is derived from Dir. 87-1, issued by the Department of Justice on March 13, 1987, and effective the same day, Dir. 91-9, issued by the Department of Justice on June 6, 1991, and effective the same day, and Dir. 96-2, issued by the Department of Justice on March 15, 1996, and effective the same day.

[49] This policy does not apply to the recovery of buy money advanced from appropriated funds. To the extent practical, negotiable instruments and foreign currency should be converted and deposited.

If the amount of seized cash to be retained for evidentiary purposes is less than $5000, permission need not be sought from the Asset Forfeiture and Money Laundering Section for an exception, but any exception granted must be granted at a supervisory level within a United States Attorney's Office using the aforementioned criteria.[50]

If the amount of seized cash to be retained for evidentiary purposes is $5000 or greater, the request for an exemption must be forwarded to the Asset Forfeiture and Money Laundering Section[51] The request should include a brief statement of the factors warranting its retention and the name, position, and phone number of the individual to contact regarding the request.

Limited exceptions to this directive, including extensions of applicable time limits, will be granted, on an interim basis, only with the express written permission of the Chief of the Asset Forfeiture and Money Laundering Section, Criminal Division.[52] Retention of currency will be permitted when retention of that currency, or a portion thereof, serves a significant independent, tangible, evidentiary purpose due to, for example, the presence of fingerprints, packaging in an incriminating fashion, or the existence of a traceable amount of narcotic residue on the bills. Avoidance of the effect of a court order is *not* a significant evidentiary purpose. If only a portion of the seized cash has evidentiary value, only that portion with evidentiary value should be retained. The balance should be deposited in accordance with Department policy.

The co-mingling of cash seized by the government under 21 U.S.C. § 881(a)(6) will not deprive the court of jurisdiction over the *res.* Unlike other assets seized by the government (*e.g.*, real property, conveyances), cash is a fungible item. Its character is not changed merely by depositing it with other cash. While it is true that the jurisdiction of the court is derived entirely from its control over the defendant *res*, court jurisdiction does not depend upon control over specific cash. As stated in *United States v. $57,480.05 United States Currency and Other Coins* and *$10,575.00 United*

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[50] The criteria and procedure for obtaining exemptions remains the same for cash retained by Customs.

[51] Requests for an exemption should be filed by the United States Attorney's Office or Criminal Division Section responsible for prosecuting, or reviewing for prosecution, a particular case.

[52] The authority to approve exceptions to the Department of Justice cash management policy requiring that all seized cash, except where it is to be used as evidence, to be deposited promptly into the Seized Asset Deposit Fund, as set forth in Section VII(1) of *The Attorney General's Guidelines on Seized and Forfeited Property* (July 1990), was delegated to the Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, by Dir. 91-16.

States Currency, 722 F.2d 1459 (9th Circuit 1984),

> ...jurisdiction did not depend upon control over specific bits of currency. The bank credit of fungible dollars constituted an appropriate substitute for the original *res*.

This has been a time-honored practice in the area of civil forfeiture law. *See American Bank of Wage Claims v. Registry of the District Court of Guam*, 431 F.2d 1215 (9th Circuit 1970.)

Additionally, some federal prosecutors are attempting to hold seized cash as evidence to avoid creating double jeopardy problems for related criminal cases. Avoiding double jeopardy is an appropriate concern, and there are a variety of steps – other than holding seized cash as evidence – that prosecutors and seizing agencies may appropriately take to accomplish the goals of asset forfeiture without jeopardizing a criminal prosecution. *See* the discussion, Chapter 2, section II.B., Double Jeopardy, *infra*, regarding *inter alia* suspension of administrative forfeiture proceedings to avoid double jeopardy, and basing forfeiture and criminal prosecutions, respectively, on separate conduct or separate offenses. A full legal memorandum setting forth the current state of double jeopardy law and strategies for avoiding double jeopardy problems was circulated to all U.S. Attorneys Offices and is available on the Asset Forfeiture Bulletin Board. *See* "Status of Double Jeopardy Law in the Sixth Circuit" (Jan. 1996).

VII. *International Seizures*[53]

Background: In support of the Attorney General's direction that we aggressively pursue the repatriation and forfeiture of foreign assets, the Criminal Division's Asset Forfeiture and Money Laundering Section (AFMLS) engaged Linda M. Samuel and Juan C. Marrero to serve as Special Counsel to the Chief of AFMLS for international forfeiture matters. These attorneys are dedicated to a "service" philosophy and will do everything possible to facilitate and expedite your efforts in international cases that have forfeiture potential.

Their primary task is to help you to immobilize and forfeit foreign assets, as well as to assist with international sharing issues. Their mandate is to be aggressive and creative in order to produce prompt and favorable results.

Federal investigators and prosecutors who seek to restrain and forfeit illicit assets traced abroad should, in the first instance, contact one of AFMLS's international forfeiture specialists. In turn, the specialists, working with the Office of International Affairs (OIA), Criminal Division, will then provide comprehensive assistance in order to accomplish the international forfeiture process.

A. *Policy on International Contacts*

It has long been the policy of the Department that all incoming and outgoing international contacts by prosecutors in criminal justice matters be coordinated with OIA. The Attorney General expects compliance with established procedures for international contacts. Federal prosecutors should not contact foreign officials directly. All such dealings must be through established channels. AFMLS's international forfeiture specialists can expedite such contacts.

B. *Importance of Reciprocal Cooperation*

The AFMLS international forfeiture specialists also will coordinate our responses to requests by foreign countries for assistance in immobilizing, repatriating, and forfeiting assets found in the United States that are traceable to violations of their laws. It is important that

[53] The text for Part VII. is derived from Dir. 90-6, issued by the Department of Justice on September 7, 1990, and effective the same day.

such foreign requests be given a high priority. Failure to do so may be construed by foreign governments as a sign that the United States lacks the resolve to combat international criminals, particularly drug traffickers, to the fullest extent of the law. Moreover, we can expect cooperation from foreign governments in our efforts to repatriate and forfeit assets found abroad only if we demonstrate that we will reciprocate.

Administrative/
Judicial Proceedings

Chapter 2 - Administrative and Judicial Forfeiture

I. Administrative Forfeiture

A. Administrative Forfeiture Caps[1]

Background: Before 1990, virtually all forfeitures of properties valued at more than $100,000 were conducted judicially.[2] On August 20, 1990, the President signed Public Law 101-382, which authorized the administrative forfeiture of cash and monetary instruments without regard to value and other property up to a value of $500,000.

The legislative history of this law makes clear that Congress sought to increase the speed and efficiency of uncontested forfeiture actions, and has confidence in the notice and other safeguards built into administrative forfeiture laws. Accordingly, the Attorney General has promulgated revised asset forfeiture regulations to implement the higher statutory ceilings for administrative forfeitures.

Properties subject to administrative forfeiture must be forfeited administratively, unless one or more of three exceptions applies. The three exceptions are:

1. Where several items of personalty are subject to civil forfeiture

   a. under the same statutory authority,

   b. on the same factual basis,

   c. have a common owner, and

   d. have a combined appraised value in excess of $500,000, they shall all be forfeited judicially. Monetary instruments as defined by 31 U.S.C. § 5312(a) (3) and Part 103 of Title

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[1] The text for section A. is derived from Dir. 91-2, issued by the Department of Justice on February 26, 1991, and effective the same day, and Dir. 91-11, issued and effective on July 5, 1991.

[2] Conveyances used to transport controlled substances have been administratively forfeitable without regard to value.

31, C.F.R., hauling conveyances or seizures of personalty that occur over a period of weeks are not subject to this aggregation policy.

2. Prosecutive considerations dictate the criminal forfeiture of the property as part of a criminal prosecution.

3. The Department's Criminal Division has expressly authorized judicial forfeiture based upon exceptional circumstances.

B. ***Administrative Forfeiture of Bank Accounts***[3]

1. Bank accounts are not "monetary instruments" and therefore may not be administratively forfeited pursuant to 19 U.S.C. § 1607(a)(4). However, bank accounts of a value of $500,000 or less may be administratively forfeited pursuant to 19 U.S.C. § 1607(a)(1).

2. Section 1607(a) (4) states that "monetary instruments" may be administratively forfeited without regard to dollar value and incorporates by reference 31 U.S.C. § 5312(a)(3) which defines the term "monetary instrument" to mean currency, travelers checks, various forms of bearer paper, and "similar material." The legislative history of 31 U.S.C. § 5312(a)(3) indicates that Congress intended the term "monetary instrument" to apply only to highly liquid assets.[4] The relevant regulatory definition of "monetary instruments," 31 C.F.R § 103.11(m), cannot be construed as encompassing bank accounts. Consequently, section 1607(a)(4) may not be used as a basis for the administrative forfeiture of seized bank accounts.

3. By contrast, section 1607(a)(1) may be used as a basis for administratively forfeiting bank accounts of a value of $500,000 or less. When incorporated by reference into substantive forfeiture statutes, the provisions of the customs laws are to be viewed as procedural rules only and do not define or limit the

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[3] Text for section B. is derived from Dir. 92-3, issued by the Department of Justice on February 28, 1992, and effective the same day.

[4] H. Rep. No. 91-975, 91st Cong. 1, 2d Sess., *reprinted in 1970 U.S. Code Cong. & Admin. News 4407.* "It is not the intention of your committee, however, that this broadened authority be expanded any further than necessary to cover those types of bearer instruments which may substitute for currency."

scope of those substantive forfeiture statutes. The only limitation on the scope of property forfeitable under the procedures set out in 19 U.S.C. § 1607(a)(1) is the "$500,000 or less" language. The listing of specific types of property in 1607(a)(1) merely refers to the types of property forfeitable under the customs laws and in no way disallows the application of the procedures in section 1607 to other types of property forfeitable under other forfeiture statutes. Moreover, 18 U.S.C. § 981(d) and 21 U.S.C. § 881(d) expressly state that the provisions of the customs laws relating to the seizure and forfeiture of property for violation of the customs laws (*i.e.*, 19 U.S.C. § 1602 *et seq.*) apply to forfeitures under those statues "insofar as they are applicable and not inconsistent with" their provisions. Consequently, property valued at $500,000 or less which is forfeitable under the governing forfeiture statute may be administratively forfeited pursuant to the procedures set forth at 19 U.S.C. § 1602, *et seq.*

In sum, administrative proceedings are not to be used to forfeit bank accounts exceeding $500,000 in value. The Criminal Division's Asset Forfeiture and Money Laundering Section (AFMLS), 202-514-1263, is available to provide guidance regarding these issues and should be notified of any challenges to the validity of previously concluded administrative forfeitures of bank accounts.

C. *Judicial Forfeiture of Real Property*[5]

All judicial forfeitures of real property or interests therein shall be conducted judicially.

[5] The text for section B. is derived from Dir. 91-2, issued by the Department of Justice on February 26, 1991, and effective the same day.

II. *Procedures*

A. *Sixty-Day Notice Period in All Administrative Forfeiture Cases*[6]

1. ***Background***: Through the many forfeiture statutes, Congress has made clear its intent that the government be expeditious in providing notice and in initiating forfeiture actions against seized property. Further, a fundamental aspect of due process in any forfeiture proceeding is that notice be given as soon as practicable to apprise interested persons of the pendency of the action and afford them an opportunity to be heard.

   Notice to owners and interested parties of the seizure and intent to forfeit in all administrative forfeiture cases is governed by 19 U.S.C. § 1607, which requires "written notice" to all interested parties.

2. ***Sixty-day Notice***

   It is the policy of the Department of Justice that the "written notice" under 19 U.S.C. § 1607 to possessors, owners, and other interested parties, including lienholders, known at the time of seizure, shall occur not later than 60 days from the date of seizure.[7] For interested parties determined after seizure, the "written notice" shall occur within 60 days after reasonably determining ownership or interest. Waivers of this notice may be obtained in writing in exceptional circumstances from a designated official within the seizing agency. If a waiver is granted, the waiver must set forth the exceptional circumstances and be included in the administrative forfeiture case file. Where a reasonable effort of notice has not been

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[6] The text for section C. is derived from Dir. 93-4, issued by the Department of Justice on January 15, 1993, and effective on March 1, 1993.

[7] The 45-day rule under 19 U.S.C. § 1607 "written notice" for administrative forfeiture of conveyances and for possession of personal use drug quantities (*see* 21 CFR § 1316.99(b) and 21 U.S.C. § 881) set forth in the memorandum captioned "Effect of Delay in Notice Required by the Anti-Drug Abuse Act of 1988," issued by the Department of Justice on March 20, 1991, is superseded by this uniform 60-day "written notice" requirement for *all* administrative forfeiture cases.

made within the 60-day period and no waiver has been obtained, the seized property must be returned and the forfeiture proceeding terminated.[8]

B. *Double Jeopardy*[9]

Background: In the aftermath of the adverse double jeopardy decisions in the Ninth and Sixth Circuits, the seizing agencies developed policies whereby they would, as required by law and policy, initiate an administrative forfeiture action following the seizure of property within 60 days of the seizure, regardless of any pending or potential criminal prosecution in a related case, but they would not *complete* the administrative action, even if no claim were filed, if the United States Attorney, following receipt of notice from the seizing agency of the administrative forfeiture action, requested that the entry of a final Declaration of Forfeiture be withheld. This policy has worked well. No court has held that the *initiation* of an administrative forfeiture proceeding constitutes "jeopardy," and the Ninth Circuit recently held that an administrative forfeiture does not constitute "jeopardy" until the Declaration of Forfeiture is entered. *See United States v. Sanchez-Cobarruvias*, 65 F.3d 781 (9th Cir. 1995) (holding that there is no jeopardy until there is some "finality" to the forfeiture proceeding).

The courts now almost uniformly hold, however, that an uncontested administrative forfeiture can never constitute jeopardy, even after it is completed, because the criminal defendant, by failing to file a claim in the forfeiture action, never became a party to the forfeiture case, and thus was never placed in jeopardy in that proceeding. This is the rule in the Third, Fifth, Seventh, Eighth, Ninth, and D.C. Circuits.[10] Thus, the seizing agencies have asked whether it is necessary for them to continue to withhold the entry of a Declaration of Forfeiture in

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[8] This policy does not change the existing policy that the phrase "date of seizure" for adoptive seizures means at the time of federal seizure.

[9] Text for section B. is derived from Dir. 95-1, issued by the Department of Justice on December 29, 1995, and effective the same day.

[10] *United States v. Baird*, 63 F.3d 1213 (3rd Cir. 1995); *United States v. Arreola-Ramos*, 60 F.3d 188 (5th Cir. 1995); *United States v. Torres*, 28 F.3d 1463 (7th Cir.), *cert. denied* 115 S. Ct. 669 (1994); *United States v. Pena*, 67 F.3d 153 (8th Cir. 1995); *United States v. Cretacci*, 62 F.3d 307 (9th Cir. 1995); *United States v. Moheyeldein*, No. 95-3137 (D.C. Cir. Oct. 5, 1995) (unpub.); *see also United States v. Hooper*, No. 94-1912 (6th Cir. Aug. 29, 1995) (unpub.); *but see United States v. Salinas*, 65 F.3d 551 (6th Cir. 1995) (leaving the issue unresolved in the 6th Circuit).

uncontested administrative forfeiture cases in those circuits.

1. ***Entry of Final Declaration of Forfeiture***

It is our view that the seizing agencies need not withhold the entry of a final Declaration of Forfeiture in an uncontested administrative forfeiture proceeding[11] in order to avoid double jeopardy problems in those circuits that have decided this issue in a published opinion. That includes the Third, Fifth, Seventh, Eighth, and Ninth Circuits, but not the D.C. Circuit, which reached the issue only in an unpublished opinion, or the Sixth Circuit, which held in favor of the government in an unpublished opinion and later explicitly reserved judgement on the issue in another case. It also does not include the other circuits even though district courts in those circuits may have reached this issue and held in favor of the government.

In circuits that have not yet ruled on the double jeopardy implications of a final Declaration of Forfeiture in an administrative forfeiture proceeding, the agencies will continue to withhold the entry of a final Declaration of Forfeiture when requested to do so by the U.S. Attorney. If any U.S. Attorney's Office is not presently receiving notice of administrative forfeiture actions sufficient to allow it to make a request to withhold entry of a Declaration, it should contact the local seizing agencies immediately to establish a mutually acceptable procedure.

We note in this regard that the U.S. Attorney should request the suspension of an administrative forfeiture only when reasonably necessary to avoid any potential double jeopardy problem. In cases where the forfeiture would not implicate any double jeopardy concerns, there would be no reason for the U.S. Attorney to ask the seizing agency to incur the expense of suspending the administrative forfeiture. In particular, there is no likelihood of a double jeopardy issue arising if there is no

[11] Note that one court has held that, for double jeopardy purposes, an administrative forfeiture is "contested" if the defendant files a request for a judicial forfeiture proceeding but fails to include a cost bond. *United States v. Ogbuehi*, 897 F. Supp. 887 (E.D. Pa. 1995); *but see United States v. Muth*, 896 F. Supp. 196 (D. Or. 1995) (claim filed without a cost bond is defective; "a defendant who fails to file and pursue a timely, sufficient claim is in the same position as someone who failed to file a claim at all"); *Jones v. United States*, 900 F. Supp. 238 (E.D. Mo. 1995) (same where request to proceed *in forma pauperis* denied).

chance of a criminal prosecution being brought against the owner of the property. Moreover, in circuits that have held that the forfeiture of criminal proceeds does not constitute "jeopardy," the administrative forfeiture of proceeds can be finalized without arousing any double jeopardy concerns.[12] The same would be true in cases where the administrative forfeiture is based on different criminal conduct or on a different offense under the "same elements" test set forth in *United States v. Dixon*, 113 S. Ct. 2849 (1993).[13]

When a decision is made to suspend an administrative forfeiture at the request of the United States Attorney's office, internal agency policy of the seizing agency may require that the request and its rationale be in writing. This is a reasonable requirement and compliance with it is in the interest of the Department of Justice.

2. ***Petition for Remission or Mitigation***

Finally, the agencies have asked us to consider the double jeopardy implications of an administrative forfeiture in which no claim or cost bond was filed, but instead the claimant filed a petition for remission or mitigation of forfeiture. Logically, a remission petition should not be considered a challenge to a forfeiture action such that the denial of the petition would constitute "punishment" for double jeopardy purposes. Indeed,

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[12] All circuits other than the Ninth that have ruled on this issue have held that the forfeiture of proceeds does not constitute punishment for double jeopardy purposes. *See United States v. Tilley*, 18 F.3d 295 (5th Cir.), *cert. denied* 115 S. Ct. 574 (1994); *United States v. Salinas*, 65 F.3d 551 (6th Cir. 1995); *cf. United States v. Alexander*, 32 F.3d 1231 (8th Cir. 1994) (forfeiture of proceeds is never punishment and thus does not trigger 8th Amendment analysis); *United States v. Wild*, 47 F.3d 669, (4th Cir. 1995) (same); *SEC v. Bilzerian*, 29 F.3d 689 (D.C. Cir. 1994) (order requiring convicted defendant to disgorge profits of illegal securities trading did not constitute additional punishment barred by double jeopardy); *but see United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994) (forfeiture of proceeds is punishment), pet. for reh. *en banc* denied, 56 F.3d 41 (9th Cir. 1995); *United States v. Baird*, 63 F.3d 1213 (3rd Cir. 1995) (*dicta*).

[13] *See e.g. United States v. Chick*, 61 F.3d 682 (9th Cir. 1995) (forfeiture for substantive offense and prosecution for conspiracy never violate double jeopardy because conspiracy requires proof of agreement and participation of defendant in the offense); *United States v. Amiel*, 889 F. Supp. 615 (E.D.N.Y. 1995) (section 981 forfeiture of laundered fraud proceeds does not bar prosecution under section 1341); *United States v. Falkowski*, 900 F. Supp. 1207, (D. Alaska 1995) (civil forfeiture requires the use of property; the criminal claim requires *mens rea*; thus, the civil claim and the criminal offense each have an element not shared by the other); *United States v. Thibault*, 897 F. Supp. 495, 498 (D. Col. 1995)(same).

the Seventh Circuit has so held. *See United States v. Ruth*, 65 F.3d 599 (7th Cir. 1995) (remission petition "does not serve to contest the forfeiture, but rather is a request for an executive pardon").[14] The Ninth Circuit, however, has issued conflicting opinions on this point. In *United States v. Wong*, 62 F.3d 1212 (9th Cir. 1995), the court held that the denial of a remission petition does not cause jeopardy to attach under a Customs procedure whereby remission petitions are considered prior to the institution of forfeiture proceedings.

In *United States v. Cretacci*, 62 F.3d 307 (9th Cir. 1995), however, another panel referred to uncontested forfeitures as ones in which the owner "utterly renounced" any interest in the property. Most recently, the panel in *Sanchez-Cobarruvias, supra*, noted in *dicta* that the defendant "made some showing of opposing the civil forfeiture" by filing a remission petition.

Until the courts resolve this issue, prudence dictates that a case in which a remission petition is filed be treated like one in which a claim is filed for double jeopardy purposes. That is, outside of the Seventh Circuit and any other circuit that addresses this issue definitively, the seizing agencies will withhold the denial of a remission petition in an administrative forfeiture case if requested by the U.S. Attorney to do so. Again, there would be no reason for the U.S. Attorney to make such a request in instances where, for factual or legal reasons, there is little likelihood of any double jeopardy issue arising.

3. ***Summary***

Finally, we reiterate that during this period of uncertainty in the law, it should be the goal of every Assistant U.S. Attorney to enforce the forfeiture laws in a manner that avoids double jeopardy problems; but we should not avoid double jeopardy problems simply by failing to pursue forfeiture. Some prosecutors have suggested that we proceed with even greater caution regarding the filing of any new administrative forfeitures. We understand the desire for caution, but as the Attorney General recently stated, a blanket policy against all administrative forfeitures is unnecessary and is not the policy of the Depart-

[14] *See also Orallo v. United States*, 887 F. Supp. 1367 (D. Haw. 1995) (denial of remission petition in otherwise uncontested administrative forfeiture is not prior jeopardy); *Juncaj v. United States*, 894 F. Supp. 318 (E.D. Mich. 1995) (same).

ment of Justice.

Pending further developments in the case law –

a. in circuits in which the court of appeals, by published opinion, has held that an administrative forfeiture does not constitute "jeopardy," the seizing agencies will initiate administrative forfeiture proceedings as required by law and policy, and may issue a Declaration of Forfeiture in such proceedings if no timely claim and cost bond are filed;

b. in other circuits, the agencies will initiate administrative forfeiture proceedings as required by law and policy, but the agencies will withhold the issuance of a Declaration of Forfeiture in such cases, even if no claim is filed, if the U.S. Attorney, following receipt of notice of the administrative proceeding from the seizing agency, requests the agency to do so;

c. the U.S. Attorney, in accord with substantive double jeopardy law, should not request that a Declaration of Forfeiture be withheld in cases where, in light of the available legal arguments, there is little likelihood of any successful double jeopardy challenge to a subsequent criminal prosecution;

d. other than in circuits where the court of appeals has definitively ruled that the denial of a remission petition does not constitute jeopardy, seizing agencies will withhold the entry of a Declaration of Forfeiture and the denial of the remission petition if requested to do so by the U.S. Attorney.

C. *Policy on In Forma Pauperis Petitions*[15]

Judicial review of an administrative seizure is available if, within 20 days of the first publication of notice of seizure by the seizing agency, the claimant either files a claim and cost bond in the sum of $5,000 or

[15] The text for section C. is derived from Dir. 93-2, issued by the Department of Justice on January 15, 1993, and effective March 1, 1993.

10 percent of the appraised value of the property (whichever is lower but not less than $250) or the bond is waived through an *In Forma Pauperis* (IFP) petition filed with the seizing agency. Failure by the claimant to submit a claim and cost bond or to obtain a waiver of bond through a valid IFP petition allows the agency to forfeit the property through administrative procedures. Although a seizing agency has jurisdiction to rule on the IFP petition, it must keep in mind that IFP petitions are constitutionally mandated for the indigent and that forfeiture laws must not be enforced so as to deny the Fifth Amendment rights of the poor.

The following procedural steps will apply when considering IFP petitions to seizing agencies processing administrative forfeitures:

1. All agencies shall provide express reference in the seizure notice to the owner's right to contest the forfeiture by either posting a claim and cost bond or petitioning for a waiver in the event he/she is indigent. All parties claiming indigent status must be provided with the IFP request form and instructions.

2. All parties claiming indigent status must establish that they are unable to post the required bond for reasons of financial hardship and must do so in a sworn affidavit under oath that is submitted to the seizing agency. The format for this affidavit is Form 4 of the Federal Rules of Appellate Procedure.

3. All cases involving claimants who establish, in the sworn affidavit of indigence submitted to the seizing agency, that they are unable to post the required bond will immediately be referred to the United States Attorney for judicial action.

4. In cases where the seizing agency believes there are clear and articulable reasons for denial of the IFP petition, the request for waiver shall be referred to AFMLS for final determination.

5. If the IFP petition is denied, the seizing agency shall inform the claimant that he/she may seek judicial review of the denial of the bond waiver request. The seizing agency shall inform the claimant that it will postpone the administrative declaration of forfeiture for 20 days in order to give claimant time to institute such a challenge if desired.

6. In cases where a false IFP petition has been submitted to the agency resulting in the United States Attorney proceeding with

judicial forfeiture in reliance upon the false information, prosecutions under 18 U.S.C. §§ 1001 and 1621 should be considered.

D. *Exemption of Certain Assets from Pre-trial Restraint of Substitute Assets*[16]

Background: The courts are divided over whether the criminal forfeiture statutes permit the pre-trial restraint of substitute assets. Under 18 U.S.C. § 1963(d)(1) and 21 U.S.C. § 853(e)(1), a court may enter a pre-trial restraining order to preserve the availability of forfeitable property pending trial. Some courts have decided that the restraining order provisions apply both to property directly traceable to the offense and to property forfeitable as substitute assets. *See Assets of Tom J. Billman*, 915 F.2d 916 (4th Cir. 1990); *United States v. Regan*, 858 F.2d 115 (2d Cir. 1988); *United States v. O'Brien*, 836 F. Supp. 438 (S.D. Ohio 1993); *United States v. Swank Corp.*, 797 F. Supp. 497 (E.D. Va. 1992).

The Third, Fifth, Eighth, and Ninth Circuits have held, however, that because Congress did not specifically reference the substitute assets provisions (18 U.S.C. § 1963(m) and 21 U.S.C. § 853(p)) in the restraining order statutes, pre-trial restraint of substitute assets is not permitted. *United States v. Floyd*, 992 F.2d 498 (5th Cir. 1993); *In Re Assets of Martin*, 1 F.3d 1351 (3rd Cir. 1993); *United States v. Ripinsky*, 20 F.3d 359 (9th Cir. 1994); *United States v. Field*, 62 F.3d 246 (8th Cir. 1995).

The Department of Justice is proposing legislation to remedy this situation. Unlike property derived from or used in criminal activity and therefore directly subject to forfeiture, however, substitute assets are legitimate assets of the defendant not otherwise subject to forfeiture. While it is appropriate to deny the defendant the use of directly forfeitable property to pay attorneys fees or other living expenses pending trial, the same rationale does not apply to substitute assets. Accordingly, the Department's legislative proposal contains a provision authorizing certain exemptions for funds needed to pay attorneys' fees, necessary living expenses, and the expenses of maintaining restrained assets from such restraining orders.

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[16] The text for section D. is derived from Dir. 96-1, issued by the Department of Justice on March 14, 1996, and effective the same day.

To be consistent with the Department's position on the proposed legislation, the United States Attorneys should adhere to the following policy, effective immediately: where orders restraining substitute assets are permitted and entered, U.S. Attorneys should agree to allow the exemption from such orders of those legitimate assets that are needed to pay attorneys' fees, necessary living expenses, and the expenses of maintaining restrained assets.

E. *Prior Approval Requirement*[17]

Prior approval of the Criminal Division is required for the substitution of assets (authorized in some criminal forfeiture actions), the forfeiture of attorneys' fees, and *ex parte* applications for Temporary Restraining Orders in criminal forfeiture cases.

[17] The text for section E. is derived from Dir. 90-2, issued by the Department of Justice on February 14, 1990, and effective the same day.

III. *Disposition of Cost Bonds*[18]

Background: Pursuant to statute, the seizing agency receiving a claim and a cost bond transmits them to the U.S. Attorney for the institution of a judicial forfeiture. 19 U.S.C. § 1608, 26 U.S.C. § 7325(3). The cost bond secures the claimant's obligation to pay costs in the event that forfeiture results.[19]

A. *Costs Chargeable Against Cost Bond*

The costs which may be charged against the cost bond are set forth in 28 U.S.C. §§ 1920 and 1921.[20] These costs are:

1. the fees of the clerk;

2. the fees of the U.S. Marshal as set forth in 28 U.S.C. § 1921, including:

   a. the Marshal's fees for service of the complaint, the

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[18] The text for section III is derived from Dir. 92-4, issued by the Department of Justice on April 7, 1992, and effective the same day, and Dir. 94-3, issued by the Department of Justice on April 1, 1994, and effective May 1, 1994.

[19] With only minor differences in statutory language, both 19 U.S.C. § 1608 and 26 U.S.C. § 7325(3) state that the cost bond is "conditioned that, *in case of condemnation* of the articles so claimed [seized], the obligor[s] shall pay all the costs and expenses of the proceedings to obtain such condemnation" (emphasis added) (section 7325(3) language in brackets); *see also, United States v. Real Property and Residence Located at Route 1, Box 111, Firetower Road, Semmes, Mobile County, Alabama*, 920 F.2d 788, 789-90 (11th Cir. 1991) (although claimant's bond amount is a "penal" sum, that amount was at risk for unsuccessful claimant only to the extent of the cost of the forfeiture proceedings). Pursuant to 19 U.S.C. § 1608, a surety bond approved by the seizing agency may be filed as the cost bond. Accordingly, applicable DEA and FBI regulations state that "[t]he bond posted to cover costs may be in cash, certified check, or satisfactory sureties." 21 CFR § 1316.76; 28 CFR § 8.8.

[20] *See also, United States v. One 1969 Plymouth Two-Door Hardtop, etc.*, 360 F.Supp. 488, 489 (M.D. Ala. 1973) (expense of storing property prior to claimant's intervention should not be taxed to unsuccessful claimant); *United States v. One 1949 G.M.C. Truck*, 104 F.Supp. 34, 38-39 (E.D. Va. 1950) (costs assessable against an unsuccessful claimant include only those enumerated in 28 U.S.C. §§ 1920 and 1921 and not storage costs incurred by the government prior to the Marshal's service of process); *but see*, 26 U.S.C. § 7323(c) (costs of seizure before process issued are taxable under internal revenue law forfeiture procedures).

warrant of arrest *in rem*, or any other writ, order, or process in the case;

b. the Marshal's fees for service of witnesses;

c. the Marshal's fees for the preparation of public notices; and

d. the Marshal's fees for the keeping of attached property, including actual expenses incurred, such as storage, moving, boat hire, or other special transportation, watchmen's or keepers' fees, insurance, and an hourly rate, including overtime, for each deputy marshal required for special services, such as guarding, inventorying, and moving;

3. the fees of the court reporter for all or any part of the stenographic transcript necessary for use in the case;

4. fees and disbursements for witnesses and any printing related to the case;

5. docket fees under 28 U.S.C. § 1923; and

6. compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under 28 U.S.C. § 1828.

Pursuant to section 1920, "[a] bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree." [21]

B. ***Procedures***

1. Upon receipt of the cost bond from the seizing agency, the U.S. Attorney shall forward the bond to the U.S. Marshal.[22] The

[21] *See also*, 28 U.S.C. § 1924 (requiring affidavit verifying bill of costs); Fed.R.Civ.P. 54(d) and 28 U.S.C. §§ 1918(a) and 2412(a) (authority for awarding costs to prevailing party).

[22] U.S. Attorneys usually will receive cost bonds from the seizing agencies after the agency has determined that the claim and the bond are in proper form. *See, e.g.*, 21 CFR § 1316.76(a), 28 CFR § 8.8(b). However, U.S. Attorneys usually will not receive cost bonds from the U.S. Customs Service because it is the general policy of the Customs Service to place the cost bond in a Customs Service

U.S. Marshal shall hold the b Seized Asset Deposit Fund pending resolution of t r which the cost bond was filed.

2. If *any* of the property for w st bond was filed is judicially forfeited:

   a. judgment for allowed c d be included in the judgment of forfeitur by separate motion and order;

   b. the costs allowed sho vered from the amount of the cost bond; and

   c. the amount remaining, er the deduction of allowed costs should b l.

3. In the settlement of judicial f ases, the U.S. Attorney shall retain the authority to w osts incurred in the case and return the bond.

4. If *none* of the property for w ost bond was filed is forfeited, the cost bond, or th mount deposited as the cost bond, should be return laimant when the property is returned.

C. ***Administrative Forfeiture by Se greement After A Cost Bond Has Been Filed***[23]

1. When a claim and a cost bo en filed and the claim is withdrawn pursuant to a se reement, the Department's policy regard osition of the cost bond is as follows:

   a. If allowable costs *ha* incurred,

      (1) the settlem should provide for return

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suspense account pending resolution of the claim.

[23] *See* Forfeiture By Settlement and Plea Bargaining minal Actions, Chapter 3., Part I.C., *infra*. *See also* policy concerning requirement th at proceeds administratively pursuant to written settlement agreement include spec of the claim. *Id.*

of the cost bond, or the entire amount deposited as the cost bond; and

(2) the cost bond, or the entire amount deposited as the cost bond, should be returned to the claimant pursuant to the settlement agreement.

b. If allowable costs *have been* incurred,

(1) the settlement agreement should provide for return of the amount of the cost bond remaining, if any, after deduction of an agreed upon sum specified as allowable costs;

(2) the agreed allowable costs should be recovered from the cost bond; and

(3) the bond amount remaining, if any, after deduction of agreed costs should be returned pursuant to the settlement agreement.

D. *U.S. Customs Service Cases Generally*

Although the Customs Service has its own asset forfeiture program and procedures, the handling and disposition of cost bonds in Customs cases generally will follow the policies set forth above. Please contact the Customs Regional or District Counsel in your area if there are any questions concerning cost bonds in Customs cases.

Please remember that all final orders of forfeiture in judicial cases following an administrative seizure and referral must contain a provision for the disposition of the cost bond in accordance with the policies outlined above.

Failure to include such a provision may prohibit the United States from applying the cost bond to cover case-related expenses and may result in the return of the cost bond to the claimant by the United States Marshals Service.

Questions regarding disposition of costs bonds in forfeiture cases other than Customs cases should be referred to AFMLS, Criminal Division, at 202-514-1263.

Chapter 3 - Settlement

I. Forfeiture by Settlement and Plea Bargaining in Civil and Criminal Actions

A. General Policy[1]

Settlements to forfeit property are encouraged to conserve the resources of both the United States and claimants in situations where justice will be served. **The following principles must be observed when negotiating and structuring settlements.**[2] The critical principle that must be applied to all settlements is that civil forfeiture, either judicial or administrative, should not be used to gain an advantage in a criminal case. Furthermore, all settlements must be in compliance with Attorney General Order No. 92-1598, as described in

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[1] The text for section A. is derived from Dir. 94-7, issued by the Department of Justice on November 9, 1994, and effective the same day, and Dir. 96-4, issued by the Department of Justice on March 18, 1996, and effective the same day.

[2] Settlements are contractual agreements to end legal disputes. *U.S. v. ITT Continental Banking Co.*, 420 U.S. 223, 228 (1975); *Village of Kaktovik et al. v. Watt*, 689 F.2d 222, 230 (D.C. Cir. 1982). Such agreements cannot dispose of the claims of non-participants. *Firefighters v. Cleveland*, 478 U.S. 501, 529 (1986). Similarly, plea agreements, which are also contractual in nature, cannot subject property to forfeiture unless permitted by substantive statute. *U.S. v. Reckmeyer*, 786 F.2d 1216 (4th Cir.), *cert. denied*, 479 U.S. 850 (1986); *U.S. v. Roberts*, 749 F.2d 404 (7th Cir. 1984), *cert. denied*, 470 U.S. 1058 (1985). Moreover, a plea agreement may significantly limit existing statutory forfeiture provisions. *See U.S. v. Paccione*, 948 F.2d 851 (2d Cir. 1991). It is important to note that while unambiguous, good faith settlements and plea agreements will be read and interpreted according to their terms, any ambiguities or imprecise terms will be construed against the government. *See United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986); *United States v. Field*, 766 F.2d 1161, 1168 (7th Cir. 1985). Because the courts are inclined to read such terms against the government even when defense counsel has contributed to the ambiguity or imprecision of the agreement, *Harvey*, 791 F.2d at 301, it is essential that federal prosecutors and forfeiture attorneys strive for clarity, precision, and detail in defining the obligations of each party to the agreement. *Fields*, 766 F.2d at 1168.

Part II of this directive.[3] Other general requirements applicable to all settlements include the following:

1. There must be a statutory basis for the forfeiture of the property and sufficient facts stated in the settlement documents to satisfy the elements of the statute.

2. All settlements must be negotiated in consultation with the seizing agency[4] and the U.S. Marshals Service.[5] The agency's

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[3] *See* Attorney General Order No. 1598-92, Appendix to Subpart Y, Part O, Title 28, Code of Federal Regulations (C.F.R.) establishing the settlement and compromise authority redelegated to the United States Attorneys from the Assistant Attorney General, Criminal Division, in accordance with the requirements of 28 C.F.R. § 0.168(d). Attorney General Order No. 1598-92 is reprinted in the Appendix, page 3-1.

[4] The contact person at the seizing agency for the purpose of determining the agency's view of the terms of the settlement is as follows:

(a) Federal Bureau of Investigation (FBI): Assistant Special Agent-in-Charge of the respective Field Office or designee.

(b) Drug Enforcement Administration (DEA): Assistant Special Agent-in-Charge or Resident Agent-in-Charge or designee.

(c) U.S. Customs Service (USCS): Regional or District Counsel for the respective Field Office or designee.

(d) Immigration and Naturalization Service (INS): Regional Director or designee.

(e) U.S. Postal Service (USPS): Inspector-in-Charge of respective Field Division or designee.

(f) U.S. Park Police (USPP): Assistant Commander or designee, Criminal Investigations Branch.

(g) Internal Revenue Service (IRS): Chief, Criminal Investigation Division of the key district or designee.

(h) U.S. Secret Service (USSS): Special Agent-in-Charge or designee, Asset Forfeiture Program, Headquarters Office.

(i) Bureau of Alcohol, Tobacco and Firearms (BATF): Resident Agent-in-Charge of the respective Field Office or designee.

[5] In Treasury cases where the U.S. Marshals Service is not the custodian of the property, the independent contractor EG&G will serve as the property manager, and the Marshals Service need not be consulted. It is the responsibility of the seizing agency to contact EG&G and inform it of any settlement proposals.

input is essential to reaching a settlement: (1) that is based on a common understanding of the facts and circumstances surrounding the seizure; and (2) that requires administrative action to be taken by the agency to implement, *e.g.*, those settlements that include a referral back to the agency for administrative forfeiture of all or a part of the seized property.[6] Input from the U.S. Marshals Service should be sought to determine current and prospective expenses to ensure that the settlement is fiscally sound from the government's perspective.

3. It is the obligation of both the Assistant United States Attorney (AUSA) and the investigating agent before any type of settlement is discussed to determine what property, if any, is presently being processed for administrative forfeiture. Moreover, AUSAs may not reach agreements with defendants or their counsel about the return of property that is the subject of an administrative forfeiture proceeding without first consulting the seizing agency. There have been instances in which AUSAs have arranged plea agreements providing for the disposition of administratively forfeitable property without consulting the appropriate seizing agency. There also have been instances in which AUSAs have agreed to return to a defendant property that has already been forfeited administratively. Property that has been administratively forfeited belongs to the government and, therefore, cannot be returned to a defendant or used to pay restitution as part of a plea agreement.

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[6] The contact person at the seizing agency, for the purpose of determining whether the terms of any settlement requiring administrative action by the agency can be implemented, is the Forfeiture Counsel of the FBI and DEA. Contact persons for the other agencies are as follows:

(a) USCS: Regional or District Counsel for the respective Field Office or designee.

(b) INS: Regional Director or designee.

(c) USPS: Manager, Forfeiture Group or designee.

(d) USPP: Assistant Commander or designee, Criminal Investigations Branch.

(e) IRS: Chief, Criminal Investigation Division of the key district or designee.

(f) USSS: Office of Chief Counsel or designee.

(g) BATF: Staff Assistant to Chief Counsel, BATF Headquarters.

Furthermore, a judicial forfeiture action may not be commenced against any property that has administrative forfeiture potential pursuant to 19 U.S.C. §§ 1607, 1609, unless it falls within one of the three exceptions identified in Chapter 2, Administrative and Judicial forfeiture, *supra*.[7] If an AUSA intends to pursue an exception as they are delineated in Chapter 2, *supra*, before doing so the seizing agency must be consulted to ensure that the agency has not already commenced an administrative forfeiture proceeding against the property.[8] More specifically, the AUSA handling the forfeiture must notify the seizing agency's contact of his/her intent to file a judicial forfeiture against the property so the seizing agency can stop the administrative process if in fact it is in progress. If the administrative forfeiture is completed, then it is not subject to judicial forfeiture. A completed administrative forfeiture is not waivable. The exceptions in Chapter 2 should be explored *prior* to the commencement of the administrative forfeiture process.

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[7] The three exceptions are:

(1) Where several items of personalty are subject to civil forfeiture (a) under the same statutory authority, (b) on the same factual basis, (c) have a common owner, and (d) have a combined appraised value in excess of $500,000, they shall all be forfeited judicially. Monetary instruments as defined by 31 U.S.C. § 5312(a)(3) and Part 103 of Title 31, C.F.R., hauling conveyances or seizures of personalty that occur over a period of weeks are not subject to this aggregation policy;

(2) Prosecutive considerations dictate the criminal forfeiture of the property as part of a criminal prosecution; and

(3) The Department's Criminal Division has expressly authorized judicial forfeiture based upon exceptional circumstances.

[8] A number of courts have held that the commencement of an administrative forfeiture action divests district courts of jurisdiction over forfeiture proceedings, unless a claim and cost bond are filed under the statutory scheme created by Congress in the customs laws. *See United States v. One 1987 Jeep Wrangler*, 972 F.2d 472 (2d Cir. 1992); *Onwubiko v. United States*, 969 F.2d 1392 (2d Cir. 1992). Recently, a court found that Congress precluded the possibility of concurrent jurisdiction over civil forfeitures in a district court and a seizing agency. *Linarez v. U.S. Department of Justice*, 2 F.3d 208, 211 (7th Cir. 1993). Administrative forfeitures commence upon notice by publication of the government's intent to forfeit.

4. Where the seizing agency disagrees with the United States Attorney's recommended settlement proposal, it must follow the procedures that are set forth in the regulations cited herein in footnote 3, *infra*.

5. A United States Attorney has the authority to settle those judicial forfeiture actions involving property located in his or her judicial district. In addition to complying with Department rules and regulations governing the settlement of cases, to settle forfeiture actions involving property located in another judicial district, the United States Attorney handling the forfeiture must notify and coordinate with the United States Attorney in the district where the property is located. It is the complete responsibility of the United States Attorney in the district that forfeits real property located in another district to comply with the requirements for forfeiture in the district where the property is located. Failure to comply with such requirements may result in a cloud on the government's title; coordination will minimize this possibility.

6. The government may conclude a civil forfeiture action in conjunction with the criminal charges against the defendant which provided the cause of action against the property. The government should *not* agree, however, to release property subject to forfeiture (civil or criminal) in order to *coerce* a guilty plea on the substantive charges, nor should the government agree to dismiss criminal charges in order to *coerce* a forfeiture settlement. If a plea agreement is not to conclude the civil forfeiture case, language to that effect should also be stated in the plea agreement. Failure to specify in this manner could be fatal to the concurrent civil forfeiture action. Further specific principles governing "global" settlements are as follows:

   a. In all cases, agreements must be based upon facts which support forfeiture. The Department does not release property which is otherwise subject to forfeiture to encourage guilty pleas; nor does it permit defendants to submit property which is otherwise not subject to forfeiture in order to lighten the potential incarceration component of the punishment.

   b. To the maximum extent possible, the criminal plea and forfeiture should conclude the defendant's business with the government. Delaying forfeiture considerations until

after the conclusion of the criminal case unnecessarily extends the government's involvement with the defendant and diminishes its effectiveness.

c. Where the claimant/defendant has negotiated a plea agreement and concurrently wishes to forfeit the property subject to a civil forfeiture action, the plea agreement should state that the defendant has waived any and all rights – constitutional, statutory, or otherwise. Any civil settlement should be documented independently of the plea agreement and should include the following information:

(1) the claimant/defendant's interest in the property;

(2) an admission of the facts supporting forfeiture;

(3) the claimant/defendant gives up all rights to the property;

(4) he/she gives up any right to contest the forfeiture; and

(5) settlement should be supported by written agreement.

Furthermore, the defendant, in the plea agreement, must admit to facts sufficient to support the forfeiture. The government, however, should not waive its right to reopen a civil forfeiture action where it is later determined that the settlement was based on false information or where the defendant violates his plea agreement.

7. Settlements shall not provide for partial payments, except upon the advice and approval of the Asset Forfeiture and Money Laundering Section, Criminal Division, in consultation with the U.S. Marshals Service, Headquarters Seized Assets Division.[9]

[9] In Department of the Treasury cases, the advice and approval of the Asset Forfeiture and Money Laundering Section, Criminal Division should also be sought.

8. The settlement should state that the claimant/defendant may not reacquire the forfeited property directly or indirectly through family members or others acting in concert with him or her.

9. The terms of the settlement, unless specified, do not affect the tax obligations, fines, penalties, or any other monetary obligations of the claimant/defendant owed to the government.[10] The civil settlement documents should state this clearly.

B. *Monetary Amounts*

United States Attorneys have authority to settle civil and criminal forfeitures within the following monetary amount or value limitations:

1. cases not in excess of $500,000; and

2. cases between $500,000 and $5,000,000, provided that the settlement releases not more than 15 percent of the amount involved.

The United States Attorney must consult with the Asset Forfeiture and Money Laundering Section (AFMLS), Criminal Division, before settling forfeiture cases involving $5,000,000 or more, and before a settlement releasing more than 15 percent of the amount involved in any case between $500,000 and $5,000,000.[11]

The authority of the Assistant Attorney General pursuant to 28 C.F.R. § 0.160 for settlement of forfeiture cases is delegated to the Chief, AFMLS, (formerly "Director, Asset Forfeiture Office"), Criminal Division, by paragraph (c) of Attorney General Order No. 1598-92. This authority is limited to settlements releasing not more than $2,000,000 or 15 percent of the amount involved, whichever is greater. When the proposed settlement would release more than

[10] United States Attorneys' Offices are obligated pursuant to 28 U.S.C. § 547(4) to "institute and prosecute proceedings for the collection of fines, penalties, and forfeitures incurred for violation of any revenue law, unless satisfied on investigation that justice does not require the proceedings." Therefore, in order that appropriate actions may be taken when a proposed forfeiture settlement will release assets to a claimant/defendant who is known or likely to have other outstanding obligations to the United States (*e.g.*, taxes), Assistant United States Attorneys should routinely notify the appropriate agency (*e.g.*, IRS) of the proposed settlement.

[11] *See supra* note 3.

$2,000,000 or 15 percent of the amount involved, whichever is greater, the Director, AFMLS, Criminal Division must refer the matter to the Deputy Attorney General for approval pursuant to 28 C.F.R. § 0.161.

C. ***Effecting Settlement Agreements Through Administrative Forfeiture***

The following procedures apply to settlement agreements in civil judicial forfeiture cases and to criminal forfeiture plea agreements where an administrative forfeiture is necessary to effectuate the agreement. In such cases, the headquarters of the seizing agency involved must be consulted by the United States Attorney's Office prior to finalizing an agreement in order to ensure the agency can accommodate the terms of the agreement. The Department's policy is to pursue an agreed upon administrative forfeiture where it is possible and economically efficient to do so.

1. ***Judicial Forfeitures Stemming From Administrative Actions.*** The following requirements must be met where a claim and a cost bond have been filed and the case has been referred to the United States Attorney but a settlement is reached before a civil judicial complaint has been filed.

   a. The terms of the settlement should be reduced to writing by the United States Attorney and include:

      (1) A provision whereby the claimant/defendant identifies his or her ownership interest in the property to be forfeited;

      (2) A provision whereby the claimant/defendant gives up all right, title, and interest in the property;

      (3) A provision whereby the claimant/defendant agrees not to contest the government's administrative forfeiture action;

      (4) A provision whereby the claimant/defendant agrees and states that the property to be forfeited administratively was connected to the illegal activity as proscribed by the applicable civil

forfeiture statute ... money to be forfeited is in fact proceeds fr... ...l drug trafficking);

(5) Specific referen... ... withdrawal of the claim and the disposit... ...e cost bond;[12] and

(6) A "hold harmles... ...sion and a general waiver of Federal Tort Cla... ...rights and *Bivens* actions, as well as other ...based on the Constitution (*e.g.*, the Excess... ...s Clause). Finally, a *Halper* waiver should b... ...d so that future civil or criminal cases a... ...mpered by the settlement agreement.

b. The case should be re... ...omptly back to the seizing agency to reinstitute t... ...istrative process. The seizing agency shall r... ...the administrative forfeiture process to ... the agreement upon receipt of a referral in... ...nce with this policy, consistent with its lav... ...rity.

(1) ***Where the Cl... ...l the Property is Withdrawn.*** ... agreement provides for the claimant to ... the claim to all property covered by cla... ...st bonds filed, the entire case will be re... ...ck to the agency for administrative ... Re-publication of the notice of the a... ...ive forfeiture action is not necessary, pro... ...lication occurred prior to filing of the cla... ...st bond.

(2) ***Where the Cl... ...ly Part of the Property is Withdraw...*** ... the agreement provides for the claimant t... ... only a part of a claim, the case will be re... ...k to the agency for administrative ... of that portion of the forfeitable pro... ...ed in the agreement, and the agency ma... ...he remainder to the claimant consi... ...the settlement. Re-publication of ... or of the administrative forfeiture acti... ...ecessary, provided

[12] *See* the discussion regarding the disposition of co... ...hapter 2, *supra*.

publication covering the property to be forfeited occurred prior to the filing of the claim and cost bond.

2. ***Civil Judicial Forfeiture Without Prior Administrative Action***. In those other cases where the judicial action was commenced without a prior administrative forfeiture action having begun and a settlement agreement has been reached involving a proposed administrative forfeiture of seized property:

   a. the headquarters of the seizing agency must concur in that part of the settlement that would obligate the agency to commence administrative forfeiture proceedings;

   b. the complaint must be dismissed; and

   c. the jurisdiction of the district court must be relinquished before referral may be made to a seizing agency under this policy.

   The seizing agency shall initiate the administrative forfeiture process to effectuate such an agreement upon receipt of a referral in compliance with this policy, consistent with its lawful authority.

3. ***Criminal Forfeiture Action***. In those cases where property has been seized or restrained for forfeiture under criminal statutes and an agreement reached between the United States Attorney and the claimant/defendant prior to an order of forfeiture relating to a proposed administrative forfeiture of the property:

   a. the headquarters of the seizing agency must concur in that part of the settlement that would obligate the agency to commence administrative forfeiture proceedings;

   b. the seizure or restraining orders must be dismissed; and

   c. the jurisdiction of the district court over the property must be relinquished. The provisions of 1.a. and 1.b, *supra*, must be met before referral may be made to a seizing agency under this policy. The seizing agency shall

initiate the administrative forfeiture process to effectuate such an agreement upon receipt of a referral in compliance with this policy, consistent with its lawful authority.

D. ***Judicial Forfeiture by Settlement***

No agreement, whether a settlement in civil judicial action or a plea agreement resolving both criminal charges and the forfeiture of assets, may contain any provision binding the Department and the agencies to a particular decision on a petition for remission or mitigation, or otherwise contain terms whose effectiveness is contingent upon such a decision. The remission and mitigation process, like the pardon process in criminal cases, is completely independent of the litigation and case settlement process.

The AFMLS, however, in appropriate cases upon request, will adjudicate a properly filed petition for remission or mitigation prior to the negotiation of a forfeiture settlement or entry of a final order of forfeiture. It is proper to include in a settlement agreement a provision that expressly leaves open or expressly forecloses the right of any party to file a petition for remission or mitigation. The settlement document should also include a "hold harmless" provision as well as other general waivers of constitutional rights as detailed in section C.1.a.(6).

1. ***Civil Forfeiture***. Any settlement that purports to "forfeit" property binds only the parties to it and forfeits only that interest in the property that the claimant possesses. The following procedures must be followed to ensure that a valid and complete civil judicial forfeiture by settlement occurs:

   a. A civil verified complaint for forfeiture of the property must be filed in the U.S. District Court to establish the court's jurisdiction. Filing an action as a "Miscellaneous Docket" and other attempts to short-cut the process will not be recognized as a valid forfeiture.

   b. A warrant of arrest *in rem* must be executed against the property.

   c. All known parties in interest must be given written notice, and notice by publication must be made.

d. After 10 days, if no claim has been filed pursuant to Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims, a default judgment must be sought pursuant to Rule 55, Federal Rules of Civil Procedure.

e. Proposed orders of forfeiture must be filed with the settlement agreement and include the terms of the settlement agreement.[13]

Note: There is no provision for substitution of assets in civil forfeiture cases, with the exception of accepting a monetary amount in lieu of forfeiture pursuant to 19 U.S.C. § 1613(c). (*See* section E., Acceptance of a Monetary Amount in Lieu of Forfeiture.)

2. ***Criminal Forfeiture***. In any plea settlement, a claimant/defendant may only consent to the forfeiture of his or her interest in the property. Forfeiture of the defendant's interest in property held by nominees can proceed criminally, but the potential for an ancillary claim by the nominee must be anticipated. A settlement that purports to "forfeit" the property may only bind the parties to it and transfers only that interest which the claimant/defendant possesses.

The following procedures must be followed to ensure that a valid forfeiture results from a plea settlement:

a. There must be a forfeiture count in the Indictment or Information, otherwise forfeiture is legally impossible. To the extent property is known to be subject to forfeiture, it should be listed in the Indictment, Information, or in a subsequent Bill of Particulars. The United States Attorney's Office must ensure that its criminal pleadings are in compliance with Rules 7 and 31 of the Federal Rules of Criminal Procedure.

b. The United States Attorney must comply with the requirements applicable to third party interests (*e.g.*, 21 U.S.C. § 853(n)(1)-(7), including notice of the forfeiture and the right of third parties to obtain an adjudication of their interests in the property.

[13] *See also* Chapter 2, Administrative and Judicial Forfeiture, Part III., Disposition of Cost Bonds.

c. The settlement to forfeit property must be in writing, and the defendant must concede facts supporting the forfeiture.

d. Close attention should be paid to the potential issue of "double jeopardy." Any plea or settlement agreement should include a waiver of any and all double jeopardy claims that might otherwise be asserted with respect to any subsequent government enforcement action. Therefore, a *Halper* waiver should be included so that future civil or criminal cases are not hampered by the settlement agreement. The settlement document should also include a "hold harmless" provision and a general waiver of Federal Tort Claims Act rights and *Bivens* actions, as well as other actions based on the Constitution.

e. The court must issue a Final Order of Forfeiture that incorporates the settlement and, if applicable, addresses any third party claims.

f. Wherever possible, in order to avoid protracted litigation of ownership issues in the context of ancillary hearings, the United States should agree to accept unencumbered property only, with the exception of valid financial institution liens, or at the very least, the plea agreement should require the defendant to convey clear title to the government.[14]

Note: Substitute assets may only be forfeited when the applicable statute permits it and when all statutory requirements have been met (*e.g.*, 18 U.S.C. §§ 982(b)(1)(A), 1963(m) and 21 U.S.C. § 853(p)). **It is recommended that there be a provision for substitute assets included in the Indictment.**

E. *Acceptance of a Monetary Amount in Lieu of Forfeiture*

1. A monetary amount may be accepted in lieu of forfeiture of the property in civil or criminal judicial forfeiture actions pursuant

[14] See also Section A.7.

to 19 U.S.C. § 1613(c).[15] The following procedures must be followed:

a. A civil complaint against the property or an indictment, or information naming the property, and alleging the defendant's interest in the property must be filed.

b. A written statement that incorporates the language of section 1613(c) must be filed and approved by the court.

c. The agreement to substitute money in lieu of forfeiture of property in judicial cases must be approved by the court.

d. The U.S. Marshals Service will accept this court approved settlement and deposit the money (and share it where appropriate) in the same manner as the proceeds of sale of a forfeited item.

e. Monies received in lieu of forfeiture must be transferred to the U.S. Marshals Service's District Office in custody of the asset being returned.

f. In cases where the Postal Inspection Service or the National Marine Fisheries Service is the primary federal investigative agency, the U.S. Marshals Service must deposit the money, deduct expenses (if any) incurred with respect to the property being returned, deduct the approved equitable shares attributable to other federal agencies participating in the Department of Justice Assets Forfeiture Fund, and transfer the balance by refund to the above services, as appropriate. Each service will be responsible for sharing with participating state and local agencies in these cases.

[15] 19 U.S.C. § 1613(c) is one of the customs laws (Tariff Act of 1930, 19 U.S.C. § 1602-21) incorporated by reference into various federal forfeiture statutes. *See e.g.*, 21 U.S.C. § 881(d).

F. *Agreements to Exempt Attorneys' Fees from Forfeiture*

Any agreement to exempt an asset from forfeiture so that it can be transferred to an attorney as fees must be approved by the Assistant Attorney General for the Criminal Division.[16]

G. *Settlement with Fugitives in Civil Forfeiture Cases*

Prosecutors should first consult with AFMLS, Criminal Division, before engaging in settlement negotiations in civil forfeiture cases where the claimants are fugitives in United States criminal proceedings.

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[16] *See United States Attorneys' Manual* § 9-111.700.

II. *Expedited Payment of Lienholders in Forfeiture Cases*[17]

The former Executive Office for Asset Forfeiture interpreted 28 U.S.C. § 524(c) as authorizing pre-forfeiture payment of liens and mortgages. Use of this authority must be approved in writing by the Asset Forfeiture and Money Laundering Section prior to entering into any agreement to pay a lienholder. It is intended that this authority be used sparingly and only in those situations where pre-forfeiture payment of liens and mortgages is necessary to avoid extreme hardship to natural persons. All other viable options, including interlocutory sales, must be pursued prior to seeking this authority.

[17] The text for section II. is derived from Dir. 93-3, issued by the Department of Justice on January 15, 1993, and effective February 1, 1993.

records giving the federal district court notice of the tax claim prior to entry of the order of forfeiture.

B. *Criminal Forfeiture Cases*[2]

Policy Directive No. 93-6 issued by the Department of Justice established policy concerning the payment of state and local taxes on civilly forfeited real property but noted that, as to state and local taxes on criminally forfeited real property, the Department of Justice remained bound by the Office of Legal Counsel's opinion of July 9, 1991.

In order to facilitate the resolution of this discrepancy between civil and criminal forfeiture cases regarding the payment of property taxes, on March 19, 1994, by order No. 1860-94, *see* Appendix, page 4-15, the Attorney General delegated to the Director, Asset Forfeiture Office, Criminal Division, her discretionary authority with respect to property forfeited under the original forfeiture statutes to " . . . take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of [the applicable chapter or section]." *See* 18 U.S.C. § 1467(h)(1) (obscene material); 18 U.S.C. § 1963(g)(1) (RICO); 18 U.S.C § 2253(h)(1) (sexual exploitation of minors); 21 U.S.C. § 853(i)(1) (controlled substances); and, by incorporation of 21 U.S.C § 853(i) by reference, 18 U.S.C § 982(b)(1) (money laundering) and 18 U.S.C. § 793(h)(3) and 794(d)(3) (espionage).

Pursuant to this delegated authority, the Acting Director, Asset Forfeiture Office, Criminal Division, now the Chief of the Asset Forfeiture and Money Laundering Section (AFMLS), has authorized the payment of state and local taxes on criminally forfeited real property in the same manner and to the same extent as is authorized for the payment of such taxes on civilly forfeited real property pursuant to the policy set forth *supra*.

[2] Text for section B. is derived from Dir. 94-4, issued by the Department of Justice on April 29, 1994, and effective the same day. Subsequently, on September 13, 1994, Congress enacted 28 U.S.C. § 524(c)(1)(H), which authorized payment of state and local property taxes on forfeited real property that accrued between the date of the violation giving rise to the forfeiture and the date of the forfeiture order.

Chapter 4 - Third Party Interests

I. State and Local Real Property Taxes

A. Civil Forfeiture Cases[1]

In light of the Supreme Court's decision in *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126 (1993), the Office of Legal Counsel (OLC) was asked to reconsider its July 9, 1991, opinion concerning payment of state and local property taxes in civil forfeiture cases. The Office of Legal Counsel opinion reprinted in the Appendix, page 4-1 *et seq*, represents the Department's official position on the issue.

The opinion concludes that we must pay state and local taxes on properties civilly forfeited where the taxing authority established its innocent owner status prior to the entry of a final order of forfeiture. Given the unique nature of the interest of taxing authorities, the Department will in the future indulge a presumption of innocence in the absence of exceptional circumstances. Accordingly, in civil forfeiture cases, the United States will henceforth pay standard *ad valorem* property taxes up to the date of entry of an order of forfeiture.

Payment of taxes upon civilly forfeited properties is permitted when:

1. the properties have not yet been sold, or

2. the properties are the subject of pending litigation regarding payment of taxes, *provided however*, that:

    a. a tax claim was filed with the federal district court prior to entry of the order of forfeiture; or

    b. a valid lien had been recorded among the pertinent land

[1] Text for section A. is derived from Dir. 93-6, issued by the Department of Justice on November 4, 1993, and effective the same day. Subsequently, on September 13, 1994, Congress enacted 28 U.S.C. § 524(c)(1)(H), which authorized payment of state and local property taxes on forfeited real property that accrued between the date of the violation giving rise to the forfeiture and the date of the forfeiture order.

II. *Waiver of Costs to Owner Victims in Remission Cases*[4]

Background: There has been an increasing number of cases in which property is seized for forfeiture from those who obtained it through theft or fraud, in violation of federal law. In many of these cases, there is a victim of the underlying crime with a cognizable ownership interest in the property forfeited. Victims with a traceable ownership interest (owner victims) in the property may submit a petition for remission or mitigation of the forfeiture. A purpose of remission is to ameliorate the effects of forfeiture for those with an interest in the forfeited property who lack involvement in, or knowledge of the conduct that resulted in the forfeiture.

To provide some relief to those victimized by crime and to ensure that forfeiture by a federal agency in such cases does not cause the victim to suffer the economic effect of the crime twice, the Department of Justice has adopted the following policy.

Policy: It is the policy of the Department of Justice to waive the payment of certain costs and expenses incident to the seizure and forfeiture of property that is being restored through remission to an owner victim of the underlying offense when the owner victim is a natural person. This policy does not apply to non-owner victims. The costs and expenses subject to waiver are property management and case-related expenses incurred in connection with the forfeiture and include storage, maintenance, and security costs, as well as those costs incurred in connection with the requirement that the government provide notice of the action to potential claimants. It is preferable to restore forfeited property to owner victims, thus avoiding disposition costs. In the event property must be sold to restore property to one or more victim owners, the costs of sale will not be waived. Nor should costs be waived where the petitioner seeking remission as an owner victim is an agency of a state or the federal government.

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[4] The text for section II. is derived from Dir. 94-6, issued by the Department of Justice on June 7, 1994 and effective July 1, 1994.

C. ***Payment of Interest and Penalties on State and Local Real Property Taxes***[3]

The following policy is meant to ensure consistent national treatment of the payment of interest and penalties on state and local taxes on forfeited real property:

1. the United States will pay interest but not penalties on overdue taxes;

2. the formula for the rate of interest is set forth in 28 U.S.C. 1961(a);

3. higher rates of interest may be paid where the taxing authority has incurred out-of-pocket interest expenses in excess of the rate specified by 28 U.S.C. 1961(a), *e.g.*, where tax certificates have been sold to private investors;

4. United States Attorneys, with the concurrence of AFMLS, Criminal Division, may agree to a higher rate of interest provided that such higher rate is not punitive; and

5. taxes and interest thereon may only be paid up to the amount realized from the sale of the property.

[3] Text for section C. is derived from Dir. 94-9, issued by the Department of Justice on November 23, 1994, and effective the same day.

II. *Use of Seized Property*[2]

Background: Absent the final decree or court order of forfeiture of property under seizure, the United States does not have title to the property. Any use of property under seizure and pending forfeiture raises issues of liability and creates the appearance of impropriety. The following general policies govern the use of seized property.

A. *Use of Seized Property by Department of Justice Personnel*

Property under seizure and pending forfeiture shall 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.

Likewise, Department personnel shall 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 U. S. 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.

B. *Use of Seized Property Where Custody is Retained by the State or Local Seizing Agency*

To minimize storage and management costs incurred by the Department of Justice, state and local agencies which present motor vehicles for federal adoptions should generally be asked to serve as substitute custodians of the property pending forfeiture.

Any use of such vehicles, including official use, by state and local law enforcement officials or others is prohibited by Department of Justice policy until such time as the forfeiture is completed and the equitable transfer is made.

C. *Use of Seized Real Property by Occupants*

As a general rule, occupants of real property seized for forfeiture

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[2] Text for section II. is derived from Dir. 91-5, issued by the Department of Justice on April 9, 1991, and effective the same day.

Chapter 5 - Use and Disposition of Seized and Forfeited Property

I. Management and Disposal of Seized Assets[1]

A. Role of the United States Marshals Service

The United States Marshals Service shall have primary authority over the management and disposal of seized assets in its custody that are subject to forfeiture or are forfeited. Arrangements for property services or commitments pertaining to the management and disposition of such property are the responsibility of the Marshals Service.

Prior to taking any action (*e.g.*, in a settlement or plea agreement) concerning the management or disposition of property, the United States Attorney or agent in charge of the field office responsible for an administrative forfeiture case should consult with the United States Marshals Service or other custodial agency. Such discussions shall address the impact that such proposed action may have on the United States Marshals Service or other custodial agency in undertaking, continuing, or terminating custody of the property. If the interests of claimants are to be satisfied in whole or in part by payments from the proceeds of a sale of the property by the Marshals Service or other custodial agency, the proposed forfeiture order should provide specific guidance for the Marshals Service or other custodial agency concerning such payments.

[1] The text for section A. is derived from Dir. 94-2, issued by the Department of Justice on February 16, 1994, and effective March 1, 1994.

III. *Disposition of Forfeited Property*[3]

A. *Forfeiture Orders*

The disposition of property forfeited to the United States is an executive branch decision and not a matter for the court. Consequently, orders of forfeiture should be drafted broadly to direct forfeiture of the property to the United States "for disposition in accordance with law." It is also unnecessary to have the court confirm the manner and conditions of sale of forfeited property except in certain civil settlements. In the usual case, the United States Marshals Service is to determine the best method and conditions of sale of forfeited property in its custody.

B. *Disposition of Forfeited Property Pursuant to 21 U.S.C § 881(e), 21 U.S.C. § 853(h), and 18 U.S.C. § 1963(f) and (g).*

Background: It is the policy of the Department of Justice that the Attorney General has been given the authority under 21 U.S.C. § 881(e), 21 U.S.C. § 853(h) and 18 U.S.C. § 1963(f) and (g) to dispose of forfeited property "by sale or any other commercially feasible means", without subsequent court approval. This is generally called a "forfeiture sale" of the property. Forfeiture sales do not require judicial confirmation pursuant to 28 U.S.C. § 2001. However, if before forfeiture an interlocutory sale is necessary because the property is declining in value, then the procedures contained in 28 U.S.C. § 2001 should be followed requiring judicial confirmation of such interlocutory sales. When property is sold in this manner, it is called a "judicial sale."

1. *Legal Analysis*

The starting point for understanding the difference between a forfeiture sale and a judicial sale is the definition of the term "forfeiture." "Forfeiture has been historically defined as 'the divestiture without compensation of property used in a manner

[3] Text for Section III is derived from Dir. 94-2, issued by the Department of Justice on February 16, 1994, and effective March 1, 1994, and Dir. 94-5, issued by the Department of Justice on June 1, 1994, and effective the same day.

should be permitted to remain in the property pursuant to an occupancy agreement pending the forfeiture.

A form occupancy agreement has been developed by the Department that includes various restrictions (*e.g.* maintenance and access to the property, potential for continued illegal activity, threat to health and safety, etc.) that address Departmental concerns. Sample occupancy agreements with specific restrictions intended to protect the best interests of the government in a particular case can be found in the Appendix, page 5 - 1.

until a final order of forfeiture. However, once there is a final forfeiture judgment, the government is vested with title by operation of law:

> ...If the Government wins a judgment of forfeiture under the common-law rule – which applied to common-law forfeitures and to forfeitures under statutes without specific relation back provisions – the vesting of its title in the property relates back to the moment when the property became forfeitable. Until the Government does win such a judgment, however, someone else owns the property.[7]

Thus, under the forfeiture process, the court's only involvement is to confirm the government's ownership interest in the property and to hear claims by innocent owners to the property in the case.[8]

a. ***Forfeiture Sale Defined***

Since the forfeiture process vests title of the property in the United States, a forfeiture sale is a sale by the government of the property it owns. The forfeiture statutes give the power to the Attorney General, on behalf of the United States as owner, to dispose of the property however she deems suitable. After the final order of forfeiture, the court is not involved in the sale or disposal process.

The Attorney General's authority to dispose of forfeited property, is determined by examining the relevant forfeiture statutes. The forfeiture statutes at issue, 21 U.S.C. § 881(e), 21 U.S.C. § 853(h) and 18 U.S.C. § 1963(f) and (g)[9], give the

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[7] *Buena Vista*, 113 S.Ct. 1126, 1136.

[8] *See e.g.*, 18 U.S.C. § 1963(l); 21 U.S.C. § 853(n); *cf.* 21 U.S.C. § 881(a)(4); (a)6; (a)(7).

[9] 21 U.S.C. § 881 provides: (e)(1) Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may – (B)...sell by public sale or any other commercially feasible means, any forfeited property...21 U.S.C. § 853 provides: (h) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or other commercially feasible means...18 U.S.C. § 1963 provides: (f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means...(g) With respect to property ordered

contrary to the laws of the sovereign.'"[4] Forfeiture, therefore, divests the owner of title and vests the title in the government. The forfeiture process is the extinguishment of the interest of the former owner, because of the criminal activity, and the vesting of all the right, title and interest in the property in the United States.[5] In *United States v. A Parcel of Land, Buildings, Appurtenances and Improvements, Known as 92 Buena Vista Avenue, Rumson, New Jersey*, the Supreme Court clarified the time when the forfeiture action vests title in the government:

> The common-law rule had always allowed owners to invoke defenses made available to them **before** the Government's title vested, and after title **did** vest, the common-law rule had always related the title back to the date of the commission of the act that made the specific property forfeitable. Our decision denies the Government no benefits of the relation back doctrine. The Government cannot profit from the common-law doctrine of relation back until it has obtained a judgment of forfeiture.[6]

In the forfeiture process, the government does not own the property

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[4] Asset Forfeiture and Money Laundering Section, *Asset Forfeiture Manual, Vol. I., Law and Practice*, Introduction, section 1, p.1 (June 1993), quoting from *United States v. Eight (8) Rhodesian Stone Statues*, 449 F. Supp. 193, 195 n.1 (C.D. Cal. 1978); *cf.* D. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 2.01, at 2-1 ("As used in this treatise, a forfeiture is the taking by the government of property that is illegally used or acquired, without compensating the owner.").

[5] *See United States v. A Parcel of Land, Buildings, Appurtenances and Improvements, Known as 92 Buena Vista Avenue, Rumson, New Jersey, et al.*, 507 U.S. 111, 128-130, 113 S.Ct. 1126, 1137, (1993); *United States v. Grundy*, 7 U.S.(3 Cranch) 337, 350-351 (1806); *cf. Republic National Bank of Miami v. United States*, 506 U.S.80, 89-92, 113 S.Ct. 554, 561-62 (1992); *United States v. Real Property Located at 185 Hargraves Drive (In Re Newport Saving and Loan Association)*, 928 F.2d 472, 478 (1st Cir. 1991); 21 U.S.C. § 881(h); 21 U.S.C.§ 853(c); 18 U.S.C. § 1963(c).

[6] *Buena Vista*, 113 S.Ct. 1126, 1137 (1993); *cf. Motlow v. State ex rel. Koeln*, 295 U.S. 97, 99 (1935) ("While, under the statute in question, a judgment of forfeiture relates back to the date of the offense as proved, that result follows only from an effective judgment of condemnation."); *United States v. Stowell*, 133 U.S. 1, 16-17 (1890); *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) 44, 56, 20 L.Ed. 815 (1871); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 460, 19 L.Ed. 196 (1869); *United States v. Grundy*, 7 U.S. (3 Cranch) 337, 350-351 (1806).

and unambiguous] language" of a statute. *United States v. Albertini*, 472 U.S. 675, 689 (1985) (citing *Garcia v. United States*, 469 U.S. 70, 75 (1984)) (*emphasis added*); *See also, United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Avenue, Elgin, Illinois*, 903 F.2d 490, 492 (7th Cir. 1990). Finally, forfeiture statutes are to be fairly and reasonably construed, so as to carry out the intention of the legislature. *United States v. Stowell*, 133 U.S. 1, 12 (1890).

Applying these principles, Congress has clearly stated that the Attorney General has the authority to dispose of property "by sale or other commercially feasible means."[10] The Attorney General's authority to sell forfeited property has been delegated to the United States Marshal.[11] Once the property is finally forfeited, title to the property is in the United States, and the forfeiture statutes provide the Attorney General with complete authority to dispose of the property by selling it, or by disposing of it by other possible commercially feasible means, such as transferring it to a state or local government. Any other interpretation thwarts congressional intent.

The forfeiture process was thoroughly reviewed by Congress when it enacted the Comprehensive Crime Control Act of 1984. As part of that review process, Congress obviously looked at various ways forfeited property could be disposed and by whom. It appears that Congress selected the Attorney General as the focal point for judicial forfeiture actions, for maintaining the seized and forfeited property, for handling the disposition of that property and for maintaining the Assets Forfeiture Fund.[12]

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[10] 21 U.S.C. § 881(e)(1)(B); 21 U.S.C. § 853(h); and 18 U.S.C. § 1963(f).

[11] 28 C.F.R. § 0.111(i) (the U.S. Marshal can dispose of property); 28 C.F.R. § 0.156 (the Deputy Marshal can sign deeds transferring the property).

[12] *See* 28 U.S.C. § 524(c) which grants the Attorney General power to pay expenses for maintaining, disposing and selling forfeited property, etc.

Attorney General the authority to dispose of forfeited property "by sale or other commercially feasible means." It is clear from the language of the forfeiture statutes, from their legislative history, and from the cases and other authorities which have addressed this issue, that the Attorney General has complete authority to dispose of forfeited property.

(1) ***Statutory Construction — Clear and Unambiguous***

In construing statutes, it is important to remember that if a statute is clear and unambiguous on its face, further review is not required. In *Consumer Product Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980), the Supreme Court reaffirmed this principle by stating that:

> We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. 447 U.S. at 108.

Unless the literal or ordinary meaning of the words used by the legislature would lead to absurd results, or thwart the obvious purpose of the statute, those interpreting statutes do not look beyond the words used by that body. *Commissioner v. Brown*, 380 U.S. 563, 571 (1965); *National Small Shipment v. CAB*, 618 F.2d 819, 827 (D.C. Cir. 1980). The Supreme Court has repeatedly noted that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975); *Perrin v. United States*, 440 U.S. 37, 42 (1979); *cf. Bowsher v. Merck & Co.*, 460 U.S. 824, 830 (1983). The Court has also cautioned that "[o]nly the *most extraordinary showing* of contrary intentions in the legislative history will justify a departure from [the plain

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forfeited under this section, the Attorney General is authorized to — ...(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means ....

of their economic power." *Id.* at 3375. The bill's primary focus was on "improving the procedures applicable to forfeiture cases." One of the primary problems addressed by Congress was how to provide a "funding mechanism to allow use of forfeiture proceeds to defray the escalating costs to the government in pursuing forfeitures..." *Id.* at 3376.

The legislative history relating to the provision dealing with the sale of forfeited property is found in Parts A, B and C of the above referenced Senate Report (incorporated in the House Report which serves as the legislative history for the entire Act). It is the Committee Report on the bill that is the authoritative source for determining legislative intent. *Garcia v. United States*, 469 U.S. 70, 77 (1984). Official committee reports represent the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation, and should be entitled to great weight in construing a statute. *Zuben v. Allen*, 396 U.S. 168, 186 (1969).

Part A discusses the relevant changes or modifications to section 1963(f) and (g) of Title 18 and section 881(e) of Title 21. Section 302 of the bill amends 18 U.S.C. § 1963(f) and (g). Most importantly in the report it states:

> Subsection (g) concerns matters regarding the disposition of property. Following the seizure of the property, *the Attorney General is authorized* to direct its disposal by *sale or other* commercially feasible means, making due provision for the rights of innocent persons. *Id.* at 3388 (emphasis added).

Section 303 of the bill contains language with the same provisions for the disposition of property under Subsection 303(i) of the bill, to be incorporated in Title 21, Section 853(h), as part of the criminal forfeiture statute. *Id.* at 3396. Part C indicates that 21 U.S.C. § 881(e), contains the same provisions. *Id.* at 3399. Therefore, the existing legislative history clearly supports

Significantly, Congress never used the term "judicial sale." Moreover, Congress obviously wanted the Attorney General to act independently since it used virtually identical language in each of the forfeiture statutes. Each of the statutes plainly states that the Attorney General can sell forfeited property or dispose of it using any other commercially feasible way. Conversely, Congress made no mention of 28 U.S.C. § 2001 or the need for confirmation of the sale by the court. Moreover, our construction of the statutes is fully supported by the existing legislative history of the relevant forfeiture statutes.

(2) ***Legislative History Supports this Analysis***

The legislative history of the various statutes fully supports this analysis. The Comprehensive Crime Control Act of 1984 was the result of a 10-year effort by the Senate Committee on the Judiciary and various administrations to reform, substantially and comprehensively, the Federal criminal laws, including some much needed changes to the civil and criminal forfeiture statutes. On June 23, 1983, the Judiciary Committee reported out a bill consisting of twelve separate titles, the third of which was captioned "Forfeiture". The Senate Report, No. 98-225, addressing the forfeiture amendments, is incorporated in its entirety as part of the House Report, No. 98-1030. House Report No. 98-1030 serves as the legislative history for specific amendments to a number of titles altered by the bill, particularly Titles 18, 19, 21, and 28 of the United States Code. Title III of the bill was eventually passed as The Comprehensive Forfeiture Act of 1984. *See* S. Rep. No. 225, 98th Cong., 1st Sess., p. 191, reprinted in 1984 U.S. Code Cong. & Ad. News, 3182.

The existing legislative history reflects that Title III of the bill was meant to "enhance the use of forfeiture," particularly "the sanction of criminal forfeiture" to combat racketeering and drug-trafficking, two of the largest crime problems facing the nation. *Id.* at 3374. Congress sought by this new legislation to dismantle the economic power of criminal enterprises and forfeiture was intended as the mechanism "designed to strip these offender organizations

> With regard to the government's motion for Court approval of its proposed settlements, the Court finds that 18 U.S.C. § 1963(g) and (h)(4), *give the Attorney General, rather than the Court, the authority to dispose of forfeited property* and 18 U.S.C. § 1963(g) gives him the authority to settle and compromise claims in the forfeited property once their validity has been adjudicated by the Court under 18 U.S.C. § 1963(m)(6). (*emphasis added.*)

b. ***Judicial Sale Defined***

Generally speaking, the process involved in a judicial sale, is not one where the United States seeks to forfeit property because of the illegal activity associated with the property. Rather, a judicial sale generally results from the United States asserting its interest in the property to obtain satisfaction because of some lien or other debt owed by the owner of the property. It has been recognized that:

> A judicial sale is generally defined as a sale made under a judgment or order of a court of competent jurisdiction by an officer legally appointed and commissioned to sell, who acts as a mere ministerial agent of the court which appoints him, such sale being subject to confirmation by the court, and becoming absolute only when so confirmed.[14]

In a judicial sale conducted in accordance with 28 U.S.C.

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[14] 47 Am. Jur. 2d *Judicial Sales* section 1 (1984); *cf. Yazoo & Mississippi Valley Railroad Company, et al. v. City of Clarksdale*, 257 U.S. 10, 19 (1921); *Pewabic Mining Company v. Mason*, 145 U.S. 349, 362 (1891); *United States v. Branch Coal Corporation*, 390 F.2d 7, 9 (3d Cir. 1968); *Prudential Insurance Company of America v. Land Estates, Inc.*, 90 F.2d 457, 458 (2d Cir. 1937); *Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co.*, 165 F. 162, 164 (8th Cir. 1908), *appeal dismissed*, 218 U.S. 685; *United States v. Smith*, 479 F. Supp. 804, 806 (N.D. Ga. 1979).

the position that the civil forfeiture statute contains the same authority of the Attorney General to sell or otherwise dispose of forfeited property. In fact, the Committee Report for section 881(e) provides some guidance of possible ways "other commercially feasible means" might be interpreted. The Committee Report states:

> Section 309 amends U.S.C. § 881(e) to achieve two purposes. First, it provides that the Attorney General may transfer drug related property forfeited under Title 21, United States Code, to another Federal agency, or to an assisting State of local agency, pursuant to Section 1616 of the Tariff act (19 U.S.C. § 1616), as amended in section 318 of the bill. Often, state and local law enforcement agencies give significant assistance in drug investigations that result in forfeitures to the United States. However, there is presently no mechanism whereby the forfeited property may be directly transferred to these agencies for their official use. This amendment, in conjunction with the Tariff Act amendment cited above, will permit such transfers and thereby enhance important cooperation between Federal, State, and local enforcement agencies in drug investigations.

(3) ***Caselaw Supports this Position***

Although the matter has not been the subject of substantial review, the available caselaw recognizes the Attorney General's authority to dispose of forfeited property. In *United States v. Mageean*,[13] the court states:

[13] 649 F. Supp. 820, 824-25 (D. Nev. 1986), *aff'd without opinion*, 822 F.2d 69 (9th Cir. 1987).

C. *Distinction of Interlocutory Sales*

It has long been the position of the Department of Justice that sales in accordance with 28 U.S.C. § 2001 are only necessary for interlocutory sales conducted in forfeiture cases.[17] Very often, interlocutory sales are necessary because the property to be forfeited is deteriorating in value. However, it must be remembered that an interlocutory sale is not the end of the forfeiture case. It is a precautionary step in which the property to be forfeited is turned into cash to prevent deterioration in value. The forfeiture case continues, and the United States, if successful, will receive a final forfeiture order against the cash fund or proceeds of the sale. Using this procedure, the proceeds of the sale are then treated as substitute *res* for the original property to maintain jurisdiction as well as to satisfy the final judgment.[18]

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[17] Criminal Division, *A Guide to Sales of Property Prior to Forfeiture* (Revised Current as of November 1990); 19 U.S.C.§ 1612; *See The Nancy II*, 38 F.2d 182, 184 (1st Cir. 1930); *United States v. Real Property and Residence at 3097 S.W. 111th Ave, Miami, Florida*, 699 F. Supp. 287, 288 (S.D. Fla. 1988); *cf. United States v. One 1984 Kawasaki Ninja Motorcycle*, 790 F. Supp. 697, 701 (W.D. Tex. 1992); *Marks v. United States*, 24 Cl. Ct. 310 (1991).

[18] Criminal Division, *A Guide to Sales of Property Prior to Forfeiture* (Revised Current as of November 1990), p. 1.

§ 2001, it is the court which conducts and supervises the sale and sets its terms:

> According to 28 U.S.C. § 2001(a), when any realty sold under any order or decree of any court of the United States shall be sold at public sale, such sale "shall be sold upon such terms and conditions as the court directs." It was therefore within the Court's discretion to order confirmation as a term and condition of this public judicial sale.[15]

In *Yazoo & Mississippi Valley Railroad Company, et al. v. City of Clarksdale*, the Supreme Court stated:

> We think that the language of this act [predecessor to 28 U.S.C. § 2001] limits its application to judicial sales made under order or decree of the court and requiring confirmation by the court for their validity, and that it does not extend to sales under common-law executions which issue by mere praecipe of the judgment creditor on the judgment without order of the court, and in which the levy and sale of the marshal are ministerial, do not need confirmation to give them effect, and only come under judicial supervision on complaint of either party. The sale in such a case depends for its validity on the marshal's compliance with requirements of law.[16]

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[15] *United States v. Smith*, 479 F. Supp. 804, 806 (N.D. Ga. 1979); *See United States v. Branch Coal Corporation*, 390 F.2d 7, 10 (3d Cir. 1967).

[16] *Yazoo & Mississippi Valley Railroad Company, et al. v. City of Clarksdale*, 257 U.S. 10, 19 (1921).

circumstances as outlined in section B, *infra*.[22]

A. ***Circumstances for the Use of a Special Warranty Deed and Indemnification Agreement***

The Department recognizes that in some situations the use of the Marshal's quitclaim deed will not be sufficient for title company requirements to insure title for a purchaser of forfeited property. Such limited circumstances include the following situations:

* The owner of the defendant property is a fugitive and the government cannot prove the fugitive was served in the forfeiture action.

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

* One of the owners of the defendant property is a fugitive who holds title to the property in a cotenancy with innocent owners.

* 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.

* The owner of 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.

* The forfeiture is subject to a pending appeal.

* Such other situations in which a special warranty deed with certain indemnification provisions or a separate indemnification agreement is appropriate (*e.g.* jurisdictions in which title insurance is unattainable without such a deed.)

If such special circumstances exist, the Marshal in consultation with the United States Attorney may execute a special warranty deed to the

[22] As used in this policy, the terms "general warranty deed" and "special warranty deed" are not intended to be limiting in their application. In some states, warranty deeds are not used (*e.g.*, in California a "grant deed" provides limited statutory warranties). The use of such state variations equivalent to a general warranty deed is satisfactory for purposes of this policy.

IV. *Attorney General's Authority to Warra*

Background: Section 2002 of the Crime of 1990, which amends 28 U.S.C. § 524(c), gives the Attorney General the authority to warrant clear title upon transfer of forfeited property. Section 524(c) (10) reads as follows:

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

The authority of the Attorney General to convey forfeited real property and to execute deeds and warrant title has been delegated to the Director of the U.S. Marshals Service, by 28 C.F.R. § 0.156, and redelegated to chief deputies or deputy U.S. Marshals by 28 C.F.R. § 0.156.

The preferred deed to transfer forfeited property is a U.S. Marshal's quitclaim deed (USM-159A) executed by the marshal. A quitclaim deed makes no warranty representations. It serves only to convey whatever right, title and interest that the Government had as of the conveyance date. A special warranty deed[20] may be used instead when the marshal, in consultation with the United States Attorney, concludes that a deed is necessary and appropriate under the facts of a particular case described in section A., *infra*. Finally, property may be transferred by a general warranty deed,[21] but it is Department policy to use general warranty deeds only in exceptional

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[19] Text for section IV. is derived from Dir. 92-1, issued by the Department of Justice on February 12, 1992, and effective the same day.

[20] The special warranty deed assures the grantee/buyer that the United States, as the current seller, has done nothing to encumber the property, nor has it conveyed any right, title, or interest in the property while the government was the owner of the property. In effect, the special warranty deed warrants the forfeiture process.

[21] A general warranty deed assures the grantee/buyer that title to the property is free and clear of any and all liens and encumbrances, and insures the grantee/buyer from any future claims against the property.

Requests to the Seized Assets Division of the U.S. Marshals Service for approval to convey title through a special warranty deed with indemnification must be accompanied by the following:

a. An explanation of the special circumstances which justify the indemnification;

b. A proposed indemnification agreement, whether in a separate agreement or as additional paragraphs in a special warranty deed; and

c. A statement of the amount of the purchase price which potentially may have to be refunded.

B. *Circumstances for the Use of a General Warranty Deed*

If the buyer of the forfeited property is still unable to procure a title insurance policy, then the Marshal may be authorized by a Significant Property Decision to execute a general warranty deed.

It is the policy of the Department that the Attorney General's discretion to warrant clear title, through the use of a general warranty deed, will be exercised only in compelling circumstances where the financial advantage of offering a general warranty deed in the particular case, compared to the available alternatives, far outweighs both the potential cost of honoring the warranty in that case and the potential effect of increased purchaser demand for general warranty deeds in future sales of other forfeited properties. The Seized Asset Division of the U.S. Marshals Service, in the exercise of sound business judgment, shall also consider the cumulative potential liability which will accrue over time as a result of each successive use of a general warranty deed.

If one or more of the circumstances listed in section A. is present, and the Marshal and the United States Attorney responsible for the forfeiture action deem it appropriate to warrant clear title, the Marshal and the United States Attorney shall request approval from the Seized Assets Division to convey title through a general warranty deed or its equivalent.

Requests to the Seized Assets Division of the U.S. Marshals Service for approval to convey title through a general warranty deed or its equivalent shall include the following:

buyer specifically warranting against claims arising from the applicable circumstances as listed, *supra*. Such special warranty deeds are permitted by the authority delegated to the Marshal in 28 C.F.R. § 0.156.

It is suggested that the language of the special warranty deed be as follows, with the insertion of the specifically applicable circumstances as listed, *supra*.

> The grantor covenants to specially warrant the title to the property hereby conveyed against any claim arising from... [Insert the specifically applicable circumstances here.]

Further, when such special circumstances exist, the buyer may also request that the United States provide certain indemnifications in order to obtain title insurance. These indemnification agreements establish affirmative measures to be taken by the United States, beyond the basic terms and obligations of its warranty deed, in the event that claims are later made against the property. The indemnification agreement may be included either in the terms of the special warranty deed or in a separate document which incorporates the deed by reference. In either form, indemnification agreements will be limited to the following terms:

1. The United States will specially warrant its title against defects or clouds arising out of the forfeiture process, and hold the buyer harmless as a result of such defects in title or clouds involving the propriety of the forfeiture of the property.

2. In the event that a court in a final judgment rules that the United States did not acquire valid legal title to the real property through the forfeiture process and therefore was not able to convey clear title to the buyer, the United States will refund to the buyer the amount of the purchase price of the property, plus the value of any improvements made to the property by the buyer. The amount will be paid out of the Assets Forfeiture Fund, plus interest on the total amount at the current rate as provided in 28 U.S.C. § 1961 from the date of the purchase of the property by the buyer to the date of the final judgment.

3. The United States, by its special warranty deed, does not warrant the title of the prior owner of the property who acquired title before the forfeiture.

V. *Purchase or Personal Use of Forfeited Property by DOJ Employees*[23]

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. 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.

Although we are unaware that any such purchases have occurred, this policy will avoid problems before they develop. We believe it is important to the integrity of the Department's forfeiture program that we preclude even the appearance of a conflict of interest which would otherwise arise should a Department employee purchase forfeited property.

Title 28, C.F.R., sections 45.735-18(a) and (b) prohibit DOJ employees from purchasing, either directly or indirectly, or using any property if the property has been forfeited to the government and offered for sale by the DOJ or its agents. A waiver to the aforementioned restrictions may be granted by the director upon a determination that two requirements are satisfied:

A. the purchase was not based on nonpublic information that came to the employee's attention by reason of his status as a DOJ employee, *i.e.*, that the purchase was based upon nonpublic source information; and

B. the employee's reason for purchasing or using the property is so compelling as to outweigh any appearance of impropriety. *See* Title 28, C.F.R., sections 45.735-18(c)(1) and (2).

[23] Text for section V. is derived from Dir. 90-4, issued by the Department of Justice on July 3, 1990, and effective the same day.

1. A title report, identifying specific deficiencies and/or exceptions that are the basis of the inability to secure title insurance, and a written explanation from the responsible Assistant United States Attorney addressing why the deficiencies and/or exceptions have not been or cannot be corrected in order to avoid the necessity of a general warranty deed;

2. An explanation establishing that a special warranty deed (*e.g.*, warranting only the forfeiture process) would not be sufficient;

3. A statement of, and an explanation of the basis for, the estimated financial advantage of offering a general warranty deed as compared to other options;

4. An explanation of the circumstances that do not permit disposition of the property by allowing the lienholder to foreclose, sell the property, recover the amount of the lien plus interest and expenses from the proceeds of the sale, and pay to the Marshal for forfeiture, any remaining proceeds in return for the release of the *lis pendens* on the property.

It is suggested that the language of the general warranty deed, or its equivalent, provide as follows:

The grantor does hereby fully warrant the title to said real property, and will hold the grantee harmless against the lawful claims of all persons whomsoever.

It should be noted that the requirements of a general warranty deed may differ between jurisdictions.

C. *Dispute Resolution*

The Asset Forfeiture and Money Laundering Section (AFMLS) will resolve any disputes that may arise in the event the United States Attorney and the U.S. Marshal cannot agree on the appropriate form of deed to be used.

VI. *Review of Official Use of Forfeited Property*[24]

Part IV, D of *The Attorney General's Guidelines on Seized and Forfeited Property* (July 1990) requires notification to the "Executive Office for Asset Forfeiture . . . at the time property valued at $50,000 or greater is placed into official use." Although this requirement may be satisfied by post-transfer notification, the FBI and U.S. Marshals Service provided the then Executive Office for Asset Forfeiture with advance notice of and an opportunity to review such decisions. Such notification should now be made to AFMLS.

Please ensure that AFMLS is given advance notice of and an opportunity to review official use actions involving federal forfeited property valued at $50,000 or more. We will endeavor to act on all such notifications within 2 weeks of receipt.

[24] Text for section VI. is derived from Dir. 93-5, issued by the Department of Justice on September 15, 1993, and effective the same day.

Information concerning any state forfeiture proceedings instituted against the property must be detailed in the request for adoption. The state or local agency must also complete the Federal agency's standard federal asset seizure form as part of its adoption request. All information provided must be complete and accurate. An estimate of fair market value must be provided for each item of seized property presented for adoption and any liens and lienholders must be identified. Copies of any investigative reports and of any affidavits in support of warrants pertinent to the seizure shall be attached for review.[3]

C. *Federal Investigative Agency Review*

The adopting federal agency must review and accept or decline adoption requests promptly. The request for adoption must be accepted prior to the transfer of the property to federal custody unless exceptional circumstances exist.

Seizures presented for adoption must be reviewed by an attorney outside the chain-of-command of operational officials (*e.g.*, the seizing agency's Office of Chief Counsel or other legal unit) unless:

1. the seizure was based on a judicial seizure warrant; or
2. an arrest was made in connection with the seizure; or
3. drugs or other contraband were seized from the person from whom the property was seized.

Such attorney review shall verify that:

1. the property is subject to federal forfeiture;
2. there is probable cause to support the seizure;
3. the property is not within the custody of a state court; and
4. there is no legal impediment to a successful forfeiture action.

[3] State or local agencies may redact from investigative reports information which may disclose the identity of a confidential informant.

Chapter 6 - Equitable Sharing

I. General Adoption Policy and Procedure[1]

A. Adoptive Seizures Are Encouraged.

Forfeiture is one of the most effective weapons in the law enforcement arsenal and its use should be encouraged. In many areas of the nation, aggressive and effective use of forfeiture requires a willingness on the part of federal law enforcement agencies to adopt State and local seizures for federal forfeiture whenever appropriate. Department of Justice personnel in the field should be encouraged to adopt State and local seizures in order to immobilize criminal enterprises and to enhance cooperation among federal, state, and local agencies. This does not preclude application of established dollar thresholds nor relieve adopting officials of the duty to verify that seized property presented for adoption is forfeitable under federal law and that its seizure was based upon probable cause.

The policies and procedures set forth below are intended to ensure consistent review and handling of state and local seizures presented for federal adoption.[2]

B. Federal Adoption Form

All state and local requests for adoption must be reported on a form entitled "Request for Adoption of State or Local Seizure" (*See* Appendix, page 6-1.) The form must be completed by the requesting state or local agency, but federal personnel may, in their discretion, complete the form for the requesting state or local agency.

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[1] The text for section I. is derived from Dir. 90-2, issued by the Department of Justice on February 14, 1990, and effective the same day; Dir. 91-5, issued by the Department of Justice on April 9, 1991, and effective the same day; Dir. 93-1, issued by the Department of Justice on January 15, 1993, and effective March 1, 1993; and Dir. 94-2, issued by the Department of Justice on February 16, 1994, and effective the same day.

[2] This policy does not apply to adoption of seizures by the United States Customs Service.

system with the result that a state forfeiture action may be unfeasible or unsuccessful;

2. The seized asset poses unique management or disposition problems (*e.g.*, real property or a business) requiring U.S. Marshals Service involvement;

3. State laws or procedures will result in a delay in forfeiture leading to significant diminution in the value of the asset or a delay in the resolution of the case that adversely affects an innocent owner or lienholder; or

4. The pertinent state or local prosecuting official has reviewed the case and declined to initiate forfeiture proceedings for any reason.

F. ***Judicial Review Favored***

Judicial review allows a neutral and detached magistrate to assess the basis for seizure prior to adoption and protects federal enforcement personnel against potential civil suits. Pre-seizure judicial review is not required for adoptive, joint, or federal seizures, but federal personnel are encouraged to secure judicial review whenever practicable prior to federal seizures or the adoption of a state or local seizure. A judicial determination of probable cause is required prior to a federal adoption of seized real property.

G. ***Thirty-Day Rule for Presentation for Federal Adoption***

State and local agencies have 30 calendar days from the date of seizure to request a federal adoption. Waivers of the 30-day rule may be approved by the adopting federal agency where the state or local agency requesting adoption can demonstrate the existence of circumstances justifying the delay.

H. ***United States Attorney Recommendation***

A United States Attorney may recommend in writing that a federal seizing agency adopt a particular state or local seizure. If the federal agency declines to adopt the seizure despite the recommendation of the United States Attorney, the agency must promptly document its reasons for declination in a memorandum and forward copies of the memorandum to the United States Attorney and the Asset Forfeiture and Money Laundering Section (AFMLS). AFMLS will resolve any disagreements and may authorize direct adoption of state or local

Federal investigative agencies will normally secure attorney review through their own Offices of Chief Counsel or other legal unit but may, in their discretion, request an Assistant United States Attorney to conduct this review. Any further review processes established in the future for federal seizures will also apply to adoptive seizures.

Pre-seizure planning is an essential part of the review process. Property management issues must be addressed in consultation with the U.S. Marshals Service prior to an adoption.

D. *Minimum Monetary Thresholds*

In adoptive cases, property is not generally forfeited unless the equity in the property exceeds the following levels:

Conveyances	
Vehicles	$5000
Vessels	$10,000
Aircraft	$10,000
Real Property Land and any improvements	$20,000 or 20 percent of the appraised value, whichever is greater
All Other Property	
Currency, bank accounts, monetary instruments, jewelry, *etc.*	$5000

E. *Forfeitures Generally Follow The Prosecution*

As a general rule, if a state or local agency has seized property as part of an ongoing state criminal investigation and the criminal defendants are being prosecuted in state court, the forfeiture action should also be pursued in state court.

However, certain circumstances may make federal forfeiture appropriate. These circumstances include but are not limited to the following:

1. State laws or procedures are inadequate or forfeiture experience is lacking in the state

II. *Processing DAG 71/DAG 72 Forms*[4]

A. *Referral of DAG 71/DAG 72 Forms to United States Attorneys' Offices*

Seizing agency field offices will provide a copy of the Application of Transfer of Federally Forfeited Property (DAG-71) and the "preliminary" Decision for Transfer of Federally Forfeited Property (DAG-72) to the pertinent United States Attorney's Office for *all* (whatever the value) administrative and judicial forfeiture actions. The originals of these forms will be concurrently forwarded to the agency's headquarters decision-maker. A United States Attorney's Office may choose not to receive the DAG-71 and/or the preliminary DAG-72 for property appraised at $100,000 or less. Written notice of this decision should be forwarded to the seizing agency for its records.

B. *Notifying the Department's Criminal Division*

Even though United States Attorneys have final decision authority with respect to equitable sharing in judicial forfeiture cases involving less than $1 million, the "Application for Transfer of Federally Forfeited Property" (DAG 71) and "Decision Form for Transfer of Federally Forfeited Property" (DAG-72), along with final orders of forfeiture, must be forwarded to the Criminal Division for processing and record-keeping purposes. Moreover, all DAG-71s should be filled out completely and all DAG-72s should be signed by the United States Attorney or an official authorized by the United States Attorney to sign on his or her behalf. Such authorizations of persons to sign on behalf of the United States Attorney should be reduced to writing and a copy supplied to the Criminal Division.

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[4] The text for section A. is derived from Dir. 91-11, issued by the Department of Justice on July 5, 1991, and effective the same day. The text for section B. is derived from Dir. 90-2, issued by the Department of Justice on February 14, 1990, and effective the same day.

seizures by United States Attorneys for judicial forfeiture in appropriate circumstances.

I. *Notice Requirements*

Prior to approval of an adoption, the state or local agency must not state or imply that a federal agency is the seizing agency or has any law enforcement interest in the property. Once adoption is approved, then notice to all interested parties will be executed by the adopting federal investigative agency pursuant to federal law and policy.

As applied in the case of adopted seizures, the requirements of written notice "At the time of seizure" set out at 21 U.S.C. § 888(b) and at the editorial note to 21 U.S.C. § 881 are construed to mean *at the time of the federal seizure, i.e.*, the decision to adopt the seizure for federal forfeiture. This construction reflects the intent of Congress and no other interpretation is feasible because seizing state and local law enforcement agencies cannot know that the property they seize will be accepted for federal forfeiture until the appropriate federal officials review the seizure and agree to adopt it.

Once a decision has been made to adopt the seizure of an item of property covered by the notice requirements set out at 21 U.S.C. § 888(b) or the note to 21 U.S.C. § 881, the adopting agency must take steps to ensure that the statutory notices are served in the most expeditious manner practicable. Each component of the Department should adjust its internal policies and procedures as necessary to give force to this construction.

J. *Retention of Custody by State or Local Agency*

To minimize storage and management costs to the Department of Justice, state and local agencies which present motor vehicles for federal adoption should generally be asked to serve as substitute custodians of the property pending forfeiture. Any use of such vehicles, including official use, by state and local law enforcement officials or others is prohibited by Department of Justice policy until such time as the forfeiture is completed and the equitable transfer is made. Adopted cash and real property must, however, be turned over to the custody of the U.S. Marshals Service. In addition, the Marshals Service must be consulted prior to the adoption of a seizure of real property.

check to the United States Attorney's office, attention "Law Enforcement Coordinating Committee (LECC) Coordinator."

If the United States Attorney makes an equitable sharing decision on a request from a state or local law enforcement agency from a different judicial district, the coordinator should contact the United States Attorney's office in the second district to determine whether or not that United States Attorney wishes to present the check.

2. ***Administrative Cases***

In cases in which the federal investigative agency makes the equitable sharing decision, the U.S. Marshal will mail the check to that agency unless otherwise directed by the local agency head.

3. ***Role of Law Enforcement Coordinating Committees***

Pursuant to the *Attorney General's Guidelines on Seized and Forfeited Property*, July 1990, the

> Law Enforcement Coordinating Committees shall promote and facilitate the Department of Justice forfeiture program with federal, state and local law enforcement agencies.

By memorandum dated June 15, 1990, to all United States Attorneys from the Associate Deputy Attorney General, LECC Coordinators were required to

> serve as a clearinghouse for state and local inquiries about the status of pending sharing cases.

To perform these functions, the U. S. Marshal shall provide advance notice to the LECC coordinator of *all* equitable sharing payments and transfers to state and local law enforcement agencies in the judicial district. We expect United States Attorneys' Offices and seizing agencies to work together to ensure proper coordination of all equitable sharing activities.

III. *Equitable Sharing Protocol*[5]

Background: The furtherance of law enforcement cooperation with state and local law enforcement agencies is one of the primary goals of the Department's asset forfeiture program. Equitable sharing has been a dramatic success in fostering cooperation with our State and local law enforcement colleagues.

But the explosive growth of sharing has created new management challenges. State and local agencies are increasingly dependent upon sharing proceeds. Expediting the processing of sharing requests, therefore, deserves a high priority both at headquarters and in the field.

The levels of decision making authority are set forth at section IX(E) of *A Guide to Equitable Sharing of Federally Forfeited Property By State and Local Law Enforcement Agencies* (March 1994).[6] All decision-makers should ensure that every equitable share approved meets the *Guidelines* standards.

All officials are cautioned not to represent that a sharing request is approved until the final decision maker has in fact rendered a decision. Premature announcement of a sharing approval can cause embarrassment if the proposed sharing is ultimately disapproved or substantially altered.

A. *Equitable Sharing Check Disbursement*

1. *Judicial Cases*

In cases in which the United States Attorney or a Departmental official is the decision maker, the U. S. Marshal will mail the

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[5] Text for section III is derived from Dir. 90-8, issued by the Department of Justice on September 25, 1990, and effective the same day.

[6] On June 5, 1995, the Deputy Attorney General delegated to the Assistant Attorney General, Criminal Division, the authority to make final equitable sharing determinations in cases involving 1) forfeited property of a value of $1 million or more, 2) multi-district cases, or 3) involving the transfer of real property if the Asset Forfeiture and Money Laundering Section (AFMLS) of the Criminal Division, the United States Attorney, and the federal seizing agency agree on the allocation of judicially forfeited property *or* AFMLS and the federal seizing agency agree on the allocation of administratively forfeited property. A copy of the June 5, 1995 memorandum delegating this authority to the Assistant Attorney General is in the Appendix, page 6-3 *et seq*.

C. *Transmittal Letters for Equitable Sharing Checks*

All federal components shall enclose a transmittal letter which reiterates the policies governing the use of equitable shares as set forth in *The Attorney General's Guidelines on Seized and Forfeited Property* (July 1990).

It is important to consistently give the same message to the recipient agencies. The following points should be made:

1. The sharing check represents the agency's equitable share of the net proceeds.

2. The monies must be used for the law enforcement purposes stated in the Application for Transfer of Federally Forfeited Property (DAG 71).

3. These funds must increase and not supplant the agency's appropriated operating budget.

4. Any interest earned on these funds must also be used for law enforcement purposes.

A sample letter is in the Appendix, page 6-5.

B. *Equitable Sharing Ceremonies*

Equitable sharing ceremonies are meant to foster goodwill. They present a unique opportunity for federal and state and local law enforcement to bask in the collective limelight of a job well done. Such ceremonies should be inclusive and not exclusive. Officials from the United States Attorney's office, the federal seizing agencies and the U.S. Marshal should routinely be included in these ceremonies.

One of the goals we must all work toward is expediting the processing of equitable sharing requests. While equitable sharing ceremonies are encouraged, they should be scheduled as quickly as possible once the cash and/or tangible property is available for sharing. Accumulating sharing checks and property for purposes of presentation is discouraged where the recipient agency does not concur – particularly where large amounts of money are involved. Not only are the funds critically important to some agencies; the interest that can be earned on these funds is also available to be used for law enforcement use.

Requests for expedited processing of an equitable sharing request in order to have a presentation ceremony can be extremely disruptive to the system. Please plan ceremonies sufficiently in advance to allow the processing of requests in the normal course of business.

On occasions when their travel schedules have permitted, the President, the Vice-President, and the Attorney General have personally presented significant equitable sharing checks. United States Attorneys and seizing agencies should contact AFMLS *as far in advance as possible* if you are aware of an upcoming significant sharing opportunity in your district. A significant amount of staff work must be done to prepare for ceremonies involving these officials.

As a general rule, the checks presented by the President have been $1 million or more and checks presented by the Attorney General have been $250,000.00 or more.

Regardless of who presents the check, it is the responsibility of the federal seizing agency or the United States Attorney's office taking the lead role in the ceremony to contact the state and local recipients and to plan the presentation.

V. *Weed and Seed Initiative; Transfers of Real Property*[8]

Background: Weed and Seed is an initiative designed to reclaim and rejuvenate embattled neighborhoods and communities. Weed and Seed uses a neighborhood focused, two-part strategy to control violent crime and to provide social and economic support to communities where high crime rates and social ills are prevalent. The initiative first removes or "weeds" violent criminals and drug dealers from the neighborhoods. Second, the initiative prevents a reinfestation of criminal activity by "seeding" the neighborhoods with public and private-services, community-based policing, and incentives for new businesses. Weed and Seed is founded on the premise that community organizations, social service providers, and criminal justice agencies must work together with community residents to regain control and revitalize crime-ridden and drug-plagued neighborhoods. Weed and Seed includes both specifically funded projects, as well as cooperative initiatives not receiving targeted federal funding.

The legal authority for the transfer of seized and forfeited real property, in appropriate cases, to states, political subdivisions, and private non-profit organizations in support of the Weed and Seed Initiative and the procedure by which such transfers are to be accomplished are described in detail *infra*. In summary, the process parallels the current sharing procedure including use of Form DAG-71, consultation among Federal, State, and local law enforcement authorities, and final approval of real property transfers by the Office of the Deputy Attorney General. Where there is a legal impediment to a Weed and Seed transfer through the participating state or local law enforcement agency, the transfer can still be accomplished through the U.S. Department of Housing and Urban Development (HUD). HUD will also play a consultant role in transfers made through state and local law enforcement agencies.

Recipients will be expected to pay any mortgages and qualified third party interests against the real property transferred. Other costs will be paid from the Assets Forfeiture Fund. No transfer will be made over the objection of a state local law enforcement agency which is entitled to an equitable share of the net proceeds from the sale of the property to be transferred.

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[8] The text for Section V. is derived from Dir. 92-5, issued by the Department of Justice on May 26, 1992, and effective the same day.

IV. *International Sharing of Forfeited Assets*[7]

Sharing with foreign governments is an important part of our program. You are urged to aggressively pursue assets located abroad. Please advise AFMLS in writing of any foreign assets that have been forfeited or are about to be forfeited under United States law with the assistance of a foreign country.

It is the policy of the Department to share, in accordance with United States law and established procedure, the proceeds of successful forfeiture actions with the country or countries which facilitate the forfeiture of assets under United States law. Commitments to share internationally in specific cases can only be made with the approval of the Attorney General and the Department of State.

To initiate this process, the investigative agency or prosecutive office responsible for the forfeiture should send AFMLS a memorandum detailing the foreign assistance provided and recommending the amount to be shared. Representatives of foreign governments should not be asked to submit a sharing request. Be aware that, unlike domestic sharing, there is no authority for us to insist that a foreign country use shared property in any particular manner or allocate it to any particular governmental component (*e.g.*, a provincial law enforcement agency).

A *Guide to International Forfeiture and Equitable Sharing* is available from AFMLS. That office is available to assist with the repatriation of forfeitable assets located overseas and with the international sharing of assets forfeited in the United States.

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[7] Text for section IV is derived from Dir. 90-6, issued by the Department of Justice on September 7, 1990, and effective the same day, and Dir. 91-7, issued by the Department of Justice on May 20, 1991, and effective the same day.

C. *Transfer of Forfeited Real Property Pursuant to Weed and Seed Initiative*

1. *Sharing Requests*

All requests for sharing of real property pursuant to the Weed and Seed Initiative shall be in a Form DAG-71 and must follow the established sharing procedures as outlined in the *Attorney General's Guidelines on Seized and Forfeited Property*. The appropriate official of the seizing federal investigative agency must recommend the transfer, as well as the United States Attorney in the particular judicial district where the property is located. Approval by the Office of the Deputy Attorney General is required for transfers of forfeited real property.

2. *Transfers to State and Local Agencies*

The participating state or local law enforcement agency, or other governmental entity permitted by applicable laws to hold property for the benefit of the law enforcement agency, will receive the initial transfer of the real property. The state or local agency will then, pursuant to prior agreement, transfer the property to the appropriate public or private non-profit organization for use in support of one of the programs described above.

The authority of the participating state or local investigative agency to transfer forfeited real property to other state or local public agencies may vary from jurisdiction to jurisdiction. In each case, the issue must be addressed in the submitted DAG-71 prior to the sharing transfer to the state or local agency. *See* section 3 *infra* for cases where there is an impediment to a transfer under this section.

3. *U.S. Department of Housing and Urban Development Transfers*

Transfer of forfeited real property under the Weed and Seed Initiative may, alternatively, be accomplished through the U.S. Department of Housing and Urban Development (HUD). In this regard, the Department of Justice has statutory authority to transfer forfeited property to another federal agency. Under this option, after a property is identified as a suitable Weed and Seed transfer and is forfeited, title to the property will be transferred

A. *General Authorization*

1. 18 U.S.C. § 981(e)(2) and 21 U.S.C. § 881(e)(1)(A) authorize the Attorney General to transfer forfeited property to any federal agency, or to any state or local law enforcement agency that participated in the seizure or forfeiture of property.

2. Transfers made pursuant to 21 U.S.C. § 881(e)(1)(A) must serve to encourage cooperation between the recipient state or local agency and federal enforcement agencies. Limitations and conditions respecting permissible uses of transferred property are set forth in *The Attorney General's Guidelines on Seized and Forfeited Property*. Pursuant to Part III, C of the *Guidelines*, this memorandum constitutes supplementary guidance regarding the meaning of Part V, A, 3 of the *Guidelines*.

B. *Identification and Use of Forfeited Real Property*

1. United States Attorneys, assisted by the United States Marshals Service, are authorized to identify seized or forfeited properties for potential transfer in support of the Weed and Seed initiative. Where appropriate, they shall consult with the U.S. Department of Housing and Urban Development. As properties are forfeited, appropriate Weed and Seed transfers will be made pursuant to the policies and procedures set out herein.

2. The proposed uses of any property to be so transferred must be in accordance with the Weed and Seed initiative, focusing on the support of community-based drug abuse treatment, prevention, education, housing, job skills, and other activities that will substantially further Weed and Seed goals. United States Attorneys are encouraged to consult with the Asset Forfeiture and Money Laundering Section for guidance in particular cases. The property must also be suited to the proposed use and the use must be consistent with all applicable federal, state, and local laws and ordinances.

3. Any proposed transfer must have the potential for significant benefits to a particular community and these benefits must outweigh any financial loss or adverse effects to the Department of Justice Assets Forfeiture Fund.

VI. *Transfer of property forfeited under the Magnuson Fisheries Conservation and Management Act from the Department of Justice to the National Oceanic and Atmospheric Administration*[9]

Background: The Magnuson Fisheries Conservation and Management Act, (MFCMA) 16 U.S.C. §§1801-1882, was enacted as part of an overall effort to conserve and manage the fishery resources found off the coasts of the United States. The National Oceanic and Atmospheric Administration (NOAA), an agency of the Department of Commerce, is responsible for investigating violations which occur under the MFCMA. The Act provides that any fishing vessel used, and any fish taken or retained, in violation of Section 1857 of the Act, shall be subject to forfeiture pursuant to a civil proceeding under section 1860.

Ordinarily, the property (defined as proceeds from the sale of perishable goods or a bond) seized for forfeiture pursuant to the MFCMA is held in the court registry pending the outcome of the forfeiture proceeding. A recent review of the MFCMA has revealed that a different disposition of the proceeds is possible. The purpose of this policy is to establish guidelines for litigating and processing MFCMA forfeitures in order to facilitate the transfer of forfeited assets to NOAA.

A. *General Policy*

Under the authorities contained in the MFCMA, the Department of Justice will transfer to NOAA funds forfeited by the Attorney General for violations under the MFCMA. Assets seized for forfeiture under the MFCMA should be deposited in the Seized Asset Deposit Fund with the United States Marshals Services (USMS). Following the forfeiture action, the funds will then be transferred by the USMS to NOAA. Where expenses have been incurred by the USMS, these expenses must first be deducted before the net proceeds of forfeiture are transferred to NOAA. If no expenses are incurred, the entire amount will be transferred to NOAA.

Any MFCMA forfeitures and requests for transfers occurring after June 1, 1992, should be identified and processed pursuant to the following

[9] Text for section VI. is derived from Dir. 92-6, issued by the Department of Justice on June 16, 1992, and effective the same day.

to HUD. After the initial transfer, HUD will then retransfer the property to the pre-selected recipient, consistent with understandings reached in consultation with federal, state and local agencies and the pertinent United States Attorney's Office.

D. *Mortgages and Ownership Interests in Weed and Seed Transferred Real Property*

1. *Mortgages*

Mortgages on real property transferred pursuant to the Weed and Seed initiative are not payable from the Department of Justice Assets Forfeiture Fund. Liens and mortgages shall be the responsibility of the recipient state or local community-based organization.

2. *Qualified Third Party Interests*

Any secured debts or other qualified interests owed to creditors are not payable from the Department of Justice Assets Forfeiture Fund. The payments of these interests are the responsibility of the recipient state or local agency or non-profit organization.

E. *Asset Seizure, Management and Case-Related Expenses*

Expenses incurred in connection with the seizure, appraisal, or security of the property are payable from the Assets Forfeiture Fund. Case-related expenses incurred in connection with normal proceedings undertaken to protect the United States' interest in seized property through forfeiture, are also payable from the Assets Forfeiture Fund.

F. *Law Enforcement Concurrence*

Any state or local law enforcement agency that would otherwise receive an equitable share of proceeds from the sale of a forfeited property must voluntarily agree to forego its share before a Weed and Seed transfer will be authorized.

The checks should be sent using certified mail. Any questions should be directed to the Assistant General Counsel of Enforcement and Litigation at 301-713-2292.

The USMS should process the transfer using subject classification code 4405, (portion of forfeited proceeds to other federal agencies).

procedures. In all future cases, in addition to USMS expenses, the Department of Justice (DOJ) Assets Forfeiture Fund will retain 10 percent of the total net proceeds of the forfeiture. This amount represents the Department of Justice share based upon its effort in forfeiting the property.

B. ***Transfer Request Procedures***

To avoid the necessity of creating new forms and procedures, the transfer to NOAA should follow established sharing request procedures as enumerated in *The Attorney General's Guidelines on Seized and Forfeited Property*, July 1990. Since MFCMA forfeitures are judicial, the local NOAA office must request the transfer of funds by submitting a form DAG-71 to the U.S. Attorney's Office in the district where the forfeiture action is pending. In preparing the DAG-71, NOAA Headquarters legal counsel will not be required to complete Section VII, Block B. Upon receipt of the DAG-71, the U.S. Attorney's Office shall make a decision using form DAG-72 on forfeitures valued less than $1,000,000 and a recommendation on forfeitures valued $1,000,000 or more. The U.S. Attorney's Office does not have to consult with any other DOJ investigative agencies concerning requests made pursuant to the MFCMA. As with other judicial forfeitures involving sharing, the United States Attorney's Office shall forward the DAG-72 recommendation or decision to the Criminal Division, Asset Forfeiture and Money Laundering Section, for processing and tracking purposes. The Criminal Division, Asset Forfeiture and Money Laundering Section, will have authority for dispute resolution in sharing decisions valued under $1,000,000 in NOAA cases.

Following the forfeiture and sharing decisions, and deduction of expenses and the Department of Justice 10 percent share, a check for the proceeds should be cut and sent to NOAA at the following address:

The National Oceanic and Atmospheric
Administration
c/o Office of the General Counsel
8484 Georgia Ave., Suite 400
Silver Spring, MD 20910

The check should also contain the following information:

case name and number _____
account number AD1000 BL2D02

II. *Payment of Costs and Attorneys' Fees From the Assets Forfeiture Fund - Limited Authority*[2]

Background: Generally, the Assets Forfeiture Fund (Fund) is not available to pay judgments arising from asset forfeiture cases, including costs and attorneys fees. The following addresses the narrow legal question of whether the Fund is available to pay judgments of expenses and attorney's fees under 28 U.S.C. § 2412(d).[3] This provision is commonly referred to as the Equal Access to Justice Act (EAJA). The Department of Justice (the Department) has the legal authority pursuant to 28 U.S.C. § 524(c)(1)(A) to permit the use of Fund monies to pay EAJA awards arising from actions related to the forfeiture, attempted forfeiture or seizure for forfeiture of property.

A. *EAJA*

The history of the EAJA indicates it was enacted to encourage private parties to pursue their legitimate claims against the government, and to deter inadvisable or inappropriate official action, including legal action, by the government, with its high cost ramifications for the non-government party. Prior to enactment of the EAJA, it was believed that many small businesses and individuals with legitimate claims or defenses failed to defend themselves against the government due to the high cost involved. Since the permanent judgment appropriation

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[2] Text for section II. is derived from Dir. 93-7, issued by the Department of Justice on December 10, 1993, and effective with respect to judgments entered on or after October 1, 1993.

[3] The relevant portions of 28 U.S.C. § 2412 follow:

> "(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> * * *
>
> (4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise."

Assets Forfeiture Fund

1. Congress wanted a more aggressive use of forfeiture;

2. the Fund was created to defray the costs associated with forfeiture actions that formerly were borne by law enforcement agency budgets; and

3. the occasional EAJA award was a known potential cost of forfeiture actions that would be borne by agency budgets.

Further, Congress crafted the Assets Forfeiture Fund statute to reach very widely with respect to agency costs associated with the forfeiture program. It not only permitted the payment of any expenses necessary to seize, maintain, sell, or dispose of property but also permitted payment of any other necessary expenses *incident* to the seizure, detention, forfeiture, or disposal of the property. 28 U.S.C. § 524(c)(1)(A). Payment of an EAJA award is a predictable expense that is incident to an aggressive forfeiture program. Moreover, an EAJA award may be considered a necessary expense in that it is ordered by a court. Therefore, the Fund is legally available to pay the EAJA awards in forfeiture cases.

C. *Policy*

Notwithstanding the legal availability of the Assets Forfeiture Fund, the Department is limiting by policy the cases in which Fund monies may be used for the EAJA awards. The Congress enacted the EAJA for specific public policy reasons. It would be inappropriate for the Fund to be used in a manner that completely ignored or negated the public policy basis for the EAJA. In an attempt to balance the competing interests involved, the following three tier policy is established:

1. ***Actions Consistent With Existing Law and Policy***

The Assets Forfeiture Fund will fund the EAJA award in any case in which the actions of the federal participants were clearly consistent with current law and Department policy. This includes those cases in which:

a. the Asset Forfeiture and Money Laundering Section (AFMLS), Criminal Division, is involved in planning a specific case or program initiative and the participating agency was executing the planned initiative in good faith;

b. the federal participants were executing their

Chapter 7 - Assets Forfeiture Fund

I. *Transfer of Funds From the Seized Asset Deposit Fund to the Assets Forfeiture Fund*[1]

The United States Attorney's Office securing a forfeiture is responsible for initiating transfers from the Seized Asset Deposit Fund to the Assets Forfeiture Fund and should provide prompt notification to the United States Marshals Service (USMS) of the events which should lead to a transfer from the Seized Asset Deposit Fund.

In the case of either a consent judgment or a default judgment, the USMS will immediately transfer the 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 10 working days. If the United States Attorney's Office indicates that no motions or requests for additional stays have been filed, then the forfeited cash will be transferred to the Assets Forfeiture Fund on the eleventh working day following a summary judgment or a judgment after trial.

[1] Text for section I. is derived from Dir. 90-4, issued by the Department of Justice on July 3, 1990, and effective the same day.

participation in preparation of the request package. The request should be forwarded by the U.S. Attorney's Office to AFMLS by express mail within 5 business days of the court order. The request should include, as appropriate:

1. a copy of the court order indicating that the award is being made under 28 U.S.C. § 2412(d) or that the government's position was not substantially justified;

2. a copy of the seizure warrant and associated affidavit or a copy of the probable cause statement supporting the seizure, if the seizure was cited as a basis for the award;

3. a copy of any pleadings or answers or a description of any litigative position that was cited as a basis for the award;

4. a description of any governmental action not referenced above that was cited as a basis for the award;

5. a description of any extenuating factors affecting the seizing agency and the U.S. Attorney's Office that should be considered;

6. a list of the agencies involved in the case; and

7. a joint proposal for allocation of responsibility for the EAJA award among the involved agencies.

If the U.S. Attorney's Office is proposing to settle an EAJA claim, the materials cited in items (2) through (7) above should be provided to AFMLS *in advance* of agreeing to any settlement. This policy is in addition to any other policies governing settlements.

Proposed court orders drafted by the government should be silent as to the source of funds for paying any award. The identification of appropriate sources of funding to pay court judgments is an Executive Branch function and may vary from case to case depending on the facts of the particular case.

E. *Allocation of Responsibility*

In general, responsibility for an EAJA award in a forfeiture case will be allocated equally among the participants, including the U.S. Attorney's Office. However, this allocation may be modified by AFMLS, depending on the specific findings made by the court and extenuating

of the Treasury was available if the government ever suffered an adverse judgment, there did not appear to be any deterrent to overreaching by Executive Branch agencies. This imbalance in power was largely unavoidable. However, Congress concluded that certain changes could be made to mitigate this imbalance.

In the EAJA, Congress provided that the non-government party could seek reimbursement of costs and legal fees if the government's position was not substantially justified. In addition, Congress decided that if the presiding court determined that the government position was not substantially justified, then requiring the agency that took the official action to pay the costs and legal fees from its own operating funds would serve as an effective deterrent to government overreaching. Thus, 28 U.S.C. § 2412(d)(4) states that the award will be paid "from any funds made available to the agency by appropriation *or otherwise*." (Emphasis added). The Assets Forfeiture Fund allocations represent funds that are "otherwise" available to an agency.

When the EAJA was enacted, the primary source of funds to pay judgments against the United States was the permanent judgment appropriation. Agency appropriations, and other funds available to each agency, were generally not available to pay these costs. As noted above, the EAJA expressly shifted responsibility for these costs from the permanent judgment appropriation to operating funds available to the individual agencies. In other words, payment of the EAJA awards arising from agency program operations was a part of the operating costs with which each agency had to cope. This practice was well established by October 1984.

B. *Assets Forfeiture Fund*

The legislative history of the Comprehensive Crime Control Act of 1984 lists several reasons for the various forfeiture provisions included in the Act. That history cites as a significant problem the financial burden an aggressive pursuit of forfeiture cases places on our law enforcement agencies. Where the sale of property does not realize more than the total expenses incurred in storing, maintaining, and selling the property, the net loss was carried by the law enforcement agency's budget. The solution proposed was the creation of the Assets Forfeiture Fund from which moneys could be appropriated to defray the mounting costs associated with forfeiture actions. While the legislative history does not mention the EAJA awards, it is clear that:

III. *Disposition of ADP Equipment Purchased with Assets Forfeiture Fund Allocations*[6]

ADP equipment purchased with Assets Forfeiture Fund monies 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*

3. No other agency participating in the AFF within a reasonable radius can use the equipment for forfeiture program purposes, *and*

4. AFMLS is provided 30 days written notice of the intent to redirect the equipment out of the asset forfeiture program with a brief explanation of the attendant circumstances.

[6] Text for section III. is derived from Dir. 91-1, issued by the Department of Justice on February 11, 1991, and effective the same day.

responsibilities in consonance with current law and Department policy but the court creates a novel reason or basis for overturning a case that could not be anticipated; and

c. similar "no fault" cases. Once approved, the EAJA awards in these cases will be paid by the Fund against the case related expenses category.

2. ***Consistency With Existing Law and Policy Unclear***

The Assets Forfeiture Fund allocations of the federal participant will be available to fund awards where the agency personnel were acting in good faith but it is not clear that their actions were consistent with existing law and Department policy. Once approved, the funds are to be taken from the case related expenses category. If there are insufficient funds available to cover the award, then the shortfall may be made up by funds available for other categories of expense. A request for reallocation will be approved for this purpose. Total allocations will not be increased to make up for the payment of the award.

3. ***Actions Inconsistent With Existing Law or Policy***

In any case in which the court finds bad faith or an intentional disregard for existing law or Department policy by the federal participants, the Assets Forfeiture Fund will not be available, either directly or indirectly, to fund the EAJA award.

D. *Procedure*

No EAJA award may be charged against the Assets Forfeiture Fund or the federal participant's Fund allocations without the express written approval of AFMLS. Requests for approval to charge an EAJA award against the Fund or against Fund allocations must be submitted to AFMLS in writing.[4] If the government has contested the case and incurred an adverse judgment, a copy of the court order should be provided to all involved agencies immediately to permit their

[4] In non-forfeiture cases, the U.S. Attorney's Office should follow any procedures established by the Executive Office for U.S. Attorneys regarding notification of pending settlements or adverse judgments. The Fund and Fund allocations are *not* available to fund EAJA awards in non-forfeiture cases. Therefore, the Asset Forfeiture and Money Laundering Section should not be notified of actions in non-forfeiture cases.

circumstances described by the participants. Availability of the Assets Forfeiture Fund to certain participants in a case must not be used to relieve other involved agencies of responsibility for a portion of the award.

F. *Execution of Payment*

Upon approval of the request for authority to pay an EAJA award directly from the Assets Forfeiture Fund, AFMLS will notify the appropriate U.S. Marshal's Office that the award may be paid. The U.S. Marshal will charge the award directly against the Assets Forfeiture Fund. If the request is to permit use of Fund allocations to pay an EAJA award, the participants will be notified directly by AFMLS of the action on the request.[5] The EAJA charges will be billed against the case related expenses category under subobject class code 4204. Questions concerning this policy may be referred to AFMLS or to Michael Perez, Director, Asset Forfeiture Management Staff, Justice Management Division, at 202-616-8000.

[5] In the case of awards to be paid by the U.S. Attorneys, the Financial Management Service in the Executive Office for U.S. Attorneys will also be notified and will be responsible for processing the payment.

II. DEFINITIONS

A. Adoptive Seizure refers to the federal adoption and forfeiture of property seized exclusively through the efforts of state or local agencies. Investigative bureaus empowered by statute or regulation may adopt such seized property for forfeiture where the conduct giving rise to the seizure is in violation of federal law. Forfeitures of seized property accepted in this manner have the same effect as if the property had originally been seized by the investigative bureau.

B. Appraised Value means the estimated fair market value at the time of seizure of the same or similar property. For vehicles, this will generally mean the average wholesale value in the N.A.D.A. Appraisal Guides. For personal property, this will generally mean estimated fair market value. For real property, businesses and certain personal property, the value shall be determined by experts qualified to make such determinations.

C. Cash means currency, negotiable instruments or securities.

D. Department component refers to agencies, divisions, offices, sections or units of the Department of Justice.

E. District refers to the federal judicial district.

F. The Fund refers to the Department of Justice Assets Forfeiture Fund as established by 28 U.S.C. § 524(c)(1).

G. Investigative bureau refers to Department of Justice agencies authorized by federal statute to investigate and enforce forfeiture statutes. These agencies are: the Federal Bureau of Investigation, the Drug Enforcement Administration and the Immigration and Naturalization Service. It also refers to other federal agency investigative units whose forfeitures result in deposits into the Fund (e.g., U.S. Postal Inspection Service, Internal Revenue Service, and the Bureau of Alcohol, Tobacco and Firearms).

H. Joint investigation means cases in which one or more foreign, state or local agencies participates in an investigation

III. GENERAL PROVISIONS

A. Whenever reference is made to a specific Department official, such reference shall also be deemed to include any duly authorized person acting for that official by law, regulation or delegation. References to the Executive Office for Asset Forfeiture include any successor organization.

B. Whenever a statute, regulation or official form cited in these Guidelines is replaced by a substantially identical one, the citation shall be deemed to refer to the replacement.

C. The Deputy Attorney General or his designee may issue supplementary and interpretative guidance to address issues that arise under these Guidelines. The Executive Office for Asset Forfeiture, Office of the Deputy Attorney General, shall provide assistance to the Deputy Attorney General in the oversight and management of the Department's forfeiture program.

Chapter 8 - Attorney General's Guidelines on Seized and Forfeited Property

THE ATTORNEY GENERAL'S GUIDELINES ON SEIZED AND FORFEITED PROPERTY[1]

I. STATEMENT OF GOALS AND PURPOSES

The Department of Justice asset forfeiture program has three primary goals: (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 this program; and, as a by-product, (3) to produce revenues to enhance forfeitures and strengthen law enforcement.

To meet these goals it is essential that the program be administered in a fiscally responsible manner which will minimize the costs incurred by the United States while maximizing the impact on criminal enterprises. Moreover, the integrity of the entire forfeiture program depends upon the faithful stewardship of forfeited property and the proceeds thereof.

The Law Enforcement Coordinating Committees shall promote and facilitate the Department of Justice forfeiture program with federal, state and local law enforcement agencies.

These Guidelines are not intended to create or confer any rights, privileges or benefits on prospective or actual claimants, defendants or petitioners. Likewise, they are not intended to have the force of law. See, *United States v. Caceres*, 440 U.S. 741 (1979).

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[1] The following is a reprint of the Attorney General's Guidelines on Seized and Forfeited Property, prepared by the Executive Office for Asset Forfeiture, Office of the Deputy Attorney General, in July 1990.

1. Seizing Investigative Bureau

   The head of the seizing investigative bureau will determine whether to place forfeited property into official use.

2. Other Investigative Bureaus

   If the property is not equitably transferred to a foreign, state or local agency, and the seizing investigative bureau chooses not to place the forfeited property into official use, then another investigative bureau or the U.S. Marshals Service may, by written request to the Director, U.S. Marshals Service, seek the transfer of the property for its use.

3. Other Department Components

   If no investigative bureau chooses to place the property into official use and the property has not been equitably transferred, other Department components may, by written request to the Director, U.S. Marshals Service, seek the transfer of the forfeited property for its official use.

4. Transfer of Forfeited Property to Other Federal Agencies

   All requests by other federal agencies shall be referred to the Director, U.S. Marshals Service. In exceptional circumstances, the U.S. Marshals Service may transfer personal property suitable for official use to a requesting federal agency which did not participate in the acts which led to a seizure or forfeiture.

   In all such cases, the U.S. Marshals Service shall consult with the investigative bureau responsible for the investigation which led to the forfeiture. Careful consideration shall be given to the value of the property requested, its potential benefit to the United States for law enforcement purposes and

with a federal law enforcement agency empowered to forfeit property.

I. Law enforcement means the investigation or prosecution of criminal activity and the execution of court orders arising from such activity.

J. Net proceeds means the forfeited cash or gross receipts from the sale of forfeited property less allowable asset management and case related expenses, third party interests and any award based on the value of the forfeiture.

K. Official use means utilization by a law enforcement agency in the direct performance of law enforcement activities.

L. Property means tangible personal and real property, other than cash, when used in the context of the equitable transfer of property.

M. Seized Asset Deposit Fund refers to the holding account administered by the U.S. Marshals Service for seized cash pending resolution of forfeiture cases.

N. Sharing means the transfer of cash, property or proceeds realized through federal forfeitures pursuant to these Guidelines.

O. State and local agencies refers to state and local law enforcement agencies.

P. Transfer and "sharing" are synonymous under these Guidelines.

each instance detailing the reasons why the forfeited property was placed into official use and that these justifications be retained for three (3) years;

4. Require that a specific supervisory-level official be responsible and accountable for the decision to place each item of forfeited property into official use and for ensuring appropriate official use of such property following its transfer;

5. Require that property placed into official use shall be identified and tracked in an accountable property system; and

6. State that the property may not be transferred or retained if it is primarily for purposes of trade or sale, or home-to-work transportation or other uses not expressly authorized for property acquired through the expenditure of appropriated funds. There must be an intention to place the property into official use for two (2) years.

F. Competing Requests for Property for Official Use by Investigative Bureau and Other Federal, State or Local Agency

When the head of an investigative bureau seeks to place forfeited property into official use and a federal, state or local agency has filed a request for an equitable share of that property, the head of the investigative bureau shall consider the following factors in making a determination regarding the disposition of the property:

1. The relative need of the requesting agency and the investigative bureau for the particular property;

2. The uniqueness of the property and the likelihood of securing similar property through seizures in the near future;

3. The relative percentage of the requesting agency's participation in the cases in addition to the other factors pertinent to the determination of equitable

IV. FEDERAL RETENTION AND USE OF FORFEITED PROPERTY

A. General Authorization

The Attorney General has the authority to retain any civilly or criminally forfeited property for official use by any federal agency. No seized property shall be placed into official use until a final determination of forfeiture has been made and the request to place the property into official use has been approved by the appropriate official.

B. Real Property

The Attorney General does not delegate his authority to place real property into official use. 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.

C. Cash

No forfeited cash, nor any proceeds from the sale of forfeited property, may be transferred to or retained by any federal agency except as provided for in Chapter X or by statute.

D. Personal Property

The Attorney General delegates his authority to place personal property into official use in the order of priority set forth below. Written notice to the Director, Executive Office for Asset Forfeiture is required at the time property valued at $50,000 or greater is placed into official use. The Director, Executive Office for Asset Forfeiture, shall determine which agency may place property into official use if more than one Department component seeks to retain the same forfeited property for official use. All property should be promptly turned over to the local U.S. Marshal after seizure, including property intended to be placed into official use, unless it is intended that such property will be used in an undercover capacity.

V. EQUITABLE TRANSFER OF FORFEITED PROPERTY TO PARTICIPATING STATE AND LOCAL AGENCIES

Pursuant to 21 U.S.C. § 881(e)(1) and 19 U.S.C. § 1616a, as made applicable by 21 U.S.C. § 881(d) and other statutes, the Attorney General has the authority to equitably transfer forfeited property and cash to state and local agencies that directly participate in the law enforcement effort leading to the seizure and forfeiture of the property. Requests for equitable transfers shall be filed in the form prescribed by the Director, Executive Office for Asset Forfeiture.

A. Equitable Transfers Generally

1. All equitable shares shall be based on the net proceeds of the forfeiture.

2. State and local investigative and prosecutive agencies may share in forfeited cash and property and the proceeds from the sale of forfeited property.

3. All property transferred to state and local agencies and any income generated by this property shall be used for the law enforcement purposes specified in the request.

4. A state or local agency may file a request for an equitable share of cash or property where it can demonstrate that it participated directly in the law enforcement effort that resulted in the forfeiture.

5. No request shall be considered if it is submitted after sixty (60) days following the seizure.

6. Cash and property shall be equitably shared with a state or local agency only where it will increase and not supplant law enforcement resources of the specific state or local agency that participated in the forfeiture.

its impact on the Fund.

A decision to grant a request for personal property with an aggregate value of less than $25,000 shall be approved in writing by the Director, U.S. Marshals Service. The recipient agency shall pay expenses incurred by the Department of Justice in connection with the forfeiture and transfer of such property. A report on all such transfers shall be prepared by the U.S. Marshals Service on a quarterly basis and submitted to the Executive Off ice for Asset Forfeiture.

A decision to grant a request for any property valued at $25,000 or more shall be approved in writing by the Director, Executive Office for Asset Forfeiture. The recipient agency shall pay expenses incurred by the Department of Justice in connection with the forfeiture and transfer of such property.

E. Investigative Bureau and Department Component Official Use Policies

Each investigative bureau and department component shall promulgate internal guidelines consistent with these Guidelines governing the placement of property into official use. Such guidelines and any subsequent supplements or revisions shall be filed with the Executive Office for Asset Forfeiture ten (10) days in advance of issuance.

All official use guidelines shall:

1. Prohibit the placement into official use of any seized property prior to the entry of a final determination of forfeiture and the appropriate approval of the request to place the property into official use;

2. Require that all seized property be recorded and tracked in an official inventory of seized property without regard to its intended disposition;

3. Require that a written justification be prepared in

5. Whether the state or local agency initially identified the asset(s) for seizure;

6. Whether the state or local agency seized other assets during the course of the same investigation and whether such seizures were made pursuant to state or local law; and,

7. Whether the state or local agency could have achieved forfeiture under state law, with favorable consideration given to an agency which could have forfeited the asset(s) on its own but joined forces with the United States to make a more effective investigation.

C. Sharing Percentages

1. In cases involving adoptive seizures that are forfeited administratively or in uncontested judicial proceedings, the determining official shall allocate to the United States fifteen (15) percent of the total net proceeds realized through the disposition of forfeited property.

   In cases involving adoptive seizures that are forfeited in contested judicial proceedings, the determining official shall allocate to the United States twenty (20) percent of the total net proceeds realized through the disposition of the forfeited property. These amounts represent the federal equitable share based upon its effort in forfeiting the property.

   These sharing percentages shall be applicable to property seized on or after September 1, 1990.

2. In non-adoptive cases the determining official shall allocate to the United States at least the applicable percentages set forth in paragraph 1.

3. The United States' equitable share will normally be satisfied by the allocation of one or more of the items forfeited (or a portion of the proceeds thereof) to the United States.

transfer;

4. The likelihood that the requesting agency will be eligible for an equitable share of property from additional seizures arising from the same investigation or from seizures in other cases in the near future;

5. The impact that a decision to place the property into official use might have on federal, state and local relations in the district; and

6. The number and value of past equitable transfers to the federal, state or local agency.

G. Payment of Liens on Personal Property Placed Into Federal Official Use

Liens on personal property placed into official use by investigative bureaus and the U.S. Marshals Service may be paid from the Fund provided that:

1. There is an intent to place the property into official use for at least two (2) years;

2. The total amount to be paid from the Fund amounts to less than one-third the appraised value of the property; and,

3. The total amount to be paid from the Fund is less than $25,000.

Requests for exceptions may be submitted in writing to the Director, Executive Office for Asset Forfeiture.

The United States Attorney shall determine the appropriate equitable distribution of asset(s) forfeited in a single judicial proceeding in his or her district where the appraised value of the asset(s) is less than $1,000,000.

3. Administrative and Judicial Forfeitures Valued at $1,000,000 or Greater and Multi-District Cases

   In the case of a single administrative or judicial proceeding where the appraised value of the asset(s) forfeited is $1,000,000 or more and in multi-district cases, the United States Attorney(s) shall, after consultation with the investigative bureau(s), forward his (their) evaluation(s) and recommendation(s) to the Deputy Attorney General or his designee for determination.

4. Real Property Forfeitures

   The Deputy Attorney General or his designee shall approve any equitable transfer of real property. Where appropriate, any such transfer shall include a provision for reversion of title to the United States if the property is not used for the agreed upon purposes.

7. The deciding official shall ensure that the share approved 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.

B. Factors Governing the Amount of the Equitable Transfer

The amount of equitable transfer of proceeds from the sale of forfeited property shall be based upon the net proceeds realized from the sale of the property or liquidation of negotiable instruments. Equitable sharing amounts shall be calculated after the determination of any award based upon the value of the forfeiture. Asset management expenses may be calculated on a pro rata basis where expenses cannot reasonably be determined for a specific asset.

In determining the amount of the equitable transfer for each participating agency, the following factors shall be considered:

1. Whether the seizure was adopted or was the result of a joint investigation;

2. The degree of direct participation in the law enforcement effort by the state or local agency resulting in the forfeiture, taking into account the total value of all property forfeited and total law enforcement effort, including any related criminal prosecution with respect to the violation of law on which the forfeiture is based (21 U.S.C. § 881 (e)(3));

3. Whether the state or local agency originated the information that led to the seizure and whether the agency obtained such information fortuitously or by use of its investigative resources;

4. Whether the state or local agency provided unique or indispensable assistance;

Based upon these and other relevant factors, the U.S. Marshals Service shall promptly and appropriately dispose of the property.

In cases where only one asset or item is forfeited and a state or local agency requests that asset in lieu of proceeds from the disposition of the property, the determining official shall ensure that the United States receives its costs and equitable share to reflect total federal participation in the forfeiture effort. If the requesting agency is unable to pay the costs and federal share in such a one-asset forfeiture case, the property shall be sold by the U.S. Marshals Service and the proceeds distributed in accordance with these Guidelines.

Exceptions to this requirement may be granted by the deciding official upon assurances that (1) the requesting state or local agency lacks funds or authority to satisfy the United States' equitable share and costs; and (2) the forfeited item will fill a demonstrable need of the requesting agency. Such exceptions shall be liberally granted where the two abode showings are made.

4. Nothing in this section shall alter the ability of the U.S. Marshals Service to pay appropriate expenses from the Fund or to recover costs directly from participating agencies.

D. Decision-Making Authority

Sharing decisions should be made during the period when forfeiture proceedings are being conducted. Decision-making authority shall be as follows:

1. Administrative Forfeitures Valued at Less than $1, 000,000

   The head of the seizing investigative bureau shall determine the appropriate equitable transfer of assets forfeited in a single administrative proceeding where the appraised value of the asset(s) is less than $1,000,000.

2. Judicial Forfeitures Valued Less Than $1,000,000

Asset management expenses include payments for contract services and the employment of outside contractors to operate and manage properties or provide other specialized services as necessary to dispose of such properties. If the asset is an on-going business, the normal and customary expenses of operating the business are asset management expenses only to the extent they are not covered by the income of the business.

2. Case related expenses. Case related expenses are those expenses that are incurred in connection with normal proceedings undertaken to perfect the United States' interest in seized property through forfeiture. This includes fees and other costs of advertising, translation, court and deposition reporting, expert witness, courtroom exhibit services, employment of attorneys or other specialists in state real estate law by the U.S. Marshals Service, travel and subsistence related to a specific proceeding, and other related items as approved by the Director, Executive Office for Asset Forfeiture.

   The Director, Executive Office for Asset Forfeiture, may approve the expenses incurred in connection with retention of foreign counsel to gain access to information needed to conduct pre-seizure planning on identified assets, to effect a seizure of assets or to perfect title of forfeited property in a foreign country.

3. Payment of qualified third party interests. Qualified third party interests are those expenses incurred in the payment of valid liens, secured mortgages and debts owed to qualified general creditors pursuant to court order or a favorable ruling on a petition for remission or mitigation of the forfeiture. This includes the restoration of the proceeds of sale pursuant to a court order or an administrative determination. Nothing in this section shall preclude a departmental component from seeking reimbursement from the state or local agency that received the property that is the basis

VI. SALE OF SEIZED AND FORFEITED PROPERTY

A. Pre-Forfeiture Sale of Seized Property

1. Pre-forfeiture sale of property (i.e., interlocutory or stipulated sale) is favored as a means of preserving asset value and mitigating asset management expenses.

2. The United States Attorney shall consult with the investigative bureau and the U.S. Marshals Service to determine the status of any requests for equitable transfer or petitions for remission or mitigation prior to seeking a pre-forfeiture sale of property pending judicial forfeiture.

3. Proceeds from any pre-forfeiture sale shall be promptly deposited into the Seized Asset Deposit Fund unless otherwise ordered by the Court.

B. Sale of Forfeited Property

1. Upon the successful completion of the forfeiture action and if the property is not placed into official use or transferred to a federal, state, or local agency, it shall be promptly sold and the proceeds of sale promptly deposited in the Fund.

2. Investigative bureaus and the United States Attorneys' offices shall promptly notify the U.S. Marshals Service of all relevant facts affecting the forfeited property. Relevant facts include, but are not limited to:

   a. Outstanding bills, invoices, orders of mitigation and remission of forfeiture;

   b. Orders of transfers to federal, state and local agencies;

   c. Orders of designation for official use by Department components if known; and,

   d. Appraisals.

Copies of such internal guidelines shall be filed with the Director, Executive Office for Asset Forfeiture.

(4) The design of all systems to be developed in whole or in part with Fund monies shall be submitted to the Director, Executive Office for Asset Forfeiture, for approval. The design of such software shall be consistent with and advance the overall objective of the Department to implement and maintain an integrated asset seizure and forfeiture information system.

b. Contracting for services directly related to the processing, data entry and accounting for forfeiture cases.

c. Printing and graphic services reasonably necessary to effectuate program goals.

d. Training

(1) The Executive Office for Asset Forfeiture shall have responsibility for oversight of forfeiture training and will assist Department components in coordinating asset seizure and forfeiture training conferences. Goals of the Department's training program shall be to provide consistent treatment of identical topics, to take advantage of opportunities for joint training, and to foster cooperation and appreciation of the needs of all components.

(2) Any agency that anticipates requesting reimbursement for training personnel shall submit a justification indicating numbers of persons to be trained, the purpose and scope of training, the location and approximate cost of such training, an outline of topics in need of

VII. THE DEPARTMENT OF JUSTICE ASSETS FORFEITURE FUND

A. Administration of the Fund

1. The Attorney General delegates the administration of the Fund to the Director, U.S. Marshals Service under the supervision of the Deputy Attorney General.

2. The U.S. Marshals Service shall prepare annual reports on the Fund in accordance with 28 U.S.C. § 524(c) (6).

3. Pursuant to these Guidelines, federal agencies reimbursed by or contributing to the Fund, shall provide information necessary to prepare these reports as requested by the U.S. Marshals Service.

4. The U.S. Marshals Service shall submit a monthly financial statement reflecting the current status of the Fund to the Director, Executive Office for Asset Forfeiture.

5. The U.S. Marshals Service shall prepare annual budget estimates for the Fund based on information submitted by the requesting agencies.

B. Payments and Reimbursements

Payments and reimbursements are permitted in six (6) general categories. In any fiscal year, reimbursement for program management expenses and investigative expenses expressly identified in 28 U.S.C. § 524(c)(1) shall not exceed the amount specified in the annual appropriation limitation on the Fund. The categories listed in order of priority are as follows:

1. Asset management expenses. Asset management expenses are those expenses that are incurred in connection with the seizure, inventory, appraisal, packaging, movement, storage, maintenance, security and disposition (including destruction) of the asset(s).

Exceptions may be granted on a case-by-case basis by the Director, Executive Office for Asset Forfeiture.

e. Other types of general program management and operational costs as approved by the Director, Executive Office for Asset Forfeiture.

6. Investigative expenses. Investigative expenses are those expenses normally incurred in the identification, location and seizure of property subject to forfeiture. Investigative expenses statutorily eligible to be paid from the Fund include such items as:

a. Awards for information concerning violations of the criminal drug laws;

b. Awards for information leading to the forfeiture of property under the Comprehensive Drug Abuse Prevention and Control Act of 1970 or the Racketeer Influenced and Corrupt Organizations (RICO) statute;

c. Awards for information concerning the killing or kidnapping of a Federal drug law enforcement agent;

d. Purchase of evidence of any violation of the Controlled Substances Act, the Controlled Substances Import and Export Act, RICO or 18 U.S.C. §§ 1956 and 1957;

e. Contracting for services directly related to the identification of potentially forfeitable assets;

f. Equipping of conveyances for drug law enforcement functions; and,

g. The storage, protection and destruction of controlled substances.

of the claim.

4. Equitable sharing payments. Equitable sharing payments are those payments which represent amounts paid directly to foreign governments or agencies and state or local agencies. Pursuant to 21 U.S.C. § 881 (e)(3)(a), these amounts shall reflect the degree of 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.

5. Program management expenses. Program management expenses are those expenses incurred in conducting program responsibilities that are not related to any specific asset or to any one specific seizure or forfeiture. Expenses included under this heading are:

   a. Automatic Data Processing

      (1) Expenses for the purchase or lease of automatic data processing equipment which is utilized the majority of the time for asset forfeiture program related work;

      (2) Expenses for the development of computer software that will enhance the capability of the Department of Justice to identify, track, manage, process and dispose of forfeitable property may be approved by the Director, Executive Office for Asset Forfeiture.

      (3) Each investigative bureau and Department component receiving monies from the Fund for automatic data processing purposes shall develop internal guidelines consistent with these Guidelines governing the use of and accountability for automatic data processing resources acquired with monies from the Fund.

c. Purchase of real property or any interest therein except to acquire full title to or to satisfy liens or mortgages on forfeited property;

d. Payments to equip property transferred to federal agencies (other than investigative bureaus or the U.S. Marshals Service) or state or local agencies;

e. Expenses in connection with the seizure, detention and disposition of property where the seizure was effected for debt collection or other non-forfeiture purposes; and

f. Reception and representation expenses (e.g., refreshments, meals, gifts or entertainment).

2. Claims of unsecured creditors generally may not be paid from the Fund, particularly if such payment may jeopardize the legitimate claims of existing lienholders.

Pursuant to 28 C.F.R. § 9.6(b), claims of unsecured creditors for debts incurred within one hundred and twenty (120) days before seizure may be paid by the U.S. Marshals Service in order to preserve the continued operation of a seized business. Such payable expenses include the following:

a. Payment of reasonable salaries and benefits of employees not believed to have been involved in the unlawful activities giving rise to forfeiture and not having an ownership interest in the business entity;

b. Payments to third party contractors for goods or services essential to carry on the business and who continue to provide those goods or services as in the regular course of business; and,

c. Utilities.

coverage, and the priority of training needs, as requested by the Director, Executive Office for Asset Forfeiture.

(3) A consolidated training calendar shall be maintained by the Executive Office for Asset Forfeiture for asset seizure and forfeiture training for Department components.

(4) The Assets Forfeiture Fund may be used to finance necessary training expenses directly related to the asset forfeiture program. Generally, this will include:

(a) any required training for employees or contractors dedicated to the asset forfeiture program (e.g., trial advocacy for asset forfeiture attorneys, training on agency computers for contract employees);

(b) any exclusively asset forfeiture training program that is conducted for other personnel, for whom asset forfeiture is an ancillary duty, to enable them to be more effective in performing asset forfeiture program functions; and

(c) that portion of a broader law enforcement training program that is directly related to the identification, tracking, evaluation, seizing, processing, accounting for, management or disposition of property subject to forfeiture (e.g., 25 percent of the expenses of a money laundering conference or a drug investigation conference if 25 percent of the conference program deals directly with the asset forfeiture program).

requesting agency of the reason.

g. If the U.S. Marshals Service and the requesting agency cannot agree on deferral or cancellation of the request, the parties shall seek in writing a determination from the Deputy Attorney General or his designee. The U.S. Marshals Service shall provide notice of the decision to the agency submitting the SF-1081.

E. Preparation of Estimates of Anticipated Expenses and Reimbursement Agreements

1. By June prior to the fiscal year in which the expenses are anticipated and as necessary during the fiscal year, any agency that anticipates requesting reimbursement for expenses from the Fund shall submit requests to the Director, Executive Office for Asset Forfeiture, based upon estimates of anticipated expenditures. Prior to submission to the Director, Executive Office for Asset Forfeiture, these requests shall be reviewed and approved in accordance with the agency's internal procedures for budget submissions.

2. Requests for anticipated reimbursements with accompanying justification shall be submitted in the format required by the Director, Executive Office for Asset Forfeiture. Information regarding appropriated resource levels shall be provided as part of the justification.

   These requests shall include information regarding the effect that any reprogramming of appropriated resources had on the need for additional resources from the Fund.

3. In evaluating the requests and approving allocations, the Deputy Attorney General or his designee shall ensure that:

   a. Overall amounts recommended for authorization in a budget for any fiscal year do not exceed

C. Liens and Mortgages

1. Liens or mortgages on real property placed into federal official use or transferred to state or local agencies are not payable from the Fund unless expressly approved by the Director, Executive Office for Asset Forfeiture.

2. Liens and mortgages shall be satisfied after the sale of forfeited property pursuant to a determination to remit or mitigate the forfeiture or an order of the court, except under the following conditions where payments may be made from the Fund:

   a. Where the payment prior to sale will improve the United States' ability to convey title to the property;

   b. Where the United States has substantial equity in forfeited real property and payment prior to sale will not result in a net loss to the United States; or

   c. Where the property is approved for placement into official use by an investigative bureau or the U.S. Marshals Service and all necessary approvals have been obtained.

D. Limitations on Use of the Fund

1. Items not payable from the Fund include:

   a. Personnel expenses (e.g., salaries, overtime and benefits) for employees of the United States;

   b. Expenses in connection with the seizure, detention and forfeiture of property where the seizure was effected by a U.S. Postal Inspection Service or a U.S. Customs Service officer and the proceeds of forfeiture, if any, are to be deposited into the Postal Fund or the Customs Forfeiture Fund, respectively;

available for specific purposes shall take into account any completed reprogrammings.

F. Payment of Awards

Monies from the Fund may be used to pay awards for specific information or instances of assistance. These monies are not to be used to pay retainers or to pay cooperating informants in the expectation of future specific information or assistance.

1. Applications for awards will be accepted on behalf of any individual. (The term "individual" encompasses corporations and associations.)

2. Applications for awards shall be submitted in a format developed and approved by the Director, Executive Office for Asset Forfeiture.

3. Awards pursuant to 28 U.S.C. § 524 (c)(1)(C) shall be paid only after disposition of the forfeited property.

4. Awards will not be paid to individuals who are representatives of state or local agencies. Any information or assistance provided by an individual who represents a state or local agency will be compensated under rules governing transfers of forfeited property.

5. Any awards pursuant to 28 U.S.C. § 524(c)(1)(B) shall not exceed $250,000. Any award pursuant to 28 U.S.C. § 524 (c)(1)(B) or (C) shall preclude the recipient of such award from any additional award based on a forfeiture resulting in any way from the same information or assistance.

   Any award pursuant to 28 U.S.C. § 524 (c)(1)(C) shall not exceed the lesser of $250,000 or one-fourth the amount realized by the United States from the property forfeited.

   a. If forfeited property is sold, then the "amount realized by the United States from the property forfeited" is the net proceeds.

3. Payment of Expenses

a. Asset management expenses incurred by the U.S. Marshals Service, qualified third party interests and equitable sharing payments as set forth above will be obligated against and paid directly from the Fund in accordance with standard Departmental financial management and accounting policies and procedures.

b. Pursuant to a properly executed Reimbursement Agreement Between Agencies (DOJ-216), all other obligations incurred under these Guidelines will be paid by the agency incurring the obligation and will be reimbursed from the Fund on a monthly basis where practicable by means of an Inter-Agency Fund Transfer (SF-1081).

c. It is the responsibility of the agency incurring the obligation to prepare the DOJ-216 and SF-1081 forms and obtain the proper authorization from the Director, U.S. Marshals Service. Each DOJ-216 and SF-1081 shall identify the appropriation to be reimbursed from the Fund.

d. Approved DOJ-216's and SF-1081's will be registered upon receipt by the U.S. Marshals Service. Properly authorized requests (SF 1081's) will be processed for payment in order of receipt. If sufficient funds are available, the U.S. Marshals Service shall approve the transfer of funds to the appropriation identified.

e. All transfers from the Fund shall be based upon certification of actual expenditures by the requesting agency. Transfers shall not be made based upon estimated obligations.

f. If a payment requested is in excess of funds available, the U.S. Marshals Service shall not process the request and shall advise the

c. Include the recommendation of the amount of the award, the seriousness and scope of the criminal activity involved, the degree to which the information or assistance aided the investigation, and whether the information or assistance provided was unique or indispensable.

10. Recommendations for payment of awards pursuant to 28 U.S.C. § 524(c)(1)(C) shall:

a. Identify the property or properties regarding which information or assistance was provided, including agency and/or federal district court case numbers;

b. Identify which of those properties were forfeited and when;

c. Identify the recommended dollar amount of the award, the degree to which the information or assistance aided in the forfeiture and whether the information or assistance provided was unique or indispensable; and

d. Identify costs incurred under Section VII.B 1-3 with respect to the property forfeited. A report on those costs shall be obtained from the U.S. Marshals Service.

11. Approval of awards will be in accordance with 28 U.S.C. § 524(c) (2) and any subsequent delegations of authority.

G. Purchase of Evidence

1. Pursuant to 28 U.S.C. § 524(c)(1)(G) the Attorney General is authorized to utilize monies from the Fund for purchase of evidence of any violation of the Controlled Substances Act, the controlled Substances Import and Export Act, 18 U.S.C. Ch. 96 or 18 U.S.C. §§ 1956 and 1957.

2. Approval of amounts for the purchase of evidence

appropriation limitations for that year; and

b. Overall amounts recommended for authorization in a budget for any fiscal year do not exceed an agreed upon estimate of amounts available for obligation, to include current year income plus any carry-over from the prior year.

4. To the extent possible, the Deputy Attorney General or his designee shall approve a budget of expenses prior to the beginning of the fiscal year. This budget will form the basis for the establishment of reimbursement agreements between the U.S. Marshals Service as the administrator of the Fund and the participating agencies.

5. An agency may change the distribution of its allocation among particular categories of reimbursable expenses during a fiscal year without approval of the Deputy Attorney General or his designee, subject to the following conditions:

   a. A redistribution cannot increase the total amount allocated for expenses subject to appropriation (i.e., program management and investigative expenses).

   b. A proposal for any redistribution shall be submitted with supporting justification to the Director, Executive Office for Asset Forfeiture, thirty (30) days in advance of the proposed effective date of the proposal. A copy of the proposed redistribution shall also be provided to the U.S. Marshals Service.

   The Director, Executive Office for Asset Forfeiture, may deny such proposed redistribution with notice to the agency and U.S. Marshals Service.

6. Forfeiture funds allocated for specific purposes shall supplement and not supplant appropriated funds provided explicitly or implicitly for those purposes. The calculation of appropriated funds

equipping Government-owned or leased conveyances for-drug law enforcement purposes. Purchased equipment must be affixed to the conveyance and used integrally with the conveyance.

5. Each agency shall establish internal guidelines which shall ensure the effective utilization of monies from the Fund budgeted for equipping forfeited, leased or owned conveyances for drug law enforcement purposes. These guidelines should consider the estimated useful life of the conveyance and the availability of similarly equipped conveyances. Such guidelines, and any subsequent revisions, are to be filed with the Executive Office for Asset Forfeiture. Agencies shall maintain records, by conveyance, of amounts from the Fund spent on equipping.

I. Cash Management

Seized cash, except where it is to be used as evidence, is to be deposited promptly in the Seized Asset Deposit Fund pending forfeiture. The Director, Executive Office for Asset Forfeiture, may grant exceptions to this policy in extraordinary circumstances. Transfer of cash to the United States Marshal should occur within sixty (60) days of seizure or ten (10) days of indictment.

b. If forfeited property is retained for official use, the "amount realized by the United States from the property forfeited" is the value of the property at the time of seizure minus expenses paid from the Fund under Section VII.B (1, 2 and 3).

6. All applications for awards shall be directed to the field office of the investigative bureau responsible for processing the forfeiture. Non-Department of Justice agencies (e.g., Organized Crime Drug Enforcement Task Force members such as Internal Revenue Service) should be instructed to direct any inquiries concerning these awards to the investigative bureau responsible for processing the forfeiture.

7. The investigative bureau field unit receiving or initiating an application for an award will prepare a written report that will evaluate the value of the information or assistance provided by the applicant and recommend an amount to be paid.

8. If more than one application for an award pursuant to 28 U.S.C. § 524(c)(1)(C) is received in a single action for forfeiture, the applications should be handled in a consolidated manner. Decisions on all applications should be made at the same time, and should consider the comparative value of information or assistance provided by each applicant and the aggregate amount of award(s) to be made. In these cases, the limits discussed in paragraph VII. F (3 and 4) apply to the aggregate amount of the awards to be made.

9. Recommendations for payment of awards pursuant to 28 U.S.C. § 524(c)(1)(B) shall:

a. Identify the investigation, including agency and/or federal district court case numbers;

b. Identify the recommended dollar amount of the award; and,

IX. DISCONTINUANCE OF FEDERAL FORFEITURE PROCEEDINGS

A. Federal Judicial Forfeiture Proceedings

1. A decision to discontinue a federal judicial forfeiture proceeding against any seized asset in favor of a state or local forfeiture proceeding requires the personal approval of the United States Attorney after review of the evaluation and recommendation of the presenting investigative bureau.

2. In making this decision, the United States Attorney shall consider the impact of such decision on the financial status of the Fund.

3. Decisions to discontinue judicial forfeitures in favor of state or local proceedings are to be documented.

B. Federal Administrative Forfeiture Proceedings

1. A decision to discontinue a federal administrative forfeiture proceeding against any seized asset in favor of a state or local forfeiture proceeding requires the approval of the head of the investigative bureau.

2. In making this decision, the head of the investigative bureau must consider the impact of such decision on the financial status of the Fund and where appropriate consult with the U.S. Marshals Service in that regard.

3. Investigative bureaus shall develop guidelines for recording these decisions and providing reports to the Director, Executive Office for Asset Forfeiture, as requested.

will be in accordance with 28 U.S.C. § 524 (1)(G) and any subsequent delegations of authority.

3. Each investigative agency shall develop internal guidelines covering the use of monies from the Fund for the purchase of evidence. Such guidelines shall be filed with the Executive Off ice for Asset Forfeiture.

4. If a participating agency recovers part or all of the monies that are used to purchase evidence for which it has obtained reimbursement from the Fund, the recovered monies shall be returned to the Fund.

H. Payments to Equip Conveyances for Drug Law Enforcement Functions

1. Decisions to equip a government-owned or leased conveyance (vehicle, vessel, or aircraft) for drug law enforcement functions shall be made by the organizational component within the agency which is responsible for management of the conveyance.

2. Reimbursable payments may be bade to equip conveyances which are used the majority of the time for activity relating to the investigation or apprehension of violators of the federal drug laws and the seizure and forfeiture of their assets

   Monies from the Fund may not be used for recurring expenses such as fuel, spare or replacement parts, maintenance, or replacement of equipment due to wear and tear by the agency using the conveyance.

3. Equipping should generally occur before the conveyance is placed into official use and only if it is intended to be in service for at least two (2) years.

   Exceptions may be made to this guidance only under extraordinary circumstances and shall be documented.

4. Unreasonable amounts shall not be spent on

VIII. TRANSFER OF FORFEITED PROPERTY TO FOREIGN COUNTRIES

A. The Attorney General may transfer any forfeited personal property or the proceeds from the sale of any forfeited personal or real property, as authorized by statute, to a foreign country which participated directly or indirectly in any acts which led to the seizure or forfeiture of the property, if such transfer:

1. Has been agreed to by the Secretary of State;

2. Is authorized in an international agreement between the United States and the foreign country; and,

3. Is made to a country which, where applicable, has been certified under § 481(h) of the Foreign Assistance Act of 1961.

B. Requests by a foreign agency shall be in the form prescribed by the Director, Executive Office for Asset Forfeiture.

X. U.S. CUSTOMS SERVICE FORFEITURES

A. Pursuant to 28 U.S.C. § 524 (c), all proceeds from the forfeiture of property under any law enforced or administered by the Department are to be deposited in the Department of Justice Assets Forfeiture Fund, except as specified in 28 U.S.C. § 524 (c) (4) and except to the extent that the seizure was effected by a U.S. Customs Service officer or to the extent that custody was maintained by the Customs Service, in which case the provisions of 19 U.S.C. § 1613b (Customs Forfeiture Fund) shall apply.

B. To the extent that the U.S. Marshals Service may have the authority and the capacity and pursuant to a Memorandum of Understanding between the Department of Treasury and the Department of Justice, the Marshals Service may store and maintain seized property for the U.S. Customs Service. The reimbursement for expenses incurred by either the U.S. Marshals Service or the U.S. Customs Service attendant to custody of seized property shall be in accordance with this agreement.

C. Pursuant to 19 U.S.C. § 1616a, requests for transfers of forfeited property by federal agencies or by participating foreign, state and local agencies in forfeitures where the seizure was effected by a U.S. Customs Service officer or custody was maintained by the Customs Service shall be directed to the Customs Service for processing and disposition pursuant to guidelines of the Department of Treasury. An information copy shall be sent to the United States Attorney in the district of seizure.

D. In the event of an unresolved dispute concerning whether a forfeiture constitutes a U.S. Customs Service or Department of Justice forfeiture for purposes of cash or proceeds disposition or for federal, state and local transfers, the Deputy Attorney General or his designee and the Assistant Secretary for Enforcement, Department of the Treasury, shall resolve the issue.

July 31, 1990 /s/

DATE DICK THORNBURGH
ATTORNEY GENERAL

C. ***Assets Located in Foreign Countries***

1. Approval/Consultation Procedure

The Assistant U.S. Attorney shall consult with the Office of International Affairs (OIA) before filing a civil action based on 28 U.S.C. § 1355(b)(2). OIA and AFMLS will determine whether the foreign country where the assets are located can assist in the U.S. action.

2. Source: *USAM* 9-13.526

D. ***Attorney Fees***

1. Approval/Consultation Procedure

No criminal or civil forfeiture proceedings may be instituted to forfeit an asset transferred to an attorney as fees for legal services without the prior approval of the Assistant Attorney General, Criminal Division. Requests for approval to forfeit attorneys' fees should be made to AFMLS.

No formal or informal, written or oral agreements, including the exemption of certain assets to pay attorneys' fees restrained as substitute assets, may be made to exempt an asset transferred to an attorney as fees for legal services from forfeiture without the prior approval of the Assistant Attorney General, Criminal Division. All such requests for approval to exempt the attorneys' fees should be made to AFMLS.

2. Sources: Attorney Fee Guidelines, *United States Attorneys's Manual*, 9-111.000 *et seq*; *Asset Forfeiture Manual, Volume III, Policy Compendium* - tab 15

E. ***Attorneys' Fees and Costs, Payment from the Assets Forfeiture Fund***

1. Approval/Consultation Procedure

Payment of costs and attorneys' fees from the Assets Forfeiture Fund to pay Equal Access to Justice (EAJA) awards arising from actions related to the forfeiture of property. Requests for approval to charge an EAJA award against the Fund or against Fund allocations must be submitted to AFMLS.

2. Sources: *Asset Forfeiture Policy Manual*, Chapter 6
Asset Forfeiture Manual, Volume III, Policy Compendium - tabs 11, 24

H. ***Exceptions to Cash Management Policy***

1. Approval/Consultation Procedure

The Department of Justice Cash Management Policy requires that all seized cash be deposited promptly into the Seized Asset Deposit Fund. Cash may be detained only when its retention serves an essential evidentiary purpose. The United States Attorney may approve this retention for amounts less than $5,000.

2. Sources: *Asset Forfeiture Policy Manual*, Chapter 7; *Asset Forfeiture Manual, Volume III, Policy Compendium* - tab 33

I. ***Expedited Payment of Lienholders in Forfeiture Cases***

1. Approval/Consultation Procedure

AFMLS must approve in writing any agreement to pay liens and mortgages to a lienholder prior to forfeiture under the Expedited Forfeiture Settlement Policy for Mortgage Holders.

2. Sources: *Asset Forfeiture Policy Manual*, Chapter 3; *Asset Forfeiture Manual, Volume III, Policy Compendium* - tab 44

J. ***Expedited Settlement***

1. Approval/Consultation Procedure

The U.S. Attorney shall within 10 working days report the denial of a request for expedited settlement made by a financial institution (as defined in 31 U.S.C. § 5312) in real property cases to AFMLS.

2. Sources: *Expedited Forfeiture Settlement and Policy for Mortgagees and Lienholders*, revised October 1993.

Chapter 9 - Miscellaneous

I. Approval/Consultation Requirements

A. Administrative Forfeiture: 60-Day Notice

1. Approval/Consultation Procedure

   In all administrative forfeitures, the notice under 19 U.S.C. § 1607 to possessors, owners, and other interested parties, including lienholders, known at the time of seizure, shall occur no later than 60 days from the date of seizure. For parties whose identity is determined after seizure, the written notice shall occur within 60 days after such determination. Waivers of this 60-day rule may be obtained in writing in exceptional circumstances from a designated official within the seizing agency.

2. Sources: *Asset Forfeiture Policy Manual*, Chapter 2; *Asset Forfeiture Manual, Volume III, Policy Compendium* - tab 45

B. Adoption Policy and Procedure

1. Approval/Consultation Procedure

   If a federal agency declines to adopt a seizure despite the recommendation of the U. S. Attorney, the agency must promptly document its reasons for declination in a memorandum and forward copies of the memorandum to the U. S. Attorney and AFMLS. AFMLS will resolve any disagreements and may authorize direct adoption of state or local seizures by U.S. Attorneys for judicial forfeiture in appropriate circumstances.

2. Sources: *Asset Forfeiture Policy Manual*, Chapter 6; *Asset Forfeiture Manual, Volume III, Policy Compendium* - tab 42

2. Sources: *The Attorney General's Guidelines on Seized and Forfeited Property*; *Asset Forfeiture Policy Manual*, Chapter 8; *Asset Forfeiture Manual, Volume III, Policy Compendium* - tab 10

O. ***Official Use of Real Property***

1. Approval/Consultation Procedure

The Attorney General must approve the placement of real property into official use by any federal agency.

2. Sources: Same as for Official Use of Personal Property

P. ***Seizure/Restraint of Ongoing Business***

1. Approval/Consultation Procedure

Assistant U.S. Attorneys shall consult with AFMLS before making an *ex parte* application for a temporary restraining order or seizure of an ongoing business.
Note: The Money Laundering guidelines require that Assistant U.S. Attorneys consult with AFMLS before seeking forfeiture of an ongoing business on a money laundering facilitation theory.

2. Source: August 4, 1994 "Bluesheet" to *USAM*, 9-105.000

Q. ***Settlement Authority (A.G. Order 1598-92)***

1. Approval/Consultation Procedure

Consultation with AFMLS is required regarding a proposed settlement if a civil or criminal forfeiture claim is more than $500,000, unless the original claim is between $500,000 and $5 million, and the difference between the original claim and the settlement amount does not exceed 15 percent of the original claim.

U.S Attorneys have authority to independently settle civil or criminal forfeiture cases: (a) involving amounts not exceeding $500,000; and (b) involving amounts between $500,000 and $5 million when the settlement releases not more than 15 percent of the original claim.

2. Sources: *Asset Forfeiture Policy Manual*, Chapter 7
Asset Forfeiture Manual, Volume III, Policy Compendium - tab 48

F. ***Equitable Sharing***

1. Approval/Consultation Procedure

The Deputy Attorney General (or designee) must approve equitable sharing: (1) in cases involving $1 million or more in forfeited assets; (2) in multi-district cases; (3) in cases involving real property transfers to a state or local agency for law enforcement related use.

The U.S. Attorney may approve equitable sharing in judicial cases involving less than $ 1 million in forfeited assets (including transfer of personal property for official use.)

The seizing agency may approve equitable sharing in administrative cases involving less than $1 million in forfeited assets (including transfer of property for official use.)

The Deputy Attorney General (or designee) must approve allocations from the Assets Forfeiture Fund to program participants for statutorily designated uses.

Personal approval of the U.S. Attorney is required for discontinuance of federal forfeiture action in favor of state proceedings.

2. Sources: *The Attorney General's Guidelines on Seized and Forfeited Property*; *Asset Forfeiture Policy Manual*, Chapter 8; *Asset Forfeiture Manual, Volume III, Policy Compendium* - tab 10

G. ***Equitable Sharing in International Cases***

1. Approval/Consultation Procedure

Commitments to share internationally in specific cases may only be made with the approval of the Attorney General and the Secretary of State. Prior commitments regarding sharing with foreign governments should be scrupulously avoided. The request to share internationally should be made to AFMLS.

U. ***Weed and Seed Initiative***

1. Approval/Consultation Procedure

   The Deputy Attorney General (or designee) must approve transfer of real property to a state or local agency (or to HUD) for further transfer to other government agencies or non-profit agencies for use in the Weed and Seed Program. Requests should be submitted to AFMLS.

2. Sources: *Asset Forfeiture Policy Manual*, Chapter 6; *Asset Forfeiture Manual, Volume III, Policy Compendium* - tab 38

K. ***Forfeiture Appeals***

Approval/Consultation Procedure

Adverse decision memos in any forfeiture shall be sent to the Appellate Section, Criminal Division, with a copy to AFMLS.

L. ***In Forma Pauperis Petitions***

1. Approval/Consultation Procedure

   In cases where the seizing agency believes there are clear and articulable reasons for denial of an *In Forma Pauperis* petition, the request for waiver shall be referred to AFMLS for final determination.

2. Sources: *Asset Forfeiture Policy Manual*, Chapter 2; *Asset Forfeiture Manual, Volume III, Policy Compendium*, tab 28

M. ***Judicial Forfeiture of Property that is Administratively Forfeitable***

1. Approval/Consultation Procedure

   AFMLS must approve judicial forfeiture of property that would otherwise be forfeited administratively under the aggregation policy.

2. Sources: *Asset Forfeiture Policy Manual*, Chapter 2; *Asset Forfeiture Manual, Volume III, Policy Compendium* - tab 28

N. ***Official Use of Personal Property***

1. The seizing agency head (or designee) may approve placement of personal property into the agency's own official use or that of another participating agency, but the Chief, AFMLS, must approve the decision if liens on the property equal $25,000 or one third of the value, whichever is greater.

   The U.S. Marshals Service must approve the placement of personal property into official use by non-participating federal agencies, but the Chief, AFMLS, must approve the decision if: (1) the property is $25,000 or more in value; (2) liens on property equal or exceed $25,000 or one third of the value, whichever is greater.

9-111.200 APPLICATION OF FORFEITURE PROVISIONS TO ASSETS TRANSFERRED TO ATTORNEYS AS FEES FOR LEGAL SERVICES

As a result of the amendments to the forfeiture provisions, assets transferred by a defendant to an attorney for payment of legal fees may be subject to forfeiture if the government proves that the fee was paid from assets that are forfeitable. An attorney would be entitled to keep the assets only if he/she could prove at a post-forfeiture proceeding that he/she was a bona fide purchaser and was reasonably without cause to know the asset was subject to forfeiture.

9-111.210 Sixth Amendment Considerations

The Sixth Amendment guarantees a defendant the absolute right to counsel in federal criminal prosecutions that may result in imprisonment. See Scott v. Illinois, 440 U.S. 367, 373 (1979); Arsinger v. Hamlin, 407 U.S. 25, 37 (1972) (defendant may not be imprisoned unless afforded the right to counsel). Accordingly, a defendant who establishes indigency is entitled to the assistance of court-appointed counsel at each critical stage proceedings, including the first appeal as of right. See, e.g., 18 U.S.C. § 3006A; Fed.R.Crim.P 44(a). Additionally, a solvent defendant is entitled to retain counsel of choice. But this guarantee of the right counsel of choice is neither absolute nor unqualified. A court may restrict a defendant's choice when there is a significant countervailing public interest.[3]

Some district court's have held that the third party forfeiture provisions interfere with a defendant's Sixth Amendment rights when they are applied to legitimately paid attorney fees. See, e.g., United States v. Rogers, 602 F.Supp. 1332 (D.Colo.1985); United States v. Badalamenti, 84 Cr. 236 (PNL) (S.D.N.Y. July 10, 1985); United States v. Ianiello, S 85 Cr. 115 (CBM) (S.D.N.Y. Sept. 3, 1985). As a result, they have reasoned, the statutes must be construed to exempt legitimate attorney fees from forfeiture to avoid unconstitutionality. The Department believes, however, that these decisions are incorrect.

The application of the third party forfeiture provisions to attorney fees impacts only the qualified right to counsel of choice and not a defendant's absolute right to be represented at all critical stages. A defendant who is effectively rendered indigent by their potential application is entitled to appointed counsel. Cf., United States v. Bello, 470 F.Supp. 723, 725 (S.D.Cal.1979) ("the ... restraining

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[3] See, e.g., United States v. Brown, 591 F.2d 307, 310 (5th Cir. 1979), cert. denied, 442 U.S. 913 (1979); United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979); United States v. Gary, 565 F. 2d 881, 887 (5th Cir.1978), cert denied, 435 U.S. 955 (1978); United States v. Robinson, 553 F. 2d 429 , 430 (5th Cir.1977), cert. denied, 434 U.S. 1016 (1978).

The Deputy Attorney General's approval is required for a settlement in which the difference between the original claim and the proposed settlement exceeds $2 million or 15 percent of the original claim, whichever is greater.

2. Sources: *Asset Forfeiture Policy Manual*, Chapter 3; *Asset Forfeiture Manual, Volume III, Policy Compendium* - tab 40

R. ***Settlements: Unsecured Partial Payments***

1. Approval/Consultation Procedure

Settlements should not provide for unsecured partial payments except with the approval of AFMLS in consultation with the U.S. Marshals Service.

2. Sources: *Asset Forfeiture Policy Manual*, Chapter 3; *Asset Forfeiture Manual, Volume III, Policy Compendium* - tab 55

S. ***Temporary Restraining Orders Pre-Indictment***

1. Approval/Consultation Procedure

Prior approval of AFMLS is required to seek a preindictment *ex parte* application for a temporary restraining order in criminal forfeiture cases.
Note: OCRS independently exercises authority to review restraining orders and seek the views of AFMLS.

2. Sources: *Asset Forfeiture Policy Manual*, Chapter 2; *Asset Forfeiture Manual, Volume III, Policy Compendium* - tab 7

T. ***Warranting Title***

1. Approval/Consultation Procedure

Approval must be sought from the Seized Assets Division, Marshals Service, to convey title through a general warranty deed or its equivalent.

2. Sources: *Asset Forfeiture Policy Manual*, Chapter 5; *Asset Forfeiture Manual, Volume III, Policy Compendium* - tab 34

to have the government provide funds to pay that attorney. But that is what would happen if forfeitable assets transferred to an attorney were exempt from the third party forfeiture provisions.[5]

Most courts have not directly confronted the question of whether the subsequent forfeiture of assets transferred to an attorney for legitimate fees violates the qualified right to counsel of choice. Several courts, however, have held that a defendant can be prevented from using assets which are subject to forfeiture to pay counsel of choice. See, e.g., United States v. Raimondo, 721 F.2d 476, 478 (4th Cir.1983), cert. denied, 105 S.Ct. 133 (1984); United States v. Long, 654 F.2d 911, 915-17 (3d Cir. 1981); United States v. Bello, 470 F.Supp. 723, 725 (S.D.Cal.1979). The only cases to actually consider application of the third party forfeiture provisions to attorney fees are United States v. Rogers, 602 F.Supp. 1332 (D.Colo.1985) and United States v. Iannielio, S 85 Cr. 115 (CBM) (S.D.N.Y. Sept. 3, 1985).[6]

As noted above, these courts held that any "legitimate" attorneys' fees and costs are immune from forfeiture, apparently even if the attorney knows they are being paid with forfeitable assets. The holdings, however, were based principally upon the courts' reading of congressional intent and only secondarily on constitutional grounds. The courts surmised that Congress intended the third party forfeiture provisions to apply only to sham transactions and not to transfers for legitimate fees. As discussed below, the Department believes that the courts' conclusion concerning Congressional intent is erroneous.

9-111.220 Congressional Intent

There is very little from which to conclude that Congress intended to create an exemption for attorney's fees from the operation of the third party forfeiture provisions. Indeed, such a conclusion effectively would render meaningless the

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[5] Upon conviction, defendant is divested of any title to forfeitable assets, and title passes to the United States as of the date of the offense. In the case of the forfeitable proceeds generated by the crime itself (e.g., proceeds of drug trafficking, loan sharking, bribery), operation of the relation back doctrine means that a convicted defendant is not just divested of any interest but that he/she never acquires any interest in such property. Unquestionably, to argue that such property may be used to pay counsel is tho argue that the government must subsidized the payment of counsel of choice. But the Sixth Amendment only requires that counsel be appointed if a defendant cannot afford counsel, and the appointee does not have to be counsel of choice.

[6] Badalamenti, supra, discussed the issue in dicta in considering a motion to quash a subpoena to an attorney.

II. *Attorneys' Fees*

(Pages 9-9 to 9-25 are reprinted from the U. S. Attorneys' Manual)

9-111.000 POLICY WITH REGARD TO FORFEITURE OF ASSETS WHICH HAVE BEEN TRANSFERRED TO ATTORNEYS AS FEES FOR LEGAL SERVICES

9-111.100 FORFEITURE UNDER RICO (18 U.S.C. § 1963) AND DRUG FELONY STATUTES (21 U.S.C. § 853)

The Comprehensive Crime Control Act of 1984[1] extensively revised criminal forfeiture law and procedure. New 18 U.S.C. § 1963(c) and 21 U.S.C. § 853(c) provide that criminal forfeitures under sections 1963(a) and 853(a), respectively, "relate back" to the commission of the act which gives rise to the forfeiture. Thus, the interest of the United States in the property vests at that time and is not extinguished simply because a defendant subsequently transfers the property to another person. As explained in the Senate Report: "[a]bsent application of this principle a defendant could attempt to avoid criminal forfeiture by transferring his property to another person prior to conviction."[2] S.Rep. No. 98-225, 98th Cong., 1st Sess. at 200 (footnote omitted). More specifically, the report notes that "[t]he purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms' length transactions." Id. at 200-201.

As an equitable measure, 18 U.S.C. § 1963(c) and 21 U.S.C. § 853(c) both provide that forfeiture shall not be ordered if a transferee establishes, at a hearing pursuant to sections 1963(m) or 853(n), that he/she was a bona fide purchaser and was reasonably without cause to believe that the property was subject to forfeiture.

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[1] Pub.L. No. 98-473, 98 Stat. 1837 (Oct. 12, 1984).

[2] The Senate Report also noted that the 18 U.S.C. § 1963(c) codified "the 'taint' theory which has long been recognized in forfeiture cases." Indeed, under most civil forfeiture statutes, the forfeiture relates back to the time of the acts which give rise to it. See, e.g., United States v. Stowell, 133 U.S. 1 (1980); United States v. $84,000 in U.S. Currency, 717 F.2d 1090 (7th Cir. 1983), cert. denied, 469 U.S. 836, 105 S. Ct. 131 (1984). The Seventh Circuit, however, twice rejected the government's argument that the "relation back" doctrine was applicable to criminal forfeitures. See United States v. Alexander, 741 F.2d 962 (7th Cir. 1984); United States v. McManigal, 708 F.2d 276 (7th Cir.), reaff'd in pertinent part, 723 f.2d 580 (7th Cir. 1983). Thus, the new legislation effectively reverses the Seventh Circuit's holding in Alexander and McManigal.

9-111.230 Policy Limitations on Application of Forfeiture Provisions to Attorney Fees

While there are no constitutional or statutory prohibitions to application of the third party forfeiture provisions to attorneys fees, the Department recognizes that attorneys, who among all third parties uniquely may be aware of the possibility of forfeiture, may not be able to meet the requirements for equitable relief without hampering their ability to represent their clients. In particular, requiring an attorney to bear the burden of proving he/she was reasonably without cause to believe that an asset was subject to forfeiture may prevent the free and open exchange of information between an attorney and a client. The Department recognizes that the proper exercise of prosecutorial discretion dictates that this be taken into consideration in applying the third party forfeiture provision to attorney fees. Accordingly, it is the policy of the Department that application of the forfeiture provisions to attorney fees be carefully reviewed and that they be uniformly and fairly applied.

9-111.300 DIVISION APPROVAL

No forfeiture proceedings under 18 U.S.C. § 1963 or 21 U.S.C. § 853 may be instituted to forfeit an asset transferred to an attorney as fees for legal services without the prior approval of the Assistant Attorney General, Criminal Division, pursuant to the guidelines herein.

No civil forfeiture proceedings under any statute may be instituted to forfeit an asset transferred to an attorney as fees for legal services without the prior approval of the Assistant Attorney General, Criminal Division, pursuant to the guidelines herein.

No formal or informal, written or oral, agreements may be made to exempt an asset transferred to an attorney as fees for legal services from forfeiture under 18 U.S.C. §1963 or 21 U.S.C. § 853 or any civil forfeiture statute without the prior approval of the Assistant Attorney General, Criminal Division. See USAM 9-111.700, infra.

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ability to pay as a result of these prior encumbrances there is no interference with the right to counsel of choice. Likewise, the forfeiture provisions do not impermissibly deny a defendant his/her counsel of choice.

order does not deprive [the defendant] of counsel, but only of the attorney of his choice. [He] will still be entitled to court-appointed counsel, if he has no means to hire an attorney."); see also United States v. Brodson, 241 F.2d 107 (7th Cir.) cert. denied, 354 U.S. 911 (1957).

The impact of the third party forfeiture provisions upon the ability to obtain counsel of choice in any event has been severely overstated and does not amount to an unconstitutional interference. The third party forfeiture provisions do not prohibit a defendant from paying attorney fees with assets which have not been generated or obtained from criminal activity. Additionally, if prior to conviction a defendant voluntarily restrains sufficient property to satisfy the judgment of forfeiture, it will not be necessary for the government to void any third party transfers. The same may be true even in the absence of a pretrial restraint if the defendant has sufficient funds at the time of the judgement of forfeiture to satisfy it.[4] Also, a defendant who is indigent by virtue of a restraining order may have counsel of choice appointed, provided counsel is willing to accept appointment under the Criminal Justice Act. Finally, if a defendant transfers forfeitable assets to an attorney and has no assets to satisfy a forfeiture judgment, an attorney still can retain the fee if he/she was an unwitting participant and can establish by a preponderance of the evidence that he/she was reasonably without cause to believe the property was subjected to forfeiture.

In view of the foregoing, the argument that the forfeiture provisions are constitutional only if the exempt attorney fees is an extreme and unwarranted interpretation of the Sixth Amendment. It amounts to arguing that the qualified right to counsel of choice includes the right to use the proceeds of criminal activity. The Sixth Amendment does not incorporate any such guarantee. Perhaps the most elementary qualification on the right to counsel of choice economic. A defendant if entitled only to counsel of choice who he/she can afford. See United States v. Rogers, 471 F.Supp. 847, 851 (E.D.N.Y.1979) ("Economic realities imposed one obvious limitation on the defendant's right to be represented by a particular attorney"). If a defendant cannot afford a particular attorney, he/she is not entitled

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[4] After obtaining a forfeiture judgment, the government may be entitled to satisfy the judgement from any funds in the hands of the defendant even, if it cannot trace those funds. In United States v. Conner, 752 F.2d 566 (11th Cir. 1985), the court held that the government has no duty to trace cash proceeds of racketeering to specific assets owned by the defendant at the time of the forfeiture verdict in order to forfeit such assets. Presumably, the government may collect the forfeited sum from any assets owned by the defendant. As the court noted, "money is a fungible item. It matters not that the government received the identical money which the defendants received as long as the amount that was received in violation of he racketeering statute is known. The forfeiture in this case is for a specific amount of money. It is in personam and is money judgment against the defendant for the same amount of money which came into his hands illegally in violation of Title 18, Section 1963(a)(1) [RICO]." Id. at 576

asset may have been transferred for legitimate services actually rendered, when there are reasonable grounds to believe that the attorney had reasonable cause to know that the asset was subject to forfeiture at the time of the transfer. See USAM 9-111.520, infra.

9-111.430 Forfeiture of Assets Transferred to an Attorney for Representation in a Criminal Matter

Forfeiture of an asset transferred to an attorney as payment for legal fees for representation in a criminal matter may be pursued, notwithstanding the fact that the asset may have been transferred for legitimate services actually rendered, where there are reasonable grounds to believe that the attorney had actual knowledge that the asset was subject to forfeiture at the time of the transfer. However, such reasonable grounds must be based on facts and information other than compelled disclosures of confidential communications made during the course of the representation. See USAM 9-111.512 and 9-111.610, infra.

9-111.500 DISCUSSION OF ACTUAL KNOWLEDGE AND/OR REASONABLE CAUSE TO KNOW

The principal issue to be addressed in the application of these guidelines is what constitutes "actual knowledge" or "reasonable cause to know" that an asset is subject to forfeiture "at the time of the transfer." This issue must be resolved on a case-by-case basis. However, the following principles shall be applied in determining whether the prerequisite of actual knowledge or reasonable cause to know exists in a particular case.

9-111.501 At the Time of the Transfer

For purposes of these guidelines, a transfer occurs at the time an attorney becomes entitled to the asset free from any claim by the defendant or others. For example, if an asset is transferred to an attorney to be held in trust for the defendant, with the understanding that the attorney shall be entitled to a portion of the asset for legal services rendered, the time of the transfer will be the time at which the attorney renders the services and becomes entitled to the asset. If he/she has the requisite knowledge at that time, the asset may be subject to forfeiture.

"reason to know" requirement for equitable relief. More significantly, however, it is facially contrary to the plain language and history of the legislation.

The statutes themselves do not contain any language exempting from their operation property which an attorney accepts as payment for legal services and which he/she has reasonable cause to know is subject to forfeiture. In subsections (c) both statutes simply state that property subject to forfeiture becomes so at the time of the offense and in subsections (a) they define the types of property subject to forfeiture. None of the subsections contain any exception for property transferred to attorneys for legal fees.

The legislative history indicates that Congress explicitly rejected the notion that attorney fees are exempt from forfeiture. The Senate Report cited with approval United States v. Long, 654 F.2d 911 (3d Cir.1981), which it characterized as "holding that property derived from a violation of 21 U.S.C. § 848 remained subject to criminal forfeiture although transferred to the defendant's attorneys more than six months prior to conviction, and that an order restraining the attorney from transferring or selling the property was properly entered." S.Rep., supra, at 200 n. 28.

Exemption of attorney fees also would undermine substantially the purpose of the third party forfeiture provisions. As the district court in In Re Grand Jury Subpoena, (Simels), No. M-11-188 (DNE) (S.D.N.Y., March 11, 1985) rev'd on other grounds, No. 85-6066 (2d Cir. June 27, 1985) stated: "[f]ees paid to attorneys cannot become a safe harbor from forfeiture of the profits of illegal enterprises. In the same manner that a defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from these same tainted funds.... To permit this would undermine the purpose of forfeiture statutes, which is to strip offenders and organizations of their economic power." Slip Op. at 18, n.14. It is hard to overestimate how significantly Congress' intent could be undermined by excluding attorney fees. A defendant could take full advantage of his/her ill-gotten gain by intentionally transferring tainted assets in payment of attorney fees and retaining only legitimate assets.[7]

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[7] The conclusion that attorney fees constitutionally can be forfeited upon conviction also dispenses with the additional argument that the threat that attorney fees may be forfeited unconstitutionally interferes with the right to counsel of choice. It is axiomatic that if forfeiture of fees upon conviction does not violate the right to counsel of choice, then the threat that forfeiture might occur also does not violate that right. Moreover, in the absence of a restraining order, the inability to retain counsel when forfeiture is alleged is due solely to counsel's desire to be guaranteed payment of his/her fee. In this regard, the third party forfeiture provisions are not unlike other economic limitations. They mean only that the government's claim to forfeitable assets in superior to any other claims arising after commission of the offense, including counsel any more that a prior mortgage of tax lien which may encumber a defendant's assets. If counsel refuses to represent a prospective client because he/she believes that the client does not have the financial

There are essentially three means by which an indictment can describe property that is alleged to be subject to forfeiture. It may specifically describe the property, such as "ten shares of stock in XYZ Corp. certificate nos. 1-10, purchased on January 1, 1985" or "account 12345 at First National Bank, Downtown Branch in the name of the defendant." It can set forth a generic description of certain property by amount and/or type, such as" ten shares of stock in XYZ Corp." or simply "$200,000." Finally, it can allege a broad all-inclusive description of property subject to forfeiture by incorporating statutory language, such as "any and all proceeds or profits of the criminal enterprise."

If property is specifically described, an attorney undoubtedly has actual knowledge of its forfeitability if he/she is aware of the contents of the indictment. However, if property is included in the forfeiture count only under a generic description or by the inclusion of the all-inclusive statutory language an attorney does not have actual knowledge based on that fact alone that any particular asset is forfeitable. Instead, reasonable grounds to believe that an attorney has actual knowledge that the asset is subject to forfeiture would have to be based on evidence that the attorney knew the asset in fact was from criminal misconduct. Of course, the fact that an all-inclusive forfeiture allegation or a generic description was included in the indictment would be relevant evidence to establish such knowledge. See USAM 9-111.512, infra.

9-111.512 Knowledge that the Asset in Fact is from Criminal Misconduct

Regardless of whether any criminal or civil proceedings have been instituted or whether a forfeiture count specifically describes an asset, an attorney may have actual knowledge that an asset in fact is from criminal misconduct. Evidence that the attorney learned from the client or another involved in the criminal activity that the asset was from an illegitimate source would be compelling proof of the attorney's knowledge. Except when the use of such communications involves compelled disclosure of a confidential communications made during the course of representation, such communications may be relied upon to establish actual knowledge that the asset came from criminal misconduct. See USAM 9-111.430, supra. For example, a client's testimony at trial or voluntary disclosure of his/her communications with his/her attorney may be relied upon to establish actual knowledge. See USAM 9-111.610, infra.

While generic or all-inclusive descriptions of property alleged to be forfeitable by themselves do not establish actual knowledge that a particular asset has been alleged to be forfeitable, such descriptions are probative and relevant evidence to prove that an attorney had actual knowledge that an asset was from criminal misconduct. Also relevant is evidence of the method of manner of payment and the attorney's knowledge of the client's means of livelihood, so long

9-111.400 ATTORNEY FEE FORFEITURE GUIDELINES

The purpose of these guidelines is twofold. First, it is to insure that any forfeiture of assets transferred to attorneys as fees for legal services has been reviewed carefully. Second, it is to insure that the public's interest that those convicted of certain offenses do not realize any economic benefit from their illegal activity is pursued fairly and with due consideration for the individual's right to counsel in a criminal matter.

These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal, nor do they place any limitations on otherwise lawful litigative prerogatives of the Department of Justice.

9-111.410 Forfeiture of Assets Transferred to an Attorney in a Fraudulent or Sham Transaction

Forfeiture of an asset transferred to an attorney as fees for legal services may be pursued where there are reasonable grounds to believe the transfer was a fraudulent or sham transaction designed to shield from forfeiture assets which otherwise are forfeitable.

The mere fact that an attorney has received a forfeitable asset as payment for legal fees by itself does not provide reasonable grounds to believe the transfer was a fraudulent or sham transaction. There must be reasonable cause to believe the asset was transferred for the purpose of impeding or defeating the government's ability to forfeit it. Generally, there should be some proof that a scheme existed to maintain the client's interest in the asset or ability to use it to his/her benefit. This may be shown, for example, by proof that the value of services actually rendered and that there was agreement by the attorney to transfer the asset or some portion of it back to the client. In other situations there may be evidence that the attorney agreed to transfer the asset to another third party for the benefit of the client or to an account or corporation that is controlled by the client. The evidence, however, need not establish that the attorney was a participant in the criminal activity-giving rise to the forfeiture or that he/she otherwise violated any law.

9-111.420 Forfeiture of Assets Transferred to an Attorney for Representation in a Civil Matter

Forfeiture of an asset transferred to an attorney as payment for legal fees for representation in a civil matter may be pursued, notwithstanding the fact that the

If civil proceedings have been instituted by the government to forfeit a particular asset or if a particular asset has been restrained, as discussed above, an attorney who has knowledge of the proceedings has actual knowledge of forfeitability. See USAM 9-111.511, supra. The same is true if the asset is specifically described in an indictment and the attorney knows the contents of the indictment. In these situations, any requirement under these guidelines that there be reasonable cause to know that an asset is forfeitable is met.

In other situations, all of the facts known to the attorney will have to be considered. The quantum of evidence required to establish reasonable cause to know will be substantially less than that needed to establish actual knowledge. However, the mere fact that an indictment alleges that "all profits or proceeds of the criminal activity" are subject to forfeiture will not meet the level of proof required to demonstrate reason to know. Similarly, forfeiture allegations which describe assets generically are sufficient to put an attorney notice that any assets of the type described potentially are subject to forfeiture, but they are not sufficient by themselves to establish reasonable cause to know. An attorney who accepts any such assets acts at his or her peril, and circumstantial evidence may establish that there was reasonable cause to know. Perhaps the only fact that prima facie would negate reasonable cause is the presence of a restraining order. For example, if an indictment alleges that $200,000 is subject to forfeiture, the existence of a restraining order applying to that same amount of cash could negate reasonable cause to believe that other money is forfeitable. See note 9, supra.

9-111.530 Policy Concerning Issuance of Notification Letters to Attorneys

There may be cases where there are reasonable grounds to believe that all of a defendant's assets are subject to forfeiture. Under these guidelines, however, the only assets which an attorney conclusively would be held to have actual knowledge of forfeitability are those specifically named in the indictment or subject to a restraining order or civil forfeiture proceeding. There would have to be some evidence in addition to the forfeiture allegations to establish actual knowledge of the forfeitability of those assets which are not specifically described or subject to restraint. See USAM 9-111.510, supra. As a result, it may be extremely difficult in cases where all of a defendant's illegitimate assets have not been discovered to prove actual knowledge, even though there are grounds to believe no legitimate assets exist. Although this may limit the cases in which actual knowledge may be established, the Department believes it is inappropriate tn give written notice to an attorney that a particular asset or that all assets belonging to a defendant are from an illegitimate source or subject to forfeiture simply to meet the requirement of actual knowledge imposed by these guidelines.

9-111.510 Actual Knowledge of Forfeitability

For purposes of these guidelines, actual knowledge refers not simply to knowledge that some of a client's assets are either subject to forfeiture or from criminal misconduct. Rather, an attorney must have actual knowledge that the particular asset he/she received was subject to forfeiture. The guidelines require that there be reasonable grounds to believe that actual knowledge exists.

Reasonable grounds exist for believing that an attorney has actual knowledge that an asset is subject to forfeiture when there is evidence that it was known to the attorney at the time of the transfer either: (a) that the government had asserted that the particular asset is subject to forfeiture or (b) that the particular asset in fact is from criminal misconduct. See USAM 9-111.530, infra.

9-111.511 Knowledge that the Government has Asserted that a Particular Asset is Subject to Forfeiture

Generally an attorney will have actual knowledge that the government has asserted a claim that an asset is subject to forfeiture based upon some proceedings instituted by the government. Normally the government will do this by initiating civil forfeiture proceedings against the asset, or by applying for pre-indictment or pre-conviction restraining orders under 18 U.S.C. § 1963 or 21 U.S.C. § 853, or by obtaining an indictment containing a forfeiture count.

A civil forfeiture proceeding, if known to an attorney, will establish actual knowledge of the forfeitability of any assets which are the subject of the proceeding since such assets must be specifically identified in the complaint.[8] For the same reason an attorney has actual knowledge of the forfeitability of any asset which he/she knows is subject to a restraining order based upon a forfeiture allegation in a criminal proceeding. However, when the government asserts a claim only by including a forfeiture count in an indictment and no assets have been restrained, the return of the indictment by itself will not necessarily establish actual knowledge that a particular asset is forfeitable. It will depend upon how specifically the asset is described in the forfeiture allegation.

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[8] This is because in a civil forfeiture proceeding the res is the defendant and it must be sufficiently identified to allow seizure. A defendant, in most cases, will not be able to transfer an asset which is the subject of a civil forfeiture action to an attorney because the asset is actually seized as soon as the proceeding is instituted. However, in the rare case where a transfer takes place after the suit is initiated but before the seizure occurs, an attorney who has knowledge of the civil forfeiture action has actual knowledge that the particular asset is subject to forfeiture.

9-111.600 DISCOVERY OF INFORMATION CONCERNING AN ASSET TRANSFERRED TO AN ATTORNEY AS FEES FOR LEGAL SERVICES

Proceedings to forfeit an asset transferred to an attorney may be instituted only after the requirements of these guidelines and the approval of the Assistant Attorney General, Criminal Division have been obtained. Of course, this requires that a certain amount of information concerning the transfer of the asset be known. The discovery of information concerning the payment of a fee may be carried out as set forth herein.

9-111.610 Compelled Disclosure of Confidential Communications During the Course of the Representation

As set forth above, actual knowledge of the forfeitability of an asset, cannot be established by compelled disclosure of confidential communications made during the course of the representation. See USAM 9-111.430, supra. This limitation upon compelled disclosure of confidential communi cations does not preclude the use of these confidential communication when they are voluntarily disclosed. For example, the testimony of the defendant at trial may be relied upon. This limitation also does not preclude the use of a subpoena to obtain non-privileged fee information, such as the amount, source and method of payment. See USAM 9-111.620, infra. But the subpoena may not seek to obtain any confidential communications.

This limitation on compelled disclosures does not recognize or imply that all confidential communications between a client and an attorney are protected either by that attorney client privilege or the constitutional right to counsel. Only those confidential communications which meet all the requirements for privilege or which relate to defense preparation are protected. See, e.g., United States v. Melvin, 650 F.2d 641, 645 (5th Cir.1981); United States v. King, 536 F.Supp. 253,264-65 (C.D.Cal.1982). The Department imposes this limitation in recognition of the fact that the need for clients to make full and free disclosure to their attorneys outweighs the detriment of placing limitation on the use of some non-privileged communications in certain limited situations.

9-111.620 Subpoenas Issued to Attorneys to Obtain Fee Information

The Department requires that any grand jury or trial subpoenas to an attorney for information relating to the representation of a client must be authorized by the Assistant Attorney General, Criminal Division. See USAM 9-2.161(a). Information concerning the amount, source and method of payment of a fee paid to an attorney is information "concerning the representation of a client."

as it is based on information other than compelled disclosure of confidential communications during the course of the representation. See USAM 9-111.610, infra. Additionally, the presence or absence of an order restraining assets is relevant.

The existence of actual knowledge that an asset is from criminal misconduct will have to be determined on a case-by-case basis, taking into consideration all of the relevant evidence. For example, if an indictment alleges that "all profits and proceeds, including $200,000" are subject to forfeiture and $200,000 has been restrained, there would have to be other evidence of an attorney's knowledge of the source of his/her fee to prove that he/she had actual knowledge that other cash he/she received is from the criminal misconduct.[9] On the other hand, if there were no order restraining a sufficient amount of cash and the fee was paid in cash, circumstantial evidence may establish that the attorney had actual knowledge that the fee was paid from the proceeds of criminal misconduct. For example, actual knowledge might be established if a forfeiture count was based on a drug felony charge, the fee was paid in a manner suggesting that it was the proceeds of drug trafficking and there was evidence other than from confidential communications that the attorney knew the client had no legitimate source of income. This latter evidence might exist where a pauper's petition was filed by the attorney for the client in other proceedings, and the client had not been gainfully employed since that time.

9-111.520 Reasonable Cause to Know that an Asset is Subject to Forfeiture

"Reasonable cause to know that an asset is subject to forfeiture" means that there is information known to an attorney which if known to a reasonably prudent person would cause such person to believe that the asset is forfeitable.[10] Just as with actual knowledge, the starting point for deciding if an attorney has reasonable cause is an examination of the evidence of the attorney's knowledge of any legal proceedings instituted by the government for forfeiture of assets.

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[9] In any event, if the government sought to forfeit a fee in such a case without direct evidence of the attorney's knowledge, the attorney could probably obtain equitable relief. He may be able to rely on the fact that sufficient cash was restrained to establish that he/she reasonably was without cause to believe that other cash is not subject to forfeiture.

[10] The standards set forth herein concerning proof of reasonable cause to know express no opinion concerning the Department's position as to what proof constitutes that a third party was "reasonably without cause to believe that the property was subject to forfeiture." Rather, the standards herein apply only to the Department's policy of not seeking forfeiture in certain cases unless there is evidence that an attorney had reasonable cause to know. See USAM 9-111.420, supra.

is sought solely or principally to obtain evidence concerning a forfeiture count, the availability of post-judgment discovery may mean that the need to subpoena the information, particularly at trial, does not outweigh the potential for disqualification. See USAM 9-111.630, infra.

9-111.630 Post-Judgment Discovery Proceedings Under 18 U.S.C. § 1963 and 21 U.S.C. § 853

Both the RICO and drug felony forfeiture statutes provide that the court may order that depositions be taken or that records be produced after an order of forfeiture is entered in order to identify and locate property declared forfeited. See 18 U.S.C. § 1963(1); 21 U.S.C. § 853(m). Consequently, if an order of forfeiture is entered covering property which is described generically or by incorporation of the statutory language, the government may make application to the court to obtain records, documents or testimony concerning the identity and location of that property. When an application is made for the deposition of an attorney or the production of records by an attorney concerning the transfer of assets for legal services, the requirement set forth in USAM 9-111.620, supra, that there be reasonable grounds to believe that the fee information will be evidence either of the disposition of forfeited assets or lead to the discovery of forfeited assets shall apply.

It should be noted that since these statutory proceedings will occur after trial, the likelihood for any adverse impact upon the attorney client relationship will be diminished substantially. In particular, the potential for disqualification of the attorney from representation of the client because of the need to testify at trial should not arise. Therefore, when fee information is sought solely for purposes of forfeiture and it is feasible, the discovery of such information should be deferred to the post-trial proceedings rather than proceeding by way of grand jury or trial subpoena.

9-111.700 AGREEMENTS TO EXEMPT FROM FORFEITURE AN ASSET TRANSFERRED TO AN ATTORNEY AS FEES FOR LEGAL SERVICES

Agreements may be entered into to exempt from forfeiture an asset transferred to an attorney as fees for legal services, but only with the prior approval of the Assistant Attorney General, Criminal Division. See USAM 9-111.300, supra. Agreements may be approved only if: (1) there are reasonable grounds to believe that the particular asset is not subject to forfeiture; and (2) the asset is transferred in payment of legitimate fees for legal services actually rendered or to be rendered.

Efforts should be made to assist in identifying the assets, if any, belonging to a defendant which are not subject to forfeiture. In this regard, any proffer of

Sending written notice of the forfeitability of assets that are not specifically described or under restraint no doubt would be attacked as impermissibly interfering with the qualified right to counsel of choice. The argument could be made that if the notice is not based upon a probable cause determination that the assets are subject to forfeiture, it was sent only to harass the attorney or cause him/her to abandon the case and not because the asset legitimately is subject to forfeiture. Thus, the government may be sidetracked into prolonged litigation which is only ancillary to the criminal charges. Additionally, if there is probable cause that a particular asset or all of a defendants assets are forfeitable, the written notice is unnecessary. The assets which are known to the government at the time of indictment can be specifically described in the forfeiture count.[11] Additional assets discovered after return of the indictment can be included in a superseding indictment or can be subjected to a restraining order by making an appropriate showing to the court. Therefore, actual knowledge will be established by the restraining order or the specific description in the indictment.[12]

Another reason cautioning against written notice is that if it is not routinely and uniformly given, it will be argued that the government is targeting certain attorneys and attempting to prevent them from representing criminal defendants in certain cases. The Department does not have or endorse such a policy and believes it is unwise to create even an appearance that such a policy exists.

The limitation herein does not apply to written notice of the government's intent to seek forfeiture of an asset when it has been concluded that an attorney has actual knowledge based on facts and information other than that contained in the written notice that the asset is subject to forfeiture. However, where the criminal case giving rise to the forfeiture has not been concluded, such notice should be given only in extraordinary cases and may not be given without the approval of the Assistant Attorney General, Criminal Division.

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[11] Including the assets in the indictment would not only have the benefit of establishing knowledge, but also would allow a restraining order to be obtained without a further showing.

[12] Perhaps the only situation in which some forfeitable assets would not be covered in this manner is when there is evidence that all assets belonging to a defendant are from criminal activity, but the government has not been able to locate all of them. In such cases, if there is probable cause to establish that all of the defendant's assets acquired after a particular date were from the criminal misconduct, the evidence could be presented to the grand jury and an allegation to that effect could be included in the forfeiture count. This allegation would be relevant and probative to prove that an attorney had actual knowledge that an asset he/she received was forfeitable. See USAM 9-111.510, supra. Actual knowledge could be established by evidence, from sources other than confidential communications, that the attorney knew the asset he/she received way obtained by the defendant after the date alleged in the indictment.

III. *Food, Drug and Cosmetic Act Cases*

Policy Directives issued by the (former) Executive Office for Asset Forfeiture (EOAF), the Asset Forfeiture Office (AFO), and the Asset Forfeiture and Money Laundering Section do not apply to civil to civil forfeiture cases brought pursuant to the Federal Food, Drug and Cosmetic Act (FD&C Act), 21 U.S.C. § 334. For information concerning the policies and procedures applicable to such cases, the Office of Consumer Litigation in the Civil Division should be contacted.[1] However, civil and criminal forfeiture investigations conducted by Special Agents under 21 U.S.C. § 334 but which result in forfeiture cases under other statutes are governed by EOAF/AFO, and the Asset Forfeiture and Money Laundering Section policy directives.

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[1] Under Title Four of the United States Attorneys Manual, Section 1-202, the Civil Division has authority for:

> All civil and criminal litigation and grand jury proceedings under the Federal Food, Drug and Cosmetic Act . . . .

Consequently, before a subpoena may be issued for such information, each of the requirements of that policy must be met. Most of these requirements should be easily met when issuing a subpoena to an attorney for fee information.

The requirements that the information be non-privileged and relevant can be satisfied then tie subpoena calls for fee information. Generally, courts have held that fee information is not privileged. See, e.g., In re Shargel, 742 F.2d 61 (2d Cir.1984); In re Ousterhoudt, 722 F.2d 591 (9th Cir.1985); In re Special Grand Jury (Harvey), 676 F.2d 1005 (4th Cir.) vacated and withdrawn, 697 F.2d 112 (1982) (en banc). In re Grand Jury Subpoena (Slaughter), 694 F.2d 1258 (11th Cir.1982); In re Grand Jury Proceedings, United States v Jones, 517 F.2d 666 (5th Cir cert. denied, 449 U.S. 1083 (1981); United States v. Strahl, 590 F.2d 10 (1st Cir.1978, cert. denied, 440 U.S. 918 (1979); United States v. Haddad, 527 F.2d 537 (6th Cir.1975) Cert. denied, 425 U.S 974 (1976). They also have recognized that fee information may be relevant to a criminal case or investigation. It may prove unexplained wealth which is relevant to show that a defendant obtained substantial income from his/her illegal activities. It may show that the fee for one or more alleged conspirators was paid by another co-conspirator which is relevant to prove "association in fact" or may lead to the discovery of other co-conspirators. Finally, it may show the disposition of forfeitable assets or lead to the discovery of forfeitable assets which have been hidden by a defendant. The requirement that reasonable attempts to obtain the information from alternative sources must be exhausted will have to be considered on the facts of each case, but it should pose no special problem. The remaining two requirements, however, do involve some special considerations.

The requirement that there be "reasonable grounds to believe ... that the information sought is reasonably needed" is straight-forward when the fee information is sought to prove association in fact or unexplained income. But where the purpose of a subpoena is solely or principally to obtain evidence relevant to a forfeiture count, this requirement translates into reasonable grounds to believe that the fee information is evidence of or will lead to evidence either of the disposition of forfeitable assets or the existence of hidden assets. This means that there must be a basis to conclude that there are assets subject to forfeiture which have not been identified or located. This may exist, for example, if there is evidence that a defendant either had no legitimate income or derived all of his/her income from an illegitimate source at the time the fee was paid. It may also exist if there is evidence that a defendant derived a certain and substantial amount of income from his/her illegal activity the disposition or whereabouts of which are unknown, and he/she had no substantial legitimate income at the time the fee was paid.

The final requirement is that the need for the information must outweigh the potential adverse effects on the attorney-client relationship. If the fee information

1. A fourth category of cases is added to the class of money laundering prosecutions and forfeitures which requires prior consultation with the Criminal Division. This new requirement is set forth in § II(B) (4), below.

2. A new reporting requirement is set forth, based on the statutory mandate of the Annunzio-Wylie Anti-Money Laundering Act of 1992, which requires that the Money Laundering Section be notified when any financial institution, or any officer, director, or employee of any financial institution has been found guilty of an offense under §§ 1956, 1957 or 1960 of Title 18, or § 5322 of Title 31.

3. A revised version of the Money Laundering Case Report is attached as Appendix A. This Case Report, which can be used to transmit filed indictments and complaints to the Money Laundering Section, has been revised in order to incorporate the statutory changes enacted in the Annunzio-Wylie Anti-Money Laundering Act of 1992.

I. Explanation of Consultation and Reporting Requirements

The Money Laundering Section was established in the Criminal Division, in part, to ensure consistency in certain types of prosecutions and to assist prosecutors in the formulation and prosecution of money laundering cases. Prosecutors should avail themselves of the Section's expertise in order to enhance their understanding of the complex issues involved in such cases, and to ensure consistency in the application of the relevant statutes.

The problems in applying the money laundering statutes are greater than the problems that ordinarily arise when a new criminal statute is applied for the first time. This is because both the criminal provisions and the civil forfeiture statute are broad. While they may have been intended primarily to address the laundering of drug money they, in fact, apply to the movement of funds derived from most serious federal crimes and a large number of state crimes, as well. "Money laundering" thus applies to everything from the international transfer by wire of hundreds of millions of dollars in drug proceeds to the purchase of an automobile with funds robbed from a bank.

Moreover, the civil forfeiture statute for money laundering, 18 U.S.C. § 981, gives the government a means to forfeit property involved in a wide range of offenses for which forfeiture is not otherwise provided. That is, the law does not generally provide for forfeiture in cases of fraud, environmental crime, or public corruption. By alleging that the proceeds of such crimes were subsequently laundered, however, the government can obtain forfeiture of the subject property – and any property used to facilitate the laundering offense – under the money laundering forfeiture statutes. We must use these powerful weapons carefully.

evidence by an attorney as to the source of the assets may be relied upon. However, an agreement to exempt fees based on such a proffer must contain an express condition that the agreement is not binding if full and accurate disclosure has not been made or if the proffer is false or misleading.

In determining whether an asset is being transferred in payment of a legitimate fee, the amount of the fee may be taken into consideration. However, the focus should not be on whether the fee is reasonable. The focus must be on whether it is a legitimate transaction or a sham transaction designed to shield assets from forfeiture. If the transaction is legitimate, the fee, even if it appears exorbitant, may be exempted if it is paid from a source that meets the first requirement. Conversely, a fee, even if reasonable, may not be exempted from forfeiture by agreement if the first requirement is not met. Any agreement to exempt a fee from forfeiture, however, may be limited to specific amount if there is basis to believe that only assets in that amount are not subject to forfeiture.

2. Tax Division Authorization: Section 9-105.000 requires Tax Division authorization of any prosecution under § 1956(a)(1)(A)(ii) where the sole or principal purpose of the financial transaction was to evade the payment of taxes. *See* Supplement to 9-105.100 issued by Assistant Attorney General Edward S.G. Dennis, Jr., on August 16, 1989.[2]

3. Prosecutions of Attorneys: Sections 9-105.300 and 9-105.600 require Criminal Division approval of prosecutions of attorneys (under either § 1956 or § 1957) where the financial transaction is one involving attorneys' fees. This approval is required regardless of whether the fee was received in a criminal or civil case. However, prosecutions are specifically barred only with respect to "*bona fide* fees" received in connection with "representation in a criminal matter." § 9-105.600.

4. Prosecution of a Financial Institution: In any criminal case in which a financial institution, as defined in 18 U.S.C. § 20 and 31 C.F.R. § 103.11, would be named as a defendant, or in which a financial institution would be named as an unindicted co-conspirator, Criminal Division approval is required before any indictment or complaint is filed.[3]

The review and approval function for §§ 1956 and 1957 prosecutions involving these four categories of cases has been centralized within the Money Laundering Section. In the case of any prosecution requiring Criminal Division approval under these provisions, a copy of the proposed indictment and a prosecutive memorandum should be sent as soon as possible before the anticipated date of indictment to the Chief of the Money Laundering Section. The preferred method of transferral is by overnight carrier. Attorneys are encouraged to seek guidance from the Money Laundering Section prior to the time an investigation is undertaken and well before a final indictment and prosecutive memorandum are submitted for review.

B. Consultation Requirement in Certain Cases

In the following instances, the United States Attorneys' Office must consult with the Money Laundering Section prior to the filing of an indictment or

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[2] With respect to prosecutions under § 1956(a)(1)(A)(ii), which relate to tax offenses, prosecutors are reminded of the importance of obtaining copies of relevant tax returns early in the investigation.

[3] In cases where the financial institution involved is a "non-bank financial institution," such as a check-cashing service or a *casa de cambio*, which is a stand-alone business and not a branch of a larger institution, the requirement does not apply. However, where such institutions are part of a larger business or a branch of an international institution, Criminal Division approval is required.

IV. *Money Laundering Prosecutions and Forfeitures*

(Pages 9-27 to 9-37 are a reprint of the bluesheet regarding Money Laundering Prosecutions and Forfeitures)

August 4, 1993

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff
Executive Office for United States Attorneys

John C. Keeney
Acting Assistant Attorney General
Criminal Division

RE: Money Laundering Prosecutions and Forfeitures:
18 U.S.C. §§ 1956-57 and 981-982; 31 U.S.C. § 5322

NOTE:
1. This is issued pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert in front of affected section.

AFFECTS: USAM 9-105.000

PURPOSE: This bluesheet supersedes the October 1, 1992, bluesheet and implements new consultation and reporting requirements for certain money laundering prosecutions brought under 18 U.S.C. §§ 1956-57 and 31 U.S.C. § 5322, and forfeiture cases brought under 18 U.S.C. §§ 981-982.

On October 1, 1992, a bluesheet was issued which reviewed and reiterated the existing requirements from Criminal Division approval of certain cases brought under the money laundering statutes (18 U.S.C. §§ 1956 and 1957), as well as money laundering forfeiture actions brought under 18 U.S.C. §§ 981 and 982, and added new approval, consultation and reporting requirements. This bluesheet supersedes the October 1, 1992, bluesheet in that it maintains the requirements set forth in that document and amends the bluesheet in the following three ways:

Explanation: During the 1992-93 amendment cycle, the United States Sentencing Commission proposed an amendment to §§ 2S1.1 and 2S1.2 (the sections relating to §§ 1956 and 1957, respectively) which would have significantly reduced the punishment imposed for non-narcotic and white collar money laundering offenses. One of the concerns of the Commissioners, in considering such an amendment, was a class of money laundering cases often referred to as "receipt and deposit" cases. "Receipt and deposit" cases are those kinds of cases where a person obtains proceeds from specified unlawful activity, which that person committed, and then deposits the proceeds into a bank account that is clearly identifiable as belonging to that person. In that type of transaction, there is generally no concealment involved and the transaction is conducted so that the person can use or enjoy the proceeds of the specified unlawful activity.

There was sentiment at the Sentencing Commission that "receipt and deposit" cases should not be sentenced as severely as money laundering cases involving more active forms of concealment or promotion because the Commission staff believed that the money laundering activity in "receipt and deposit" cases creates little or no additional harm to society above that which was caused by the commission of the underlying offense and, in some cases, merely constituted the completion of the underlying offense. The Department of Justice vigorously opposed this amendment and the proposal was not adopted. However, the Sentencing Commission has indicated its continuing interest in this area and we anticipate another effort to weaken the money laundering sentencing guidelines during the next amendment cycle.

While §§ 1956 and 1957 apply to "receipt and deposit" transactions, for reasons of policy it may be advisable to consider charging the "receipt and deposit" transaction only where there is an attempt to conceal or disguise the illegal proceeds, where a financial transaction is conducted to promote further unlawful activity, or where the transaction is designed to avoid a transaction reporting requirement, or in the case of a charge under § 1957, for transactions involving the movement or expenditure of funds subsequent to the initial deposit.

In order to be prepared to address the use of the money laundering statutes in such cases in the future, the Criminal Division is promulgating this new consultation requirement. Consultation with the Money Laundering Section will give the Section an opportunity to provide guidance as to whether the proposed "receipt and deposit" transaction should be charged.

C. Notification of the Money Laundering Section and Asset Forfeiture Office: Reporting Requirement

In light of the scope of the money laundering statutes, it is essential that the Money Laundering Section be kept abreast of the way the statutes are being used.

Consultation with the Money Laundering Section will provide a means to ensure the orderly development of the case law and to assist prosecutors in applying these statutes at a time when the case law in this area is developing very fast. The Money Laundering Section will perform an important service in providing reference to recently decided cases on critical issues and the legislative history of the numerous amendments made by Congress since these statutes were first enacted.

The reporting requirement is intended to serve two additional purposes. First, providing copies of all indictments and complaints will continue to make the Money Laundering Section a central repository of sample pleadings that are an invaluable resource to prosecutors in the field. This is particularly important in the next few years when many United States Attorneys will be using the money laundering statutes for the first time. Moreover, the reporting requirement will enable the Criminal Division to respond to the frequent requests from Congress and federal agencies for statistics regarding the application of the money laundering statutes.

II. Review and Authorization Requirements

The addition of the new notification and consultation guidelines to the already existing requirements for Criminal Division authorization of money laundering prosecutions under certain circumstances creates a three-tier level of communication between the United States Attorneys' offices, other Divisions and the Criminal Division. These three tiers break down into the following classes.

A. Requirements for Criminal Division Approval

There are four categories of cases which require prior authorization from the Criminal Division. Chapter 9-105 of the *United States Attorneys' Manual* presently provides for Justice Department review and approval of three classes of money laundering prosecutions.[1] The fourth category is new.

1. Extraterritorial Jurisdiction: Section 9-105.000 requires Criminal Division approval before the commencement of any investigation where jurisdiction to prosecute is based solely on the extraterritorial jurisdiction provisions of §§ 1956 and 1957.

[1] It should be noted that, prior to the establishment of the Money Laundering Section, requests for Criminal Division approval in these three categories of cases were directed to the Narcotic and Dangerous Drug Section. All such requests should now be directed to the Money Laundering Section.

III. Reporting Requirements Pertaining to Financial Institutions

Section 1504(c) of the Annunzio-Wylie Anti-Money Laundering Act, which was signed and became effective on October 28, 1992 (except as provided otherwise in the bill), added the following subsection to § 1956:[4]

> (g) NOTICE OF CONVICTION OF FINANCIAL INSTITUTIONS. — If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

In order to implement this requirement, all United States Attorneys Offices or Department components must notify the Money Laundering Section of such convictions. Attached to the notification letter must be a certified copy of the order of conviction from the court rendering the decision. See 1502(a) - (c) and § 1503 (a) - (b) of the Annunzio-Wylie Act. In addition, the notification should include a file-stamped copy of the indictment, the name of the Assistant U.S. Attorney who handled the case, and the name of the primary investigative agency involved.

With regard to this notification requirement, three factors should be noted:

First, since this provision was added to § 1956, the relevant definition of the term "financial institution" is that set forth in § 1956(c)(6), which is very broad and includes numerous kinds of businesses other than depository institutions. Based on the prior history of this provision and the context in which it was enacted, it is the position of the Criminal Division that the notification requirement in § 1956(g) be limited to national banks, federal savings associations, federal credit unions, federally insured State depository institutions and federally insured State credit unions.

Second, this requirement will apply to persons who were officers, directors or employees of a financial institution either at the time of the offense or at the time

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[4] It should be noted that § 1530 of the bill also created a new subsection 1956(g), which raised the penalty for conspiring to violate § 1956 or § 1957 from 5 years (under § 371) to whatever the penalty would be for the substantive violation of § 1956 or § 1957. Consequently, there are two subsections denominated as 1956(g). This error will be rectified as soon as possible.

complaint. Written notice should be sent to the Money Laundering Section at least 2 weeks before the proposed action. Notice should consist of a draft indictment or complaint and a memorandum to the Chief of the Money Laundering Section summarizing the evidence and the proposed prosecution.

1. Forfeiture of Businesses: In any case where forfeiture of a business is sought under the theory that the business facilitated the money laundering offenses, no forfeiture action, either criminal or civil, may be filed without prior consultation with the Money Laundering Section and the Asset Forfeiture Office.

2. Cases Filed Under § 1956(b): Section 1956(b) provides for the imposition of a civil penalty (of not greater than $10,000 or the value of the property, funds, or monetary instruments involved in the transaction) against anyone who violates the criminal provisions of § 1956(a)(1) and (a)(2). In any case where a civil action under § 1956 is going to be brought against a business entity, no complaint may be filed without prior consultation with the Money Laundering Section.

3. Cases Involving Financial Crimes: In any case where the conduct to be charged as "specified unlawful activity" under §§ 1956 or 1957 consists primarily of one or more financial or fraud offenses, and where the financial and money laundering offenses are so closely connected with each other that there is no clear delineation between the underlying financial crime and the money laundering offense, no indictment or complaint may be filed without prior consultation with the Money Laundering Section.

Explanation: Sections 1956 and 1957 both require that the property involved in the money laundering transactions be the **proceeds** of specified unlawful activity at the time that the transaction occurs. The statute does not define when property becomes "proceeds," but the context implies that the property will have been derived from an already completed offense, or a completed phase of an ongoing offense, before it is laundered. Therefore, as a general rule, neither § 1956 nor 1957 should be used where the same financial transaction represents both the money laundering offense and a part of the specified unlawful activity generating the proceeds being laundered.

4. Prosecutions in Deposit Cases: In any case where the conduct to be charged as money laundering under § 1956 or § 1957, or where the basis for a forfeiture action under § 981 consists of a deposit of proceeds of specified unlawful activity into a domestic financial institution account that is clearly identifiable as belonging to the person(s) who committed the specified unlawful activity, no indictment or complaint may be filed without prior consultation with the Money Laundering Section.

APPENDIX A

MONEY LAUNDERING CASE REPORT

The following form should be filed with the Money Laundering Section, P.O. Box 28159, Central Station, Washington, D.C. 20038, as soon as possible after the filing of an indictment or civil complaint involving the money laundering statutes. Please attach a copy of the indictment or complaint.

Case Name: _____ **District** _____

AUSA: _____ **Phone (FTS):** _____

Type: Criminal / Civil (Circle One) **No. of defendants:** _____ (Criminal only)

Date Filed: _____

Money Laundering Statutes (Check all that apply):

§1956(a)(1)(A)(i) ____
(a)(1)(A)(ii) ____
(a)(1)(B)(i) ____
(a)(1)(B)(ii) ____
(a)(2)(A) ____
(a)(2)(B)(i) ____
(a)(2)(B)(ii) ____

§1956(a)(3)(A) ____
(a)(3)(B) ____
(a)(3)(C) ____
§1956(g) ____
§1957 ____
§5313 ____
§5314 ____
§5316 ____

§5324(a)(1) ____
(a)(2) ____
(a)(3) ____
§5324(b)(1) ____
(b)(2) ____
(b)(3) ____
§6050I ____
§6050I (f) ____

Forfeiture Statutes (if applicable):

§981 (a)(1)(A) ____
§982 ____
§981(a)(1)(B) ____
§5317 ____

Specified Unlawful Activity (SUA):

Drugs: _____ Other (cite statutes if federal):

_____ _____

_____ _____

Fact Pattern (select one):

Drugs ____
Fraud/Other ____
Organized Crime ____
Environmental ____
Fraud/Financial Instn ____
Terrorism ____
Street Crime ____
Other (specify) ____

While prior review and approval of all § 1956 and § 1957 prosecutions are not required, it is necessary that the Money Laundering Section be advised of all prosecutions under those statutes. Therefore, the following notification requirement is being implemented:

> In all criminal cases involving charges under § 1956 Or § 1957, or forfeiture cases involving § 981 or § 982, the United States Attorney's Office or Department component handling the case must notify the Money Laundering Section by sending a copy of the indictment or complaint to the Money Laundering Section as soon as possible after the return of the indictment or the serving of the complaint. Attached to this memorandum is a form which can be used to transmit the indictment or complaint to the Money Laundering Section. Following sentencing, the Assistant United States Attorney or Department attorney should inform the Money Laundering Section of the nature of the disposition.

Prosecutors are encouraged to consult the Money Laundering Section prior to bringing charges under § 1956 or § 1957, either by telephone, or by submitting a draft indictment or complaint to the Section in advance of the date of filing. Similarly, prior to the filing of a complaint in any civil forfeiture case under § 981 (a)(1)(A) where no related criminal indictment under § 1956 or § 1957 will be returned, the prosecutor handling the case is encouraged to consult with the Asset Forfeiture Office.

If the proposed criminal indictment contains a § 982 criminal forfeiture count or if a related § 981 civil forfeiture action will be filed, the Assistant United States Attorney handling the case should consult with the Money Laundering Section and the Asset Forfeiture Office. The Money Laundering Section will be responsible for issues regarding legal theory and evidence supporting the money laundering allegation(s). The Asset Forfeiture Office will be responsible for issues relating to the propriety and nature of the forfeiture, and any procedural issues relating to the forfeiture. To the extent that issues on which consultation is sought overlap both areas of responsibility, prosecutors should initially consult the Money Laundering Section.

V. *FIRREA Memorandum of Understanding (Reprint)*

OVERVIEW

Memorandum of Understanding Governing FIRREA Forfeiture Cases

Introduction

The Introduction explains that the principal purpose of the FIRREA MOU is to facilitate inter-agency coordination in identifying, seizing, and disposing of forfeitable properties in order to maximize FIRREA recoveries for the benefit of the American taxpayer. To facilitate the identification of cases in which the use of criminal or civil forfeiture may be appropriate, the Introduction calls for periodic, local and regional meetings of federal prosecutors, federal law enforcement, and federal financial institution regulatory agency representatives to coordinate investigations. Additionally, each regulatory agency is to designate a FIRREA MOU contact point at its headquarters.

Minimizing Litigation

Section 1 (Minimizing Litigation) establishes as a basic principle of inter-agency coordination that the departments and agencies of the United States should not litigate against each other, i.e., that the Government should not litigate against itself. Section 1 provides that the Department of Justice and the Department of the Treasury will give appropriate deference to both the legal and equitable claims of the regulatory agencies and will seek to resolve those claims within the Executive Branch.

Specifically, the Department of Justice will not prosecute closed financial institutions. Additionally, in any "FIRREA forfeiture" case[1], and in any forfeiture case in which a regulatory agency asserts legal title to property seized for forfeiture, the agency's legal title will be determined within the Executive Branch, not through the filing of a claim in the forfeiture proceeding or the filing of a petition for remission. There are minor exceptions in footnotes 4 and 5 of the FIRREA MOU applicable in forfeitures other than FIRREA forfeitures for petitions for remission or

[1] The term "FIRREA forfeiture" has been carefully defined in footnote 2 of the FIRREA MOU. Most significantly, the definition includes forfeitures of any property which is referred to in 18 U.S.C. § 981(a)(1)(C) or (D) and therefore, forfeitable under FIRREA, regardless of whether the 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 the property is designed as a FIRREA forfeiture before it is forfeited.

of the conviction (*i.e.*, if the offense was committed prior to the defendant's employment at the financial institution).

Third, it should be noted that § 5322 of Title 31 is the penalty provision for violations of other sections of subchapter II of chapter 53 of Title 18 (*i.e.*, §§ 5311-5328; § 5322 does not set out an offense which can be committed. However, we will interpret this provision to include violations of other sections of Title 31 which are punishable under § 5322.

Notifications pursuant to this provision should be sent to:
Chief, Money Laundering Section
Criminal Division
United States Department of Justice
P.O. Box 28159
Central Station
Washington, D.C. 20038

Attachments

official use by federal agencies, except that the FBI and the Secret Service (the "seizing agencies") may retain office and electronic communications equipment valued at under one thousand dollars ($1,000.00) and motor vehicles pursuant to standard procedures in the Attorney General's Guidelines on Seized and Forfeited Property.

Disposition of Property in FIRREA Forfeitures

Section 5 (Disposition of Property in FIRREA Forfeitures) establishes administrative procedures for the disposition of property forfeited in FIRREA forfeitures in order to facilitate the distribution of such property by the Department of Justice and the Department of the Treasury in a manner consistent with the multiple provisions of 18 U.S.C. § 981(e). In particular, subsections 5(c)(i)-(v) establish priorities (absent in section 981(e)) to govern the distribution of FIRREA forfeiture proceeds, "unless compelling circumstances dictate otherwise." In abbreviated form, the distribution priorities are as follows:

first, as provided in an Order or Declaration of Forfeiture or in any petition for remission or mitigation ruling that specifies distribution (- - this provision effectively grants priority to innocent owners, including co-owners and secured creditors, who file successful claims in the judicial proceeding or meritorious petitions for remission);

second, to any federal agency (including any regulatory agency) that incurred expenses (- - these expenses include such out-of-pocket costs as payments for storage, maintenance, notices by publication, and costs related to the sale of the property);

third, to reimburse regulatory agencies for payments to claimants or creditors of the financial institution affected by the underlying offense and to reimburse the appropriate insurance fund for losses suffered by the fund as a result of receivership or liquidation pursuant to 18 U.S.C. § 981(e)(3) or (7);

fourth, as provided by any outstanding order issued by any regulatory agency pursuant to 18 U.S.C. § 981(e)(4) (- - such order direct restitution to a financial institution for losses suffered);

fifth, to the extent that there are any proceeds remaining, such proceeds may be distributed to any eligible victims pursuant to 18 U.S.C. § 981(e)(6) (restoration of forfeited property to any victim of an offense described in section 981(a)(1)(C)), and then to the Department of Justice Assets Forfeiture Fund or the Department of the Treasury Forfeiture Fund.

Appendix B

Theodore S. Greenberg
Chief, Money Laundering Section
Criminal Division
United States Department of Justice
P.O. Box 28159
Central Station
Washington, D.C. 20038

Dear Mr. Greenberg:

This letter will serve as a notification pursuant to the requirements of Title 18, U.S.C., § 1956(g). The following [financial institution/officer, director, employee] was convicted of a money laundering offense as described below:

Financial Institution _____

Defendant _____

Defendant's Position _____

Dates of Employment _____

Date of Conviction _____

Offense(s) of Conviction _____

_____

Sentence _____

Prosecutor _____

Phone Number _____

Investigative Agency _____

Enclosed are a certified copy of the order of conviction and a file-stamped copy of the indictment.

Sincerely,

United States Attorney

_____
Assistant United States Attorney

Enclosures

CATS participating agencies. Statistics on FIRREA forfeitures which do not originate as seizures by one of the CATS participating agencies will be provided by the other seizing agencies, the United States Attorneys' Offices, and the Fraud Section.

Effective Date and Retroactive Application by Consent

Section 8 (Effective Date and Retroactive Application by Consent) will establish a basic starting date for application of the FIRREA MOU. The FIRREA MOU will be applicable to forfeiture actions commenced on or after that date, but it also may be applied by consent to then pending forfeiture actions. For agencies that sign the FIRREA MOU after it goes into effect, the FIRREA MOU will apply to forfeiture actions commenced on or after the signing date, but it also may be applied by consent to forfeiture actions that are pending on the agency's signing date.

mitigation necessary to recover non-legal property interests and for claims against property in forfeiture actions as 1 The term "FIRREA forfeiture" has been carefully defined in footnote 2 of the FIRREA MOU. Most significantly, the definition includes forfeitures of any property which is referred to in 18 U.S.C. § 981(a)(1)(C) or (D) and therefore, forfeitable under FIRREA, regardless of whether the 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 the property is designated as a FIRREA forfeiture before it is forfeited.

Necessary to preserve any priority of the regulatory agency's interest from encroachment by other claims.

Custody of Seized Assets

Section 2 (Custody of Seized Assets) designates the United States Marshals Service (USMS) or designated Treasury component to be the primary custodians of assets pending FIRREA forfeiture. Section 2 also incorporates Department of Justice and Department of the Treasury pre-seizure planning procedures and provides that the "pertinent regulatory agency" (as determined pursuant to footnote 8 of the FIRREA MOU) will participate with federal prosecutors, the USMS or designated Treasury component, and the seizing agency in pre-seizure planning for FIRREA forfeitures. Footnote 9 of the FIRREA MOU designates the Federal Bureau of Investigation and the United States Secret Service as the "seizing agencies."

Currency, negotiable instruments, and securities seized for FIRREA forfeiture will be deposited by the USMS into the Department of Justice Seized Asset Deposit Fund, or by the appropriate Department of the Treasury component into the relevant Department of the Treasury seized asset fund. Such assets will be designated as related to a FIRREA forfeiture and will be invested in interest-bearing Treasury securities pending disposition.

Methods of Recovery and Enforcement

Section 3 (Methods of Recovery and Enforcement) provides guidance for the coordination of FIRREA forfeitures with other actions. Priority consideration is to be given to maximizing recovery and minimizing costs. Additionally, specific consideration is to be given to avoiding duplicate actions by different agencies to recover the same property.

Retention of Forfeited Property by Federal, State, and Local Agencies

Section 4 (Retention of Forfeited Property by Federal, State, and Local Agencies) provides that in FIRREA forfeitures there will be no equitable transfers of forfeited assets to state or local agencies and no retention of forfeited assets for

The Government is mindful of its obligation to protect the interests of innocent third parties in property seized for forfeiture. It is the intent of the Senior Interagency Group established by the Crime Control Act of 1990 that, in any FIRREA forfeiture case[2], and in any forfeiture case in which a regulatory agency asserts a claim of legal title[3] to property seized for forfeiture, that agency's claims of legal title will be determined within the Executive Branch, not through the filing of a claim in the forfeiture proceeding or the filing of a petition for remission.[4] The Department of Justice will assert the recognized legal claims advanced by the regulatory agencies against property subject to forfeiture as necessary to preserve any priority of the interest advanced by the regulatory agency from encroachment by other claims in the forfeiture action.[5] Thus, in all forfeiture cases, the

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[2] 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 and the financial institution affected by the underlying violation has been under the supervision of a regulatory agency in its receivership, conservatorship, liquidating agency, or corporate purchaser capacity, or where the regulatory agency has become successor to the interest of the failed financial institution pursuant to written agreement (e.g., under 12 U.S.C. § 1729(f)(1)-(4)). 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 shall determine whether any or all of the forfeited property is subject to disposition in accordance with section 5 (Disposition of Property in FIRREA Forfeitures) below. 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.) 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.

[3] For example, a claim under 21 U.S.C. § 853 (n), as incorporated by 18 U.S.C. § 982(b)(1)(B), requires proof of legal ownership exclusive of an superior to the offender's. While the Department of Justice is prepared to recognize such claims when advanced by regulatory agencies, sound policy requires resolution of such claims within the Executive Branch pursuant to the provisions of section 853(h) and (i), as incorporated by 18 U.S.C. § 982(b)(1)(B) [and analogous provisions of other forfeiture laws] rather than through litigation under section 853(n).

[4] In non-FIRREA forfeiture cases, a regulatory agency may, if necessary, file a petition for remission or mitigation of forfeiture to seek recovery of a <u>non-legal</u> interest in seized property (e.g., as a non-owner victim under 28 C.F.R. § 9.8 (proposed)).

[5] Regulatory agencies are authorized to receive forfeited assets pursuant to 18 U.S.C. § 981(e)(1), 19 U.S.C. § 1616a(c)(1)(B)(i), or 21 U.S.C. § 881(e)(1)(A). In forfeiture cases other than FIRREA forfeiture cases (e.g., controlled substance violations), a regulatory agency may file a claim as part of a stipulated settlement pursuant to the Expedited Settlement Policies of the Department of Justice or

Subsection 5(c)(v) also provides that if a regulatory agency is entitled to a share of such net proceeds pursuant to the provisions of 18 U.S.C. § 981(e)(5) (transfers of forfeited property based upon the agency's contribution of resources to the investigation, seizure, and forfeiture), it shall make written request to the appropriate official to obtain such a share and that the decision granting or denying such transfer will be made in writing by the official authorized to make transfer decisions for equitable sharing purposes in such cases. Subsection 5(d) limits the purposes for which the regulatory agencies may expend forfeiture proceeds received through transfers pursuant to 18 U.S.C. § 981(e)(5).

Other Financial Institution Forfeiture Cases

Section 6 (Other Financial Institution Forfeiture Cases) establishes procedures for cases involving the forfeiture of property that is forfeitable under the provisions of 18 U.S.C. § 981(a)(1)(C) but which are not classified under the FIRREA MOU as FIRREA forfeiture cases. In such cases, standard procedures for the custody and disposition of forfeited property will apply, except in two situations.

First, if a regulatory agency is entitled to remission or mitigation of forfeited assets, subsection 6(b)(i) provides procedures for transfers to the regulatory agency by a written decision after the agency submits a written request containing the information required for petitions for remission or mitigation.

Second, if a regulatory agency is eligible for transfer of 981(e)(1) or (5), the procedures set forth in subsections 5(c)(v) pursuant to section 981(e)(5) will apply.

Statistical Data on FIRREA Cases

Section 7 (Statistical Data on FIRREA Cases) establishes procedures for reporting information on FIRREA recoveries generally, and forfeitures in particular, to the Executive Office for United States Attorneys (EOUSA) for development of accurate data on FIRREA recoveries.

Subsection 7(a) provides that the regulatory agencies will report to EOUSA on recoveries obtained through activities including, but not limited to, forfeitures and that the USMS and designated Treasury component will report to EOUSA on the inventory of property seized for FIRREA forfeiture.

Subsection 7(b) provides that the Consolidated Asset Tracking System (CATS), through the Department of Justice Executive Office for Asset Forfeiture and the Department of the Treasury Executive Office for Asset Forfeiture, will provide EOUSA information about forfeitures which originate as seizures by one of the

Treasury seized asset fund, so that it can be invested in interest-bearing Treasury securities pending final disposition of the forfeiture action and receipt of necessary information and directions for disbursement. USMS or the appropriate Department of the Treasury component shall designate all such cash deposits as seizures related to FIRREA forfeitures.

3. Methods of Recovery and Enforcement

Because a regulatory agency assumes obligations when a victim financial institution has been closed, priority consideration shall be given to maximizing recovery to the Government (including the regulatory agencies) when assessing optional methods of recovery and enforcement. The pre-seizure planning referred to in section 2 above should include consideration of the various methods of enforcement and recovery available to the Government and should coordinate the enforcement and recovery actions to be taken by the various agencies involved on behalf of the Government so as to maximize the potential for recovery and minimize the costs. Such coordination should avoid duplications of actions to recover the same property by different Government agencies such that one of the actions eventually will have to be discontinued or become unenforceable.

FIRREA forfeiture will normally be the most effective means of reaching proceeds traceable to the criminal activity. Moreover, use of other methods to recover traceable proceeds will sometimes preclude forfeiture of those proceeds, whereas use of forfeiture will not preclude use of other methods of recovery that reach a more general class of assets.[10]

In addition to forfeiture, however, consideration will be given to the use of other statutory and regulatory remedies available to the Government in FIRREA cases. For example, remedies available pursuant to the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. § 3001 et seq., the Federal Credit Union Act, 12 U.S.C. § 1786(e), and the Federal Deposit Insurance Act, 12 U.S.C. §§ 1818(i)(4) and 1818(b)(6)(A), will be fully considered as they may be more effective than forfeiture in recouping losses in some cases.

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[10] The set-off provision in 18 U.S.C. § 981(e)(4) requires that any future award of compensatory damages to a victim financial institution will be reduced by the value of the forfeited property transferred to it as restitution under section 981(e)(4). The set-off provision does not affect the disposition of forfeited proceeds. For example, the amount to be transferred to such institution as restriction to make it whole will be reduced by any amount of compensatory damages already obtained by the institution. Similarly, 18 U.S.C. § 3663(e)(2) requires that any future award of compensatory damages be reduced by the amount of any restitution paid to a victim under the Victim and Witness Protection Act.

MEMORANDUM OF UNDERSTANDING

GOVERNING

FIRREA FORFEITURE CASES

Introduction

The United States Government (Government) is committed to the goals of the Financial Institution Reform, Recovery, and Enforcement Act of 1989 (FIRREA), the vigorous pursuit of those who steal from financial institutions, and the recovery of the profits and proceeds of financial crimes. To maximize recoupment for the benefit of the American taxpayer, all departments and agencies of the United States must coordinate their efforts in the identification, seizure, and disposition of forfeitable properties. This Memorandum of Understanding is intended to facilitate that coordination. To facilitate the identification of cases in which the use of criminal or civil forfeiture may be appropriate, representatives of the appropriate Department of Justice component, the United States Attorneys' Offices or the Fraud Section, Criminal Division, shall meet periodically with federal law enforcement and federal financial institution regulatory agency[1] representative through local and regional working groups to prioritized and coordinate investigations. In addition, each regulatory agency shall designate a central contact point at its headquarters office for all purposes of this Memorandum of Understanding.

1. Minimizing Litigation

The Government believes that departments and agencies of the United States should not litigate against each other. Therefore, the Department of Justice will not pursue criminal charges against closed financial institutions, absent exceptional circumstances, as to do so would: (1) require regulatory agencies, in their receivership, liquidating agency, or corporate purchaser capacities, or where the regulatory agency has become successor to the interest of a failed financial institution pursuant to written agreement, to incur defensive costs; (2) needlessly clog already crowded court dockets; and (3) create the spectacle of the Government litigating against itself.

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[1] For the purposes of this Memorandum of Understanding, the term "federal financial institution regulatory agency(ies)" (hereinafter, "regulatory agency(ies)") means: 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; the Resolution Trust Corporation; or their successor agencies.

relevant ruling official(s) all documentation supporting the regulatory agencies' interest in the FIRREA proceeds or property, and a brief but specific summary thereof. Should additional information be necessary, the ruling official shall request in writing such information from the regulatory agencies. The regulatory agencies shall respond to the request in writing in a timely manner and provide the requested information. Upon receipt, the ruling official shall give due consideration to the information submitted by the regulatory agencies in reaching a decision under the applicable regulations.

(b) The regulatory agencies shall develop among themselves a mechanism for assuring that each of them is given adequate notice of every FIRREA forfeiture in which it has an interest. The regulatory agencies shall resolve any competing inter-agency interests and submit joint recommendations to the ruling officials for disposition of the proceeds of FIRREA forfeitures.

(c) Forfeited cash and cash proceeds from the sale of forfeited property shall be deposited in the Department of Justice Assets Forfeiture Fund administered by the USMS or in the Department of the Treasury Forfeiture Fund. Interest earnings allocable to the deposit of cash in the Funds will be transferred to the regulatory agencies at the end of each fiscal year in accordance with determinations to be made by the Executive Offices for Asset Forfeiture. The Department of Justice and the Department of the Treasury shall distribute forfeited cash and cash proceeds from the sale of forfeited property deposited in their respective forfeiture funds and shall direct the disposition of non-cash property in accordance with the following priorities, 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 ruling granting a petition for remission or mitigation that specifies the disposition of assets or the distribution of proceeds including any expenses necessary to effect a ruling for remission or mitigation.

(ii) Second, to any federal agency (including any regulatory agency) 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, or to any regulatory agency that has become successor to the interest of the failed financial institution pursuant to written agreement, to reimburse

Department of Justice and the Department of the Treasury will give appropriate deference to both the legal and equitable claims of the regulatory agencies and will seek to resolve those claims within the Executive Branch.

2. Custody of Seized Assets

Except as set forth in section 4 below, the United States Marshals Service (USMS), designated Treasury component, or other designated custodian of seized assets pending forfeiture shall maintain custody of and assume full responsibility for the preservation and management of all real and personal property (including cash)[6] restrained for FIRREA forfeiture during the pendency of any administrative or judicial forfeiture proceedings.

The policies and procedures established by the Department of Justice or the Department of the Treasury for pre-seizure planning will apply to FIRREA forfeiture cases as well as to all other forfeiture cases.[7] The pertinent regulatory agency[8] will participate in pre-seizure planning for FIRREA forfeitures. The United States Attorney's Office (or, where appropriate, the Fraud Section), the USMS or designated Treasury component, and the seizing agency[9] will consult with the pertinent regulatory agency in determining whether specific assets should be seized for forfeiture. All administrative forfeiture cases, regardless of the seizing agency involved, shall be coordinated closely with the United States Attorney in the judicial district in which any related criminal investigation or civil litigation is either ongoing or contemplated (or, where appropriate, with the Fraud Section).

Regardless of whether the regulatory agency restrains it or the seizing agency seizes it, all FIRREA forfeiture cash shall be tendered to the USMS for deposit into the Department of Justice Seized Asset Deposit Fund (SADF), or to the appropriate Department of the Treasury component for deposit into the relevant Department of

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the Department of the Treasury.

[6] Cash, as defined in the Attorney General's Guidelines on Seized and Forfeited Property (July 1990), means "currency, negotiable instruments or securities."

[7] Some aspects of pre-seizure planning may be carried out post-seizure in some cases pursuant to Department of Justice policy.

[8] The "pertinent regulatory agency" will be determined at the pre-seizure planning stage by the U.S. Attorney responsible for pre-seizure planning (or, where appropriate, by the Fraud Section.) In cases where pre-seizure planning takes place before the involvement of the United States Attorney or the Fraud Section, this determination will be made by the seizing agency in the firs instance.

[9] For the purpose of this Memorandum of Understanding, the term "seizing agency(ies)" means the Federal Bureau of Investigation and the United States Secret Service.

Memorandum of Understanding as FIRREA forfeiture cases,[11] the USMS, designated Treasury component, or other designated custodian will maintain custody of seized assets pending forfeiture and will be responsible for their disposition after forfeiture to the same extent it would in forfeitures under other statutes. The net proceeds from such forfeitures will be deposited into the Department of Justice Assets Forfeiture Fund, the Department of the Treasury Forfeiture Fund, or into such other Funds as provided by statute or by separate memoranda of understanding between either department and other agencies or departments.

(b) In such cases, where a regulatory agency:

(i) is entitled to remission or mitigation of forfeited assets to it because of an interest which is recognizable under the regulations governing petitions for remission or mitigation of forfeiture or is eligible for such transfer pursuant to 18 U.S.C. § 981(e)(6), the decision to make such transfer shall be made in writing by the official entitled to make transfer decisions for remission or mitigation purposes is such cases under 28 CFR 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 which contains the information required for such petitions under the regulations;

(ii) is eligible for transfer of forfeited assets to pursuant to the provisions of 18 U.S.C. § 981(e)(1) or (5), the procedures set forth in subsections 5(c)(v) and 5(d) above for transfers pursuant to section to section 981(e)(5) shall apply to transfers pursuant to 18 U.S.C. § 981(e)(1) or (5).

7. Statistical Data on FIRREA Cases

(a) Reporting

In order to develop accurate statistical data on property recovered by the Government in FIRREA cases, the regulatory agencies will regularly provide to the Priority Programs Team ("PPT"), Executive Office for United States Attorneys, Department of Justice, information they possess on recoveries obtained through enforcement and liquidation activities, including civil

[11] This provision applies to those 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, and no regulatory agency has become successor to the interest of a failed financial institution pursuant to written agreement.

When a FIRREA forfeiture has been commenced, regulatory agencies will not pursue alternative methods of recovery against the assets subject to the FIRREA forfeiture action. A FIRREA forfeiture will not be pursued, however, when an alternative method of recovery has resulted in an order or judgment in favor of the Government or a regulatory agency that is capable of execution only against assets otherwise subject to FIRREA forfeiture.

4. Retention of Forfeited Property by Federal, State, and Local Agencies

No property or proceeds within the scope of footnote 2 of this Memorandum of Understanding will be transferred to State or local agencies. Seizing agencies may retain for official use from FIRREA forfeitures office and electronic communications equipment having an aggregate appraised value in any given investigation of less than One Thousand Dollars (1,000) and motor vehicles having an appraised value of less than Twenty-five Thousand Dollars ($25,000) pursuant to the policies and procedures set forth in Part IV of The Attorney General's Guidelines on Seized and Forfeited Property (July 1990). The seizing agencies shall not retain motor vehicles having an aggregate appraised value exceeding 5 percent of the total appraised value of all the assets seized or restrained for forfeiture in any investigation. If the foregoing 5 percent limitation produces results that any affected party deems inequitable, this limitation shall be subject to renegotiation based on actual experience under this section. The total appraised value of motor vehicles to be retained in any investigation shall not exceed $100,000. Exceptions to these limitations and any other issues regarding the retention of motor vehicles for official use will be referred to and resolved by the designated central contact points of the agencies involved. Where the pertinent regulatory agency has any lien interest in any forfeited motor vehicle to be retained for official use by a seizing agency, that lien interest must be recognized and paid by the seizing agency. No other property or proceeds from FIRREA forfeitures may be retained for official use by a federal agency.

5. Disposition of Property in FIRREA Forfeitures

(a) The Department of Justice and the Department of the Treasury shall dispose of all FIRREA forfeiture proceeds in a manner consistent with the provisions of 18 U.S.C. § 981(e). Executive branch ruling officials in FIRREA forfeiture cases may decline to grant petitions filed by non-owner victims pursuant to [proposed] 28 C.F.R. § 9.8 when the ruling official determines that granting such petitions would result in insufficient proceeds remaining for satisfaction of regulatory agency interests pursuant to 18 U.S.C. § 981(e)(3), (6) or (7). Under these circumstances, so as to ensure that the ruling official possesses adequate information to make an informed decision, the relevant ruling official(s) shall notify those regulatory agencies of the pendency of such petitions, and the regulatory agencies shall submit to the

Approved and hereby adopted by the undersigned.

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Special Counsel for
Financial Institution Fraud
Department of Justice

Ronald K. Noble /Date
Under Secretary for
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National Credit Union
Administration

Jean Noonan
General Counsel
Farm Credit Administration

Jean Noonan /Date
General Counsel
Farm Credit System
Insurance Corporation

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 pursuant to 18 U.S.C. § 981(e)(4).

(v) Fifth, to the extent that there are any proceeds remaining in FIRREA forfeiture cases after disposition of such proceeds has been made in accordance with the provisions of 18 U.S.C. § 981(E)(3), (4), or (7), such proceeds may be distributed to any eligible victims pursuant to 18 U.S.C. § 981(e)(6), and then to the Department of Justice Assets Forfeiture Fund or the Department of the Treasury Forfeiture Fund. If a regulatory agency is entitled to a share of such net proceeds pursuant to the provisions of 18 U.S.C. § 981(e)(5), it shall make a request to obtain such a share. The decision to make such transfer pursuant to § 981(e)(5) shall be made by the official entitled to make transfer decisions for equitable sharing purposes in such cases under the Attorney General's Guidelines for Seized and Forfeited Property, 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 shall be made in writing to the appropriate official. Decisions granting or denying such requests shall also be made in writing.

(d) Where a regulatory agency obtains forfeitable proceeds pursuant to 18 U.S.C. § 981(e)(5), the proceeds shall be authorized to be expended only for the purposes authorized under the statute governing the Department of Justice Assets Forfeiture Fund (28 U.S.C. § 524(c)) or the statute governing the Department of the Treasury Forfeiture Fund (31 U.S.C. § 9703). The regulatory agency shall not transfer any such proceeds to another entity except with the consent of the pertinent Executive Office for Asset Forfeiture.

6. Other Financial Institution Forfeiture Cases

(a) 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 under this

While this MOU allocates jurisdiction to investigate violations of sections 1956 and 1957, nothing in this MOU is intended to augment or diminish the investigatory authority of any Justice or Treasury bureau or the Postal Service over violations of any Federal criminal law, independent of the money laundering statute, or to alter the existing allocation or delegation of such authority. This MOU governs all investigations involving 18 U.S.C. 1956 and 1957 and is intended to be used together with MOU does not supersede the provision of 26 U.S.C. 6103 (confidentiality and disclosure of returns and return information).

Section II. Definitions

1. "Bureau" includes the Postal Inspection Service.

2. "Treasury bureaus" mean the Internal Revenue Service (IRS), the United States Customs Service, the Bureau of Alcohol, Tobacco, and Firearms (ATF), and the United States Secret Service.

3. "Justice bureaus" means[57] the Drug Enforcement Administration (DEA) and the Federal Bureau of Investigation (FBI).

4. "Violations of section 1956" refers to both civil and criminal violations.

5. "Specified unlawful activities" has the definition set forth in 18 U.S.C. section 1956(c)(7).

6. "Justice Department attorney" means the appropriate Assistant United States Attorney or designated Justice Department attorney assigned to the prosecution of the cases.

Section III. Investigatory Jurisdiction

A bureau's investigatory actions in pursuit of a section 1956 or 1957 violation shall be conducted only in those areas in which the investigating bureau has existing jurisdiction, independent of the money laundering statutes, as set forth in this section.

[57] Editor's Notes: So in the original. The word "means" should be singular.

penalties, restitution, fines, and forfeitures realized from criminal and civil litigation and administrative proceedings. The USMS and designated Treasury component shall periodically report to the PPT of the extent of the inventory (tangible property and cash) seized and tendered for FIRREA forfeiture.

(b) Statistical Data Sources

Through the Department of Justice Executive Office for Asset Forfeiture and the Department of the Treasury Executive Office for Asset Forfeiture, the Consolidated Asset Tracking System (CATS) will provide to the Executive Office for United States Attorneys statistical information about administrative and judicial forfeitures provided that:

(i) the forfeiture follows a seizure by one of the seizing agencies participating in CATS; and

(ii) the seizing agency or United States Attorney's Office which determines that it is a FIRREA forfeiture in accordance with footnote 2 above also ensures that the appropriate assets are identified in CATS as part of the FIRREA forfeiture.

Statistics on FIRREA forfeitures that do not originate as seizures by one of the CATS participating agencies will be provided by the other seizing agencies, the United States Attorneys' Offices, and the Fraud Section.

8. Effective Date and Retroactive Application by Consent

This Memorandum of Understanding shall become effective on August 1, 1994, and shall be applicable to forfeiture actions commenced on or after that date. Additionally, this Memorandum of Understanding may be applied by the consent of the affected parties to uncompleted forfeitures that are pending on that date.

Application of this Memorandum of Understanding to forfeitures involving agencies that become signatories after the effective date shall be to forfeiture actions commenced on or after the date such agency signs this Memorandum of Understanding except that this Memorandum of Understanding except that this Memorandum of Understanding may be applied by the consent of the affected parties to uncompleted forfeitures that are pending on that date.

by employees of the FDIC), and section 1029 (fraud and related activity in connection with access devices).

4. Bureau of Alcohol, Tobacco and Firearms

The Bureau of Alcohol, Tobacco, and Firearms will have investigatory jurisdiction over violations of section 1956 or section 1957 involving the specified unlawful activity of an offense under 18 U.S.C. sections 2341-2346 (trafficking in contraband cigarettes); section 38(c) of the Arms Export Control Act, 22 U.S.C. section 2778 (relating to the importation of items on the U.S. Munitions Import List, except those relating to exportation, intransit, temporary import, or temporary export transactions); and 18 U.S.C. 1952 (relating to travelling in interstate commerce, with respect to liquor on which Federal excise tax has not been paid and arson); or any act or activity constituting an offense listed in 18 U.S.C. 1961(1), with respect to any act or threat involving arson, which is chargeable under State law and punishable for more than one year.

B. JUSTICE BUREAUS

1. Federal Bureau of Investigation

The Federal Bureau of Investigation will have investigatory jurisdiction over violations of section 1956 or section 1957 involving the specified unlawful activities of an offense under 18 U.S.C. section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), section 513 (relating to securities of States and private entities), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), 658[58] (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 875 (relating to interstate communications), section 1201 (relating to kidnapping), section 1203 (relating to hostage taking), section 1344 (relating to bank fraud), or section 2113 or 2114 (relating to bank and postal robbery and theft), section 2319 (relating to copyright infringement); 21 U.S.C. section 830 (relating to precursor chemicals), section 857 (relating to transportation of drug paraphernalia) and with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act); and any act or acts constituting a continuing criminal enterprise, as that term

[58] Editor's Notes: So in the original. The word "section" should be added prior to "658."

VI. *Memorandum of Understanding Regarding Money Laundering Investigations (Reprint)*

MEMORANDUM OF UNDERSTANDING
AMONG
THE SECRETARY OF THE TREASURY
THE ATTORNEY GENERAL AND
THE POSTMASTER GENERAL
REGARDING MONEY LAUNDERING INVESTIGATIONS

This Memorandum of Understanding (MOU) constitutes an agreement among the Secretary of the Treasury ("the Secretary"), the Attorney General and the Postmaster General as the investigatory authority and procedures of Treasury and Justice bureaus and the Postal Service under 18 U.S.C.[56] section 1956 and 1957, as amended by the Anti-Drug Abuse Act of 1988, Pub. L. 100-690 (Nov. 18, 1988). This replaces a previous MOU on this subject between the Secretary and the Attorney General effective May 20, 1987.

Section I. Purpose

The Attorney General, the Secretary and the Postmaster General have entered into this MOU in order the encourage effective and harmonious cooperation by Treasury and Justice bureaus and the Postal Service in the development of cases by bureaus with appropriate experience, to reduce the possibility of duplicative investigations, to minimize the potential for dangerous situations which might arise form uncoordinated multi-bureau effort, and to enhance the potential for successful prosecution in cases presented to the various United States Attorneys.

As clearly stated in the legislative history of the Act, this MOU does not confer any rights on any third party, including a defendant or other party in litigation with the United States. The fact that a bureau investigates a violation of section 1956 or section 1957 that should have been investigated by another bureau under the terms of this MOU, or that an agency not a party to this MOU investigates a violation of section 1956 or section 1957, confers no rights and provides no defense to any party.

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[56] Editor's Notes: So in the original. Period is missing after "C."

precursor and essential chemicals) and 857 (relating to transportation of drug paraphernalia); or any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848); or any of the predicate offenses enumerated in 18 U.S.C. 1961(1) dealing in narcotics or other dangerous drugs which are chargeable under State law and punishable for more than one year, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotics or other dangerous drugs, punishable under any law of the United States.

C. UNITED STATES POSTAL SERVICE

The investigative jurisdiction of the Postal Inspection Service is limited by 18 U.S.C. 3061 to offenses regarding property in the custody of the Postal Service, property of the Postal Service, use of the mails, other postal offenses, and offenses for which the Postal Service has been delegated investigative authority pursuant to 18 U.S.C. 3061(b)(2). Subject to these limitations, the Postal Inspection Service shall have investigative jurisdiction over violation of sections 1956 and 1957 involving the specified unlawful activities of 18 U.S.C. 201 (bribery of public officials and witnesses); 18 U.S.C. 500-503 (counterfeiting of money orders, post cards, indicia of postage and postmarking stamps); 18 U.S.C. 641 (theft of public money, property or records); 18 U.S.C. 1029 (fraudulent activity in connection with access devices) with respect to violations involving postal employees, fraud against the Postal Service or where the primary focus of the offense is mail fraud or a violation of 18 U.S.C. 2114 (postal robbery); 18 U.S.C. 1341 (mail fraud); 18 U.S.C. 1343 (wire fraud) where the primary focus of the offense is mail fraud; 18 U.S.C. 1461 and 1463 (mailing of obscene matter); 18 U.S.C. 1503,1510-1513 (obstruction of justice); 18 U.S.C. 1952 (mailing in aid of racketeering enterprises); 18 U.S.C. 1961(l)(A) (organized crime); 18 U.S.C. 2114 (robbery of mail, other property); 18 U.S.C. 2251, 2252 (sexual exploitation of minors); any 18 U.S.C. 1961 (1) offense dealing in narcotics and other dangerous drugs which are chargeable under state law and punishable for more than one year, or by the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotics or other dangerous drugs punishable under any law of the United States, or any act or acts constituting criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848); 21 U.S.C. 843 (b) (use of mails to violate Controlled Substances Act); and section 1822 of the Mail Order Drug Paraphernalia Control Act (21 U.S.C. 857) (transportation of drug paraphernalia).

Section IV. Undercover Operations

This MOU will govern the conduct of all money laundering investigations under sections 1956 and 1957 in that all parties hereto agree that all undercover operations will be reviewed using each bureau's internal guidelines, the objectives

A. TREASURY BUREAUS

1. Internal Revenue Service

The Internal Revenue Service will have investigative jurisdiction over all violations of section 1956 and 1957 where the underlying conduct is subject to investigation under title 26 or the Bank Secrecy Act.

2. United States Customs Service

a. The United States Customs Service will have investigatory jurisdiction over violations of section 1956 or section 1957 involving the following specified unlawful activities: criminal offenses under 18 U.S.C. section 542 (relating to entry of goods by means of false statements), section 545 (relating to the smuggling of goods into the United States), section 549 (relating to theft from foreign shipment), sections 1461-63 and 1465 (relating to illegal import or export of obscene matter), sections 2251-52 (relating to imports or exports of material involving sexual exploitation of children), section 2314 (relating to foreign transportation of stolen property), and section 2321 (relating to the import or export of certain motor vehicles or vehicle parts); 19 U.S.C. section 1590 (relating to aviation smuggling); 21 paraphernalia); criminal offenses under section 11 of the Export Administration Act of 1979 (50 U.S.C. App. section 2410); criminal offenses under section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705); criminal offenses under section 16 of the Trading with the Enemy Act (50 U.S.A. App. 16); and criminal offenses under section 38(c) of the Arms Export Control Act (22 U.S.C. section 2778) (relating to exportation, intransit, temporary import, or temporary export transactions).

b. The United States Customs Service will have investigatory jurisdiction over violations of section 1956(a)(2)(B)(ii), involving the international transportation of monetary instruments or funds which are proceeds of some form of unlawful activity and where the defendant knew that the transportation was designed in whole or in part to avoid a transaction reporting requirement under 31 U.S.C. 5316 (Reports on exporting and importing monetary instruments).

3. United States Secret Service

The United States Secret Service will have investigatory jurisdiction over violations of section 1956 or section 1957 involving the specified unlawful activity of an offense under 18 U.S.C. sections 471-473 (counterfeiting of obligations or securities of the United States), sections 500-503 (counterfeiting of blank or postal money orders, postage stamps, foreign governments postage and revenue stamps, and postmarking stamps), section 657 (involving theft, embezzlement or misapplication

Section VI. Prosecution

A bureau that conducts an investigation under the authority of this MOU shall coordinate with Justice Department attorneys.

Section VII. Notice, Coordination, and Lead Bureau

A. Notice

1. If, during the investigation of a section 1956 or 1957 violation, a bureau discovers a specified unlawful activity or a transaction reporting violation over which another bureau has investigatory jurisdiction, that bureau shall give notice to the bureau which has investigatory jurisdiction over the specified unlawful activity or to the Internal Revenue Service or Customs, as appropriate, in the case of a transaction reporting violation, and to consult prior to taking any investigative actions impacting on the other bureau's jurisdiction.

2. If a bureau discovers transactions involving the proceeds of a specified unlawful activity conducted with intent to engage in a violation of section 7201 or 7206 of the Internal Revenue Code, that bureau shall give notice to the Internal Revenue Service and coordinate the subsequent investigation with the IRS. To the extent that any IRS money laundering investigation requires the acquisition of evidence concerning an underlying specified unlawful activity, the IRS shall notify the bureau having jurisdiction over the specified unlawful activity and coordinate the subsequent investigation with that bureau.

3. Notice under this section will ordinarily be made at the supervisory field level and will, at a minimum, require a complete summary of the facts and circumstances of the investigation. However, in those instances where a bureau undertakes an investigation in which it determines that field level disclosure would be detrimental to the investigation, the required notice will be made at the headquarters level and dissemination restricted to selected individuals consistent with the need to maintain security of the investigations.

B. Coordination and Determination of Lead Bureau

Investigatory actions which involve areas outside the investigating bureau's existing jurisdiction, independent of the money laundering statute, shall be conducted only in coordination with the bureau(s) which do have existing jurisdiction independent of the money laundering statute. Coordination requires, at a minimum, a determination of the degree of cooperation necessary between the coordinating bureau(s) and includes continuing dialogue as the case develops. At the request of

is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848); or any act or activity constituting an offense listed in 18 U.S.C. 1961(1), with respect to any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or in dealing in narcotics or other dangerous drugs which is chargeable under State law and punishable for more than one year; 18 U.S.C. 201 (bribery); 18 U.S.C. 224 (sports bribery); 18 U.S.C. 659 (theft from interstate shipment); 18 U.S.C. 664 (embezzlement from pension and welfare funds); 18 U.S.C. 891-894 (extortionate credit transactions); 18 U.S.C. 1029 (fraud and related activity in connection with access devices); 18 U.S.C. 1084 (the transmission of gambling information); 18 U.S.C. 1341 (mail fraud); 18 U.S.C. 1343 (wire fraud); 18 U.S.C. 1461-1465 (obscene matter); 18 U.S.C. 1503 (obstruction of justice); 18 U.S.C. 1510 (obstruction of criminal investigation); 18 U.S.C. 1511 (the obstruction of State of local law enforcement); 18 U.S.C. 1512 (tampering with a witness, victim or informant); 18 U.S.C. 1513 (retaliating against a witness, victim or informant[59]; 18 U.S.C. 1951 (interference with commerce, robbery or extortion); 18 U.S.C. 1952 (racketeering, except with respect to untaxed paid liquor and arson); 18 U.S.C. 1953 (interstate transportation of wagering paraphernalia); 18 U.S.C. 1954 (unlawful welfare fund payments); 18 U.S.C. 1955 (the prohibition of illegal gambling businesses); 18 U.S.C 1958 (use of interstate commerce facilities in the commission of murder-for-hire); 22 U.S.C. 2251-52 (sexual exploitation of children); 18 U.S.C. 2321 (trafficking in certain motor vehicles or motor vehicle parts); 18 U.S.C. 2312 and 2313 (interstate transportation of stolen motor vehicles); 18 U.S.C. 2314 and 2315 (interstate transportation of stolen property); 18 U.S.C. 2421-24 (white slave traffic); any act which is indictable under 29 U.S.C. 186 (restrictions on payments and loans to labor organizations) or 29 U.S.C. 501(c) (embezzlement from union funds); any offense involving fraud connected with a case under title 11, fraud in the sale of securities, and the felonious manufacturer,[60] importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

2. Drug Enforcement Administration

The Drug Enforcement Administration shall have investigatory jurisdiction over violations of sections 1956 or 1957 involving the specified unlawful activities of, with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purpose of the Controlled Substances Act) including 21 U.S.C. 830 (relating to

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[59] Editor's Notes: So in the original. A parenthesis symbol should appear after the word "informant."

[60] Editor's Notes: So in the original. The "r" at the end of "manufacturer" should be deleted.

- Only one evidentiary[63] document, such as a record of interview will be prepared, and a copy will be furnished to the other bureau at time the document is prepared.

- Resources and investigatory expertise will be provided to the requesting bureau when the investigatory matter meets the criteria of the requested bureau and when available resources allow.

- Any contact with the news media, such as press releases, will be coordinated and agreed to in advance by the bureaus involved.

Section IX. Dispute Resolution

The Secretary, the Attorney General and the Postmaster General contemplate that in cases of overlapping jurisdiction, the appropriate bureaus will work in concert to the extent authorized by law. Any disputes between bureaus should be resolved at the field level. When this cannot be accomplished, the matter will be referred to the respective headquarters' point of contact. In the event that disputes cannot be resolved by the bureau headquarters, the matter will be expeditiously referred to the Assistant Attorney General, Criminal Division, Department of Justice, and the Assistant Secretary for Enforcement, Department of the Treasury, and in disputes involving the Postal Service, to the Chief Postal Inspector, whose decisions shall be final.

Section X. Extraterritorial Jurisdiction

Treasury and Justice bureaus and the Postal Service must immediately notify the appropriate prosecuting attorney or other designated Department of Justice official if, in the course of a section 1956 or section 1957 investigation, it becomes likely that extraterritorial jurisdiction under section 1956(f) or section 1957(d) will be invoked. See United States Attorneys[64] Manual 9-105.100.

Section XI. Amendment

This MOU may be amended by deletion or modification of any provision contained herein, or by addition of new provisions, after written concurrence of all the parties to the MOU.

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[63] Editor's Notes: In the original MOU, this word was incorrectly spelled "evidentiory."

[64] Editor's Notes: So in the original. An Apostrophe should be placed after the word "Attorneys."

of which are consistent with existing Attorney General Guidelines on undercover operations.

Section V. Seizure and Forfeiture

Any property involved in a violation of section 1956 or 1957 that a Treasury or Justice bureau or the Postal Service has authority to investigate under section III of this MOU may be seized by that bureau or the Postal Service, if that property is subject to forfeiture to the United States under 18 U.S.C. 981(a)(l)(A) or 981(a)(l)(B).

Where a Treasury or Justice bureau or the Postal Service would have authority to seize property under the authority stated in the preceding paragraph is not present to make the seizure, any Treasury or Justice bureau or the Postal Service that is present may seize the property and shall immediately turn over that property to the bureau having section III investigatory jurisdiction, where the forfeiture processing shall occur.

Any property seized under this section shall, upon forfeiture under 18 U.S.C. 981 or 982, be apportioned among the appropriate Treasury or Justice bureaus or the Postal Service in accordance with their respective contribution to the overall efforts expended in the investigation, seizure, or forfeiture.

Pursuant to 18 U.S.C. 981(e) and, where appropriate, the Justice Department, the Treasury Department or the Postal Service forfeiture guidelines, apportionment may include equitable transfers to any other Federal agency or State or local authorities, which participated directly in any of the acts which led to the seizure or forfeiture.

Any dispute regarding the seizure, forfeiture, apportionment, or disposition of property under this section shall be governed by the disputes resolution procedure in section IX of this MOU. This MOU does not affect Treasury or Justice bureaus' or the Postal Service's authority to seize property or the disposition of such property under statutory seizure and forfeiture provisions not based on section 1956 and 1957 violations.

A. Seizure of Attorney Fees: Treasury and Justice bureaus and the Postal Service will follow DOJ guidelines in reference to the seizure and forfeiture of any money or property that is held by an attorney for payment for the defense of a client. See United States Attorneys[61] Manual 9-111.000, et seq.

[61] Editor's Notes: So in the original. An apostrophe should be placed after the word "Attorneys."

VII. *Dyncorp Employees*

DIRECTIVE NO. 94-1 (Reprint)

U.S. Department of Justice
Office of the Deputy Attorney General
Executive Office for Asset Forfeiture
Washington, D.C 20530

January 10, 1994

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General Criminal Division Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration Commissioner, Immigration and Naturalization service Director, U.S. Marshals Service
Chief Inspector, Postal Inspection Service
Chief, U.S. Park Police

FROM: Cary H. Copeland
Director and Chief Counsel

SUBJECT: Policy Regarding Work with DynCorp Contract Employees

Effective July 21, 1993, the Department of Justice (DOJ) entered into a contract with DynCorp to provide the administrative support to our asset forfeiture efforts. Under this contract, DynCorp will provide administrative support services to the DOJ asset forfeiture program and other agency missions approved by this Office to be supported by this contract. Data processing and linguistic services are excluded from the scope of this contract.

In reviews of the previous support services contract, four problem areas were consistently identified. A discussion of each is attached. Your assistance in ensuring that all necessary implementation actions are taken to avoid recurrence in the contract with DynCorp is appreciated. Our ability to use contract employees in support of the asset forfeiture program has been enormously beneficial, therefore it is essential that we comply fully with pertinent federal laws and regulations and with the terms of the contract itself if we expect to be permitted to continue to use asset forfeiture proceeds to pay for the costs of contract employees.

As stated in the contract, the contract employees are not government employees and should not hold themselves out to be such. In this regard, DynCorp employees may not have access to grand jury materials unless so ordered by the court pursuant to Rule 6(e)(3)(C)(i). Each component using the administrative support contract is required to establish affirmative controls over classified, tax, grand jury, or other sensitive information by contractors to assure compliance with all relevant laws and regulations.

any coordinating bureau, at any time as the case develops, there shall be a determination of the lead bureau for the section 1956 or 1957 investigation. The determination of lead bureau does not preclude a subsequent request by a coordinating bureau for redetermination of the lead as compelling facts and circumstances warrant.

The determination of the lead bureau will be made at the supervisory field level by the bureaus involved and will be governed by which bureau has the paramount investigatory interest. In determining which bureau has the paramount investigatory interest, the factors to be considered shall include, but not be limited to:

- Likely impact on major criminal enterprises;
- Likelihood of successful prosecution;
- Existence of a specified unlawful activity, as defined in section 1956(c)(7);
- Jeopardy to informants, undercover agents, or third parties;
- Commitment of investigatory resources; and
- Any other matter of substantive investigative interest.

Section VIII. **Jointly Conducted Investigations**

Treasury and Justice bureaus and the Postal Service are encouraged to enter into joint investigatory endeavors in circumstances that may necessitate or justify the use of skills and resources or[62] more than one bureau. The specific details of each joint investigation, including the role of each bureau in the endeavor, will be formulated at the onset of the investigation and will be provided to each bureau's headquarters by each bureau's established procedures. While differing circumstances will result in varied arrangements from project to project, certain conditions will always apply:

- Participating personnel will be supervised by their respective bureaus. This does not alter any other concerning supervision of investigatory personnel.

[62] Editor's Notes: So in the original. This word should read "of" instead of "or."

DIRECTIVE NO. 94-1

Points to Remember
When Working with DynCorp Contract Employees

I. RECRUITING, HIRING AND TERMINATION OF CONTRACT EMPLOYEES IS THE RESPONSIBILITY OF DYNCORP.

DynCorp must do all recruiting, including advertising, for their employees. The Government cannot advertise or pay to advertise for DynCorp positions. The Government may encourage qualified persons to submit applications to DynCorp.

DynCorp must do all screening of applicants for DynCorp positions. Federal employees may be present during interviews conducted by DynCorp. Questions for the applicant may be provided to the DynCorp interviewer.

Selection of contract employees must be made by DynCorp. Advice of the Government may be considered in the selection process. Likewise, all hiring is done by the contractor and DynCorp must extend any offer of employment. The contract employee also may only be terminated by DynCorp.

II. DAY-TO-DAY SUPERVISION OF DYNCORP EMPLOYEES IS THE RESPONSIBILITY OF DYNCORP.

A contract employee may not work directly for or be supervised by a federal government employee without express statutory authority. The Assets Forfeiture Fund statute does not provide such authority. The day to day supervision of each of the contract employees is the responsibility of the designated DynCorp supervisor.

* Federal employees must refer work projects to the DynCorp supervisor to assign to DynCorp employees.

* Problems with work products or contract employee performance should be discussed with the DynCorp supervisor.

* Federal employees must not sign work plans or performance appraisals for DynCorp employees.

* Federal employees must not approve leave for DynCorp employees, but should consult with the DynCorp supervisor to ensure that the supervisor is aware of proper staffing requirements.

* Federal employees must verify time and attendance for DynCorp employees. Under the terms of the contract, the Government only pays DynCorp for the actual hours that the contract employee is on duty. For example, Dyncorp is not paid for days when the federal office is closed in observance of holidays. Similarly, if the DynCorp employee works from 9:00 AM to 5:00 PM and takes an hour for lunch, DynCorp is paid for seven hours. Certification that a contractor was on duty during-periods they were absent may constitute fraud.

Section XII. **Termination**

This MOU will remain in effect until terminated by the Attorney General or the Secretary or the Postmaster General upon 30 days'[65] written notice.

Section XIII. **Approval**

This MOU becomes effective when approved by the parties identified below.

(signed)

Peter K. Nunez
Assistant Secretary (Enforcement)
U.S. Department of Treasury

July 31, 1990
Date

(signed)

William P. Barr
Deputy Attorney General
U.S. Department of Justice

August 11, 1990
Date

(signed)

Charles R. Clauson
Chief Postal Inspector

August 16, 1990
Date

[65] Editor's Notes: So in the original. There should not be an apostrophe after the word "days."

* Shall not drive official Government or seized vehicles, unless they are in one of the driver/messenger labor categories. Other DynCorp employees may use common carriers or drive their own vehicles and seek reimbursement for mileage from DynCorp.

* Shall not develop, modify, or maintain computer software or equipment. This does not preclude the use of computer resources to perform activities authorized under the contract.

IV. MAINTAINING THE DISTINCTION BETWEEN GOVERNMENT EMPLOYEES AND DYNCORP CONTRACT EMPLOYEES IS THE RESPONSIBILITY OF BOTH ORGANIZATIONS.

Extreme care must be taken to ensure that DynCorp contract employees are not given the trappings or appearances of a federal employee. Ensuring the separate and distinct identity of contract employees is necessary to ensure that your organization stays within the bounds of the contract and the law.

Federal employees are cautioned:

* Not to refer to DynCorp employees as "my employee" or "my staff."

* Not to provide identification cards or credentials that appear to be official Government employee identification. DynCorp employees must have identification that clearly indicates that they are contract employees.

Any questions regarding the use of DynCorp contract employees should be referred to the Contracting Officer, Mr. Garland Sharp on 202-307-1961 or Rob Weeks, the Contracting Officer's Technical Representative on 202-616-8005.

Effective Date: This directive is effective immediately and supersedes directive 91-8, Points to Remember Regarding Work with Ebon Contract Employees, dated May 20, 1991.

Attachment

cc: Charles Bartoldus
Acting Director
Executive Office for Asset Forfeiture
Department of the Treasury

* While the Government should report to the DynCorp supervisor the circumstances and value of the efforts of an exemplary DynCorp employee, federal employees may neither demand, recommend specific amounts for, nor pay cash awards to DynCorp employees.

III. DYNCORP EMPLOYEES MAY ONLY PERFORM TASKS WITHIN THE TERMS OF THE LABOR CATEGORIES ENUMERATED IN THE CONTRACT.

When the contract with DynCorp was drafted, clerical and support functions attendant to administration of the asset forfeiture program were the only functions included. There are 18 labor categories included in the contract as it currently exists.

With the exception of the Project Director, Office Manager, Regional, and Program Manager labor categories, the majority of the work is related to maintaining and analyzing forfeiture information contained in automated systems or case files. Federal employees are cautioned not to request or encourage work assignments that fall outside of the purview of the contract labor descriptions.

DynCorp employees:

* Shall not be used for other than asset seizure and forfeiture work without specific approval by the Executive Office for Asset Forfeiture. Using DynCorp employees to fill in for non-forfeiture support staff is not appropriate.

* Shall not make decisions involving the discretionary exercise of government authority.

* Shall not do investigative work without the specific approval of the Executive Office for Asset Forfeiture. However, contract personnel may research public information sources or obtain information from commercial data bases or 'Obtain documents or other information from other agencies that are related to the forfeiture of assets that have been seized or are targeted for seizure.

* Shall not conduct interviews on behalf of the Government.

* Shall not have access to non-forfeiture computer data bases without the specific approval of the Executive Office for Asset Forfeiture.

* Shall not handle seized assets or evidence during the pendency of the forfeiture action, unless the employee is in one of the driver/messenger or property custodian labor categories.

* Shall not sign Government forms on behalf of the Government. This prohibition does not apply to the signing of document receipts or Certificates of Service.

* Shall not represent the Government in negotiations conferences, or meetings. However, this does not preclude their attendance at negotiations, conferences, or meetings if their attendance is necessary to perform their functions under the contract.

* Shall not attend Government training conferences except to the extent that the training is necessary to permit the performance of labor category descriptions set forth in the contract.

SEIZURE INFORMATION

16. Date USMS office was contacted:

17. Name and phone no. of USMS contact:

18. Pre-seizure meeting date:

19. Scheduled seizure date:

20. Relevant statute(s) authorizing seizure:

21. Specific facts that demonstrate the existence of probable cause that the property violated statutes authorizing civil forfeiture:

22. Has information which will assist agents regarding their safety and welfare been transmitted to USMS?
☐ Yes ☐ No

23. Estimated post-seizure management expenses (including maintenance and disposition):

24. Are there any public relations concerns anticipated? ☐ Yes ☐ No

25. If yes, has the appropriate public affairs personnel been advised or consulted?
☐ Yes ☐ No

26. Is the property potentially contaminated? ☐ Yes ☐ No

27. If yes, has any agency been contacted to provide contamination assessment on the property? ☐ Yes ☐ No

PREPARE NET EQUITY SHEET
(NET EQUITY WORK SHEET MUST BE ATTACHED)

28. Does the asset meet the minimum net equity threshold value? ☐ Yes ☐ No

29. If no, what law enforcement benefits are to be derived from the seizure?

30. Can the losses be mitigated? ☐ Yes ☐ No

31. Explain:

Prepared by: Name/Title: Date

☐ **VEHICLES**:
year: make:
model: NADA loan value:
condition: ☐ good ☐ fair ☐ poor ☐ salvage/scrap NADA wholesale value:
other information:
☐ **VESSELS**:
name: make:
model: type:

length: EFMV:
condition: ☐ good ☐ fair ☐ poor ☐ salvage/scrap
other information (include construction, e.g., wood, steel, etc.):
☐ **OTHER**:
type: quantity:
condition: ☐ good ☐ fair ☐ poor ☐ salvage/scrap EFMV:
other information:

PERSONAL PROPERTY PRE-SEIZURE CHECKLIST
(For seizures of personal property.)

PROPERTY INFORMATION

1. Description of property, i.e., location, type, quantity, condition, and estimated fair market value (EFMV): (See attachment for examples of information to include in the description.)

_____

_____

2. Name, address, and phone no. of owner of property:

_____

_____

GENERAL INFORMATION

3. AUSA assigned: _____ 4. Telephone: _____

5. Address:

_____

6. Case no. (when available):

_____

7. Agency(ies) Involved:

_____

8. Agent(s) name:

_____

9. Phone no.: _____ 10. Agency case no.: _____
11. Is there a related criminal case or investigation? ☐ Yes ☐ No
12. If yes, name of criminal case:

_____

13. Criminal AUSA assigned:

_____

14. Is sharing anticipated? ☐ Yes ☐ No
15. If sharing is anticipated, is storage by participating state and local law enforcement agency also anticipated? ☐ Yes ☐ No

13. Is the property a historical site or proposed historical site under federal/local law? ☐ Yes ☐ No

PREPARE NET EQUITY SHEET
(NET EQUITY WORKSHEET MUST BE ATTACHED)

14. Does the asset meet the minimum net equity threshold value? ☐ Yes ☐ No
15. If no, what law enforcement benefits are to be derived from the seizure?

_____

_____

16. Can the losses be mitigated? ☐ Yes ☐ No
17. Explain:

_____

_____

B. BUSINESS

18. Name of business:

_____

19. Type of business:

_____

20. Is business ☐ operating ☐ idle

REAL PROPERTY/BUSINESS PRE-SEIZURE CHECKLIST

21. Factors relevant to the decision to continue operating the business:

_____

_____

22. Are business assets being seized? ☐ Yes ☐ No
23. If yes, describe assets to be seized:

_____

_____

_____

24. Are accounts payable being seized? ☐ Yes ☐ No
25. Are accounts receivable being seized? ☐ Yes ☐ No
26. Is the business located in leased real property? ☐ Yes ☐ No
27. Is it located in real property owned by the business? ☐ Yes ☐ No

ATTACHMENT TO PERSONAL PROPERTY CHECKLIST
EXAMPLES

☐ AIRCRAFT
tail #: serial #:
make: model:
EFMV: liens:
condition: ☐ good ☐ fair ☐ poor ☐ salvage/scrap
location of log books and keys:
other information:

☐ ANIMALS
type: quantity:
location of registration documentation: EFMV:
any other description and specific needs of the animals:

☐ CHEMICALS, HAZARDOUS MATERIALS and CONTROLLED SUBSTANCE GROWTH EQUIPMENT:
type of operations: type of chemicals:
type of containers: number of containers:
EFMV: other concerns:

☐ ELECTRONIC EQUIPMENT/APPLIANCES:
type: quantity:
condition: ☐ good ☐ fair ☐ poor ☐ salvage/scrap EFMV:
other information:

☐ EXPLOSIVES/FIREARMS:
make: type:
condition: ☐ good ☐ fair ☐ poor ☐ salvage/scrap model:
antique or collectible: EFMV:
other information:

☐ FURNITURE/HOUSEHOLD ITEMS:
type: quantity:
condition: ☐ good ☐ fair ☐ poor ☐ salvage/scrap EFMV:
other information:

☐ GAMBLING DEVICES:
quantity: type:
condition: ☐ good ☐ fair ☐ poor ☐ salvage/scrap type of storage facility:
EFMV: date of inventory:
other information:

☐ HEAVY MACHINERY:
type: quantity:
condition: ☐ good ☐ fair ☐ poor ☐ salvage/scrap EFMV:
lien: other information:

☐ JEWELRY/PRECIOUS ITEMS (Antiques, Fine Art, Precious Metal, and Collectibles):
type: quantity:

EFMV: denomination, if collector coins:
other information:

PREPARE NET EQUITY SHEET
(NET EQUITY WORKSHEET MUST BE ATTACHED)

36. Does the asset meet the minimum net equity threshold value? ☐ Yes ☐ No
37. If no, what law enforcement benefits are to be derived from the seizure?

_____

_____

38. Can the losses be mitigated? ☐ Yes ☐ No
39. Explain:

_____

_____

GENERAL INFORMATION

40. AUSA Assigned:_____ 41. Phone No.:_____
42. Address:

_____

43. Case No. (when available):

_____

44. Agency(ies) Involved:

_____

45. Agent(s) Name:

_____

46. Phone no.: _____ 47. Agency Case No.: _____
48. Is there a related criminal case or investigation? ☐ Yes ☐ No
49. If yes, name of criminal case:

_____

50. Criminal AUSA assigned:

_____

51. Is sharing anticipated? ☐ Yes ☐ No

SEIZURE INFORMATION

52. Date USMS Office was contacted?

_____

53. Name, phone no. of USMS contact:

_____

REAL PROPERTY/BUSINESS PRE-SEIZURE CHECKLIST
(To be used in residential, business, and commercial seizures.)

PROPERTY INFORMATION (Complete all sections that apply)

A. REAL PROPERTY

1. Description of property, i.e., address/location (attach legal description of the property, title report, if available, and evidence of ownership):

2. Name, address, and phone no. of titled owner:

3. Is titled owner a fugitive? ☐ Yes ☐ No
4. Name, address, phone no., and grounds for claims of all potential claimants:

5. Type of Real Estate (check all that apply):
   ☐ Single Family Detached Residence ☐ Apartment/Condominium Unit
   ☐ Apartment/Condominium Building ☐ Commercial
   ☐ Undeveloped Land ☐ Other
6. Specific concerns regarding the property (include apparent major structural defects, unfinished or incomplete construction areas, etc):

7. Is the property potentially contaminated? ☐ Yes ☐ No
8. If yes, has any agency been contacted to provide contamination assessment on the property?
   ☐ Yes ☐ No
9. Is the property occupied? ☐ Yes ☐ No
10. If yes, attach name, phone no., and status of all known occupants (owner, renter, elderly, children, handicapped, pets, other)

11. Are contents of the house being seized? ☐ Yes ☐ No
12. If no, have arrangements been made to handle unseized personal property?
    ☐ Yes ☐ No

REAL PROPERTY
PERSONAL PROPERTY
NET EQUITY WORKSHEET

Case Name: _____

State and District: _____

Court Case of Docket No.: _____

Identification of Real/Personal Property: _____

1. a.	Appraised value	$_____	(date of appraisal _____)
	minus		
b.	Expenses[1]	- _____	
	plus		
c.	Income[2]	+ _____	
	equal		
d.	Net Value	= _____	

2. a.	Net Value	$ _____
	minus	
b.	Liens[3]	- _____
	equal	
c.	U.S. equity[4]	= _____

---

[1] Includes maintenance and disposal expenses, e.g., advertising, sales commission, sellers expenses to close, property manager salary, etc.

[2] Only applies to real property. Include any rental income.

[3] Includes total of all liens, principal and interest from the date of seizure to the date this worksheet is completed.

[4] Districts are <u>not</u> authorized, without additional approval, to pay a lien or liens totalling more than $50,000.

28. Type of ownership: ☐ Corporation ☐ Partnership ☐ Sole Proprietorship
☐ Other, explain:

29. Name(s), address(es), and phone no(s). of owner(s):

30. Name, address, phone no., and grounds for claims of all potential claimants:

31. Name and location of contact person for access to business records:

32. State the financial condition of the business:

33. Business Liabilities: $

34. Net worth: $

35. Indicate source, i.e.: ☐ Estimate ☐ Balance Sheet (date: _____)

BUSINESS
NET EQUITY WORKSHEET

Case Name: _____

State and District: _____

Court Case of Docket No.: _____

Name of Business: _____

1. a. Net worth[1] $_____ (date of net worth appraisal _____)
   minus
   b. Expenses[2] - _____
   plus
   c. Income[3] + _____
   equal
   d. Net Value = _____

---

[1] Business Net Worth = Assets minus Liabilities. Assets include real property (lands and structures) owned, or leasehold interests held, by the business.

[2] Includes maintenance and disposal expenses, e.g., advertising, sales commission, sellers expenses, property manager salary, amounts not paid from business revenues, etc.

[3] Business revenues less operating expenses.

REAL PROPERTY/BUSINESS PRE-SEIZURE CHECKLIST

54. Pre-seizure Meeting Date:

55. Scheduled Seizure Date:

56. Relevant statute(s) authorizing seizure:

57. Specific facts which demonstrate the existence of probable cause that the property violated statutes authorizing civil forfeiture:

58. Has information which will assist agents regarding their safety and welfare been transmitted to USMS?
☐ Yes ☐ No

59. Estimated post-seizure expenses (including maintenance and disposition):

60. Are there any public relations concerns anticipated? ☐ Yes ☐ No

61. If yes, has the appropriate public affairs personnel been advised or consulted?
☐ Yes ☐ No

Prepared by: Name/Title

UNITED STATES DISTRICT COURT
DISTRICT OF

UNITED STATES OF AMERICA,

PLAINTIFF,

v. CIVIL NO.

ONE PARCEL OF PROPERTY
LOCATED AT:
WITH ALL
APPURTENANCES AND
IMPROVEMENTS THEREON,

DEFENDANT

WARRANT OF ARREST IN REM

To the United States Marshal for the _____ District of :

WHEREAS, a verified complaint of forfeiture has been filed on [2], in the United States District Court for the _____ District of _____, alleging that the real property and premises located at [3], with all appurtenances and improvements thereon, more specifically described in Exhibit A, attached hereto and fully incorporated herein by reference, [[4a] was used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of Title II of the Controlled Substances Act, 21 U.S.C. §§ 801 et seq., punishable by more than one (1) year's imprisonment and is, therefore, subject to seizure and forfeiture to the United States pursuant to 21 U.S.C. § 881(a) (7).) [[4b] constitutes proceeds

3. a. U.S. equity $ _____
   divided by
   b. Appraised value _____
   equal
   c. Percentage of U.S. equity[5] = _____ %

_____

Prepared by: (Name/Title) Date

[5] U.S. equity must be at least 20% or more of the appraised value in order to pay a lien prior to sale.

The United States Marshal shall have at his discretion the authority to dispose of, by any means available, perishable,

contaminated, flammable, explosive, or violable items. An inventory will be kept as to those items and the method of disposal.

[[5]All persons, animals, and property located within the premises and not subject to seizure pursuant to this Order shall be removed from the premises no later than _____. Such removal shall be accomplished making due provisions for the rights of innocent parties.]

AND UPON APPLICATION of the plaintiff, United States of America, and pursuant to the All Writs Act, 28 U.S.C. § 1651(a), the Court shall issue any order necessary to effectuate and prevent the frustration of the execution of this warrant;

[[6]FURTHER, IT IS HEREBY ORDERED that the occupants of said real property and premises described in Exhibit A, if there be any, upon execution of this seizure warrant, acknowledge in writing the seizure of said property and service of this warrant, [7] and quit the premises no later than _____[8].]

It is further ORDERED that the owners and occupants of the defendant property not make any changes or improvements whatsoever to said property without the written consent of the United States Marshal.

[[9]The United States Marshal, at his discretion, shall be accompanied by federal, state, or local law enforcement officers to assist him in the execution of this Warrant.s

2. a. Net Value $ _____
   minus
   b. Liens[4] - _____
   equal
   c. U.S. equity[5] = _____

3. a. U.S. equity $ _____
   divided by
   b. Appraised value _____
   equal
   c. Percentage of U.S. equity[6] = _____ %

_____

Prepared by: (Name/Title) Date

---

[4] Includes total of all liens, principal and interest from the date of seizure to the date this worksheet is completed.

[5] Districts are <u>not</u> authorized, without additional approval, to pay a lien or liens totalling more than $50,000.

[6] U.S. equity must be <u>at least</u> 20% or more of appraised value in order to pay a lien prior to sale.

COMMENTS

Note that there is no "[ ]" to the right of the Civil Number on this form. Generally, this document is prepared and filed prior to this number being available.

This alternative warrant may be used in those districts where either policy or judicial decision requires an ex parte determination of probable cause before the issuance of a Rule C warrant for the arrest of real property. This warrant eliminates the need for a Writ of Entry For Inspection, Code: INSPECT.WRT, since it constitutes a court order authorizing the entry onto the property by the United States Marshal. It also eliminates the need for a motion for authorization for the appointment of a substitute custodian, since it specifically authorizes the United States Marshal to hire anyone necessary to assist him in the maintenance of the property.

[5 and 8][Optional) These provisions can be extremely controversial and the decision to evict should in all instances be reserved by the United States Attorney and the United States Marshal based upon judicial and public climate weighed against the best interest of the case.

[6] A signed acknowledgement will eliminate subsequent issues of notice and may be used in support of an order to vacate the property.

[8][Optional] to be used in conjunction with #5.

traceable to the exchange of controlled substances in violation of Title II of the Controlled Substances Act. 21 U.S.C. §§ 801 et seq.] and is, therefore, subject to seizure and forfeiture to the United States pursuant to 21 U.S.C. § 881(a) (6).

And, the Court being satisfied that based on the verified complaint of forfeiture there is probable cause to believe that the real property and premises so described was so used or intended for such use, and that grounds for application for issuance of a seizure warrant exist, title having vested in the United States by operation of law;

YOU ARE, THEREFORE, HEREBY COMMANDED to arrest and seize said property, entering said property far the purpose of determining the physical condition of the property at the time of the seizure, and to maintain custody of said property as provided by 19 U.S.C. § 1605 until further order of this Court respecting the same. The United States Marshals Service shall use its discretion and whatever means appropriate to protect and maintain said defendant property.

YOU ARE FURTHER COMMANDED TO POST upon said real property in an open and visible manner notice of such seizure at the time thereof, making the government's seizure open and notorious;

AND FURTHER TO SERVE upon the record owner thereof a copy of this warrant in a manner consistent with the principles of service of process of an action in rem under the Supplemental Rules For Certain Admiralty and Maritime Claims, Federal Rules of Civil Procedure, within a reasonable time of seizure;

other seized assets. After the identification, collection, and removal of the personal belongings by the occupants, the occupants shall depart the location pursuant to the Order to Vacate.

Where it would be desirable to rent or lease the seized property during the pendency of the forfeiture action, you may want to include this paragraph:

The United States Marshals Service, or any of its authorized agents or designees, shall have at its discretion the authority to rent/lease any vacant seized properties. Continued vacancy may result in deterioration and a diminished value to said property. The rental or leasing shall help assure any claimants and the United States Marshals Service that the property's value and integrity shall be maintained in at least the same condition as existed at the time of seizure.

A RETURN of this warrant shall be promptly made to the Court identifying the individuals upon whom copies were served and the manner employed, and a statement as to the satisfaction of the orders herein issued.

All persons claiming an interest in said property shall file their claims within ten (10) days after the execution of the Warrant or notice of this seizure, whichever occurs first, pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims, and shall serve and file their answers within twenty (20) days after the filing of the claim with the Office of the Clerk, United States District Court,

_____, _____,

_____, with a copy thereof sent to Assistant United States Attorney

_____.

Additional procedures and regulations regarding this forfeiture action are found at 19 U.S.C. §§ 1602-1619, and Title 21, Code of Federal Regulations (C.F.R.), Sections 1316.71-1316.81. All persons and entities who have an interest in the defendant property may, in addition to filing a claim or in lieu of the filing of a claim, submit a Petition for Remission or Mitigation of the forfeiture for a nonjudicial determination of this action pursuant to 28 C.F.R. Part 9.

Dated this _____ day of _____, 19 _____.

_____

UNITED STATES DISTRICT JUDGE

Land and Natural Resources Division

May 16, 1990

MEMORANDUM

TO: Edward S. G. Dennis, Jr.
Assistant Attorney General
Criminal Division

FROM: Richard B. Stewart /s/
Assistant Attorney General
Environment and Natural Resources Division

SUBJECT: Environmental Liability in Relation to
Federal Property Ownership: New EPA Regulation

SUMMARY

This is to advise you of a recent regulation promulgated by the Environmental Protection Agency (EPA) concerning the hazardous substance activity reporting requirements for federal agencies when selling or transferring federal real property. The regulation implements Section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), 42 U.S.C. 9620(h). The regulation should assist the law enforcement components in the Department in establishing procedures for seizure and forfeiture of property that may be contaminated with hazardous substances.

EPA's regulation governs the notice federal agencies must give when selling or transferring real property on which hazardous substances have been stored, released or disposed of. Federal agencies must include in the contract of sale or transfer notice of any hazardous substance which "during the time the property was owned by the United States" was "stored for one year or more, known to have been released, or disposed of." The notice must include the "type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent such information is available on the basis of a complete search of agency files." 55 Fed. Reg. 14212 (April 16, 1990), to be codified at 42 C.F.R. 373.1. Because the regulation focuses on hazardous substance conditions which occurred during the federal ownership, federal law enforcement agencies will not bear the burden of concern over waste problems created by prior owners.

The regulation constitutes a government interpretation of Section 120(h), which establishes special conditions for federal agencies when they transfer property. Many agencies,

[9][Optional) This has been added in response to the U.S. v. Ladson, 774 F.2d 436 (11th Cir. 1985) and U.S. v. Showalter, 858 F.2d 149 (3d Cir. 1988), decisions and provides explicit authority for the United States Marshal to be assisted in the execution of the warrant when, for example, there is a potential for violence or where numerous tenants need to be interviewed.

"Posting" the property. In a few instances it may not be advisable to make the seizure open and notorious, e.g., when the building is occupied solely by innocent tenants.

Where the seized property is vacant, you may want to include this paragraph:

If the property seized is vacant, or becomes vacant, the United States Marshal, or any of his agents, shall, in addition to an inspection, secure the premises and inventory the contents of the premises to the extent the United States Marshal deems appropriate, and take such action as the United States Marshal or his agents deem necessary to protect the personal property of the owner or the former tenants of the property.

Where it is anticipated that occupants of the seized property will request to remove their non-forfeitable personal property, you bay want to include this paragraph:

When the seizure of the real estate property includes the contents, the occupants will be given the opportunity to remove from the location all of their personal belongings. A Deputy United States Marshal will accompany the occupants during the collection and packing of these belongings to ensure that only personal articles are removed from the location and to provide security for government agents and

(2)an act of war;

(3)an act or omission of a third party other than an employee or agency of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant. . ."

To invoke the CERCLA "third party" defense, the liable party must also demonstrate (1) exercise of "due care with respect to the hazardous substance concerned" and (2) taking of "precautions against foreseeable acts or omissions" of possible third parties. See 42 U.S.C. § 9607(b)(3).[2]

Government "innocent landowner" defense. In 1986, when Congress amended CERCLA, it supplemented the third party defense to address the so-called innocent landowner. Concerned that the contracts for sale and transfer of property would put subsequent purchasers in a "contractual relationship" that would vitiate the availability of the third party defense, Congress added detailed definitional requirements to address such circumstances. Section 101(35) defines "contractual relationship" to include land transfer arrangements with specified limitations; a party meeting these limits is, notwithstanding the land transfer, eligible to invoke the third party defense.

The conditions established in Section 101(35) for the innocent landowner defense are as follows:

- acquisition of the property "after the disposal or placement of the hazardous substance on, in, or at the facility," and;
- either:

no knowledge of the hazardous substance, or

"The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation" or

acquisition of the property by inheritance or bequest, but;

"if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently

[2] Federal agency compliance with EPA's Section 120(h) property transfer regulations does not constitute a defense to liability for cost recovery under CERCLA. The liability regime governs when someone else may seek to hold a party liable for cleanup costs. The property transfer regulation, on the other hand, does effect the federal agencies' obligation to clean up property, since the pendency of suits or claims by third parties is irrelevant to Section 120 responsibilities.

Land and Natural Resources Division

May 16, 1990

MEMORANDUM

TO: Edward S. G. Dennis, Jr.
Assistant Attorney General
Criminal Division

FROM: Richard B. Stewart /s/
Assistant Attorney General
Environment and Natural Resources Division

SUBJECT: Environmental Liability in Relation to
Federal Property Ownership: New EPA Regulation

Attached is a comprehensive memorandum regarding new regulations which will affect federal agencies that own contaminated property and later sell or transfer it. As you know, concerns about such liability prompted former Acting Associate Attorney General Whitley to issue a letter which limits law enforcement forfeiture activities due to such liability.

The new EPA regulation should allow greater use of forfeiture without liability for contamination which was not caused by the agency which takes ownership.

After you review this memorandum, I propose discussing it with the Advisory Committee of United States Attorneys (at the upcoming meeting on May 21) as well as other appropriate components in order to help develop operational guidelines for law enforcement agencies, and determine the best way to communicate these guidelines. We have already been engaged in discussions with the Asset Forfeiture Office.

Please let Deputy Assistant Attorney General Barry Hartman or me know if you have questions or concerns.

cc: Barry N. Stern
Cary Copeland

Section 120(j) allows the President to issue special orders exempting Department of Defense and Department of Energy facilities from any CERCLA requirements, if necessary to protect the national security interests of the United States. There are conditions on this authority, including notification to Congress and a limitation of one year, with the authorization to extend. 42 U.S.C. § 9620(j).

Section 120(h) Requirements. Section 120(h) addresses property transferred by Federal agencies. The section, which has been construed in EPA's recent regulations, provides in brief the following: Subsection (1) requires notice in the contract of sale or transfer of hazardous substances stored, released or disposed of at federally owned property; Subsection (2) requires EPA to promulgate regulations establishing the form of the notice required; Subsection (3) requires notice in any deed transferring federal property of the hazardous substances on the property and any remedial action taken. It also provides that such deed will include a covenant that necessary remedial action has been undertaken and that the United States will conduct any additional remedial action found to be necessary after the transfer of the property.

On its face, Section 120(h) might be read to impose onerous obligations on federal property owners, resulting in a situation where the United States would be perpetually responsible for hazardous substances found on any of its properties, without regard to how long the property was held or what government function was performed at the property. It appears from the legislative history of the 1986 amendments, however, that in Section 120 Congress was principally concerned with federal facilities engaged in waste generating practices. There is no indication that Congress intended law enforcement agencies, who come to own property temporarily and in the course of punishing violations of the law, to carry the burden and expense of perpetual clean up of such properties. As a result, EPA's regulation construes Section 120(h) to provide a more reasonable reading, consistent with legislative purpose.

The preamble to the regulation explains this interpretation:

EPA believes that the concern of Congress in enacting section 120(h) was with federally owned facilities whose own operations might involve storage, disposal or release of hazardous substances. The types of facilities cited in Congressional discussion of section 120 included military bases, Department of Energy nuclear production facilities, and other civilian installations. Moreover, nothing in the text or legislative history of the statute suggests that Congress meant to require agencies which had not in some manner been responsible for the storage, release or disposal of hazardous substances to unilaterally assume the obligation in section 120(h) (3) of remedying the contamination prior to sale and warranting that contamination that came to light after sale would also be corrected. In addition, section 120(h)(l) requires the notice to contain information about the type and quantity of hazardous substance stored, released, or disposed of, and the time at which such storage, release or disposal took place. It is unlikely that the agency would be expected to have such detailed information with respect to an activity which took place before the agency held the property.

including the Department, have been concerned over their exposure to clean up and other costs under the environmental laws, in particular CERCLA, when they obtain real property particularly as a result of forfeiture proceedings in connection with law enforcement activities. To assist the Department in both understanding this regulation, and assessing its potential liability for environmental contamination on real property, I am providing an additional explanation of the pertinent provisions of federal environmental law.

CERCLA BACKGROUND

Liability Scheme. CERCLA establishes both funding and authority for EPA to undertake clean up of hazardous substance sites, and also structures a liability scheme under which persons who fund clean up of hazardous substances may recover their costs. EPA's funds, known as the Superfund, are generally not available for response actions on federally owned property.[1] As a result, federal agencies must plan and budget for clean up of hazardous substances at their own property.

The heart of CERCLA rests in its liability scheme, found primarily in Section 107, which establishes classes of persons who. may be liable for clean up costs. Liable parties include (1) owners and operators of facilities; (2) certain prior owners and operators; (3) generators, i.e., those who arrange for the disposal of waste; and (4) transporters of waste. 42 U.S.C. § 9607(a). Facility is a broadly.defined term, including landfills, pits, buildings, vehicles, and "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9). Consumer products in consumer use are excluded.

Liable parties may be held liable for the costs of removal or remedial actions, natural resource damages and health assessments, as each of these terms is used in CERCLA. 42 U.S.C. § 9607(a). Generally these costs are incurred by a federal or state governmental entity, which then seeks to recover from liable parties. CERCLA also permits actions for contribution among and between liable parties. 42 U.S.C. § 9613(f)(1). In such suits, the court is to "allocate response costs among liable parties using such equitable factors as the court deems are appropriate." id.

Defenses Available. CERCLA recognizes few defenses. Under Section 107(b), the only defenses to liability require proof that the
"release or threat of release of a hazardous
substance and the damages resulting therefrom
were caused solely by -

(1)an act of God;

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[1] See Section 111(e) (3), 42 U.S.C. § 9611(e) (3), E#.O. 12580 §§ 2(a), 2(e), 9(i). Short term or emergency responses, known as removal actions, may be undertaken by the Superfund at federally owned properties at the discretion of EPA.

ownership, the statute does not support requiring the agencies to provide warranties for hazardous waste activities which did not occur during their ownership.

Relationship of CERCLA Notice Requirements.Although EPA's regulation limits the burden of notice required of federal agencies under Section 120(h), federal agencies must take care to assure that they can invoke the so-called "innocent landowner" defense described above. In order to do so, notice' of known hazardous substance activities on federal properties must be provided prior to sale or transfer. We recommend that Departmental components establish routine practices of assembling sufficient information to give notice to prospective purchasers of those hazardous substance activities which the agency knows have occurred on the property, even where our information reflects that the hazardous substances were stored, released or disposed of prior to governmental ownership. Even though the EPA Section 120(h) regulation might permit an agency to give notice of solely those hazardous substance activities which occur during governmental ownership, Section 107(b), as clarified by Section 101(35) mandates that the governmental entity who seeks to invoke an 'innocent landowner' defense must provide notice to purchasers of known hazardous substance activities. For Section 120(h) disclosure, practices during federal ownership are sufficient; to qualify for the defense, however, any information about activities prior to federal ownership should also be disclosed.[6]
In sum, while CERCLA Section 120 addresses supplemental responsibilities for federal agencies, governmental entities must also observe their obligations under other sections of CERCLA. Departmental components should take the steps necessary to assure that they can invoke the one defense from liability which Congress made specifically available to the governmental property acquirer.[7]

RCRA BACKGROUND

While the primary purpose of this memorandum is to advise you of requirements under CERCLA, federal agencies handling hazardous substances also need to be familiar with the

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[6] For example, property used as a drug lab may be seized with certain hazardous chemicals on site, which law enforcement officers will dispose of properly. Information obtained from witnesses or informants may address where other drugs were processed, where wastes or bad batches were dumped or other information about contamination at the site. The information concerning what we do with hazardous substances during our ownership is pertinent to the Section 120(h) requirements. The information concerning previous disposals is pertinent to invoking the "innocent landowner" defense and should be disclosed for that reason only.

[7] As addressed above, CERCLA subjects federal agencies to potential suit from any party who incurs costs as a result of cleaning up hazardous substance contamination. Federal agency compliance with Section 120(h) is not a defense to claims by these governmental or private entities that they have spent money to clean up contamination resulting from governmental property or activities. Rather, allegations of non-compliance with the section 120(h) obligations would provide a different .cause of action against the federal agency, likely arising under the "citizen's suit" provision, 42 U.S.C. § 9659(a)(1).

transferred ownership of the property to another person without disclosing such knowledge" no defense under Section 107(b) will be available.

Together, Section 107(b) (3), with the definitions in Section 101(35), allows a government entity which acquires through involuntary means (this includes seizures and forfeitures, which are "involuntary" to the law enforcement violator) to invoke a defense from liability for hazardous substance contamination found on real property as a result of prior owner's activities if that federal agency (1) exercises due care once it owns the property, (2) secures the property from other third party actions, and (3) provides notice to any transferee of those hazardous substance conditions about which it knows.[3]

Section 120 Obligations. In 1986, Congress expressed particular concern about the slow pace of clean up at major federal facilities. For the most part, the debate concerned large federal properties such as military bases and defense production facilities, nuclear and conventional. CERCLA had, since its enactment in 1980, included a waiver of sovereign immunity, subjecting federal agencies to the requirements of the federal statute. However, compliance had been slow. Congress responded in 1986 with detailed provisions in Section 120, designed to assure that federal facility clean up was made subject to EPA oversight, and that federal agencies thoroughly inventoried and reported on hazardous substance practices in their operations.

The Section 120 obligations are organized around reporting of hazardous waste facilities and subsequent clean up schedules for those sites posing sufficient threat to warrant inclusion on EPA's National Priorities List. Thus Sections 120(b) and (c) require federal agencies to report to EPA, for maintenance on a Federal Agency Hazardous Waste Compliance Docket, facilities engaged in the storage, treatment or disposal of hazardous waste (see 42 U.S.C. § 3016); any information provided in permit applications or other reports required for the storage, treatment or disposal of hazardous wastes (see 42 U.S.C. §§ 3005, 3010)[4]; and any information required to be reported when notice is given of a hazardous substance release (see 42 U.S.C. § 9603). From this information, EPA is to oversee the conduct of "preliminary assessments" of the federal properties, and evaluate such facilities to determine if they should be listed on the National Priority List. 42 U.S.C. § 9620(b), (c).

For federal facilities on the National Priority List, Section 120(e) provides a detailed arrangement for conduct of appropriate remedial investigations and feasibility studies (the RI/FS) necessary to select a remedy, and schedules for the conduct of such remedial actions as are found to be needed. 42 U.S.C. § 9620(e).

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[3] Steps necessary to meet these conditions will, of course, vary from site to site.

[4] These basic reporting requirements are found in a companion statute, the Resource Recovery and Conservation Act, addressed briefly below.

NOTICE, COVENANT and WARRANTY

NOTICE [For Contract of Sale and for Deed]

This notice provides information concerning hazardous substances known or believed to have been stored, released or disposed of at [provide common identification of the property, such as a site name or street address; followed by a proper legal description]. The United States of America owned the described property as a result of deed [dated; record book entry]. The [name of agency(s)] has (have) provided the information contained herein for the time period(s) indicated based on a complete search of agency files.

This notice is to be recorded with the deed transferring title of this property to _____ pursuant to a contract or option dated [fill in date].

A. Hazardous Substances Known to have been Released, Disposed of or Stored during United States Ownership

Information provided in this part addresses the period from [date of deed] to [date of sale] , [being the period when the [name of agency] had administrative jurisdiction over the subject land, or being the entire period in which title was vested in the United States,] based on a complete search of agency files. [repeat for other agency(s) if needed]

1. **Identify any hazardous substances removed from the site for disposal.**_____

_____

[e.g., provide information from, summarize or attach manifests identifying any hazardous substances disposed of from site by United States or other notification of hazardous substances provided to federal, state or local agency.]

2. **Identify any hazardous waste storage, treatment or disposal units on the site.**_____

_____ _____ [e.g., provide information from, summarize or attach any permit or permit application or other notice provided by U.S. Environmental Protection Agency or state or local agency with responsibility for hazardous substances.]

3. **Identify any other information concerning hazardous substances stored, disposed or released on the property** _____

_____[e.g., summarize any information concerning hazardous substance activity reported by witnesses.]

Therefore, it is EPA's belief, in light of the overall statutory scheme, that section 120(h) (1) was meant to apply where the storage, release, or disposal referred to in the statute occurred during the time the property was owned by the Federal government.

55 Fed. Reg. 14210. Consistent with this interpretation, EPA's regulation requires:

. . . whenever any department, agency, or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is owned by the United States and at which, during the time the property vas owned by the United States, any hazardous substance was stored for one year or more, known to have been released, or disposed of, the head of such department, agency, or instrumentality must include in such contract notice of the type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent such information is available on the basis of a complete search of agency files.

55 Fed. Reg. 14212 (emphasis added).

The regulation does not directly address the Section 120(h)(3) deed and covenant requirement. Although it could be argued that subsection (h)(3) should be read more broadly than subsection (h) (1)[5], we believe that it should be read in consonance with subsection (h)(1). As a result, the obligation to include information in the deed, including warranties with regard to clean up, will cover only those hazardous substance activities which are subject to the notice requirement of Section 120(h)(1). On the same reasoning which supports not requiring agencies to give Section 120 (h)(1) notice of events which did not occur during their

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[5] The deed must provide information about the nature of hazardous substance activity, "to the extent such information is available on the basis of a complete search of agency files." The covenant is to warrant that "(i) all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer' and that any additional remedial action found to be necessary will be conducted by the United States. See 42 U.S.C. § 9620(h) (3) (A), (B). Since Congress again tied the federal agency's obligations to a search of its own files, using language parallel to subsection (h)(1), it is logical that the obligation to clean up and warrant the clean up applies to the same property as the obligation to give notice. A broader reading would make the United States perpetually the guarantor of the environmental health of any property that ever enters government inventories, even if the agency had no knowledge of the conditions and no obligation to provide notice. It is more likely that Congress intended governmental responsibility under subsection 120(h)(3) to cover the same property as the notice requirements of subsection 120(h) (1).

This reading also makes sense since Section 120(h) does not exculpate federal agencies from CERCLA liability parties under Section 107(a) even where it does not have a notice or covenant responsibility under Section 120(h), although those circumstances should be rare. Thus, in the event an agency provides notice and covenants based on a complete search of its files, but additional information demonstrates other hazardous substances for which the agency is a responsible party, the agency may bear liability for cleanup costs incurred.

abstracts number and the EPA hazardous waste number, or other information sufficient to describe the substance. Material safety data sheets should be provided to prospective buyers.

3. "Disposal" and "storage" shall have the meanings set forth in 42 U.S.C. §§ 6903(3), (33) and regulations promulgated thereunder. "Release" shall have the meaning set forth in 42 U.S.C. § 9601(22) and regulations promulgated thereunder.

COVENANT and WARRANTY [for Deed]

The United States hereby covenants and warrants that-

(i) all remedial action necessary to protect human health and the environment with respect to any such substance identified in part A of this Notice remaining on the property has been taken before the date of such transfer, and

(ii) any additional remedial action found to be necessary with respect to any such substance identified in part A of this Notice after the date of such transfer shall be conducted by the United States.

companion statute, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 - 6992. RCRA is designed generally to manage ongoing activities involving handling of solid and hazardous waste. A few provisions are pertinent to this memorandum's discussion of CERCLA. Broadly, while the CERCLA provisions addressed herein concerned federal real property, RCRA concerns itself with the personal property-the hazardous substances, containers, equipment or other materials.[8]

Where federal agencies have hazardous waste on their property, they will generally have to comply with RCRA in the handling and disposal of that waste. RCRA governs storage, treatment and disposal of hazardous waste, requiring entities who conduct such activities to have permits. All persons must assure that hazardous waste is stored, treated or disposed of at permitted RCRA facilities. For Department components taking property in the course of law enforcement efforts, this will generally mean securing and disposing of any hazardous waste in accordance with RCRA, usually by contracting for transport and disposal in a permitted facility. Without going through all of the details of RCRA regulation, it is important to note that storage of most hazardous wastes at a location for longer than 90 days requires that the facility be permitted as a storage facility. As you review Departmental practices, please assure that waste materials are being handled lawfully and are not maintained or disposed of at unpermitted facilities.

You should also be aware that federal agencies engaging in hazardous waste activities may be required to give notice of those activities to EPA. As summarized above, RCRA Section 3016 requires federal agencies to maintain an inventory of sites at which hazardous wastes are stored, treated or disposed. 42 U.S.C. § 6937. Under these requirements, for example, a federal entity which takes real property on which hazardous waste has been stored could, after the passage of time, itself become responsible for a RCRA storage facility, and have to give notice to EPA.

CONCLUSION

Department components involved with property on which hazardous substances are found must consider the potential responsibility under federal environmental laws outlined in this memorandum. The recent EPA Federal Property Transfer Regulations reflect an effort to reduce the burden that CERCLA places on law enforcement agencies. As there are a multitude of specific circumstances in which the statutes and regulations are applied, we are happy to continue to work with the Department components in applying these laws.

Attachments

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[8] Under RCRA, sovereign immunity has been waived to state and local regulation of solid and hazardous waste. Federal agencies
must therefore comply not only with federal law, but with state and local law as well. See 42 U.S.C. § 6961.

4. **Where property was used, in whole or in part, for, or potentially affected by, continuing operations which generate hazardous substances, identify all such operations and substances**

_____

[e.g., for property on which hazardous substances were in use during United States ownership, provide information from, attach or summarize any permits, notifications, reports or documentation concerning hazardous substances prepared, filed or submitted during the time of United States ownership. Include such documentation whether prepared by the United States, its agencies, or private tenants, residents or occupants on the real property.)

B. Actual Knowledge of Hazardous Substances at Property, without regard to United States Ownership

Information in this part addresses hazardous substances which may have been stored, released or disposed of prior to United States ownership. To the extent possible, this notification also describes the source of the information. The United States cannot assure that information based on reports by other persons, indirect evidence or other sources is accurate in all respects.

1. **Describe any known instances of authorized or permitted storage, disposal or release of hazardous substances at the property**_____

_____

[e.g., provide information from, attach or summarize any permits, notifications, reports or documentation concerning hazardous substances issued to prior owners or prior operators and located at property]

2. **Describe any known instances of unauthorized or unpermitted storage, disposal or release of hazardous substances at the property**_____

_____

[e.g., indirect evidence from conditions at site, reports from informants, witnesses, evidence from state or local regulatory entities.]

C. Definitions

1. "Hazardous substances" has the meaning provided in 42 U.S.C. § 101(14) and 40 C.F.R. §§ 300.6 and 302.4 and thus includes all hazardous wastes identified and listed pursuant to 40 C.F.R. part 261.

2. Descriptions of hazardous substances shall include, to the extent such information is known and is appropriate, the common name, the chemical abstracts name, the chemical

There are no items in the Appendix for Chapter 2 at this time.

authority by Assistant Attorneys General to United States Attorneys will include the authority: (1) to accept offers in compromise in cases involving original claims by the United Sates of not more than $500,000; (2) to accept offers in compromise in cases involving original claims by the United States between $500,000 and $5,000,000, so long as the difference between the original claim and the proposed settlement does not exceed 15 percent of the original claim; and (3) to accept offers in compromise of claims against the United States in cases where the principal amount of the proposed settlement does not exceed $500,000.

This Order supersedes Criminal Division Directive No. 116 (48 FR 50712-13, November 3, 1983), which contains the current redelegation of the authority of the Assistant Attorney General, Criminal Division, to compromise civil penalties and forfeitures and close civil claims.

This Order is exempt from the requirements of Executive Order 12291 as a regulation related to agency organization and management. Furthermore, this Order will not have a significant economic impact on a substantial number of small entities because its effect is internal to the Department of Justice. 5 U.S.C. 605(b).

List of Subjects in 28 CFR Part 0

Authority delegations (Government agencies), Organization and functions (Government agencies), Penalties, Seizures and forfeitures.

Accordingly, 28 CFR Part 0 is amended as follows:

PART O - ORGANIZATION OF THE DEPARTMENT OF JUSTICE

1. The authority citation for Part 0 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515-19.

2. The Appendix to Subpart Y of Part 0 is amended by removing Criminal Division Directive No. 116.

exceed $500,000, and in all civil or criminal forfeiture cases, except that the U.S. Attorney shall consult with the Asset Forfeiture Office of the Criminal Division before closing a forfeiture case in which the gross amount of the original forfeiture sought is $500,000 or more.

(2) This subsection does not apply–

(A) When, for any reason, the compromise or closing of a particular claim (other than a forfeiture case) will, as a practical matter, control or adversely influence the disposition of other claims which, when added to the claim in question, total more than the respective amounts designated above;

(B) When the U.S. Attorney is of the opinion that because of a question of law or policy presented, or for any other reason, the matter should receive the personal attention of the Assistant Attorney General;

(C) When a settlement converts into a mandatory duty the otherwise discretionary authority of an agency or department to revise, amend, or promulgate regulations;

(D) When a settlement commits a department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek a particular appropriation or budget authorization; or

(E) When a settlement limits the discretion of a Secretary or agency administrator to make policy or managerial decisions committed to the Secretary or agency administrator by Congress or by the Constitution.

(b) Notwithstanding the provisions of this Order, the Assistant Attorney General of the Criminal Division may delegate to U.S. Attorneys authority to compromise or close other cases, including those involving amounts greater than as set forth in paragraph (a) above, and up to the maximum limit of his authority, where the circumstances warrant such delegation.

(c) All other authority delegated to me by §§ 0.160, 0.162,

DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 0

[A.G. Order No. 1598-92

Redelegations of Authority to

United States Attorneys, Deputy Assistant Attorneys General,

Section Chiefs, and Director, Asset Forfeiture Office,

in the Criminal Division

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This Order is the Criminal Divisions implementation of the first increase in the settlement and compromise authority delegated to the Assistant Attorneys General since 1981. It provides a corresponding increase in the settlement and compromise authority redelegated to United States Attorneys, Deputy Assistant Attorneys General, Section Chiefs, and the Director, Asset Forfeiture Office, in the Criminal Division, to further the efficient operation of the Department of Justice.

EFFECTIVE DATE: [Insert date of publication in the FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Lee J. Radek, Director, Asset Forfeiture Office, Criminal Division, Department of Justice, Washington, D.C. 20530, 202-514-1263.

SUPPLEMENTARY INFORMATION: This Order conforms the redelegations of the Assistant Attorney General's authority to compromise civil penalties and forfeitures and close civil claims to subpart Y, part 0, title 28 of the Code of Federal Regulations (CFR), 0.160, 0.164. 0.165, and 0.168 as amended by the Attorney General (Order No. 1478-91, 56 FR 8923-24, March 4, 1991). Subject to limitations set forth in 0.160(c) and 0.168(a), 0.168(d) provides that redelegations of this

3. The Appendix to Subpart Y of Part 0 is further amended by adding Order No. [___] to read as follows:

[Order No. ___]

REDELEGATIONS OF AUTHORITY TO UNITED STATES ATTORNEYS, DEPUTY ASSISTANT ATTORNEYS GENERAL, SECTION CHIEFS, AND DIRECTOR, ASSET FORFEITURE OFFICE, IN THE CRIMINAL DIVISION

By virtue of the authority vested in me by part 0 of title 28 of the Code of Federal Regulations, as amended, particularly §§ 0.160, 0.162, 0.164, 0.168 and 0.171, it is hereby ordered as follows:

(a) (1) Each U.S. Attorney is authorized in cases delegated to the Assistant Attorney General of the Criminal Division–

(A) To accept or reject offers in compromise of–

(i) Claims in behalf of the United States in all cases (other than forfeiture cases) in which the original claim $500,000, and in all cases in which the original claim was between $500,000 and $5,000,000, so long as the difference between the gross amount of the original claim and the proposed settlement does not exceed 15 percent of the original claim; and in all civil or criminal forfeiture cases, except that the U.S. Attorney shall consult with the Asset Forfeiture Office of the Criminal Division before accepting offers in compromise or plea offers in forfeiture cases in which the original claim was $5,000,000 or more, and in forfeiture cases in which the original claim was between $500,000 and $5,000,000, when the difference between the gross amount of the original forfeiture sought and the proposed settlement exceeds 15 percent of the original claim and

(ii) Claims against the United States in all cases, or in administrative actions to settle, in which the amount of the proposed settlement does not exceed $500,000; and

(B) To close (other than by compromise or entry of judgment) claims asserted by the United States in all cases (other than forfeiture cases) in which the gross amount of the original claim does not

0.164 and 0.171 of title 28 of the Code of Federal Regulations not falling within the limitations of paragraph (a) of this Order is hereby redelegated to Section Chiefs in the Criminal Division, except that–

(1) The authority delegated to me by §§ 0.160, 0.162, 0.164 and 0.171 of that title relating to conducting, handling, or supervising civil and criminal forfeiture litigation (other than bail bond forfeiture), including acceptance or denial of petitions for remission or mitigation of forfeiture, is hereby redelegated to the Director of the Asset Forfeiture Office; and

(2) When a Section Chief or the Director of the Asset Forfeiture Office is of the opinion that because of a question of law or policy presented, or for any other reason, a matter described in paragraph (c) should receive the personal attention of a Deputy Assistant Attorney General or Assistant Attorney General, he shall refer the matter to the appropriate Deputy Assistant Attorney General or to the Assistant Attorney General.

(d) Notwithstanding any of the above redelegations, when the agency or agencies involved have objected in writing to the proposed closing or dismissal of a case, or to the acceptance or rejection of an offer in compromise, any such unresolved objection shall be referred to the Assistant Attorney General for resolution.

MAY 19, 1992 /s/

Date

Robert S. Mueller, III
Assistant Attorney General
Criminal Division

Approved:

June 5, 1992 /s/
Date

Wayne A. Budd
Associate Attorney General

[subject to forfeiture] shall vest in the United States upon commission of the act giving rise to forfeiture . . . ."); 18 U.S.C. § 1963(c), 21 U.S.C. § 853(c) (substantially identical to quoted language from 21 U.S.C. § 881(h)). Under the Department's traditional interpretation, title in forfeited property vests in the federal government at the time of the offense. The date of the judicial order of forfeiture is not significant. From the date of the offense, states and other parties are barred from acquiring interests in the property from the owner whose interests are forfeited to the United States. *See In re One 1985 Nissan*, 889 F.2d 1317, 1319-20 (4th Cir. 1989); *Eggleston v. Colorado*, 873 F.2d 242, 245-48 (10th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990) (cases decided before *Buena Vista* and consistent with the Harrison Memorandum).

The Harrison Memorandum considers and rejects several possible grounds for limiting the operation of the relation back doctrine and requiring payment of state and local tax liens for the period between the offense and the forfeiture order. The two grounds of principal concern here are the "innocent owner" defense in the civil drug forfeiture statute, *see* 21 U.S.C. § 881(a) (6)[2], and the "bona fide purchaser" defense in the criminal drug forfeiture statute, *see* 21 U.S.C. § 853(c), and in the forfeiture provision of the RICO statute, *see* 18 U.S.C. § 1963 (c). The Harrison Memorandum concludes that these defenses do not protect a state or locality (or anyone else) who innocently acquires a property interest after the time of the offense. The Supreme Court's decision in *Buena Vista* forces us to reconsider this conclusion. We conclude that the Harrison Memorandum's conclusion concerning the innocent owner defense must be reversed, but that the Harrison Memorandum's conclusion regarding the *bona fide* purchasers defense is correct (although this latter conclusion is less certain than the Harrison Memorandum indicates and we reach it through an analysis different from that set forth in the Harrison Memorandum).

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[2] The conclusions with regard to section 881(a) (6), the innocent owner provision immediately at issue in *Buena Vista* and applicable to all "things of value" traceable to an exchange for a controlled substance, also apply to section 881(a) (7), which contains a nearly identical innocent owner provision applicable to real property used in a drug offense. *See* footnotes 1 and 5, *supra*, *infra*.

innocent owner defense would seem to be easy to satisfy in most cases. Like an innocent donee or purchaser, a state or locality holding a tax lien generally has obtained its interest without knowledge of the offense giving rise to the forfeiture.

The Harrison Memorandum's further conclusion with regard to the innocent owner defense, however, cannot survive the ruling in *Buena Vista*. The plurality and concurring opinions reject the interpretation of the relation back doctrine set forth in the Harrison Memorandum, and agree that the innocent owner defense is available to persons who acquire interest in forfeitable property after the commission of the offense that rendered the property subject to forfeiture. The opinions differ only as to the reading of the statute that leads to this result.

The plurality and the concurrence both analyze the common law doctrine of relation back as transferring ownership of forfeited property retroactively to the date of the offense, *but only* upon the entry of a judgment of forfeiture. Until a court issues such a judgment, this retroactive vesting of ownership in the United States does not occur, and all defenses to forfeiture that an owner of the property otherwise may invoke will remain available. Thus, a person who has acquired an interest in the property may raise any such defense in a forfeiture proceeding. If that person prevails, a judgment of forfeiture will not vest (retroactively) ownership off that property interest in the United States. *Buena Vista*, 113 S. Ct. at 1135-36, 1137 (plurality opinion), 1138-39 (Scalia, J., concurring).

The plurality and the concurrence both conclude that the federal civil forfeiture statute is fully compatible with the common law, and that the statutory innocent owner clause provides a defense for a third party who innocently acquires ownership of the property after the offense and before a judgment of forfeiture. The plurality

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owner provisions assumed to apply where purported innocent owner is local tax lien holder).

Office of Legal Counsel Opinion

You have asked us to reconsider our opinion that property seized by and forfeited to the United States is not subject to state or local taxation for the period between the commission of the offense that leads to the order of forfeiture and the entry of the order of forfeiture. *See* Liability of the United States for State and Local Taxes on Seized and Forfeited Property, 15 Op. O.L.C. 85 (1991) (preliminary print) ("Harrison Memorandum"). In light of the Supreme Court's decision in *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126 (1993), we partially reverse our opinion.

Because states and localities may not tax federal property (absent express congressional authorization),[1] the time at which ownership of forfeited property passes to the United States and the extent of the ownership interest that passes to the United States determine whether state and local taxes are owed. In many property transactions, the time and the extent of transfer of ownership are unambiguous and independent issues. In cases of transfers of ownership under the federal forfeiture statutes, however, the answer to the question of when ownership is transferred has been a matter of dispute, and of great consequence for the extent of the interest transferred.

The Harrison Memorandum expresses the Justice Department's traditional view that title vests in the United States at the time of the offense. This view is based on an interpretation of the "relation back" doctrine, which provides that a judicial order of forfeiture retroactively vests title to the forfeited property in the United States as of the time of the offense that leads to forfeiture, not as of the time of the judicial order itself. *See* 21 U.S.C. § 881(h) ("[a]ll right, title, and interest in property

[1] *See, e.g., United States v. City of Detroit*, 355 U.S. 466, 469 (1958) ("a State cannot constitutionally levy a tax directly against the Government of the United States or its property without the consent of Congress."); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

In sum, we reverse the Harrison Memorandum's conclusion that the innocent owner defense, set forth in 21 U.S.C. § 881(a), does not protect state and local claims for tax liabilities arising between the time of an offense rendering property subject forfeiture and the issuance of a court order of forfeiture.[7]

II.

The two federal criminal forfeiture statutes addressed in the Harrison Memorandum do not contain an innocent owner defense. Those statutes, however, do provide protection for a "transferee [who] establishes in a hearing [to 'amend' an order of forfeiture] that he is a *bona fide* purchaser for value of [the] property [subject to criminal forfeiture] who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture . . . ." 21 U.S.C. § 853(c); 18 U.S.C. § 1963(c) (same). The Harrison Memorandum concluded

[7] The local tax lien cases decided by lower courts since the Supreme Court's decision in *Buena Vista* do not alter our conclusion. In *2350 N.W. 187 St.*, 996 F.2d 1141, the court vacated the judgments in two cases in which the district courts had relied on the interpretation of the relation back doctrine described in the Harrison Memorandum, and had granted summary judgment against a county invoking the innocent owner defense in 21 U.S.C. § 881(a) (6), (7) to assert liens for property taxes owed for some of the period between an offense giving rise to forfeiture and the entry of a judgment of forfeiture. The appellate court remanded the cases for further consideration in light of the Supreme Court's decision in *Buena Vista*.

In *United States v. 7501 S.W. Virginia St.*, No. 92-921-BE (D. Ore. Aug. 3, 1993), the district court held that a county asserting a lien, for taxes accruing after the offense, in a forfeiture proceeding was an innocent owner under section 881(a) (6), but that the relation back doctrine had vested the title in the United States as of the date of the offense and therefore precluded payment of the tax lien. To support this conclusion, the court quoted the plurality's statement in *Buena Vista* that "[o]ur decision denies the Government no benefits of the relation back doctrine." Slip op. at 6 (quoting *Buena Vista*, 113 S. Ct. at 1137). The court has taken this quotation out of context, interpreting it as meaning, in effect, "our decision denies the Government no benefits of the relation back doctrine as is it had been understood, erroneously, in the case law that *Buena Vista* rejects." The district court simply misunderstands or ignores the Supreme Court's holding. This misinterpretation does not appear to be widely shared by courts applying the *Buena Vista* analysis of the relation back doctrine in analogous contexts. *See, e.g., United States v. Daccarett*, 1993 U.S. App. Lexis 23418 at *42-43 (2d Cir. Sept. 10, 1993); *United States v. 41741 Nat. Trails Way*, 989 F.2d 1089, 1091 (9th Cir. 1993); *2350 N.W. 187 St.*, 996 F.2d 1141; *United States v. One 1990 Lincoln Town Car*, 817 F. Supp. 1575, 1579-80 (N.D. Ga. 1993).

I.

The civil drug forfeiture statute provides that "no property shall be forfeited . . . , to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. § 881(a) (6). The Harrison Memorandum accepted that "owner" could include a state or locality holding a tax lien on the property. *See* Harrison Memorandum, 15 Op. O.L.C. at 88 (preliminary print). The Memorandum concluded, however, that this "innocent owner" provision does not apply to asserted property interests that arise after the time of the offense because, as of the moment of the offense, the property belongs (by operation of the relation back doctrine) to the United States, and not to the person from whom a third party innocently acquires an interest.

We conclude, consistent with the Harrison Memorandum, that a state or locality holding a tax lien can be an "owner" as that term is defined in the civil forfeiture statute's innocent owner provisions. The broad language of the statute – "[a]ll . . . things of value" and "[a]ll real property, including any right, title and interest" provides no reason to exclude a tax lien-holder from the definition of "owner." 21 U.S.C. § 881(a) (6), (7). The legislative history urges a broad reading.[3] And the courts have followed, sometimes explicitly, the path suggested by Congress.[4] The "innocence" requirement of an

[3] *See* Joint Explanatory Statement of Titles II and III, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 9522 (in section 881(a) (6), "[t]he term 'owner' should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized"); *see also* S. Rep. No. 225, 98th Cong., 2d Sess. 195, 215 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3378, 3398 (describing section 881(a) (7) as, in effect, extending section 881(a) (6) to cover real property used in a drug offense but not acquired with proceeds of prohibited drug transactions).

[4] *See, e.g., United States v. 717 S. Woodward St.*, 1993 U.S. App. Lexis 21051 at *15 (3d Cir. Aug. 20, 1993) (citing legislative history); *United States v. 6960 Miraflores Ave.*, 995 F.2d 1558, 1561 (11th Cir. 1993) ("Lien holders have the right to assert their claims of innocent ownership" under section 881(a), as interpreted in *Buena Vista*); *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 625 n.4 (3d Cir. 1989) (cited in *Buena Vista* and citing legislative history); *see also United States v. 2350 N.W. 187 St.*, 996 F.2d 1141 (11th Cir. 1993) (*Buena Vista* analysis of section 881(a) innocent

A.

The Harrison Memorandum's central argument concerning the relation back doctrine addresses the bona fide purchaser defense no less than the innocent owner defense. *See* Harrison Memorandum, 15 Op. O.L.C. at 88 (preliminary print). On the interpretation set forth in the Harrison Memorandum, the United States has owned the property since the commission of the offense giving rise to the criminal forfeiture, and no one, including a *bona fide* purchaser, can later acquire any interest from the former owner.

Although the question is a closer one than in the civil forfeiture context, we conclude that the Supreme Court's decision in *Buena Vista* rejects this argument as well.[9] We recognize that the plurality's holding is based on a reading of the civil forfeiture statute (and its innocent owner provisions) and does not address the criminal forfeiture statutes (and their *bona fide* purchaser provisions). That holding also does not require the plurality to adopt the interpretation of the common law relation back doctrine that the opinion sets forth. Nonetheless, the plurality's discussion of the common law doctrine makes clear that it agrees with the concurrence that the relation back doctrine vests ownership retroactively in the United States only upon entry of a final judgment of forfeiture. Under that reading, if a state or locality establishes that it is a "*bona fide* purchaser" of an interest in the property by virtue of a tax lien, and does so before a court orders forfeiture, the order of forfeiture will not extend to the lien-holder's interest and, therefor, will not vest title to that interest in the United States.[10]

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[9] *Cf. United States v. Harry*, 1993 U.S. Dist. Lexis 11999 at *21-27 (E.D. Iowa May 6, 1993) (drawing on *Buena Vista* discussion of innocent owners to resolve *bona fide* purchaser issue under the criminal forfeiture statute).

[10] This conclusion would follow rather simply from the court's analysis in *Buena Vista* when the state or locality asserts its *bona fide* purchaser defense at or before the proceedings in which the court issues an order of forfeiture. The conclusion is less certain under the procedure set forth in the criminal forfeiture statutes, which provides for assertion of *bona fide* purchaser claims at a

notes that section 881(h), which sets forth the relation back doctrine for the civil forfeiture statute, applies that doctrine only to "property described in subsection (a) of this section. " Subsection (a) (6) excepts, from its description of forfeitable property, the property of an innocent owner. Therefore, in the plurality's analysis, subsection (a) places the property of an innocent owner beyond the reach of the forfeiture and relation back provisions in subsection (h). *See Buena Vista*, 113 S. Ct. at 1136-37. Accordingly, an ownership interest in forfeitable property that is transferred to an innocent person (after the offense giving rise to forfeiture) does not vest in the United States as of the time of the offense. Indeed, it does not vest in the United States at all.

Interpreting the civil forfeiture statute as a more straightforward codification of common law doctrine,[5] the concurrence reads the phrase, in subsection (h), "'shall vest in the United States upon commission of the act giving rise to forfeiture'" as meaning "'shall vest in the United States upon forfeiture, effective as of commission of the act giving rise to forfeiture.'" *Buena Vista*, 113 S. Ct. at 1140 (Scalia, J., concurring).[6] The result, of course, is the same as under the plurality's analysis: a property interest innocently acquired after the offense is not forfeited to the United States if an owner asserts the interest in a proper and timely way, before the entry of a forfeiture judgment.

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[5] The concurrence specifically rejects the plurality's reading of the phrase, in subsection (h), "property described in subsection (a)" as meaning, in effect, "property forfeitable under subsection (a)." The concurrence stresses that subsection (h) refers to "property *described* in subsection (a)," not property deemed forfeitable under subsection (a). Since subsection (a) describes property generally and does not declare that property that cannot be forfeited is not "property," the "property described in subsection (a)" refers to all relevant property interests, including those of innocent owners. *Buena Vista*, 113 S. Ct. at 1139 (Scalia, J., concurring).

[6] The concurrence "acknowledge[s] that there is some textual difficulty with th[is] interpretation," but argues, first, that the imprecision imputed to the quoted language in subsection (h) is to be expected "in a legal culture familiar with retroactive forfeiture" and, second, that the civil forfeiture statute as a whole, including subsection (d) and its adoption of forfeiture procedures applicable under 19 U.S.C. § 1602 *et seq.*, does not make sense if one rejects the concurrence's reading of subsection (h) (and the plurality's reading of subsections (a) and (h)). *Buena Vista*, 113 S. Ct. at 1140 (Scalia, J., concurring).

would adopt the concurrence' s views.

Further, the concurrence's argument reads too much into the actual, multi-step procedures by which a court adjudicates a criminal forfeiture claim. It thereby overlooks – or confuses those procedures with – the more fundamental legal (and fictional) process through which a retroactive transfer of ownership occurs. The better interpretation of the criminal forfeiture statutes is that the procedures of entering an order of forfeiture, holding a hearing at which transferees assert claims to be *bona fide* purchasers, and amending the order of forfeiture upon successful presentation of such a claim are but phases in a single (if protracted) process for determining what property interest vests, retroactively, in the United States when the court enters its final, amended order of forfeiture. The entire process is the equivalent of the single order of forfeiture in the civil context.

This interpretation fits more easily with the statutory language, especially when that language is read in light of the discussion in *Buena Vista* of common law relation back doctrine. The criminal forfeiture statutes provide that title in property subject to forfeiture "shall be ordered forfeited to the United States *unless* the transferee establishes" that he is a *bona fide* purchaser for value, and that "the United States shall have clear title to [the] property" only "*following* the court's disposition of all petitions" filed by transferees asserting claims to be *bona fide* purchasers. 21 U.S.C. § 853(c), (n) (7); 18 U.S.C. § 1963 (c), (l) (7) (emphasis added). Such language would seem to suggest that the United States *never obtains* title from a *bona fide* purchaser, not that the United States first obtains title and then must give it back. Only after the entry of the final, amended order of forfeiture would ownership vest retroactively in the United States.[11]

[11] Although the statutory language does not fit perfectly with the interpretation adopted here, somewhat imprecise drafting concerning the sequence of events leading to a retroactive vesting of title is, as the *Buena Vista* concurrence points out, perhaps to be expected in a legal culture familiar with retroactive vesting. *See Buena Vista*, 113 S. Ct. at 1140 (Scalia, J., concurring).

Moreover, the legislative history of the criminal forfeiture provisions also seems to support

that this statutory "*bona fide* purchaser" defense is not available to a state or locality asserting a lien for tax liability incurred after the offense that made the property subject to forfeiture.

We conclude, consistent with the apparent assumption of the Harrison Memorandum, that such tax liens are "property" or an "interest" in property under the two criminal forfeiture statutes. Both statutes define property broadly, as including all "real property" and all "tangible and intangible personal property, including rights, privileges, interests, claims and securities." 21 U.S.C. § 853(b); 18 U.S.C. § 1963(b) (same); *see also* 21 U.S.C. § 853(c), (n) (6); 18 U.S.C. § 1963(c), (l) (6) (forfeiture and bona fide purchaser defense provisions referring to "interest" in such property). The legislative history and the courts' application of this statutory language also suggest a definition of property interests broad enough to include state and local tax liens on real property.[8]

The Harrison Memorandum suggests two arguments – one based on the relation back doctrine and another based on the definition of *bona fide* purchaser – to support its conclusion that the *bona fide* purchaser defense does not extend to holders of property interests that consist of liens for state and local taxes for the period after the offense and before a judgment of forfeiture.

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[8] *See* S. Rep. No. 225 at 193, *reprinted in* 1984 U.S.C.C.A.N. at 3376 (section enacting current 18 U.S.C. § 1963(c) and 21 U.S.C. § 853(c) "allows the use of criminal forfeiture as an alternative to civil forfeiture in all drug felony cases"); *id.* at 211, *reprinted in* 1984 U.S.C.C.A.N. at 3394 (property defined as subject to criminal forfeiture under 18 U.S.C. § 1963(a) and 21 U.S.C. § 853(a) is equivalent to property subject to civil forfeiture under 21 U.S.C. § 881(a)); *United States v. Reckmeyer*, 836 F.2d 200, 205 (4th Cir. 1987) (unsecured creditor who has reduced his claim to judgment and acquired a lien could seek an amendment to a forfeiture order under 21 U.S.C. § 853(n)); *United States v. Robinson*, 721 F. Supp. 1541, 1545 (D.R.I. 1989) (a leasehold interest ordinarily is a real property interest within the definition in 21 U.S.C. § 853(b)); *see also United States v. Monsanto*, 491 U.S. 600, 606-09 (1989) (noting breadth of forfeitable property under 21 U.S.C. § 853 (a)).

B.

The Harrison Memorandum also states that state and local tax authorities cannot "qualify as *bona fide* purchasers for value" under the criminal forfeiture statutes. Harrison Memorandum, 15 Op. O.L.C. at 88 (preliminary print). The Memorandum does not set forth the basis for this conclusion. The *Buena Vista* plurality and concurrence have nothing to say about this issue and, thus, do not require a reversal of the Harrison Memorandum. Although the matter is not free from doubt, we believe that the stronger argument is that state and local tax lien-holders are not "*bona fide* purchasers."

The courts have not adopted a clear and uniform view of how to interpret "*bona fide* purchaser" under the criminal forfeiture statutes. *See, e.g., United States v. Lavin*, 942 F.2d 177, 182-89 (3d Cir. 1991) (*bona fide* purchaser acquires interest through volitional, advertent and, generally, commercial transaction; victim of embezzlement acquired interest through unwitting and inadvertent tortious action of another and therefore was not a bona fide purchaser); *United States v. Reckmeyer*, 836 F.2d 200, 206-08 (4th Cir. 1987) (*bona fide* purchaser includes a general, unsecured creditor of defendant who gave value to defendant in arms'-length transaction with expectation that he would receive equivalent value in the future, and whose interest must have been in some part of the forfeited property because debtor's entire estate had been forfeited); *cf. United States v. Campos*, 859 F.2d 1233, 1237-38 (6th Cir. 1988) (general, unsecured creditor is not a *bona fide* purchaser, because he does not have a legal interest in the forfeited property); *Torres v. $36,256.80 U.S. Currency*, 1993 U.S. Dist. Lexis 9107 at *19-23 (S.D.N.Y. July 7, 1993) (similar to *Campos*; also pointing out significance, for general, unsecured creditor, of unusual circumstance in *Reckmeyer* that entire estate had been seized); *United States v. Mageean*, 649 F. Supp. 820, 824, 829 (D. Nev. 1986) (definition of *bona fide* purchaser cannot be "stretch[ed]" to include tort claimants, but "there is no reason that a good-faith provider of goods and services," although an unsecured creditor, "cannot be a bona fide purchaser"), *aff'd without opinion*, 822 F.2d 62 (9th Cir.

We also recognize that the concurrence in *Buena Vista* suggests that the relation back doctrine precludes a *bona fide* purchaser defense under the criminal statutes where it allows an innocent owner defense under the civil statute. As the concurrence points out, the criminal forfeiture statutes establish a procedure by which a person asserting a *bona fide* purchaser defense raises that defense *after* the court has entered an order of forfeiture. *See* 21 U.S.C. § 853(n); 18 U.S.C. § 1963 (l). In contrast, the civil forfeiture process (on both the plurality's and the concurrence's reading) contemplates that a person asserting an innocent owner defense will do so *before* the court enters an order of forfeiture. As the concurrence sees it, in the former case, the court order already has vested title retroactively in the United States (effective as of the date of the offense) before the "transferee" asserts a claim to be a *bona fide* purchaser. In the latter case, however, the court will not yet have issued the order vesting title retroactively when the "owner" asserts an innocent owner claim. (The concurrence argues that the civil statute's use of the term "owner" and the criminal statutes' use of "transferee" reflects this distinction and suggests its significance.) On this view, if a transferee's claim to be a *bona fide* purchaser succeeds and the court amends the order of forfeiture, the amendment does not void, retroactively, the initial retroactive vesting of title in the United States. The amendment to the initial order of forfeiture simply effects a new transfer of title to the *bona fide* purchaser, leaving undisturbed the United States' ownership from the time of the offense to the time of the amendment to the forfeiture order. *See Buena Vista*, 113 S. Ct. at 1141 (Scalia, J., concurring).

The *Buena Vista* concurrence fails to establish, however, that the criminal forfeiture statutes' *bona fide* purchaser defense does not protect liens for state and local tax liabilities incurred after the offense giving rise to the forfeiture. Only the concurrence advances the argument. The plurality does not join in it, and nothing in the dissenting opinion suggests that the dissenters

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hearing held after the court issues an initial order of forfeiture. The remainder of this subsection addresses this issue.

provisions cannot be relied upon to require payment of state and local tax liens.[13]

III.

For the reasons set forth above, we reach the following conclusions: In civil forfeiture proceedings (under 21 U.S.C. § 881) the United States may – and, indeed, must – pay liens for state and local taxes accruing after the commission of the offense leading to forfeiture and before the entry of a judicial order of forfeiture, if the lien-holder establishes, before the court enters the order of forfeiture, that it is an innocent owner of the interest it asserts. In criminal forfeiture proceedings (under 18 U.S.C. § 1963 or 21 U.S.C. § 853), however, the United States may not pay such liens because state and local tax lien-holders are not *bona fide* purchasers for value of the interests they would assert, and therefore do not come within any applicable exception to a statute that, upon entry of a court's final order of forfeiture, vests full ownership retroactively in the United States as of the date of the offense.

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[13] The Harrison Memorandum also found that payment of liens for state and local taxes, accruing after the offense, was not within the Attorney General's discretionary authority under 28 U.S.C. § 524(c) (1) (D) ("payment of valid liens . . . against property that has been forfeited") or 28 U.S.C. § 524(c) (1) (E) (payments "in connection with remission or mitigation procedures relating to property forfeited"). We reach the same conclusion through a different analysis. A tax lien-holder who establishes that he or she is an innocent owner under the civil forfeiture statute or a *bona fide* purchaser under the criminal statutes is protected from the operation of the relation back doctrine, and need not rely on the Attorney General's discretionary payment of a valid lien or remission or mitigation of a forfeiture that has not occurred with respect to the lien-holder's interest. *See* S. Rep. No. 225 at 207-08, 217, *reprinted in* 1984 U.S.C.C.A.N. at 3390-3391, 3400; *Lavin*, 942 F.2d at 185 (*bona fide* purchaser provisions designed to require protection previously left to discretion of Attorney General). If the tax lien-holder fails to establish that he or she is protected by one of these defenses to forfeiture, there can be no "valid lien" for taxes to be paid and no forfeited interest (in the form of tax liabilities) for the Attorney General to "remi[t] or mitigat[e]." Because ownership of the property will have vested in the United States as of the commission of the offense, state and local authorities cannot (absent a congressional waiver of immunity from state and local taxation that we do not find in 28 U.S.C. § 524 or elsewhere) levy taxes on such property after the date of the offense any more than they could levy taxes on a federal courthouse or post office.

This conclusion also avoids an incongruity that the concurrence's interpretation would create: an innocent owner (under the civil statute) would owe state and local taxes from the moment he or she acquired the property, but a *bona fide* purchaser for value (under the criminal statutes) would not owe taxes from the time he or she acquired the property until the time the court amended the order of forfeiture.

Finally, the conclusion we reach also is consistent with the statutory distinction between "owner" and "transferee." A person claiming to be a *bona fide* purchaser is nothing more than a transferee until he or she establishes to the court that he or she is a *bona fide* purchaser (whether the transferee does so after an initial forfeiture order, as the statute contemplates, or at some earlier stage). Only after the transferee has made this showing is he or she recognized as an owner (indeed, an innocent owner) of a particular type. Similarly, a person claiming to be an innocent owner is recognized as an innocent owner only after he or she proves to the court that he or she meets the standards of innocent ownership. Before that, such a person is, in the eyes of the court, merely a transferee. The civil forfeiture laws simply do not address or refer explicitly to those who assert, but have not yet established, that they are innocent owners.

For these reasons, we do not believe that the concurrence's discussion of the legal significance of the differences between the civil and criminal forfeiture statutes (which, in any case, is unnecessary to its conclusions) is correct.

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the interpretation set forth in this Memorandum. It refers to *bona fide* purchaser claims, raised after the initial forfeiture order, as "in essence, . . . challenges to the *validity* of the order of forfeiture," and, when successful, as "render[ing] that portion of the order of forfeiture reaching [the bona fide purchaser's] interest *invalid*." S. Rep. No. 225 at 208, *reprinted in* 1984 U.S.C.C.A.N. at 3391 (emphasis added).

1987); *see also United States v. 318 S.W. 138th Place*, 778 F. Supp. 1570, 1574-75 (S.D. Fla. 1991) (civil forfeiture case stating that locality is not *bona fide* purchaser by virtue of tax lien), *vacated on other grounds*, 996 F.2d 1141 (11th Cir. 1993); S. Rep. No. 225 at 201, 209, *reprinted in* 1984 U.S.C.C.A.N. at 3384, 3391.

We are aware of no case that has decided the precise question at issue here. We acknowledge that some of the claims that courts have rejected are weaker than those presented by tax liens, and that at least one court has pointed to a primary purpose of the criminal forfeiture statutes' relation back provisions that would not be served by denying the bona fide purchaser defense to holders of liens for state and local taxes. *See Reckmeyer*, 836 F.2d at 208 ("Congress's primary concern in adopting the relation-back provision was to make it possible for courts to void sham or fraudulent transfers that were aimed at avoiding the consequences of forfeiture"). Nonetheless, we have found no authority that has construed *bona fide* purchaser broadly enough to encompass such a tax lien-holder.

A state or locality does provide something of value, in the form of government services, in return for the interest it acquires in property (ultimately in the form of a lien) by virtue of its taxing authority. This exchange, however, does not fit the transactional, arms'-length exchange of values contemplated in the case law and suggested by the statutory phrase "*bona fide* purchaser for value.[12]

Therefore, we do not reverse the Harrison Memorandum's conclusion that the *bona fide* purchaser

[12] *See, e.g., Lavin*, 942 F.2d at 185-86 (Congress derived *bona fide* purchaser exception "from hornbook commercial law" principle of protecting the "innocent purchaser for valuable consideration" which had developed at common law "in order to promote finality in commercial transactions and thus to . . . foster commerce"); *Reckmeyer*, 836 F.2d at 208 (scope of *bona fide* purchaser provision "construed liberally" is to protect "all persons who give value to the defendant in an arms'-length transaction with the expectation that they would receive equivalent value in return").

Office of the Attorney General
Washington, D.C. 20530

ORDER NO. 1860-94

DELEGATION OF AUTHORITY TO RESTORE FORFEITED PROPERTY OR TAKE OTHER ACTION TO PROTECT THE RIGHTS OF INNOCENT PERSONS IN CRIMINAL FORFEITURES

By virtue of the authority vested in me as Attorney General of the United States, including 18 U.S.C. §§ 793(h)(3), 794(d)(3), 982(b)(1), 1467(h)(1), 1963(g)(1), 2253(h)(1), 21 U.S.C. § 853(i)(1), and 28 U.S.C. §§ 509 and 510, I hereby delegate to the Director, Asset Forfeiture Office, Criminal Division, my authority, pursuant to 18 U.S.C. §§ 793(h)(3), 794(d)(3), 982(b)(1), 1467(h)(1), 1963(g)(1), 2253(h)(1), and 21 U.S.C. § 853(i)(1), to restore forfeited property to victims or take other actions to protect the rights of innocent persons in criminal forfeitures which are in the interest of justice and which are not inconsistent with the provisions of those sections.

3/19/94
Date

Janet Reno
Attorney General

2. The USMS shall have the right to re-enter the property, with or without the consent of Occupant, at reasonable times to inspect and/or appraise the property, or for any other purpose consistent with this Agreement.

3. Occupant shall maintain the property at Occupant's expense in the same, or better, condition and repair as when seized. The term "maintain" shall include, but not be limited to keeping the property free of hazards and/or structural defects; keeping all heating, air conditioning, plumbing, electrical, gas, oil, or other power facilities in good working condition and repair; keeping the property clean and performing such necessary sanitation and waste removal; maintaining the property and grounds in good condition by providing snow removal, lawn mowing and all other ordinary and necessary routine maintenance.

4. Occupant shall maintain casualty and fire insurance equal to the full replacement cost of the property and all improvements thereon, and shall maintain liability insurance for injuries occurring on or resulting from use of the property, or activities or conditions thereon, in the minimum amount of (appraised value). Additionally, occupant shall arrange for a rider to all above-mentioned policies naming the United States as a loss payee and additional insured for the life of the Agreement. Occupant shall deliver proof of such insurance to the USMS no later than the seventh calendar day following the execution of this Agreement.

5. Occupant shall timely pay any and all mortgage, home equity loan, rent, utilities, sewer, trash, maintenance, cable television, tax and/or other obligations, otherwise necessary and due on the property, for the life of this Agreement. Moreover, Occupant shall abide by all laws, codes, regulations, ordinances, covenants, rules, bylaws, binding agreements and/or stipulations or conditions pertaining to the care, maintenance, control and use of the property.

6. Occupant shall not convey, transfer, sell, lease, or encumber in any way, title to the property. Nor shall he/she permit any other person, other than his/her immediate family, and temporary house guests, to occupy the property.

7. Occupant shall not remove, destroy, alienate, transfer, detract from, remodel or alter in any way, the property or any fixture, which is part of the property, ordinary wear excepted, without express written consent of the USMS. Occupant shall not use the property for any illegal purposes or permit the use of the property for such purposes; use the property so that it poses a danger to the health or safety of the public or a danger to law enforcement; or use the property so that it adversely affects the ability of the U.S. Marshal or his designee to manage the property.

14. Occupant acknowledges that violation of the contents of this Agreement as it pertains to the removal or destruction of property under the care, custody, or control of the USMS constitutes a violation of federal criminal law, specifically, 18 U.S.C. 2233 entitled "Rescue of Seized Property". That section provides for a fine not exceeding $2,000, or imprisonment not exceeding two (2) years, or both.

15. This Agreement shall be construed in accordance with federal law, and any conflict over the terms and conditions of this Agreement must be decided by the Court as part of the forfeiture action.

[If applicable add:

Occupant agrees to protect, feed and provide all reasonable and necessary veterinary care for any domestic animals permitted by the USMS to remain upon the seized property.]

_____ ----------
Date Occupant

_____ ----------
Date U.S. Marshal for the District
of _____

[If applicable:
Entered as an Order of this Court, dated this _____ day of _____, 199_.

_____
UNITED STATES DISTRICT JUDGE]

OCCUPANCY AGREEMENT

(Caption of the case.)

ORDER AND OCCUPANCY AGREEMENT

This Occupancy Agreement ("Agreement") is made between _____ and the United States Marshals Service (USMS) for the District of _____

On (date) United States of America, by and through the USMS, seized under authority of a warrant in rem bearing civil number _____, under the provisions of and authority of _____ U.S.C. _____ a parcel of real property ("property") located at _____ which includes all fixtures and appurtenances thereto, and which is described as follows:

(address/description)

[The United States, by and through the USMS, also seized the following personal property which may, at the option of the USMS, remain on the property for the duration of this Agreement:

(description/attached list)]

The undersigned ("Occupant"), _____, resided on the property when it was seized by the USMS, and desires to continue to reside there pending the disposition of the forfeiture proceeding with respect to the property.

Therefore, it is hereby agreed, upon execution of the Agreement, and in compliance with all the terms and conditions stated herein, that the Occupant may continue to occupy the property until such time as an order for interlocutory sale or a final disposition order is entered by the Court.

TERMS AND CONDITIONS

1. Occupant shall be permitted to occupy the residence located on the property subject to the terms and conditions of this Agreement as long as the Court permits. It is understood by the Occupant that this Agreement does not create any interest in the land or a tenancy of any kind, but rather this Agreement is a license by USMS of this property under custody of the Court subject to revocation by the Court at the discretion of the Court or for violations of the terms and conditions of this Agreement.

8. Occupant shall not use the property for any illegal purposes or permit the use of the property for such purposes; use the property so that it poses a danger to the health or safety of the public or a danger to law enforcement; or use the property so that it adversely affects the ability of the U.S. Marshal or his designee to manage the property.

9. Occupant agrees to provide the USMS with thirty (30) days' advance notice, in writing, in the event he/she chooses to vacate the property.

10. The USMS may require Occupant to vacate the property when the interests of the United States so requires. Except for the circumstances described in paragraph Il, or in exigent circumstances, the USMS agrees to provide Occupant with thirty (30) days' advance notice to vacate the property. However, at the discretion of the Court or if Occupant fails to vacate the property within that period, the USMS., upon notice to Occupant and all parties to the forfeiture action, may immediately petition the Court for directions to remove Occupant, and all other persons occupying the property, pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims, Rule E(4) (d).

11. If Occupant violates any term or condition of this Agreement, except Paragraph 10, the USMS shall notify Occupant that he/she has ten (10) days to correct the violation(s). If Occupant fails to correct the violation(s) cited by the USMS within that period, the USMS, upon notice to Occupant and all parties to the forfeiture action, may immediately petition the Court for directions to remove Occupant, and all other persons occupying the property, pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims, Rule E(4)(d).

12. Occupant, on behalf of himself/herself, his/her heirs, statutory survivors, executors, administrators, representatives, successors and assignees ("potential claimants"), agrees that he/she does hereby release the United States, its agencies, agents, assigns and employees ["potential federal defendants") in their official and individual capacities, from any and all pending or future injuries, claims, demands, damages, suits and causes of actions arising from Occupant's possession, maintenance, occupancy and/or use of the property.

13. Occupant, on behalf of himself/herself and other potential claimants, further agrees to indemnify the United States, and other potential federal defendants, as to any and all pending or future claims, demands, damages, suits and causes of actions regarding any damage or personal injuries incurred on, or as a result of, the property while Occupant resides there.

- drugs or other contraband were seized from the person from whom the property was seized

Investigative Agency Headquarters Approval:

_____ _____

Name/Title Date John Doe

Recommendation:

Delegation of decision-making authority to the Assistant Attorney General of the Criminal Division (or her designee) in equitable sharing cases (1) involving property valued at $1 million or more, (2) in multi-district cases, or (3) involving the transfer of real property, provided that AFO, the United States Attorney, and the federal seizing agency agree on the allocation of judicially forfeited property or that AFO and the federal seizing agency agree on the allocation of administratively forfeited property.

APPROVE /s/ Jamie S. Gorelick

DISAPPROVE _____

OTHER _____

Request for Adoption of State or Local Seizure

Federal Use Only

Asset Identifier: _____
Agency Case Number: _____
Agency Seizure Number: _____
Seizure Date: _____

Judicial District: _____
Date Request Received: _____

-Request must be submitted to the federal investigative agency within 30 calendar days of State and local seizure date unless circumstances merit a waiver.

-Federal investigative agency shall review all requests for adoptions.

-USMS must be consulted for purposes of pre-seizure planning prior to adoption.

Name of Requesting State or local Agency: Contact Person:

Date of Seizure: Telephone Number:

Date of Request:

Delay Requested in Processing: Yes ( ) Reason: _____ No( )

Criminal Case: State ( ) Case # _____District Attorney Assigned: _____

Federal ( ) Case # _____ Assistant United States Attorney: _____

Was Property Seized Pursuant to State Warrant Yes( ) Attach Copy No( ) State Forfeiture Action Initiated: Yes( ) No( )

If yes, explain circumstances: _____

Has a State or local prosecutor declined to proceed with forfeiture under State law? Yes( ) No( )
Has another Federal Agency been contacted and declined to proceed with this forfeiture under Federal law? Yes( ) No( )
Have you attached copies of pertinent investigative or arrest reports and copies of any affidavits filed in support of a seizure warrant? Yes( ) No( )

To be Completed by Federal Investigative Agency

Recommend Adoption: [ ] Adoption is in accord with general and local policy.

Decline Adoption: [ ] Reason for declination: _____

Investigative Agency Reviewing Official _____ _____
Signature Date

Immediate Probable Cause Review needed if following factors are not present:

- seizure was based on judicial warrant
- arrest made in connection with seizure

There are no items in the Appendix for Chapter 9 at this time.

June 5, 199

MEMORANDUM

TO: Assistant Attorney General, Criminal I
United States Attorneys
Director, Federal Bureau of Investigat
Administrator, Drug Enforcement Adı
Commissioner, Immigration and Natu
Director, United States Marshals Servi

FROM: Jamie S. Gorelick
Deputy Attorney General

SUBJECT: Delegation of Authority to Make Fina
Uncontested Equitable Sharing Reque

Parts V.D.3 and 4 of The Attorney General's
Forfeited Property (1990) provide that final determ
of forfeited property valued at $1 million or greate
(3) involving the transfer of real property are to b
General or her designee.

I hereby delegate to the Assistant Attorney
(or her designee) the authority to make final equi
otherwise would require my approval, provided t
the Criminal Division, the United States Attorney,
agree on the allocation of judicially forfeited prop
seizing agency agree on the allocation of administ

I will continue to make final equitable shar
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seizing agency on the sharing of judicially forfeite
the federal seizing agency on the sharing of admi

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Service

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multi-district cases, or
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of the Criminal Division
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Forfeiture Office (AFO) of
federal seizing agency
at AFO and the federal
orfeited property.

minations where there is
orney, and the federal
y or between AFO and
y forfeited property.

Sheriff
State or Local Law Enforcement Agency
Address

Re: United States v. $1,000,000.00
Civil Action Number:

Dear Sheriff Doe:

I am pleased to forward to you the enclosed United States Treasury check in the sum of $_____ (or title to tangible property), which represents your department's equitable share of the net proceeds of the forfeiture in the above referenced case.

These funds must be used for the law enforcement purposes stated in your Application for Transfer of Federally Forfeited Property (Form DAG 71). As the intent of this transfer is to enhance law enforcement, these funds must increase and not supplant your appropriated operating budget. Any interest earned on these funds must also be used for law enforcement purposes. (See: The Attorney General's Guidelines on Seized and Forfeited Property, July 1990.)

On behalf of the U.S. Department of Justice, I want to commend your department for its effort which led to the seizure(s) in this case. Your continuing cooperation with this Office and the (federal seizing agency) in the war against crime in our community is important and greatly appreciated by your federal law enforcement colleagues.

Sincerely,

John Q. Prosecutor
United States Attorney

or

John Q. Agent
Special Agent-in-Charge

Enclosure
cc: United States Attorney
or
Special Agent-in-Charge

U.S. Marshal

There are no items in the Appendix for Chapter 8 at this time.

There are no items in the Appendix for Chapter 7 at this time.