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Asset Forfeiture Policy Manual

Chapter 1

Seizure/Restraint

I. Guidelines for Preseizure/Restraint Planning

A. 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/restrained assets.[1] In particular, they are meant to ensure that the U.S. Marshals Service (USMS) and its headquarters Asset Forfeiture Office (AFO) and other agencies with responsibility for managing seized and restrained assets are consulted prior to the seizure/restraint and forfeiture of assets in order that the USMS is afforded (1) sufficient time to plan for the care of the assets and (2) the opportunity to assess the level of difficulty in handling the assets and any special requirements needed to preserve the assets.

These guidelines direct the U.S. Attorney's Office (USAO) (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/restraining 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 USAO (or in administrative matters, the agent in charge of a field office) to establish and utilize procedures which clearly define and assign local preseizure/restraint planning responsibilities.

As discussed *infra*, in order to afford the USMS sufficient time to obtain all resources necessary to effectuate significant seizures it should be advised promptly prior to all significant seizures/restraints, the filing of civil forfeiture complaints, or the return of indictments containing forfeiture allegations.

B. 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

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[1] References to seizure in this chapter include criminal or civil restraint unless plainly not applicable or appropriate. References to U.S. Marshals Service (USMS) includes other departments responsible for managing restrained and seized assets (e.g., the Department of the Treasury and the Department of Homeland Security.)

of federal forfeiture. The degree and nature of preseizure planning will depend directly upon the circumstances and complexity of each case.

In order for the USMS to best assist the USAOs and seizing agencies in a thorough and prompt manner, the USMS should be involved in the investigation as soon as the USAO is aware assets will be targeted for forfeiture. Formal preseizure planning should occur well in advance of filing a civil forfeiture complaint or the return of an indictment containing forfeiture allegations. Specifically, formal preseizure planning requires detailed discussion of the seizure, custody, and disposal arrangements specific to an asset targeted for forfeiture. This discussion may take place either in person, by telephone, or electronically, and may be ongoing depending on the nature of the asset and stage of the case. These preseizure discussions should result in a strategy to take possession of or manage each asset category listed below:

(1) residential real property and vacant land;

(2) businesses and commercial real property;[2]

(3) large quantities of assets involving potential inventory and storage or security problems (e.g., multiple vehicles, drug paraphernalia to be seized from multiple "headshops" on the same day, and the inventory of ongoing businesses such as jewelry stores);

(4) assets that create difficult or unusual problems (e.g., animals, perishable items, chemicals and pharmaceuticals, leasehold agreements, intellectual property, valuable art and antiques); and

(5) assets located in foreign countries.

Depending upon the complexity and scope of the case, formal preseizure planning may continue after this initial discussion as required by either the USAO or the USMS. In many instances, the USMS will be required to procure the professional assistance of commercial vendors during the covert stage of an investigation so that services such as inventories, appraisals, transportation, and storage will coincide with a scheduled takedown date. The USMS will take appropriate measures to protect sensitive law enforcement information while consultation occurs with the involved components. No information will be released to third party contractors without prior USAO approval. In addition, the information provided to such

[2] For the purposes of this manual, *commercial real property* means residential real property comprised of five or more units and other real property held for commercial purposes.

contractors can be limited to that necessary to preposition contractor assets (e.g., towing services and storage space for 50 vehicles required in a particular location by a certain date).

Examples of the types of services the USMS may provide upon a request by either the USAO or seizing agency (as well as the usual time it takes to obtain the requested service) include the following:

Lien search and appraisal information[3]	3–4 weeks from date of request to return information (additional time necessary for full, non-"drive-by" appraisals)	The USMS offers these services to provide USAOs and investigative agencies information during the preindictment preseizure planning stage of a criminal or civil investigation.
Animals	1 month prior to seizure	Proper arrangements must be made to ensure health and daily care.
Logistics services	3–6 months prior to take-down date	Federal contracting regulations and the time necessary to coordinate with commercial vendors make it imperative to involve the USMS's AFO as soon as such services are contemplated.
Business review[4]	2–4 months	Forfeiture decisions by the USAO and the seizing agency should be made only after the USMS's AFO conducts a documentary review of the targeted business's assets and financial status.

C. General policy guidelines

Broad preseizure planning policy guidelines for all agencies participating in the Department of Justice's Asset Forfeiture Program are defined below. Variations to these guidelines may be made following discussions with Asset Forfeiture and Money Laundering Section (AFMLS).

[3] *See* USMS Policy Memorandum dated October 9, 2003, in Appendix A at A–1.

[4] *See* section I.D.4 at page 9, for a discussion of the information provided by the business review, as well as the considerations involved in seizing or restraining a business and/or its assets.

1. Lead responsibility

The U.S. Attorney (or in administrative forfeiture cases, the agent in charge of a field office) is responsible for ensuring that proper and timely preseizure planning occurs in asset forfeiture cases within that federal judicial district. All preseizure planning meetings will include, at a minimum, as applicable, the Assistant U.S. Attorney (AUSA) or investigative agent in charge of the forfeiture matter (and, if applicable, the AUSA in charge of the related criminal matter), investigative agents, and the appropriate USMS representative (which should include a representative from the district where the property is to be seized if different from the district where the action is to be filed). A federal regulatory agency representative may also attend in forfeiture cases involving federal regulatory matters as appropriate. Assets in cases where a Department of Justice investigative agency is not the lead agency may be handled by independent contractors employed by non-Department of Justice agencies rather than the USMS (e.g., the Department of the Treasury or the Department of Homeland Security), and those independent contractors should participate in preseizure planning as appropriate.

For asset forfeiture cases involving more than one federal judicial district, the USAO instituting the forfeiture action has the primary responsibility, in coordination with the investigative agency, to ensure that all asset forfeiture program participants are notified and that proper and timely preseizure planning occurs in those districts where assets will be seized.

2. Preseizure planning defined

Preseizure planning consists of anticipating and making informed decisions about what property is going to be seized or restrained, how and when it is going to be seized or restrained, and, most important, whether it should be seized or restrained.

(1) *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 is being seized, is the building in which it operates, the property upon which it is located, the inventory of the business, and the operating or other bank accounts, accounts receivable, accounts payable, etc., also being seized? All ownership interests must be identified to the extent possible.

(2) *Should the asset be seized*? If the asset has a negative or marginal net equity at the time of seizure, should it be seized? Over time, what is the likelihood that the asset will depreciate to a negative or marginal value? What law enforcement

benefits are to be derived from seizure? Is a restraining or protective order an adequate alternative under the circumstances? Can any losses be mitigated by careful planning on the part of the participants? Will the asset require a significant amount of USMS or USAO resources or oversight?

(3) *How and when is the asset going to be seized*? Determine whether immediate seizure is necessary or if restraint of the asset is sufficient to preserve and protect the Government's interest. The type and content of the seizing instrument and authority to enter or cross private property must be communicated or provided, in advance, to both the investigative agency and the USMS to ensure that each has the necessary information and legal authority to carry out its respective seizure and post-seizure responsibilities.

(4) *What management and disposition problems are anticipated, and how will they be resolved*? Any expected logistical issues involved in the maintenance, management, or disposition of the asset should be discussed and resolved as early as possible in the investigation.

(5) *Is publicity anticipated*? If publicity or public relations concerns are anticipated, appropriate public affairs personnel should be advised and consulted. How will negative publicity be handled?

D. Preseizure planning questionnaires and net equity worksheets

The considerations which bear on whether a property should be seized must be documented during the preseizure process.

1. Asset-specific net equity thresholds

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 case quality and expediting 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 direct federal and adoptive cases. In general, the minimum net equity requirements are:

(1) Residential real property and vacant land—minimum net equity must be at least 20 percent of the appraised value, or $20,000, whichever is greater.[5]

[5] As a general rule, the Department of Justice does not seize or adopt contaminated real properties. *See* discussion of contaminated real property in section IV at page 23.

(2) Vehicles—minimum net equity must be at least $5,000. The value of multiple vehicles seized at the same time may be aggregated for purposes of meeting the minimum net equity. If the person from whom the vehicle is taken was or is being criminally prosecuted by state or federal authorities for criminal activities related to the vehicle and there is justification for a low value seizure, the minimum net equity is $2,000.[6]

(3) 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.

(4) Aircraft—minimum net equity must be at least $10,000. Note that failure to obtain the log books for the aircraft will reduce the aircraft's value significantly.

(5) Vessels—minimum net equity must be at least $10,000.

(6) All other personal property—minimum net equity must be at least $1,000 in the aggregate. Exceptions from the minimum net equity requirements should not be made for any individual item if it has a value of less than $1,000. Such exceptions can be made if 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 described above, AFMLS must be advised in writing of the change.

Each USAO may institute higher district-wide thresholds for judicial forfeiture cases. In doing so, USAOs 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 must be provided to AFMLS. Any threshold higher than those described above must not be the basis for failing to assist in seizing property when requested to do so by another district with lower monetary thresholds if the requesting district intends to file the judicial action.

[6] 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. This restriction does not apply in the case of seizures by U.S. Immigration and Customs Enforcement (ICE) of vehicles used in the smuggling of aliens or in the case of vehicles modified or customized to facilitate illegal activity.

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, a conveyance with hidden compartments, a computer or Internet domain name seized to disrupt a major fraud scheme, or assets connected to a child pornography ring or a terrorist organization.) Any downward variation from the above thresholds must be approved in writing by a supervisory-level official and an explanation of the reason for the variation noted in the case file. A copy of this approval, in either a written memorandum or an e-mail, must be provided to the USMS district office that will take custody of the asset(s).

2. Preseizure planning questionnaires

The USMS's AFO has compiled preseizure planning questionnaires for each asset type in a publication entitled the *Preseizure Planning Guide*.[7] Obtaining the information required to complete the forms for each targeted asset will identify the concerns which must be addressed during the preseizure planning phase of a case to reduce the chance of a seizure that will cost more than the asset is worth (a "liability seizure"). Consult with the custodial USMS district office to calculate the storage and maintenance costs particular to each asset (e.g., the monthly rate for indoor automobile storage, or the transportation fee incurred when ferrying a seized aircraft or yacht to a USMS storage yard.) Copies of the guide may also be ordered from the USMS at 202-307-9221.

Individual offices may supplement these forms as they see fit. However, the basic information called for in these forms is required for adequate planning.

3. Net equity worksheet

When certain assets, especially residential and commercial real property and businesses, are targeted for forfeiture, the potential net equity must be calculated.[8] A written financial analysis facilitates and documents preseizure planning decisions. The last page of every preseizure questionnaire sets forth a step-by-step formula for computing net equity—the estimated total amount of money the Government will recoup from the asset once the aggregate of all liens, mortgages, and management and disposal costs has been subtracted from the proceeds of the sale of the asset—and documents the results of this analysis. In cases where information relating to titles and liens cannot be acquired without compromising

[7] *See* Appendix B.

[8] *See* Appendix B for examples of the net equity worksheet contained within the preseizure planning questionnaires.

the investigation, the financial analysis may be completed post-seizure.[9] The USAO or the seizing agency may adopt these forms, supplement them as it sees fit, or develop its 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 USMS and the USAO whenever practicable prior to seizure. In instances where real property and businesses are targeted for seizure, the USMS will have primary responsibility for conducting a title search prior to seizure unless otherwise agreed in individual cases.[10] The USMS cannot conduct a complete ownership analysis for a business unless the USAO obtains, by subpoena or otherwise, appropriate ownership documents (e.g., stock record books, stock certificates, partnership agreements, etc.)

b. Financial analysis: avoiding liability seizures

(1) Preseizure

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 USAO, or in administrative forfeiture actions, the seizing agency, must either (1) determine not to go forward with the seizure,[11] or (2) acknowledge the potential financial loss and document the circumstances that warrant the seizure and institution of the forfeiture action.

(2) Post-seizure

In rare instances where preseizure planning is not possible, the seizing agency may be responsible for custody and maintenance of the property until the USMS has had an opportunity to conduct an analysis of the assets. The USMS must complete a preseizure planning questionnaire within 5 business days after the seizure or as soon as practicable given the nature of the information required. If the financial assessment indicates that the aggregate of all liens, mortgages, and management and disposal costs approaches or exceeds

[9] *See* discussion of post-seizure at page 8. *See also* Appendix B for sample preseizure planning questionnaires.

[10] *See* USMS Policy Memorandum dated October 9, 2003, in Appendix A.

[11] The USAO may consider alternatives to seizure such as a *lis pendens* or restraint of certain assets.

the anticipated proceeds from the sale of the property, the USAO must either (1) take action to dismiss the forfeiture action and to void any expedited settlement agreements (if any have been entered into), or (2) acknowledge the potential loss and document the circumstances that warrant the continuation of the forfeiture action.

In deciding how to proceed with the seizure and forfeiture of potential liability seizures during the preseizure phase in judicial forfeitures, the USAO in consultation with the seizing agency and the USMS (and in administrative forfeitures, the agent in charge of the field office responsible for the administrative forfeiture, or designee, in consultation with the USMS) must evaluate and consider the forfeitable net equity and the law enforcement purposes to be served in light of the potential liability issues and estimated costs of post-seizure management and disposition.

4. Business seizures[12]

The complexities of seizing an ongoing business and the potential for substantial losses and possible other liabilities from such a seizure require that a USAO consult with AFMLS prior to initiating a forfeiture action against, seeking the seizure of, or moving to restrain an ongoing business.[13]

Deciding whether and how to restrain or seize an ongoing business is a complex and time consuming process. A comprehensive analysis of the scope of the illegal activity and what is to be achieved through seizure/restraint is necessary. AFMLS and the USMS recommend restraining a business in the least restrictive manner that preserves the Government's interest. Seizure of a business, and operation or closure of the business by the Government, should only be carried out where all other options have been considered and rejected.

As discussed in the introduction to this chapter, the first question is, What is being seized or restrained? How is the business owned? Is it a corporation, partnership, or sole proprietorship? Will the business be indicted? Are there innocent shareholders or other third party interests to take into consideration?

In case of an ongoing business that has been targeted for forfeiture, it is generally desirable to utilize the least intrusive means to gain control over the business during the

[12] *See* Briskman, Leonard, "Preseizure Planning with the U.S. Marshals Recommended to Avoid Disruption of Business," *Asset Forfeiture News*, July/August 2004, at 3.

[13] *See also U.S. Attorneys' Manual* 9–105.000 (the U.S. Attorney is required to obtain the *concurrence* of AFMLS before initiating a forfeiture action against an ongoing business under a money laundering facilitating theory).

pendency of litigation. *See Unites States v. All Assets Statewide Autoparts*, 971 F.2d 896 (2d Cir. 1992) (hearing and consideration of less drastic alternatives required). AFMLS recommends restraining orders for ongoing businesses if at all possible.

There are instances in which it may be necessary to close down a seized business prior to forfeiture, particularly if an ongoing business is engaged in substantially illegal activity and/or there are exigent circumstances, such as ongoing health and safety issues that cannot be satisfactorily addressed by other means.

Seizure of business accounts, necessary equipment, and licenses can also cause an ongoing business to fail even if the business itself is not seized. If the Government fails to achieve forfeiture and the business asset must be returned to the owner, the Government may be subject to substantial financial and adverse legal ramifications for failure to return the asset to its owner in substantially the same condition in which it was seized.

The USAO may consider simply naming the business as an asset for forfeiture; often businesses shut down of their own accord once key defendants are arrested or indicted, making final forfeiture unnecessary and saving Government resources. This is frequently the result where the assets of the business consist primarily of inventory and goodwill. A *lis pendens* placed on the real property or restraining order on valuable equipment, with monitoring, inspection, or reporting requirements, may secure the targeted assets sufficiently without taking possession of them. Alternatively, the USAO may require, as a condition of release, that a defendant/owner maintain appropriate licenses or comply with regulatory or insurance requirements.

AFMLS recommends restraining ongoing businesses, rather than seizing them before forfeiture, wherever possible. If direct government oversight is required, the USMS has contractors available to run ongoing businesses. In rare cases, a court-appointed trustee or monitor is required. *See* chapter 11. Taking over a business before forfeiture is a last resort and should occur only after the USMS has completed a thorough business review. A business review will help a USAO answer the following questions:

- Who owns the building in which the business operates?
- Who owns the land?
- What is the cash flow of the business?
- What are the monetary values of accounts receivable and payable?

- What other valuable assets does the business own?
- Are there significant liabilities?
- Are there environmental concerns?
- Is the business highly regulated? Is the business currently in compliance with its regulatory obligations?
- Will the business require capital contributions to stay viable?
- What law enforcement or regulatory methods other than forfeiture may be effective?
- Is the business being seized as facilitating property or as proceeds of crime? Once the source of illegal funding and the illicit customers are gone, the business may no longer be profitable. If the business is facilitating illegal activity and also engaged in legal but unseemly activity, is the Government in a position to prevent or monitor the activity (e.g., Government operation of a strip club which attracts illegal drugs and prostitution)? The public may have an expectation that if the Government is operating the business, it will be able to prevent all illegal activity. *See* chapter 11 for a discussion of security measures.
- What would it cost to hire either a business monitor or trustee and necessary staff?
- How will the business be disposed of, and how long will that process take?

AFMLS and the USMS's AFO are available to organize a "business evaluation and seizure team" to conduct a business review at the request of either a USAO or a seizing agency. Business reviews take time, so the USAO or seizing agency should request a business review as early in the investigative process as possible.

The AUSA (or the agent in charge of the field office responsible for an administrative forfeiture case) is responsible for ensuring that all preseizure planning, questionnaires, and net equity worksheets (including those prepared by the USMS) are complete and placed in the case file.

If the net equity worksheet indicates that the property targeted for forfeiture has marginal or negative anticipated net sale proceeds, the USAO (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 Government (e.g., an immediate motion of interlocutory sale or stipulated sale of the property, thereby minimizing asset management costs.) A copy of this plan, along with the net equity worksheet, is to be sent to AFMLS.

E. Trustees and monitors in forfeiture cases

See chapter 11 for the Department of Justice's policy on trustees and monitors in forfeiture cases.

II. General Procedures for Seizing Property

A. Notification by seizing agency

Most USAOs can access reports of seizures in their districts from the Consolidated Asset Tracking System (CATS) database. An individual USAO may elect to receive copies of all seizure forms directly from the Department of Justice seizing agencies, but should recognize that this defeats the purpose of the CATS centralized database. All non-Department of Justice agencies must forward copies of seizure forms or a report of seizures to the pertinent USAO within 25 days of seizure unless an individual USAO chooses to not receive seizure notices.

B. Preseizure judicial review

1. Preseizure judicial authorization of property seizures

Preseizure judicial authorization of property seizures serves multiple purposes, including the following:

(1) allows neutral and detached judicial officers to review the basis for seizures before they occur;

(2) enhances protection for Department of Justice officers against potential civil suits claiming wrongful seizures; and

(3) reduces the potential that the public will perceive property seizures to be arbitrary and capricious.

2. Preseizure judicial review favored for seizure of personal property

Whenever practicable, Department of Justice officials should obtain ex parte judicial approval prior to seizing personal property.[14]

C. Forms of process to be used

1. Warrant of arrest in rem

In a civil judicial case, the Government may take possession of property with an arrest warrant in rem. The procedure for issuing an arrest warrant in rem is set forth in Supplemental Rule G(3).

Under the Rule, no arrest warrant is needed if the property is real property, or if the property is already subject to a pretrial restraining order. That is because in those cases, the court already has in rem jurisdiction over the property, making the arrest warrant in rem unnecessary for that purpose.[15] In all other cases, however, the Government must obtain an arrest warrant in rem and serve it on the property to ensure that the court obtains in rem jurisdiction.

The procedure for issuing the warrant differs depending on whether the property is already in the Government's custody at the time the complaint is filed. If the property is already in the Government's custody, the warrant may be issued by the clerk of the court without any finding of probable cause by a judge or magistrate judge, but if the effect of the warrant will be to take the property out of the hands of a non-Government entity, the warrant must be issued by a court upon a finding of probable cause.

Once the warrant is issued, it must be delivered "to a person or organization authorized to execute it." Rule G(3)(C). *See* Section II.D, *infra.*

[14] 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.

[15] *See United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) (holding that it is unnecessary to serve real property with an arrest warrant in rem to obtain in rem jurisdiction).

2. Seizure warrant

A second 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 requires a judicial determination of probable cause.

3. Seizure of real property

In general, real property is not seized prior to forfeiture; nor is it served with an arrest warrant in rem. Typically, a *lis pendens* is filed in the property records of the local jurisdiction. The procedures for commencing a civil forfeiture action against real property are set forth in 18 U.S.C. § 985.

D. Responsibility for execution of process

Generally, the USMS 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 seizure warrants. It is recommended that the USMS and investigative agencies coordinate execution of process.

III. Seizures for Criminal Forfeiture

A. When is a seizure warrant or restraining order required?

Property subject to criminal forfeiture is occasionally seized pursuant to a criminal seizure warrant issued under 21 U.S.C. § 853(f). More often, property named in a criminal indictment or information is in the custody of the Government because it was seized pursuant to a civil seizure warrant issued under section 981(b) or because it was seized as evidence in the underlying criminal investigation. The question that arises is whether it is proper for the Government to maintain possession of property subject to criminal forfeiture without obtaining a section 853(f) seizure warrant in the following situations where the property was originally seized for some other purpose:

(1) Where the initial seizure was pursuant to a civil seizure warrant, and the U.S. Attorney elects to pursue criminal forfeiture after someone files a claim in the administrative forfeiture proceeding.

(2) Where the initial seizure was without any warrant, but was based on probable cause to believe the property was subject to forfeiture when observed in plain view in a public place or pursuant to a lawful search.

(3) Where the initial seizure was for evidence, but the evidentiary basis for the continued possession of the property has evaporated.

(4) Where the property is lawfully handed over to the federal agency for criminal forfeiture by a state court or state law enforcement agency.

B. Summary

The Government does not need to have possession of property subject to criminal forfeiture during the pendency of the criminal case, but it is perfectly appropriate for the Government to maintain possession of such property prior to the entry of a preliminary order of forfeiture as long as it has a valid basis for holding the property. The criminal forfeiture action itself is a valid basis for maintaining possession of the property only if the Government has obtained a seizure warrant pursuant to section 853(f) or a restraining order (mandating transfer of the property to Government control) pursuant to section 853(e). Absent such authority, the Government may not continue to possess property subject to criminal forfeiture unless there is an independent basis for such possession.

A seizure warrant issued in a parallel civil forfeiture case provides such independent basis as long as the civil action is pending. Similarly, an administrative forfeiture action is also an independent basis for maintaining custody of an asset. Likewise, property seized for evidence may remain in Government custody as long as the evidentiary basis remains. In such cases, the Government does not need to obtain a criminal seizure warrant or restraining order to maintain possession of the property. In the absence of an administrative forfeiture action or if the civil forfeiture action ends, or if the evidentiary basis for the property evaporates, then the Government must obtain either a criminal seizure warrant or a restraining order under section 853(f) or (e), respectively, to maintain custody of the property pending the outcome of the criminal case.

C. Discussion

It is not necessary for the Government to have the property subject to criminal forfeiture in its possession during the pendency of a criminal forfeiture proceeding. To the contrary, the criminal forfeiture statutes contemplate that the property will, in most cases, remain in the possession of the defendant—albeit pursuant to a pretrial restraining order—until the court

enters a preliminary order of forfeiture. *See* section 853(g) (upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited….) Cases where the Government takes physical possession of property subject to criminal forfeiture with a criminal seizure warrant prior to the entry of a preliminary order of forfeiture are relatively rare.

But the Government frequently does have physical possession of the property subject to criminal forfeiture before any preliminary order of forfeiture is entered in the criminal case. Such possession may be the result of a seizure pursuant to a civil seizure warrant issued pursuant to section 981(b), or a seizure for the purpose of civil forfeiture that was based on probable cause. It also could be the consequence of the seizure of the property for evidence—with or without a warrant—or the adoption of the property for the purpose of forfeiture from a state or local law enforcement agency. The question is whether such possession during the pendency of criminal forfeiture proceedings is proper absent the issuance of a criminal seizure warrant under section 853(f) or a pretrial restraining order under section 853(e).

Because the Government need not have possession of the property subject to forfeiture at all during the pendency of the criminal case, the absence of a criminal seizure warrant or pretrial restraining order is of no moment as long as the Government's possession of the property pending trial has an independent basis. The following discussion focuses on four possible independent bases for maintaining physical possession of the property pending trial.

1. Property seized pursuant to a civil seizure warrant

The seizure of property pursuant to a civil seizure warrant issued under section 981(b) provides a valid basis for the Government's physical possession of property pending the outcome of a criminal forfeiture proceeding. But this is so only as long as the civil forfeiture matter is pending. In the Civil Asset Forfeiture Reform Act (CAFRA) of 2000, Congress provided that if someone files a claim in an administrative forfeiture proceeding, the Government has 90 days in which to (1) commence a civil forfeiture action, (2) commence a criminal forfeiture action, or (3) return the property. *See* 18 U.S.C. § 983(a)(3)(B). It is perfectly appropriate for the Government to file both a civil action and a criminal action within the 90-day period, or to file a civil action within such period and file a criminal action later. In such cases, the civil seizure warrant provides a valid basis for the Government's continued possession of the property.

But section 983(a)(3)(C) provides that if "criminal forfeiture is the only forfeiture proceeding commenced by the Government, the Government's right to continued possession

of the property shall be governed by the applicable criminal forfeiture statute." In other words, if there are parallel civil and criminal proceedings, the civil seizure warrant will provide a sufficient basis for holding the property, but if there is only a criminal case, the Government must takes steps to retain possession of the property either with a criminal seizure warrant issued pursuant to 21 U.S.C. § 853(f), or with an order issued pursuant to 21 U.S.C. § 853(e).[16]

The 90-day deadline provision in CAFRA, of course, only applies to cases where the property was initially seized for the purpose of "non-judicial" (i.e., administrative) forfeiture. *See* section 981(a)(1)(A). If the property was seized pursuant to a civil forfeiture seizure warrant under section 981(b), but it was not seized for the purpose of administrative forfeiture, the prescriptions found in section 983(a)(3) regarding the 90-day deadline and the need to reseize property already in Government possession do not apply. Nevertheless, even in such cases, if the Government does not file a civil forfeiture complaint and proceeds only with a criminal forfeiture action, it may not lawfully maintain possession of the property pursuant to the civil seizure warrant alone, but must obtain either a criminal seizure warrant or a pretrial restraining order. *See United States v. Schmitz*, 153 F.R.D. 136 (E.D. Wis. 1994) (pre-CAFRA case; once the Government filed criminal forfeiture action, it no longer had authority to retain property seized under section 881 unless it obtained a restraining order under section 853(e) or a seizure warrant under section 853(f); property ordered returned).

2. Property seized without a warrant based on probable cause

Under section 981(b), property may be seized for civil or administrative forfeiture without a warrant if there is probable cause for the seizure and an exception to the warrant requirement applies. If those conditions are satisfied, the Government may maintain physical possession of the property pursuant to the section 981(b) seizure during the pendency of a criminal forfeiture case to the same extent as it could if the property had been seized with a warrant. That is, as long as the civil or administrative forfeiture case is ongoing, the continued possession may be based on the civil seizure. But if the civil case is terminated or not filed within the statutory deadline, the Government will have to maintain physical possession pursuant to a criminal seizure warrant or pretrial restraining order.

[16] One court has held that if property is already in Government custody, the proper procedure under section 983(a)(3)(C) is not to issue a criminal seizure warrant under section 853(f), but to issue an order under section 853(e). The order need not be a restraining order or an injunction, however. Rather, the court pointed out, section 853(e) authorizes the court to issue any order that will "assure the availability of the property." *See In Re: 2000 White Mercedes ML320*, 220 F. Supp. 2d 1322, 1326 n.5 (M.D. Fla. 2001). AFMLS recommends that AUSAs use Form CRM1001 available on the AFMLS Web site to apply for a section 853(e) order in this situation. *See* Katz, James V., "Criminal Forfeiture of Property Already in Government Custody," *Asset Forfeiture News*, November/December 2002, at 11.

3. Property seized for evidence

The seizure of property for evidence provides an independent basis for the continued physical possession of property during the pendency of a criminal forfeiture proceeding as long as the evidentiary value of the property persists. Thus, if property is seized for evidence, it may be named in a criminal forfeiture proceeding and held by the Government without the need to obtain a criminal seizure warrant or pretrial restraining order. However, if the evidentiary value of the property evaporates, the Government must obtain a seizure warrant or restraining order to maintain custody of the property for the purpose of forfeiture.[17] The USMS does not store property held as evidence, even when it is subject to forfeiture. Such property is retained in the custody of the seizing agency until such time as it is no longer needed for evidence.

4. Property obtained from the state for adoptive forfeiture

A federal seizing agency may take custody of property from a state or local law enforcement agency for the purpose of administrative forfeiture. If, in such a case, someone files a claim contesting the forfeiture, the 90-day deadline provision in section 983(a)(3)(B) comes into play. Thus, the Government's obligations regarding the continued physical possession of the property during the pendency of a criminal forfeiture proceeding are the same as they would be if the property had been seized for the purpose of civil forfeiture by a federal agency in the first instance.

Alternatively, the Government may take possession of property from a state agency without any intention of proceeding with administrative or civil judicial forfeiture, but rather with the intent to seek the forfeiture of the property in a criminal case. In that instance, CAFRA does not apply, but neither does the provision in section 981(b)(2)(c) creating an exemption from the warrant requirement in adoption cases. That provision applies only to civil forfeiture proceedings. Therefore, the Government may maintain custody of the property only if it has evidentiary value, or if it obtains a criminal seizure warrant or pretrial restraining order. In such matters, the USAO must not agree to the request by a state or local agency to institute a criminal forfeiture action until a federal agency has consented to process the asset for federal seizure.

[17] If an AUSA declines to seek a criminal seizure warrant or a section 853(e) order on the ground that this exception applies (i.e., on the ground that the property has evidentiary value but the seizing agency feels that the evidentiary value of the property is in doubt) the agency may request that the USAO provide the agency with a letter that it may use to protect itself from liability should someone later question whether there was a lawful basis for the agency's retention of the property.

D. Proper use of writs of entry in civil and criminal forfeiture cases[18]

1. Summary

Writs of entry issued by the court and based upon a finding of probable cause may be used in both civil and criminal forfeiture cases by the United States in the following circumstances: (1) to enter onto the curtilage and inventory structures located thereon without entering those structures; (2) to enter onto private real property for the purpose of seizing personal property located thereon (such as an automobile) in plain view; and (3) to enter into the interior of a private structure subject to forfeiture to conduct an inventory limited to documenting the condition of the interior and inspecting for damage. If a private structure is to be entered for the purpose of searching for and seizing (or inventorying) personal property located therein that is subject to forfeiture, it is recommended that a separate search warrant be obtained. Of course, warrantless seizures for forfeiture may be based on the automobile, plain view, exigent circumstances, and search incident exceptions to the Fourth Amendment.

2. Discussion

"Civil forfeiture of real property," 18 U.S.C. § 985, provides at (b)(2), "the filing of a lis pendens and the execution of a writ of entry for the purpose of conducting an inspection and inventory of the property shall not be considered a seizure under this subsection." The term *writ of entry* appears nowhere else in the CAFRA, nor in any other civil or criminal forfeiture statute. Section 985 provides no guidance of any kind as to the proper use and scope of a writ of entry. Answers to those questions must be gleaned from the scant case law discussing the scope of writs of entry in the context of Fourth Amendment searches and seizures.

As an initial matter, arguments can be made that the Government may seek and a district court has the authority to issue writs of entry in both civil and criminal forfeiture cases. Despite the phrase appearing only in section 985, the use of a writ of entry is not restricted to the civil forfeiture of real property. A district court has the authority pursuant to 18 U.S.C. § 983(j)(1)[19] and 21 U.S.C. § 853 (e)(1)[20] to take any action necessary to preserve the

[18] Section III.D was previously circulated as Interim Legal Advice Memorandum 04-2 in 2005.

[19] 18 U.S.C. § 983, General rules for civil forfeiture proceedings, provides at (j)(1), "Upon application of the United States, the court may enter a restraining order or injunction, require the execution of satisfactory performance bonds, create receiverships, appoint conservators, custodians, appraisers, accountants, or trustees, or take any other action to seize, secure, maintain, or preserve the availability of property subject to civil forfeiture."

[20] 21 U.S.C. § 853, a criminal forfeiture statute located in the drug code, provides at (e)(1), "Upon

availability of property subject to forfeiture. Accordingly, the Government can make application for a writ of entry in any civil or criminal forfeiture case in order to preserve the availability of property subject to forfeiture, and the district court has the authority to issue such a writ for that purpose.

The limited case law potentially applicable to the proper use of a writ of entry is *United States v. Ladson*, 774 F.2d 436 (11th Cir 1985) and *United States v. U.S. Currency in the amount of $324,225.00*, 726 F. Supp. 259 (W.D. Mo. 1989). The cases suggest that writs of entry based upon a finding of probable cause by the court may be used as a basis to enter, inspect and search the interiors of structures subject to forfeiture. In *Ladson*, a civil forfeiture action was commenced against a house pursuant to 21 U.S.C. § 881(a)(6). At the time the action was commenced, the house was rented. The Government requested and received from the district court an order entitled "seizure warrant/writ of entry," which authorized the seizure of the real property and directed the preparation of a "…written inventory of the real estate and property thereon seized." Upon arriving at the home, the agent executing the seizure warrant/writ of entry, over the objection of the renters, entered the house and conducted a walk-through inventory of its contents. During the inventory drugs were found. The renters were indicted and moved to suppress the drugs. The district court suppressed the evidence. The Eleventh Circuit affirmed. 774 F.2d at 438.

The court of appeals found that nothing in the seizure warrant/writ of entry authorized the agents to enter the house without permission. It permitted nothing more that a cursory examination of the lot. "The warrant authorized seizure of…*real estate* and ordered an inventory of the property *seized*. It would have been a simple matter to inventory the *seized* property—that is, the real estate and improvements on it—from outside the house." *Id*. at 439. Since the contents of the house were not subject to seizure, and the seizure warrant/writ of entry did not authorize an inventory of un-seized property, the agent had no legal right to enter the house." *Id*.[21]

The Eleventh Circuit found that the writ of entry did not provide the Government with the legal authority to enter the house to inventory its contents or inspect for damage without a search warrant. The Fourth Amendment applies to searches for administrative purposes.

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application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property [subject to criminal forfeiture] under this section." Section 853 is applicable to the general criminal forfeiture statute found in title 18 pursuant to 18 U.S.C. § 982(b)(2).

[21] The Eleventh Circuit did not hold that the district court could not have authorized entry into the house if presented with probable cause sufficient to support a search warrant.

774 F.2d at 439-40. Absent exigent circumstances, the Government must obtain a warrant based upon probable cause to inspect a seized house and inventory its contents. 774 F.2d at 440.

The district court in *United States v. U.S. Currency in the amount of $324,225.00*, 726 F. Supp. 259 (W.D. Mo. 1989), disagreed with the Eleventh Circuit's analysis in *Ladson*. Here, a motion was filed by the Government seeking authority for the USMS to enter, inspect, inventory, and secure the defendant property.[22] A magistrate judge would only grant the motion if the Government agreed not to use any contraband or evidence of a crime found inside the home against its owner. The Government appealed to the district court, which reversed the magistrate. 726 F. Supp. at 260.

> The *Ladson* decision ignores the basic purpose of the plain view doctrine which is to permit law enforcement personnel to seize evidence that is in plain view *without first obtaining a search warrant*. Under *Ladson* the government cannot protect itself by inventorying and securing a house lawfully seized without surrendering its authority to seize evidence or contraband within plain view. Just as an arrestee's person may be searched and the discovered items inventoried without probable cause or search warrant…and as an impounded vehicle may be inventoried without probable cause or search warrant…the government should be permitted to conduct a limited inventory search of a building or house *lawfully seized*. The presence of law enforcement personnel inside the house for this limited purpose is undoubtedly lawful and proper. Therefore, if such an inventory should produce contraband or evidence of crime, the plain view doctrine's first requirement of a valid prior intrusion would be met. It is the Court's judgment that the government need not first agree not to use any contraband or evidence of crime that might be found during the inventory of the house.

726 F. Supp. at 261.

The district court went on to note that in cases such as the one at issue, the Government was not conducting the inventory on a whim. Such an inventory search would only be authorized after the Government made a showing of probable cause that the property is subject to forfeiture. Moreover, the Government could not do more than conduct an inventory search. If it engaged in a broader search, it would probably violate the Fourth Amendment and any evidence or contraband discovered would be subject to the exclusionary rule. "A lawful seizure only legitimizes a limited inventory search of the seized property and not a broad search for evidence or contraband." *Id.*

See also United States v. Santiago-Lugo, 904 F. Supp. 36 (D.P.R. 1995) (inventory of seized residence permitted where civil seizure warrant expressly authorizes an inventory of

[22] In addition to the cash, forfeiture was sought for 15 cars and a parcel of real estate.

the contents of the residence); *United States v. One Parcel of Real Property*, 724 F. Supp. 668 (W.D. Mo. 1989) (where Government makes an initial probable cause showing that property is subject to forfeiture, basis exists for court to issue order that authorizes the Government to enter, inspect, inventory, and secure such property at the time of arrest).

Warrantless seizures for forfeiture may be based on the automobile, plain view, exigent circumstances, and search incident exceptions to the Fourth Amendment: *Florida v. White*, 526 U.S. 559 (1999) (warrantless seizure of automobile did not violate the Fourth Amendment where there was probable cause to believe the automobile was subject to forfeiture and it was found in a public place); *United States v. Gaskin*, 364 F.3d 438 (2d Cir. 2004) (applying *Florida v. White*: if agents have probable cause to believe a vehicle was used to facilitate a drug offense, and it is in a public place, they may seize it, search it, and seize currency and evidence they find therein); *United States v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66 (2d Cir. 2002) (structured money orders found in plain view by airport security could be detained temporarily as a *Terry* stop and ultimately seized on probable cause to believe the items were involved in a structuring offense; the test of whether the criminal connection was "immediately apparent" is objective—the Government does not have to establish that the seizing agent was trained to understand the significance of structured money orders); *United States v. Rankin*, 261 F.3d 735 (8th Cir. 2001) (police officer's observation of defendant conducting drug deal from his car provided probable cause for seizure of car for forfeiture and subsequent inventory search); *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) (warrantless seizure of funds captured in middle of electronic funds transfer through intermediary bank justified by exigent circumstances); *United States v. $149,442.43 in U.S. Currency*, 965 F.2d 868, 875-76 (10th Cir. 1992) (firearms, jewelry, and vehicles may be seized as proceeds or property used to facilitate when found incident to execution of search warrant even if items were not specifically listed in the warrant); *United States v. Berry*, 2002 WL 818872 (E.D. Pa. 2002) (under statute forfeiture law, officer was entitled to make warrantless seizure of vehicle he had seen used in drug deal and was entitled to seize gun he found in plain view); *Seaborn v. Thompson*, 2002 WL 737654 (M.D.N.C. 2002) (following *Florida v. White*; state police may seize automobile for forfeiture under state law without a warrant if they have probable cause); *United States v. Wright*, 171 F. Supp. 2d 1195 (D. Kan. 2001) (no warrant required for seizure of vehicle from public place where officer has probable cause to believe vehicle was previously used to transport drugs; lawful inventory search may follow); *United States v. Warren*, 181 F. Supp. 2d 1232 (D. Kan. 2001) (items discovered during execution of search warrant, but not named in warrant, may be seized if there is probable cause to believe they are subject to forfeiture under state law); *United States v. Medina*, 301 F. Supp. 2d 322 (S.D.N.Y. 2004) (cash found in plain view in closet during a "protective sweep" of apartment to make sure no one else is present during criminal suspect's arrest may be seized if there is probable cause); *United States v.*

Washington, 1997 WL 198046 (D. Kan. 1997) (items found incident to execution of search warrant may be seized for forfeiture under section 881(b)(1)), *aff'd*, 162 F.3d 1175 (10th Cir. 1998); *but see United States v. One 1974 Learjet*, 191 F.3d 668, 672 n.2 (6th Cir. 1999) (reserving decision on whether a warrant is required to seize property for forfeiture even if the Government has probable cause); *United States v. Brookins*, 228 F. Supp. 2d 732 (E.D. Va. 2002) (*Florida v. White* permits warrantless seizure based on probable cause only when the vehicle is in a public place, not when it is on a private driveway).

3. Conclusion

In view of the limited and somewhat conflicting case law on this obscure writ, it is the opinion of AFMLS that writs of entry issued by the court and based upon a finding of probable cause may be used in both civil and criminal forfeiture cases by the United States in the following circumstances: (1) to enter onto the curtilage and inventory structures located thereon without entering those structures; (2) to enter onto private real property for the purpose of seizing personal property located thereon (such as an automobile) in plain view; and (3) to enter into the interior of a private structure subject to forfeiture to conduct an inventory limited to documenting the condition of the interior of the structure and inspecting for damage. If a private structure is to be entered for the purpose of searching for and seizing (or inventorying) personal property located therein that is subject to forfeiture, it is recommended that a separate search warrant be obtained in conjunction with or in lieu of a writ of entry. In any case where a writ of entry is being sought, the application should be accompanied by a detailed agent affidavit setting forth the facts supporting a conclusion that the Government has probable cause to believe that (1) the property being searched for, seized, and/or inventoried is subject to forfeiture; and (2) that the said property is located at or in the place to be searched.

IV. Contaminated Real Property

A. Background

Certain statutory provisions may impose liability on the United States in connection with contaminated real property that it owns—including ownership obtained through forfeiture. Moreover, even when liability is not imposed on the United States under these statutory provisions, there may be practical impediments to the sale or transfer of such properties by the United States after forfeiture. Consequentially, caution must be exercised in targeting real property for forfeiture when there are indications that the real property may be contaminated.

The most prominent of these statutory provisions include the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq. The liability provisions of 42 U.S.C. § 9607 are imposed upon the United States by 42 U.S.C. § 9620(a). Section 9620(h) 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[23] either[24] (1) has been stored for more than 1 year, (2) is known to have been released, or (3) is known to have been disposed of.

The Residential Lead-Based Paint Hazard Reduction Act of 1992 includes provisions at 42 U.S.C. § 4852(d) which require disclosure of information concerning potential lead-based paint contamination upon the transfer of residential property.[25] Further, the United States may be required to undertake certain abatement actions of lead-based paint contamination for forfeited pre-1960 property.[26] Forfeited property constructed during or after 1960 but before 1978[27] may be marketed and sold after complying with certain risk assessment and lead-based paint inspection. If the sale is completed within 270 days of the final order of forfeiture, the Government is exempted from these abatement, risk assessment, and inspection requirements.[28]

In addition to federal statutory provisions, state environmental laws must be considered when targeting contaminated real property for forfeiture.[29] Even when federal statutes may allow the United States to transfer contaminated real property without continuing federal

[23] The term *hazardous substance* means that group of substances defined as hazardous under CERCLA (42 U.S.C. § 9601(14)) and that appear at 40 C.F.R. § 302.4. *See also* 40 C.F.R. §§ 261 and 373. The requirements for reporting hazardous substances in connection with the sale or transfer of federal property are in part 373.

[24] The Land and Natural Resources Division, now the Environmental 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 Appendix C.

[25] The regulations implementing these disclosure requirement are found at 24 C.F.R. § 35.88. Certification and acknowledgment of disclosure requirements are found at 24 C.F.R. § 35.92.

[26] 24 C.F.R. § 35.210.

[27] 24 C.F.R. § 35.215. In the case of jurisdictions that banned the sale or residential use of lead-based paint prior to 1978, an earlier date may be applicable. 24 C.F.R. § 35.115(a)(1).

[28] 24 C.F.R. § 35.115(a)(10).

[29] Section 9620(a)(4) provides that state law concerning removal and remedial action shall apply to such actions facilities owned by the United States, including property transferred by federal agencies. Section 9620(h)(3)(C).

liability for cleanup, applicable state law may continue to impose liability or may make the real property unmarketable in practical terms.

B. Policy

It is the policy of the Department of Justice that real property that is contaminated or potentially contaminated with hazardous substances may in the exercise of discretion be subject to forfeiture only upon determination by the U.S. Attorney, in the district where the property is located, in consultation with the seizing agency and the USMS that such action is fiscally sound or necessary to advance a law enforcement purpose. If the U.S. Attorney chooses to delegate this authority to an AUSA, provision must be made for review by a supervisor. As part of the consultation with the seizing agency and the USMS, due consideration must be given to the disposal alternatives that may be available after forfeiture, and the impact of any cleanup costs to the AFF. Furthermore, such real property that is forfeited will only be transferred or sold with notice of the potential or actual contamination. Notice must be based on information that is available on the basis of a complete search of agency files.[30] This notice will be included in the contract of sale and the deed.[31]

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 of Justice by any agency of the United States.

Forfeited real property that is marketable but is contaminated, or potentially contaminated, with hazardous substances due to activities of a prior owner may be transferred or sold as is and an environmental assessment and/or remediation of the contamination need not be undertaken.[32] Whenever possible, the USMS will obtain a commitment from the buyer to clean up the property as a part of the contract of sale.

However, the United States may bear additional responsibility and liability if the real property becomes contaminated with a hazardous substance after the United States becomes

[30] 42 U.S.C. § 9620(h)(3); 40 C.F.R. § 373.1. It is envisioned that this search will involve the investigative agency's case files(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.

[31] A proposed notice is in Appendix D.

[32] In cases involving illegal drug laboratories, the laboratories must be dismantled and all chemicals and equipment must be seized and removed in accordance with the *DEA Agents Manual*, Section 6674.0 et seq. In cases involving lead-based paint contamination, abatement is not required only if the property is sold within 270 days of the date of forfeiture.

the owner. 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.) Under this circumstance, the United States is responsible for (1) all costs of hazardous substances removal and/or remedial action,[33] (2) providing notice of the hazardous substance to a subsequent transferee or purchaser, (3) a warranting covenant to a subsequent transferee or purchaser.[34] Because of the potential resulting liability and expense, the USMS's AFO shall approve the operation of such a business or activity only in unusual circumstances.

This policy envisions U.S. Attorneys exercising discretion in undertaking forfeiture action against real property that is contaminated where the use of the property indicates contamination or where there is the potential of contamination with hazardous substances. If such circumstances are disclosed within the period of time that the forfeiture action is being pursued, the U.S. Attorney must reevaluate the decision to continue the forfeiture. Such properties must not be forfeited unless the defendant's net equity in the property clearly exceeds the estimated cost of cleanup. *Furthermore, such properties are not to be forfeited when there is reason to believe that the property is substantially contaminated with hazardous substances and that such contamination will render the property unmarketable*. Cleanup costs can be considerable, particularly when the water table is involved. In making this determination, the USMS may order an environmental assessment[35] that will be paid from the AFF.

If, at any point, the U.S. Attorney elects, in the exercise of discretion, not to proceed because significant contamination renders the property unmarketable, the U.S. Attorney must 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 action;

[33] The Environmental Protection Agency's funds, to include the Superfund, are generally not available for remedial actions on federally owned property. *See* 42 U.S.C. § 9111(e)(3).

[34] 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. *See* 42 U.S.C. § 9620(h)(3)(B).

[35] The U.S. Army Corps of Engineers has agreed to conduct environmental assessments for the Department of Justice on a cost basis. All contacts with the corps are to be made through the USMS.

(2) the filing of some other document in the country deed records 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 (federal, state, or local law may require mandatory notification);

(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 owner—the USAO should contact the Environmental Division (Environmental Crimes Section or Environmental Enforcement Section).

Not all of these alternatives are mandatory. Ultimately, it is within the discretion of the U.S. Attorney 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. Consultation with the USAO is recommended.

A. Postal money orders

1. Seizing agency

Immediately following seizure, the seizing agency should send (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 following address:

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

The seizing agency should also provide the USMS with a copy of this letter at the time the money orders are transferred to the USMS for custody.

2. The USMS

Upon forfeiture of the money orders, the USMS will

(1) complete a domestic money order inquiry, PS Form 6401, for each money order; and

(2) return the form, via registered mail, with the original money order to the national money order coordinator, along with the appropriate legal documentation showing that the Government is entitled to receive the proceeds.

B. Personal and cashier's checks

1. Seizing agency

Immediately following seizure, the seizing agency, in conjunction with the USAO, should

(1) obtain a restraining order or seizure warrant, under the applicable criminal or civil forfeiture statute, directing the financial institution upon which the check is drawn to either:

(A) take necessary steps to maintain funds sufficient to cover the check, in the case of a restraining order; or

(B) release funds in the amount of the check, in the case of a seizure warrant;

(2) serve the restraining order or seizure warrant on the financial institution; and

(3) provide a copy of the restraining order or seizure warrant to the USMS at the time the check is transferred for custody. In the event that a seizure warrant is obtained, the check should be voided and returned to the bank when it is no longer needed as evidence.

2. The USMS

The USMS will accept custody of all checks as to which the investigative agency has contacted the bank on which they were drawn and 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 or restraint, the seizing agency should (1) notify the bank that issued the certificate of deposit that it has been seized or restrained for forfeiture and (2) instruct the bank officials to take whatever steps are necessary to freeze the funds covered by the certificate so the certificate of deposit will be negotiable by the USMS after forfeiture.

2. The USMS

The USMS will take appropriate action, in accordance with established procedures, to liquidate the certificate of deposit after forfeiture.

D. Traveler's checks

1. Seizing agency

Immediately following seizure, the seizing agency should (1) notify the company issuing the checks that they have been seized for forfeiture and (2) determine what procedures will be required in order to redeem the checks.

If they can be redeemed prior to forfeiture, (1) take appropriate steps to liquidate the checks and (2) have the issuing company issue a cashier's check to the USMS.

If liquidation cannot occur until after forfeiture, turn the checks over to the USMS with verification that the issuing company has been notified.

2. The USMS

The USMS will accept custody of all traveler's checks that cannot be liquidated until after forfeiture. Upon receipt of a declaration of forfeiture, the USMS will liquidate the asset in accordance with established procedures.

E. Stocks, bonds, and brokerage accounts

1. Seizing agency

Immediately following seizure or restraint, the seizing agency should contact a certified stock broker (state and national) to establish the fair market value of the asset and determine how the instrument is traded.

Securities targeted for forfeiture that are in a brokerage account will usually be seized or restrained in place. Upon receipt of a final forfeiture order, the USMS will instruct the broker to liquidate the account. The net proceeds after commission are deposited in the AFF. Pursuant to court order, brokerage accounts may be held in a different manner in order to preserve the value of the account.

When stocks or bond certificates are seized, the USMS's AFO sends them to a USMS brokerage account at an established securities firm. Upon receipt of a final forfeiture order, the certificates are submitted to a transfer agent to change ownership to the USMS and the certificates are liquidated and deposited into the AFF.

The USMS will not accept custody of any financial instrument with a fair market value 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 not be seized unless the seizing agency can document that they have a significant value.

2. The USMS

The USMS will accept custody of all stocks and bonds for which the seizing agency can document a significant worth. As a general rule, the USMS 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 notify the Department of the Treasury, by certified letter, listing the following:

(1) serial numbers;
(2) bond denominations;
(3) to whom payable; and
(4) the reason for which they were seized.

The seizing agency should send the above information to the following address:

Bureau of Public Debt
Savings Bond Division
Parkersburg, WV 26106

The seizing agency should provide the USMS with a copy of this letter at the time the savings bonds are transferred for custody.

2. USMS

The USMS will accept custody of all savings bonds, maintain such bonds until forfeiture, and dispose of such bonds in accordance with established procedures.

VI. Seized Cash Management

The security, budgetary, and accounting problems caused by retention of large amounts of cash historically has caused great concern within the Department of Justice and Congress. In the past, agencies participating in the Department of Justice'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 control issues. The Department of Justice must report annually to Congress on the amount of seized cash not on deposit.

The Attorney General has established the following policy on the handling of seized cash[36]:

> 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, AFMLS, may grant exceptions to this policy in extraordinary circumstances. Transfer of cash to the U.S. marshal should occur within 60 days of seizure or 10 days of indictment.

This policy applies to all cash seized for purposes of forfeiture. Therefore, all currency seized that is subject to criminal or civil forfeiture must be delivered to the USMS for deposit in the USMS Seized Asset Deposit Fund either within 60 days after seizure or 10 days after

[36] *The Attorney General's Guidelines on Seized and Forfeited Property* (July 1990), paragraph VII (1). The guidelines are currently under review. The revised guidelines and any new policies or procedures designed to implement the guidelines will be attached as an appendix at a later date.

indictment, whichever occurs first.[37] Where appropriate, photographs or videotapes of the seized cash should be taken for later use in court as evidence.

If the amount of seized cash to be retained for evidentiary purposes is less than $5,000, permission need not be sought from AFMLS for an exception; but any exception granted must be granted at a supervisory level within a USAO using the criteria below.

If the amount of seized cash to be retained for evidentiary purposes is $5,000 or greater, the request for an exemption must be forwarded to AFMLS.[38] 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 AFMLS.[39] Retention of currency will be permitted when it 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.[40] 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 of Justice policy.

The commingling of cash seized by the Government under section 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 States Currency*, 722 F.2d 1457 (9th Cir. 1984),

[37] 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.

[38] The criteria and procedure for obtaining exemptions remains the same for cash retained by other agencies participating in the asset forfeiture program.

[39] Requests for an exemption should be filed by the USAO or Criminal Division section responsible for prosecuting, or reviewing for prosecution, a particular case.

[40] 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, is 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 by the Assistant Attorney General, Criminal Division, to the chief, AFMLS, Criminal Division, on December 13, 1991.

"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."

It has never been a requirement that the Government segregate specific cash seized for forfeiture in one case from that seized for forfeiture in another. Commingling of such assets has been the rule and not the exception.[41]

[41] *See American Bank of Wage Claims v. Registry of the District Court of Guam*, 431 F.2d 1215 (9th Cir. 1970).

Chapter 2

Administrative and Judicial Forfeiture

I. Interplay of Administrative and Civil Judicial Forfeiture

A. Preference for administrative forfeiture

Before 1990, virtually all forfeitures of properties valued at more than $100,000 were conducted judicially. In 1990, however, the law was amended to permit the administrative forfeiture of cash and monetary instruments, without regard to value, and of other property up to a value of $500,000. *See* 19 U.S.C. § 1607.

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. Moreover, the due process protections enacted as part of the Civil Asset Forfeiture Reform Act (CAFRA) of 2000 ensure that the administrative forfeiture laws operate fairly. Accordingly, there is a preference for doing forfeitures administratively where it is possible to do so.

In general, properties subject to administrative forfeiture[42] must be forfeited administratively, unless one of the following exceptions applies.

(1) Where several items of personal property (other than monetary instruments) are subject to civil forfeiture under the same statutory authority and on the same factual basis, and they have a common owner and a combined appraised value in excess of $500,000, the property should be forfeited judicially in a single action.

(2) Where the items subject to forfeiture include some that can be forfeited administratively and others that must be forfeited judicially, the forfeitures may be combined in a single judicial action.

[42] In general, all property subject to forfeiture may be forfeited administratively except (1) real property (*see* 18 U.S.C. § 985); (2) personal property having a value of more than $500,000, except as noted in 19 U.S.C. § 1607(a); and (3) property forfeitable under a statute that does not incorporate the Customs laws (*see*, e.g., 18 U.S.C. § 492, relating to counterfeiting).

(3) When pursuing administrative forfeiture might create the appearance that the Government is circumventing the time limits on administrative forfeiture set forth in 18 U.S.C. § 983(a), the forfeiture should be done judicially as explained in section I.D at page 41.

(4) When the U.S. Attorney and the seizing agency agree that the forfeiture should proceed judicially in the first instance, administrative forfeiture is unnecessary.

(5) When, as explained in section II.B at page 51, the U.S. Attorney requests that the seizing agency suspend the administrative forfeiture to allow the forfeiture to be handled criminally, and the seizing agency agrees to do so, the forfeitures may be pursued exclusively as part of the criminal case.

B. Administrative forfeiture of bank accounts

Section 1607(a)(4) of title 19 states that "monetary instruments" may be administratively forfeited without regard to dollar value. This is an exception to the $500,000 cap on the administrative forfeiture of personal property set forth in section 1607(a)(1), but it does not apply to funds in a bank account.

The term *monetary instrument* is defined in 31 U.S.C. § 5312(a)(3) to mean currency, traveler's checks, various forms of bearer paper, and "similar material." Neither this statutory definition nor the parallel definition in the applicable regulations encompasses the funds in a bank account.[43] Moreover, the legislative history of section 5312(a)(3) indicates that Congress intended the term *monetary instrument* to apply only to highly liquid assets.[44] Consequently, funds in a bank account may not be considered monetary instruments for the purposes of the exception to the cap on administrative forfeitures. Nor may a seizing agency invoke the exception to the $500,000 cap in section 1607(a)(4) by waiting until the funds are converted to a monetary instrument such as a check, and then forfeiting the check administratively. If funds in a bank account having a value in excess of $500,000 are seized from a bank, they must be forfeited judicially regardless of the form they take when received from the bank by the seizing agency.

Funds that were withdrawn from a bank account by the account holder and converted to currency or a monetary instrument before the seizure by a law enforcement agency took

[43] *See also* 31 C.F.R § 103.11(u) (defining monetary instruments).

[44] H. Rep. No. 91-975, 91st Cong. 1, 2d Sess. (1970), *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."

place, however, fall within the exception in section 1607(a)(4) and thus may be forfeited administratively regardless of value. Moreover, funds in a bank accounts of a value of $500,000 or less may be administratively forfeited pursuant to section 1607(a)(1), subject to the policy on handling forfeitures judicially if the aggregate value of two or more assets exceeds $500,000, as discussed in section I.A at page 35.

C. Conversion of administrative forfeitures covered by the Customs carve-out to judicial forfeitures covered by CAFRA[45]

There are times when an administrative forfeiture is commenced under Title 19,[46] but the ensuing judicial forfeiture is brought under another statute. Title 19 forfeitures, of course, are exempt from the provisions of CAFRA, whereas most other forfeitures are not. This section discusses what action the United States should take when it converts an administrative forfeiture action under Title 19 to a civil judicial action brought under a non-Title 19 statute that is not exempt from the CAFRA requirements.

1. Summary

The reforms enacted by CAFRA are applicable to all civil forfeitures taken under any provision of federal law except for those specifically exempted by 18 U.S.C. § 983(i). Forfeitures to which the provisions of CAFRA are not applicable include, inter alia, forfeitures under Title 19 that are enforced by Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) (formerly components of the U.S. Customs Service). In instances where CBP (on its own, or on behalf of ICE) commences an administrative forfeiture action under Title 19, but the U.S. Attorney subsequently files a civil judicial forfeiture action under a non-Title 19 statute (e.g., 21 U.S.C. § 881, which is not CAFRA-exempt) the U.S. Attorney should comply with all CAFRA deadlines, including the 90-day filing deadline under section 983(a)(3), and CBP should return the cost bond.

2. Discussion

CAFRA, which took effect on August 23, 2000, enacted a set of procedural provisions in section 983 that governs administrative and judicial forfeitures under all civil forfeiture provisions of federal law, except for those explicitly exempted by section 983(i). Thus, the procedures governing administrative and civil judicial forfeiture in section 983 apply to even

[45] Section I.C was previously circulated as Interim Legal Advice Memorandum 03-3 in 2003.

[46] The reference to forfeitures commenced under Title 19 is to cases in which Title 19 provides the substantive basis for the forfeiture, not cases in which the procedures in Title 19 are incorporated into other forfeiture statutes. *See*, e.g., 18 U.S.C. § 981(d).

the most obscure federal civil forfeiture statutes. The only forfeitures to which section 983 does not apply are those specified in section 983(i), which include, inter alia, all forfeitures under Title 19, all forfeitures under Title 26 (including forfeitures of firearms under the National Firearms Act), and certain forfeitures under other statutes enforced by CBP and ICE.[47] In those cases, the Customs laws remain in effect as if CAFRA had not been enacted. Because section 983(i) exempts many forfeiture provisions enforced by CBP and ICE from the application of the CAFRA reforms, it is generally referred to as the "Customs carve-out" provision.[48]

Given the Customs carve-out in CAFRA, a potential problem arises when a CBP or ICE officer seizes property pursuant to Title 19 authority, initiates an administrative forfeiture action, and—as CBP is required to do—refers the case to the U.S. Attorney following the filing of a claim and cost bond, but the U.S. Attorney subsequently decides to commence a civil forfeiture action under another statute that is not exempt from CAFRA. For example, CBP or ICE may seize property in a drug case under Title 19, but the U.S. Attorney may believe it advantageous to the Government for strategic reasons to pursue the forfeiture under section 881.

Because the Government has chosen to pursue forfeiture under a CAFRA statute (i.e., one not designated under the Customs carve-out provision) all of the CAFRA-mandated procedures and deadlines would become applicable to the Government's forfeiture case. For example, CAFRA changed the deadlines for filing administrative and civil judicial forfeiture actions from those required under pre-CAFRA law and abolished the cost bond.[49] In "exempted cases," such as those filed pursuant to Title 19 under the Customs carve-out provision, the Customs laws and supplemental rules require only that forfeiture proceedings be commenced "forthwith" and be prosecuted "without delay." Under CAFRA, however, notice of administrative forfeiture generally must be sent within 60 days of the seizure, and

[47] Section 983(i)(2) also exempts from the requirements of CAFRA the following provisions of law which allow for forfeiture: section 983(i)(2)(B) exempts the Internal Revenue Code of 1986; section 983(i)(2)(C) exempts the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 et seq.); section 983(i)(2)(D) exempts the Trading with the Enemy Act (50 U.S.C. App. § 1 et seq.) and the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. § 1701 et seq.) (IEEPA provision added by the USA Patriot Act of 2001, Pub. L. 107-56, Title III, § 316(d), Oct. 26, 2001, 115 Stat. 272, 310); and section 983(i)(2)(E) exempts section 1 of Title VI of the Embargo Act of June 15, 1917 (40 Stat. 233; 22 U.S.C. § 401).

[48] Section 983(i) does not exempt all statutes enforced by CBP and ICE. The currency and monetary instrument report (CMIR) offenses in Title 31, smuggling offenses under 18 U.S.C. § 545, and other provisions are not exempted from the requirements of CAFRA.

[49] 18 U.S.C. § 983(a)(2)(E) provides that "any person may make a claim under subparagraph (A) [of section 983(a)(2)] without posting bond with respect to the property which is the subject of the claim."

the civil judicial complaint must be filed within 90 days of the filing of a claim contesting the administrative forfeiture. *See* section 983(a).[50]

Choosing to pursue judicial forfeiture under a CAFRA statute, after CBP has commenced an administrative forfeiture under an exempted statute, thus presents the Government with a number of questions: Does the 90-day period for filing a judicial forfeiture action under section 983(a)(3) run from the date the claim was filed with CBP (or ICE), or from the date the AUSA decided to pursue civil forfeiture under a CAFRA statute? Does the 60-day notice requirement for administrative forfeitures apply retroactively so that a claimant who did not get notice within 60 days of the seizure could demand the return of the property pursuant to section 983(a)(1)(F) on the ground that the Government did not comply with the requirements in section 983(a)(1)(A)? Should the Government return the cost bond?

The question regarding the cost bond is the easiest to resolve. If the Government is no longer pursuing civil forfeiture under a statute exempted from CAFRA, it has no legal authority to continue to hold the cost bond. In such cases, the U.S. Attorney should advise CBP that the cost bond must be released. On the other hand, if the Government pursues the civil judicial forfeiture under *both* the exempted statute and a CAFRA statute, the cost bond may be retained as long as the exempted cause of action remains part of the complaint.[51]

The question regarding the retrospective application of the 60-day notice requirement is also easy to resolve. If, at the time it seized the property and commenced administrative

[50] Section 983(a)(1) deals with notice of administrative forfeiture actions, which must, in general, be sent to interested persons within 60 days of the seizure of the property.

Section 983(a)(2) deals with filing a claim in the administrative forfeiture proceeding in response to the notice. Under this provision, property owners have 30 days from the last date of publication to file a claim, and may do so without having to file a cost bond (section 983(a)(2)(E)).

Section 983(a)(3) deals with the filing of the judicial forfeiture complaint in cases where a claim is filed. Under this provision, the Government has 90 days to file a civil judicial action (or include the forfeiture allegation in a related criminal indictment).

Finally, if the Government files a civil judicial complaint, section 983(a)(4) gives any person claiming an interest in the seized property 30 days to file a claim to the property in accordance with the supplemental rules, and 20 days from the filing of the claim to file an answer.

[51] We note that pursuing civil judicial forfeiture under mixed theories (i.e., under CAFRA statutes and statutes covered by the Customs carve-out) will be problematic and is not recommended. Among other things, the trial procedure and jury instructions would be extraordinarily complex, given that hearsay would be admissible to allow the Government to establish probable cause (outside the presence of the jury) on the exempted theory, while only admissible evidence could be used (in the presence of the jury) to establish the forfeitability of the property by a preponderance of the evidence on the CAFRA theory. Also, if the Government meets its burden under both theories, the innocent owner defense in section 983(d) would apply to the CAFRA theory, but would not apply to the exempted theory.

forfeiture proceedings, CBP or ICE was acting pursuant to an exempted statute, it is not required to send any notice within any fixed period of time. That the U.S. Attorney subsequently decides to pursue the forfeiture under a CAFRA statute does not change that fact. Accordingly, the U.S. Attorney's charging decision would not retroactively convert a properly conducted administrative forfeiture proceeding into one that constituted a violation of the notice requirements in section 983(a)(1).

Moreover, even if we are mistaken in that regard, the same event that created the retrospective violation—the filing of the civil judicial action under the CAFRA statute—would itself render any supposed violation of the notice requirement moot. That is because we interpret section 983(a)(1)(F), which requires the return of the seized property if the Government fails to comply with the 60-day notice deadline "without prejudice to the right of the Government to commence a forfeiture proceeding at a later time," as allowing the Government to retain possession of the seized property if it promptly files the civil judicial action upon discovery of the missed deadline. *See also Manjarrez v. United States*, 2002 WL 31870533 (N.D. Ill. 2002) (failure to send notice of an administrative forfeiture within the 60-day period prescribed by CAFRA does not bar the Government from commencing a civil judicial forfeiture action against the same property without first returning the property to the claimant). In a case where the supposed violation of the notice requirement does not even occur until the Government has decided to abandon the non-CAFRA forfeiture theory in favor of one to which the notice requirement applies, the Government will have filed the judicial action as discussed in Interim Legal Advice Memorandum 02-2, (*see* section I.F, *infra*) and maintained custody of the property pursuant to an arrest warrant in rem, before any obligation to return the seized property arises.

How to deal with the 90-day filing requirement in section 983(a)(3) presents a closer question. On the one hand, until the U.S. Attorney determines to pursue the civil judicial forfeiture under CAFRA statute, the 90-day filing requirement simply does not apply. On the other hand, if the Government routinely seized property under an exempted statute, delayed filing any civil judicial action for more than 90 days after a claimant filed a claim and cost bond, and then filed the judicial forfeiture under a CAFRA statute, it might create the appearance that the initial seizure under the exempted statute was merely a ruse to allow the U.S. Attorney to avoid complying with CAFRA when the Government intended all along to pursue the judicial forfeiture under the CAFRA statute. Accordingly, in any case referred by CBP or ICE where the initial seizure was pursuant to an exempted statute, the U.S. Attorney should make the decision whether to switch theories to a CAFRA statute, or to include both CAFRA and non-CAFRA theories in the complaint, within 90 days of the filing of the claim and cost bond; and if the decision is made to pursue the CAFRA forfeiture, the U.S. Attorney

should file the complaint before the 90 days expires, or ask the court for an extension of time in accordance with section 983(a)(3).

D. Whether to file a judicial forfeiture action when the timeliness or form of an administrative forfeiture claim is in dispute[52]

There are times when the claim filed in an administrative forfeiture proceeding is facially defective or filed out of time, but the claimant disputes that characterization. This section discusses whether, in such cases, the seizing agency should enter a declaration of forfeiture or refer the case to the U.S. Attorney.

1. Summary

Section 983(a)(2) requires that a claim contesting an administrative forfeiture action contain certain information and be filed within a certain number of days. If the claim is not filed in accordance with the statute, the seizing agency may enter a declaration of forfeiture pursuant to 19 U.S.C. § 1609. There are times, however, when the claimant may dispute the agency's characterization of the claim as defective or untimely.

If the seizing agency ignores the claimant's protestations and proceeds with the declaration of forfeiture without referring the case to the U.S. Attorney, it runs the risk that the claimant may turn out to have been correct. By that time, it is likely that the 90-day period for commencing a civil judicial forfeiture action pursuant to section 983(a)(3) will have expired, and that civil forfeiture of the property will be barred by the "death penalty" provision in section 983(a)(3)(B).

On the other hand, if the agency routinely forwards untimely or defective claims to the U.S. Attorney, and the U.S. Attorney files a civil judicial forfeiture action to toll the 90-day period, the agency's policy of insisting on strict compliance with section 983(a)(2) will be undermined, and claimants will have little incentive to adhere to the statutory requirements.

On balance, the seizing agencies should continue to adhere to the policy of strict compliance and should only refer valid claims to the U.S. Attorney. The agencies are encouraged, however, to consult with the local U.S. Attorney if the content or timeliness of a claim filed in an administrative forfeiture proceeding is questionable before deciding to issue a declaration of forfeiture.

[52] Section I.D was previously disseminated as Interim Legal Advice Memorandum 03-4 in 2003.

2. Discussion

Section 983(a)(2) provides that a person contesting an administrative forfeiture proceeding must file a claim with the seizing agency not later than the deadline set forth in the letter giving the person notice of the forfeiture, or not later than 30 days after the final day of publication of that notice in a newspaper, if direct notice was not received. *See* section 983(a)(2)(B). Moreover, the statute also provides that the claim must identify the property being claimed, state the claimant's interest in the property, and be made "under oath" subject to penalty of perjury. *See* section 983(a)(2)(c).[53] If no valid and timely claim is filed, the seizing agency is entitled to enter a declaration of forfeiture against the property pursuant to section 1609.

If a claim is timely and contains the required information, however, the agency must transfer the case to the U.S. Attorney, who must either commence a civil or criminal forfeiture action in the district court or return the within 90 days after the agency received the claim. *See* 18 U.S.C. § 983(a)(3)(A). If the U.S. Attorney does not comply with the statutory requirement, and the 90-day deadline is neither waived by the claimant nor extended by the court, the Government must release the property and the civil forfeiture of the property is forever barred. *See* section 983(a)(3)(B).

In the vast majority of cases, no one files a claim, and the seizing agency proceeds to enter the declaration of forfeiture. In most other cases, a clearly valid and timely claim is filed, and the agency transfers the case to the U.S. Attorney as required by law. In a small but significant number of cases, however, the timeliness or adequacy of the claim is in doubt. In such cases, the seizing agency may—in its discretion—give the claimant additional time to perfect the claim; but if the claim was untimely, or if the defects are not corrected, the agency has the right to proceed with the administrative forfeiture.

It is clear that the U.S. Attorney's duty to file a civil or criminal forfeiture action in the district court does not arise until a claim is filed with the seizing agency in the proper form. For example, in *Manjarrez v. United States*, 2002 WL 31870533 (N.D. Ill. 2002), the district court held that a claim filed by the claimant's attorney, instead of by the claimant personally, was not under oath as the statute requires, and therefore was not a valid claim. Accordingly, the court held, the 90-day period in which the Government was required to commence a judicial forfeiture action never began to run.

There are times, however, when it is not entirely clear that the claim filed with the seizing agency is defective or untimely. For example, the agency may believe a claim is late

[53] *See* section III at page 55, regarding the "under oath" requirement.

because it was filed after the deadline set forth in the notice letter that the agency sent to the claimant; but the claimant may assert that the notice was defective because it was sent to the wrong address. If the agency is convinced that a claim is incomplete or is filed out of time, and it sticks to its guns and proceeds with the administrative forfeiture without referring the case to the U.S. Attorney, there is always the chance that a court will agree with the claimant and hold that the Government should have filed a judicial forfeiture action within the 90-day period prescribed by section 983(a)(3)(A). In that case, because there is no provision in the statute tolling the 90-day period while such disputes are resolved, it is likely that the Government will find itself outside of the 90-day period and unable to pursue the civil forfeiture of the property.

On the other hand, if the seizing agency forwarded every questionable case to the U.S. Attorney, the agency's policy of insisting on strict compliance with the terms of section 983(a)(2) would be rendered meaningless, and claimants would have little incentive to comply with those terms.

What is truly needed to resolve this problem is a provision in the statute tolling the 90-day period while any dispute as to the adequacy or timeliness of the claim filed in the administrative forfeiture proceeding is resolved by the court. But the absence of such a provision does not mean that the Government must liberally construe the otherwise strict requirements of section 983(a)(2). In fact, a recent decision by the Court of Appeals for the Third Circuit suggests that when there is a bona fide dispute as to the timeliness of a claim, the court should *equitably toll* the period for filing the judicial action to avoid any injustice to the Government.

In *Longenette v. Krusing*, 322 F.3d 758 (3d Cir. 2003), a claimant mailed his claim to the seizing agency within the statutory time period, but the agency did not receive the claim until after the time period expired. The agency assumed that the claim was untimely and entered a declaration of forfeiture, but the claimant disagreed and filed an action to recover his property in the district court. Ultimately, after protracted litigation, the court of appeals held that the claimant was correct: under pre-CAFRA law, at least, the timeliness of a claim filed in an administrative forfeiture proceeding by a prisoner was determined by the "mailbox rule." That is, the claim was deemed to have been filed when it was mailed.[54]

[54] The rule seems to be otherwise for CAFRA cases and for claims filed by persons who are not prisoners. *See Sandoval v. United States*, 2001 WL 300729 (S.D.N.Y. 2001) (claim is considered filed in a civil forfeiture action when it is received by the seizing agency, not when it is mailed by the claimant); *Florez-Perez v. United States*, Case No. 3:99-cv-1230-J-20A (M.D. Fla. Sept. 1, 2000) (claim sent by Federal Express on the last day for filing a claim but not received by the Drug Enforcement Administration (DEA) until the next day was not timely filed).

By this time, however, the 5-year statute of limitations for filing a civil forfeiture action had expired. The claimant argued that, accordingly, the Government should be required to release the property and should be forever barred from commencing a civil forfeiture action. But the Third Circuit held that in fairness to the Government, given the novel legal issue involved, the statute of limitations would be equitably tolled. Thus, the Government was given 6 additional months in which to commence a new forfeiture action against the property.

While *Longenette* was a pre-CAFRA case involving the 5-year statute of limitations under 19 U.S.C. § 1621, and not the 90-day filing deadline under section 983(a)(3), the principle is the same. When the Government, in good faith, enters a declaration of forfeiture believing that the claim filed in an administrative forfeiture proceeding was inadequate or untimely, but is ultimately mistaken in that belief, the U.S. Attorney may argue that the time for filing a judicial action should be equitably tolled.

There is no guarantee, of course, that any court will agree with the Government on this point. But the availability of that remedy, coupled with the disadvantages of routinely referring all cases involving defective or untimely claims to the U.S. Attorney, militates in favor of taking the more aggressive approach on this issue.

It should be added, however, that in any case in which the legal issues regarding the adequacy or timeliness of a claim are unclear, the seizing agencies are encouraged to consult with the U.S. Attorney before deciding to go forward with the administrative forfeiture of the property. Such consultations—particularly in cases where further litigation is likely—will give the U.S. Attorney, who ultimately will have to defend the agency's action in the district court, the opportunity to advise the agency on the strengths and weaknesses of its position and the risks involved in not transferring the case for judicial forfeiture.

3. Conclusion

Seizing agencies should insist on strict compliance with the filing requirements of section 983(a)(2), and should not routinely refer defective claims to the U.S. Attorney just because a claimant insists that a claim contained all of the required information and was timely filed. The agencies, however, should consult with the U.S. Attorney regarding any claims in which the adequacy or the timeliness of the claim is unclear. If the agency rejects the claim and declares forfeiture but a court ultimately decides that the claim filed in that proceeding was valid, the U.S. Attorney should argue that the 90-day period for filing a judicial forfeiture action under section 983(a)(3) should be equitably tolled.

E. 60-day notice period in all administrative forfeiture cases

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 any non-judicial civil forfeiture proceeding is governed by section 983(a)(1), which requires "written notice" to all interested parties.

2. 60-day notice

Section 983(a)(1) requires that written notice of an administrative forfeiture action be sent to interested parties as soon as practicable but no later than 60 days after the date of the seizure. For interested parties determined after seizure, the written notice shall occur within 60 days after reasonably determining ownership or interest. *See* section 983(a)(1)(A)(v). Waivers of this notice deadline may be obtained in writing in exceptional circumstances from a designated official within the seizing agency. *See* section 983(a)(1)(B).[55] The exceptional circumstances are those set forth in section 983(a)(1)(D).

If a waiver is granted, it must set forth the exceptional circumstances and be included in the administrative forfeiture case file. A waiver issued under this provision, however, is valid for no more than 30 days. If additional time is required, the waiver must be extended by a judicial officer pursuant to section 983(a)(1)(c).

F. Inadvertent violation of 60-day deadline for sending notice[56]

This section discusses what action the Government should take if it discovers that the seizing agency has inadvertently failed to send notice of the commencement of administrative forfeiture proceedings within 60 days of the seizure of the property as required by section 983(a)(1)(A).

[55] For the Drug Enforcement Administration (DEA), the designated official is the DEA forfeiture counsel in DEA headquarters.

[56] Section I.F was previously disseminated as Interim Legal Advice Memorandum 02-2 in 2002.

1. Summary

Failure to comply with the 60-day deadline for sending notice precludes the Government from pursuing administrative forfeiture of the seized property and requires that the property be returned to the property owner. Section 983(a)(1)(F), however, permits the Government to file a judicial forfeiture action—civil or criminal—against the same property, and to reseize the property with either civil or criminal process. If the judicial action is commenced as soon as practicable after the discovery of the inadvertent failure to send notice, the Government may maintain custody of the property pursuant to the new civil or criminal process without having to go through the exercise of returning the property and seizing it back.

2. Discussion

Section 983(a)(1)(A)(i) provides that in non-judicial forfeiture proceedings,[57] the Government must send notice of the forfeiture within 60 days after the date of the seizure. Section 983(a)(1)(A)(iv) extends the deadline to 90 days in cases where the forfeiture is adopted from a state or local law enforcement agency. The statute also contains various exceptions to the notice deadlines and a procedure for obtaining extensions of time.[58]

Congress enacted these deadlines to ensure that property owners are given timely notice of their right to contest a forfeiture and are apprized of the procedures for doing so. Hence, law enforcement agencies should endeavor at all times to adhere to the notice deadlines and obtain extensions of time for sending notice only when necessary, and only in the manner described in the statute. *See* sections 983(a)(1)(B) and (c). Intentionally ignoring a notice deadline in order to delay the sending of notice to the property owner or other interested parties is not permissible.

There are times, however, when the failure to send notice within the statutory period is purely inadvertent. The question that arises in such cases is what action the Government must take to rectify the situation.

[57] The notice requirement in section 983(a)(1) applies to all cases where the property was seized for the purpose of forfeiture, and administrative forfeiture is permissible under 19 U.S.C. § 1608 and not barred by 18 U.S.C. § 985. Seizures that are strictly for evidence, that are undertaken only pursuant to a criminal seizure warrant (21 U.S.C. § 853(f)), or that cannot, by statute, lead to an administrative forfeiture proceeding, do not trigger the notice requirements of section 983(a)(1).

[58] References in this section to the notice deadline apply to whatever deadline may be applicable in a given case, be it the 60-day deadline, the 90-day deadline, or some other deadline established pursuant to the statutory procedure for obtaining an extension of time.

Section 983(a)(1)(F) provides as follows:

> (F) If the Government does not send notice of a seizure of property in accordance with subparagraph (A) to the person from whom the property was seized, and no extension of time is granted, the Government shall return the property to that person *without prejudice to the right of the Government to commence a forfeiture proceeding at a later time*. The Government shall not be required to return contraband or other property that the person from whom the property was seized may not legally possess. (Emphasis added.)

In our view, subparagraph (F) evinces Congress's intent to ensure that seized property does not indefinitely remain in the hands of the Government without the property owner having any opportunity to contest the forfeiture in a court of law. Thus, if the Government fails to send notice to the person from whom the property was seized within the statutory period for sending notice, it must return the property to that person (unless the property was contraband).

Section 983(a)(1)(F) also makes clear, however, that the Government is permitted to commence a new forfeiture proceeding. This presents two questions: Can the new proceeding be administrative, or must it be judicial? And can the Government reseize the property from the property owner when it commences the new proceeding?

While the statute does not make clear whether the new forfeiture proceeding can be administrative or must be judicial, we reject the view that section 983(a)(1)(F) permits the Government to reseize property for administrative forfeiture, thus starting the clock for sending notice all over again. The statute does not prohibit such action, but returning property to a property owner after the Government has missed the notice deadline, only to snatch the property back from the owner in order to start the clock over again, may violate the spirit of the legislation, and creates the appearance that the Government is trying to circumvent the statutory requirement. Thus, it is our view that once the Government misses the notice deadline for administrative forfeiture, and has returned the property pursuant to section 983(a)(1)(F), no new administrative forfeiture should be commenced against the same property based on the violation that led to the initial seizure, unless there are extraordinary circumstances indicating that return of the property would be contrary to the public interest.

On the other hand, section 983(a)(1)(F) does permit the Government to commence either a civil or criminal forfeiture action in court. In the case of a criminal action, the Government may name the property in an indictment or information and obtain a criminal seizure warrant,

a restraining order, or some other order under 21 U.S.C. § 853(e).[59] In the case of a civil judicial action, the Government may file a complaint and obtain an arrest warrant in rem for the property pursuant to Supplemental Rule C. Like the criminal seizure warrant, the arrest warrant in rem gives the Government a lawful basis to maintain custody of the property pending the resolution of the case in court. Thus, once the Government commences a judicial forfeiture action—either civil or criminal—against the property, it may reseize the property and hold it pending the resolution of the forfeiture case.

This matter is not without some ambiguity. It is possible to read section 983(a)(1)(F) to say that once the 60-day notice deadline is missed, the property must be returned to the property owner, and must remain in the owner's possession even though a civil or criminal forfeiture action is commenced in court. We do not think, however, that this was the intent of Congress. Again, the purpose of section 983(a)(1)(F) was to ensure that the Government did not hold property indefinitely without giving the property owner a day in court. Thus, absent extraordinary circumstances, if the notice deadline has passed, *and no forfeiture action is pending*, the property must be returned to the person from whom it was seized.[60] But once a judicial forfeiture action is filed, and the property owner is assured of a day in court, the Government can maintain the property in its possession as it would in any other forfeiture case, subject only to the "hardship" provisions in section 983(f). That, in our view, is what Congress meant by the language in section 983(a)(1)(F) providing that the return of the property is "without prejudice" to the right of the Government to commence a forfeiture proceeding at a later time.

The remaining question is whether, in cases where the Government files the criminal or civil judicial action immediately upon discovering the failure to send notice within the 60-or 90-day period, it is necessary to go through the exercise of physically returning the property to the property owner, only to reseize it immediately thereafter. We think that exercise is unnecessary.

Returning the property with one hand while seizing it back with the other, pursuant to an arrest warrant in rem or criminal seizure warrant, is an empty gesture that accomplishes nothing either in terms of the public interest or the private rights of the property owner.

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[59] *See In Re: 2000 White Mercedes ML320*, 220 F. Supp. 2d 1322, 1326 n.5 (M.D. Fla. 2001) (if property is already in Government custody, no section 853(f) seizure warrant can be issued, as an order under section 853(e) would be sufficient to preserve the property; a section 853(e) order need not be an injunction or restraining order, but can be any order that will "assure the availability of the property"), *aff'g* 174 F. Supp. 2d 1268 (M.D. Fla. 2001).

[60] If the judicial forfeiture action cannot be filed immediately, the prosecutor may want to consider obtaining a precomplaint civil restraining order under section 983(j), or a preindictment restraining order under section 853(e), to preserve the property until an action is commenced.

Moreover, proceeding directly to a judicial forfeiture action while maintaining custody of the property is entirely consistent with the intent of section 983(a)(1)(F). By commencing civil judicial forfeiture actions immediately upon learning of the inadvertent violation of the filing deadline, the Government will, in most cases, be placing property owners in a better position than they would have been in had the Government successfully commenced an administrative forfeiture proceeding.

As set forth in sections 983(a)(2) and (3), if the seizing agency sends notice of the administrative forfeiture action within the statutory period, the claimant has 30 days within which to file a claim to the property, after which the Government has 90 days to commence a civil or criminal forfeiture action in court. In contrast, by proceeding directly to the filing of the civil forfeiture complaint, the Government immediately places claimants in the position they would have been in if they had received the notice, filed a claim, and waited for the Government to file its complaint before the expiration of the 90-day period for doing so—assuming it did not take so long to discover the inadvertent failure to send notice that the 90-day period for filing a complaint would already have expired. Thus, filing a civil forfeiture complaint as soon as may be practicable after learning of the inadvertent violation of the notice deadline is in keeping with the intent of Congress to prevent the Government from holding on to property without giving the property owner a day in court. *See United States v. $39,480.00 in U.S. Currency*, 190 F. Supp. 2d 929 (W.D. Tex. 2002) (where the Government inadvertently filed its complaint on the 91st day because of a clerical error on the date stamp, claimant suffered no prejudice, and strict enforcement of the 90-day rule would have a "Draconian effect" on the Government's forfeiture case, the court equitably tolled the 90-day period and deemed the complaint timely filed).

3. Conclusion

If a seizing agency discovers that it has inadvertently failed to comply with a deadline for sending notice of the administrative forfeiture of property in a case where such deadlines apply, and the person from whom the property was seized has not waived the 60-day deadline, no further action may be taken to forfeit the property administratively based on the offense giving rise to the original seizure, and the property must be returned to the person from whom it was seized in accordance with section 983(a)(1)(F), unless the return of the property would be unlawful, or unless the Government, as soon as may be practicable, commences a judicial forfeiture proceeding by (1) naming the property in a criminal indictment or information and obtaining a judicial order pursuant to section 853(e) or (f) allowing it to hold the property; or (2) filing a civil judicial forfeiture action and retaining lawful possession of the property pursuant to an arrest warrant in rem.

II. Interplay of Administrative Forfeiture and Criminal Forfeiture

A. Starting a case administratively

A recurring issue concerns the interplay of criminal and administrative forfeiture. In general, there is no reason for the seizing agency not to commence administrative forfeiture proceedings against property even if the property could be included in a future criminal indictment. Therefore, in most cases, the seizing agency will commence administrative forfeiture proceedings against seized property by sending notice to potential claimants, while simultaneously, the U.S. Attorney will ask the grand jury to include a forfeiture allegation against the same property in a criminal indictment. This is the proper procedure. If there is no claim in the administrative forfeiture proceeding, the property will automatically be forfeited, thus simplifying the criminal case; and if there is a claim, there will be no need to supersede the indictment to include a forfeiture allegation.

In cases where no claim is filed and the property is forfeited administratively, however, it is necessary to strike the forfeiture allegation from the indictment to avoid a situation in which the court, the defendant, or the jury is confused by the procedure and mistakenly believes that the Government abandoned the administrative forfeiture once the indictment was returned, and intended to proceed with the criminal forfeiture alone. Accordingly, in cases where administrative and criminal forfeiture proceedings are instituted simultaneously, and no one files a claim in the administrative proceeding, the agency should complete the administrative forfeiture, and the AUSA handling the criminal case should file a motion reporting the completed forfeiture and therefore striking the forfeiture from the indictment.[61]

If the Government serves the motion to strike the forfeiture allegation on defense counsel, and the defendant does not respond, it is safe to assume that the defendant is aware of the administrative forfeiture and is not expecting to have an opportunity to contest the forfeiture in the criminal case. In that situation, the defendant would be estopped for later contesting the administrative forfeiture on the ground that the defendant never received notice of the administrative forfeiture or he or she thought the forfeiture would be handled criminally. On the other hand, if the defendant responds to the motion by stating that he or she would have contested the administrative forfeiture but for the indictment, the prosecutor should either withdraw the motion and proceed with the criminal forfeiture, or ask the court to conduct a hearing to determine if the defendant's assertion is bona fide. If the court finds that the defendant was properly notified of the administrative forfeiture and did not file a claim, it should enter an order to that effect and grant the motion to strike the forfeiture allegation. But if the court finds that the defendant may in fact have been confused regarding

[61] Form CRM2901 on the AFMLS Web site is designed for this purpose.

the status of the administrative forfeiture, the Government should proceed with the criminal forfeiture.

B. Requesting the seizing agency to suspend the administrative forfeiture

In an extraordinary case, the U.S. Attorney may have a reason why the case should not be handled administratively and may ask the seizing agency to suspend the administrative forfeiture in favor of criminal forfeiture. Seizing agencies will generally comply with that request, but the U.S. Attorney may then have to take steps to ensure that the 60-day deadline for commencing an administrative forfeiture proceeding under section 983(a)(1)(A) is not violated. *See* section 983(a)(1)(A)(iii) (no notice of administrative forfeiture is required if, before the 60-day period expires, a grand jury returns an indictment naming the property, and the Government takes steps to preserve its right to maintain custody of the property under the criminal forfeiture laws).

C. Disposing of administrative forfeiture in a plea agreement

Criminal prosecutors should not agree to return property that has already been forfeited administratively as part of the plea agreement in a criminal case. Once the property has been forfeited, it belongs to the Government, and may have already been liquidated, put into official use, or shared with a state or foreign law enforcement agency. Thus, the U.S. Attorney has no authority to agree to return such property as part of a plea agreement in a criminal case.

Moreover, recognizing that the seizing agencies often have put considerable resources into the administrative forfeiture of property by the time the prosecutor is negotiating a plea agreement, the U.S. Attorney should not agree to the return of property as part of a plea agreement if the property is subject to an ongoing administrative forfeiture proceeding unless (1) the seizing agency is requested to suspend the administrative forfeiture and it agrees to do so, or (2) the Asset Forfeiture and Money Laundering Section (AFMLS) approves the decision to return the property.

D. Seizure pursuant to a criminal warrant: availability of administrative forfeiture[62]

This section deals with the issues that arise when property is seized with a criminal seizure warrant, but the seizing agency nevertheless wants to initiate administrative forfeiture

[62] Section II.D was previously disseminated as Interim Legal Advice Memorandum 02-3 in 2002.

proceedings. Note: This is the reverse of the situation discussed in section II.A at page 50, which dealt with pursuing criminal forfeiture after property was seized for civil or administrative forfeiture.

1. Summary

There are two separate issues here. The first is whether a seizing agency can begin a forfeiture proceeding as a criminal forfeiture (i.e., by seizing the property with a criminal seizure warrant under section 853(f)) and then convert the proceeding to an administrative one without reseizing the property or taking some other action under the civil forfeiture statutes. The second is whether such an administrative forfeiture must be conducted in accordance with the 60-day deadline and other procedural requirements enacted by CAFRA.

The answer to the first question appears to be yes. Despite the common practice of commencing an administrative forfeiture only after the property has been seized pursuant to a civil warrant, there is no reason why property seized pursuant to a criminal warrant issued under section 853(f) cannot be forfeited administratively. There is no requirement in such cases that the Government reseize the property from itself with a civil warrant.

The second question is more difficult. The 60-day requirement in section 983(a)(1) that was enacted by CAFRA does not, by its terms, apply to criminal forfeiture proceedings. Thus, the 60-day clock never starts to tick if property is seized pursuant to a criminal seizure warrant. However, if the Government were routinely to seize property with a criminal warrant, ignore the 60-day deadline for commencing an administrative forfeiture proceeding, and then commence such a proceeding at a later date, it would create the appearance of misusing the criminal forfeiture process as a way of evading CAFRA's strict deadlines. Therefore, except in extraordinary circumstances, if the Government desires to commence administrative forfeiture proceedings against property seized pursuant to a criminal seizure warrant, it should do so within 60 days of the seizure. If the 60-day deadline has passed, and the Government still desires to pursue the forfeiture civilly instead of criminally, the case should be referred to the U.S. Attorney to commence a civil judicial proceeding.

2. Discussion

Most civil forfeiture statutes authorize the seizing agency to forfeit seized property administratively in accordance with the Customs laws. *See*, e.g., 18 U.S.C. § 981(d) and 21 U.S.C. § 881(d) (incorporating the provisions of 19 U.S.C. § 1602 et seq. into the civil forfeiture statutes). Nothing in the incorporated provisions of Title 19 limits administrative forfeiture to cases where the property was seized pursuant to a particular kind of seizure

warrant. To the contrary, section 1603(a) provides that property may be seized for administrative forfeiture "upon process issued in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure [i.e., Rule 41], [or] any seizure authority otherwise provided by law." Thus, nothing in the Customs laws themselves would preclude the commencement of administrative forfeiture proceedings following the seizure of property pursuant to a criminal seizure warrant issued under section 853(f).

Likewise, the civil forfeiture statutes themselves do not prescribe a particular form of warrant to be used to commence a civil—and hence, an administrative—forfeiture proceeding. Section 981(b)—which governs seizures for the purpose of civil forfeiture under both that section and the drug laws[63]—provides that property may be seized either pursuant to a warrant "obtained in the same manner as provided for a search warrant under the Federal Rules of Civil Procedure" or without a warrant if (1) there is probable cause to believe the property is subject to forfeiture and an exception to the Fourth Amendment warrant requirement would apply, or (2) the property was seized by a state or local agency and transferred to a federal agency. *See* sections 981(b)(1) and (2).

Finally, it is now established that there is nothing improper about the Government beginning a case criminally and then deciding to proceed civilly, or vice versa. *See United States v. Leyland*, 277 F.3d 628 (2d Cir. 2002) (there is nothing improper about beginning forfeiture as an allegation in a criminal indictment and then switching to civil forfeiture); *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (there is nothing improper in the Government beginning a forfeiture case with a civil seizure and switching to criminal forfeiture once an indictment is returned; it is commonplace). Moreover, CAFRA specifically authorizes parallel administrative and criminal forfeiture actions. *See* section 983(a)(1)(A)(iii)(I). Thus, administrative forfeiture under the Customs laws may be commenced in respect of any property seized by a federal law enforcement agency (including property seized by a state or local agency and transferred to a federal agency for the purpose of adoptive forfeiture) without regard to the nature of the warrant that was used to seize the property.[64]

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[63] *See* section 881(b), incorporating section 981(b).

[64] In *United States v. Millan-Colon*, 836 F. Supp. 994 (S.D.N.Y. 1993), a district court held that it was improper for the Government to commence administrative forfeiture proceedings against property that had already been included in a criminal indictment and was subject to a pretrial restraining order in the criminal case. As mentioned in the text, that case appears to be inconsistent with later Second Circuit law, *see Leyland, supra*, and CAFRA. Moreover, *Millan-Colon* is easily distinguished from most cases in that the pretrial restraining order in that case may have signaled to the defendant that he did not need to respond to the notice of the administrative forfeiture proceeding. As mentioned in section II.A at page 50, such misunderstandings will be avoided if, once parallel administrative and criminal forfeiture proceedings have been commenced and the claimant fails to file a timely claim in the administrative forfeiture proceeding, the Government moves to strike the forfeiture allegation from the criminal indictment, thus giving the defendant a fair opportunity to argue that

The second question is whether such administrative forfeiture proceedings must be commenced within the 60-day deadline set forth in section 981(a)(1)(A). Section 983(a)(1)(A)(i) provides that in non-judicial forfeiture proceedings,[65] the Government must send notice of the forfeiture action within 60 days after the date of the seizure. Section 983(a)(1)(A)(iv) extends the deadline to 90 days in cases where the forfeiture is adopted from a state or local law enforcement agency. The statute also contains various exceptions to the notice deadlines and contains a procedure for obtaining extensions of time.[66]

Congress enacted these deadlines to ensure that property owners are given timely notice of their right to contest an administrative forfeiture action and are apprized of the procedures for doing so. But the statute, by its terms, only applies to *non-judicial* forfeiture proceedings, and thus cannot, and does not, apply to criminal forfeiture proceedings which must, in all cases, be judicial proceedings. Accordingly, if the Government seizes property for the purpose of criminal forfeiture and proceeds solely along the criminal forfeiture track, the 60-day deadline under section 983(a)(1)(A) never comes into play.

To be sure, there will be cases where the Government seizes property for criminal forfeiture, intending at all times that the forfeiture will be made a part of the criminal case, but then finds that the criminal forfeiture option is not viable.[67] In such cases, there is nothing in the law preventing the Government from switching to civil forfeiture, or forfeiting the property administratively. Nor would the Government be required in such circumstances to seize the property from itself with a civil seizure warrant in order to commence the civil or administrative forfeiture proceeding. CAFRA does contain an odd and burdensome procedure requiring the Government to obtain new authority to maintain custody of property already in its possession when it switches *from civil forfeiture to criminal forfeiture*. *See*

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the default in the administrative proceeding was based on an assumption that the forfeiture in the criminal case could be opposed. A motion to strike form can be downloaded from the AFMLS Web site. *See* Form CRM2901.

[65] For purposes of section 983(a)(1), a non-judicial forfeiture proceeding is any proceeding in which (1) the motive for the seizure was, at least in part, to take custody of property that the Government intended to pursue in a civil forfeiture action; and (2) administrative forfeiture is permissible under section 1608 and notwithstanding section 985. Seizures that are strictly for evidence, that are undertaken for the purpose of criminal forfeiture, or that cannot, by statute, lead to an administrative forfeiture proceeding do not trigger the notice requirements of section 983(a)(1). *See* Cassella, "The Civil Asset Forfeiture Reform Act of 2000," 27 J. Legislation 97, 127 (2001).

[66] References in this section to the notice deadline apply to whatever deadline may be applicable in a given case, be it the 60-day deadline, the 90-day deadline, or some other deadline established pursuant to the statutory procedure for obtaining an extension of time.

[67] Among other reasons, it may turn out that the defendant has died or is a fugitive, that criminal charges cannot be presented to a grand jury for strategic or evidentiary reasons, that the property subject to forfeiture belongs to a third party, or that the property was derived from or involved in an offense other than the offenses to be charged in the criminal case.

section 983(a)(3)(B)(ii)(II); Form CRM1001 is available on the AFMLS Web site.[68] But as discussed above, nothing in the civil forfeiture statutes predicates administrative forfeiture proceedings on the use of a particular form of seizure warrant.

Thus, the Government may switch theories of forfeiture from criminal forfeiture to civil or administrative forfeiture at any time. At most, the deadline for commencing an administrative forfeiture would relate back to (i.e., would begin to run from) the date when the decision was made to pursue a non-judicial forfeiture, not the date of the original seizure. If, however, the Government were routinely to assert that it had originally intended to pursue a forfeiture criminally, but after 60 days had passed from the date of the seizure, it had decided to pursue administrative forfeiture instead, it would create the appearance that the criminal forfeiture process had been abused, or was a post hoc invention designed to excuse the Government from having to comply with the 60-day deadline for commencing an administrative forfeiture when the property is seized for civil forfeiture in the first instance.

To avoid such appearance of impropriety, we recommend that whenever the Government commences a criminal forfeiture action by seizing property for the purpose of criminal forfeiture, but later decides to switch theories to forfeit the property under the civil forfeiture statutes, the forfeiture action be referred to the U.S. Attorney for the purpose of filing a civil complaint in the district court unless fewer than 60 days have elapsed since the date of the seizure. Only when the decision to switch theories of forfeiture is made within 60 days of the seizure should the Government consider commencing an administrative forfeiture proceeding against the seized property. There may be other exceptions to this, but the only two that presently come to mind are (1) the extraordinary case where there is clear documentation that the decision to switch from criminal to civil forfeiture was made after the 60 days expired; and (2) a case where the claimant agrees to waive the 60-day notice requirement and allow the Government to proceed administratively (e.g., as part of a settlement or plea agreement.)

III. Form of the Claim

A. Claims must be filed under oath by the claimant, not by an attorney or agent[69]

This section addresses the question whether claims filed by persons contesting forfeiture actions must be filed under oath by the claimants themselves instead of being verified and filed on behalf of the claimant by an attorney or other representative.

[68] *See* Form CRM1001 on the AFMLS Web site.

[69] Section III.A was previously disseminated as Interim Legal Advice Memorandum 03-1 in 2003.

1. Summary

The statutes and rules governing the filing of claims in administrative, civil and criminal forfeiture cases all require that the claim be filed under oath by the claimant, and not by his or her attorney or other representative.

2. Discussion

With respect to claims filed in administrative forfeiture proceedings, section 983(a)(2)(C)(iii) provides in relevant part that "A claim shall…be made under oath, subject to penalty of perjury." Moreover, section 983(h) provides that if a court finds that a "claimant's assertion of an interest in the property was frivolous, the court may impose a civil fine *on the claimant* of an amount equal to 10 percent of the value of the forfeited property." (Emphasis added.)

These provisions were included in CAFRA to address the concern that by eliminating the cost bond requirement,[70] Congress would be encouraging the filing of false and frivolous claims in administrative forfeiture cases.[71] Given that context, it is clear that Congress intended that the claim be filed by the claimant personally, and that the claimant be the one to swear under oath that the assertions made in the claim are well-founded. *See Manjarrez v. United States*, 2002 WL 31870533 (N.D. Ill. 2002) (claim filed by claimant's attorney, instead of by claimant personally, is not "under oath" as the statute requires, and therefore is not a valid claim).

In the case of claims (petitions) filed in the ancillary proceeding in criminal forfeiture cases, the applicable statute is section 853(n). Subsection 853(n)(2) provides in relevant part that "any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States…may…petition the court for a hearing to adjudicate the validity of his alleged interest in the property…." Subsection 853(n)(2) is qualified by subsection 853(n)(3), which mandates that "the petition shall be *signed by the petitioner under penalty of perjury* and shall set forth the nature and extent of the petitioner's right, title, or interest in the property…." (Emphasis added.) This statute appears unequivocal: if the petition must be "signed by the petitioner under penalty of perjury," there

[70] Under pre-CAFRA law, a claimant had to post a bond equal to 10 percent of the value of the seized property. *See* section 1608. This provision was repealed by section 983(a)(2)(E).

[71] "The Civil Asset Forfeiture Reform Act of 2000," 27 J. Legis. 97, 142 & nn. 239-40 (2001) (quoting legislative history of the requirement that the claim be filed under oath, subject to the penalty of perjury).

is little room to suggest that it could be filed on behalf of a claimant by his or her attorney or other representative.[72]

Prior to the enactment of Supplemental Rule G, the requirements regarding claims filed in civil judicial forfeiture cases were less clear but the Rule has removed all ambiguity on this issue. Rule G(5)(a)(i)(C) says that the claim must identify the specific property claimed, identify the claimant and state the claimant's interest in the property, be signed by *the claimant* under penalty of perjury, and be served on the Government attorney handling the case. Accordingly, provisions of the prior law allowing claims to be verified by the claimant's attorney in some cases are no longer in effect.

3. Conclusion

In all federal forfeiture cases—including administrative forfeiture proceedings conducted by seizing agencies, civil judicial proceedings, and the ancillary proceedings in criminal cases—a claim filed by a person contesting the forfeiture action must be filed under oath by the claimant him or herself, and not by an attorney or other representative acting on behalf of the claimant.

IV. Criminal Forfeiture Procedure

A. Filing a motion for reconsideration in a criminal forfeiture case

1. Summary

When the order of forfeiture in a criminal case contains a legal or factual error, the Government may file a motion for reconsideration. If the order was entered prior to sentencing, as contemplated by Rule 32.2(b)(2), Federal Rules of Criminal Procedure, the filing of the motion for reconsideration is straightforward. If the order is not entered until sentencing, however, the opportunity to move to correct the order may be quite limited. That is because the filing of a motion for reconsideration in a criminal case may not suspend the time for filing an appeal under Appellate Rule 4(b), and because, in any event, the only vehicle for correcting an order of forfeiture once it becomes part of the sentence may be Rule

[72] Courts have strictly enforced this provision. *See United States v. BCCI Holdings (Luxembourg) S.A. (Fifth Round Petition of Liquidation Comm'n for BCCI (Overseas) Macau)*, 980 F. Supp. 1 (D.D.C. 1997) (petition that is not signed under penalty of perjury and fails to identify asset in which claimant is asserting an interest and nature of that interest does not comply with 18 U.S.C. § 1963(l)(3)); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of BCCI Campaign Committee)*, 980 F. Supp. 16 (D.D.C. 1997) (petition dismissed because not signed under penalty of perjury). Note: section 1963(l)(3) is the RICO counterpart to section 853(n)(3).

35(a), which requires that the motion be made, and the relief be granted, within 7 days of the sentence.

Accordingly, prosecutors should always ask the court to issue a preliminary order of forfeiture as soon as possible in accordance with Rule 32.2(b)(2) so that there is ample opportunity to correct the order before it becomes final at sentencing. Prosecutors should not assume that a motion for reconsideration filed *after* the sentence will suspend the time for appeal.

2. Applicable rules and statutes

Rule 35(a), Federal Rules of Criminal Procedure, says that motions to correct an "arithmetical, technical, or other clear error" must be filed, and ruled upon, within 7 days after sentencing. Appellate Rule 4(b)(5) says that a motion filed under Rule 35(a) does not suspend the time for filing an appeal.

3. The traditional rule is that a motion for reconsideration suspends the time for filing an appeal

Prosecutors frequently find it necessary to file motions for reconsideration in criminal forfeiture cases because the court, in announcing sentence or issuing the judgment of forfeiture, has misapplied forfeiture law. The traditional rule is that a motion for reconsideration of a judgment or order may be filed at any time before the time to appeal has expired, and that the filing of such a motion suspends the time to file an appeal.[73] Indeed, the Supreme Court has applied this rule to motions for reconsideration filed by the Government in criminal cases. *See United States v. Ibarra*, 502 U.S. 1, 4-6 (1991) (noting the advantages of giving district courts the opportunity to correct their own alleged errors, and thus preventing unnecessary burdens from being placed on the courts of appeals); *United States v. Dieter*, 429 U.S. 6, 8 n.3 (1976).

[73] 16A Charles A. Wright et al., *Wright & Miller's Federal Practice & Procedure* § 3950.10 (2005) ("It is not only those motions expressly listed in Rule 4(b) that stall the running of the time in which to appeal… A timely motion for reconsideration…postpones the appeal time."); 5 Am. Jur. 2d *Appellate Review* § 303 (2004) ("In an appeal from a District Court to the United States Supreme Court, the time for appeal does not begin to run until the court entering judgment disposes of a proper motion for…reconsideration."). *See United States v. Ibarra*, 502 U.S. 1, 6 (1991) (rejecting attempts to get around *Healy* and *Dieter*, a motion for reconsideration renders a final decision not final until the district court can rule on the motion, which suspends the time period for filing an appeal); *United States v. Dieter*, 429 U.S. 6, 8 (1976) ("consistent practice in civil and criminal cases alike has been to treat timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending"); *United States v. Healy*, 376 U.S. 75, 77-78 (1964) (same); *United States v. Correa-Gomez*, 328 F.3d 297, 299 (6th Cir. 2003) (citing *Ibarra*, reiterating that a timely motion for reconsideration means that the period to file an appeal begins to run only after the district court has ruled on the motion for reconsideration).

4. Rule 35(a) motions do not suspend the time

In contrast to the traditional rule, Rule 35(a) provides that a motion to correct an "arithmetical, technical, or other clear error" in the defendant's sentence must be filed, and ruled upon, within 7 days after sentencing.[74] Moreover, in 2002, Appellate Rule 4(b)(5) was amended to make clear that a motion filed under Rule 35(a) does not suspend the time for filing a notice of appeal. *See* Advisory Committee Note to 2002 Amendment. The question is whether motions to reconsider orders of forfeiture based on erroneous applications of forfeiture law are, in effect, Rule 35(a) motions that are subject to the 7-day rule and to the provisions of App. Rule 4(b)(5), or whether they are separate motions governed by the traditional rule that a motion for reconsideration may be filed at any time before the time for appeal has expired, and that the motion suspends the time for filing the appeal.

5. The rules applicable to Rule 35(a) motions may not apply to motions for reconsideration of a forfeiture order

A strong argument could be made that Rule 35(a) relates only to motions to modify the portion of the sentence governed by the sentencing guidelines. Prior to 1987, Rule 35(a) provided that a court could "correct an illegal sentence at any time." Rule 35(a), Federal Rules of Criminal Procedure (1986). That provision was stricken by the Sentencing Reform Act as part of the effort to ensure consistency in sentencing under a guidelines system. *See* Pub. L. 98-473; 18 U.S.C. § 3582(c) (stating the narrow grounds on which a sentence of imprisonment may be modified). In 1991, however, the rule was amended to restore narrow authority to correct an "arithmetical, technical, or other clear error." This was viewed as a codification of cases holding that the courts retained inherent authority to correct such errors notwithstanding the repeal of the former rule. *See* 1991 Advisory Committee Note. But the Advisory Committee was careful to make clear that the narrow exception being created was not intended to create wholesale authority to revise the portion of the sentence governed by the sentencing guidelines. As the Committee Note states, the rule was amended to limit motions to correct the sentence to instances where there was an "obvious error or mistake," but not to give the court the opportunity "to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence." *Id.*

In short, the 1987 repeal of former Rule 35(a), and the 1991 amendment that restored the authority to correct certain technical errors within 7 days, were part of the sentencing reform movement that introduced the use of a guidelines system for determining the period of incarceration that could be imposed on a defendant once he or she was convicted. None of

[74] Rule 35(c) defines *sentencing* as the oral announcement of the sentence.

this had anything to do with the forfeiture aspects of the sentence that remain subject to the traditional rule regarding motions for reconsideration.

No court has ever held that the narrow scope of Rule 35(a) applies to a motion to correct the forfeiture aspect of a sentence. While forfeiture is part of sentencing for many purposes, it is undisputed that neither the sentencing guidelines nor the case law interpreting them apply to forfeiture, *see* U.S.S.G. § 5E1.4 and Commentary (providing that forfeiture is "automatic" upon conviction and thus not governed by the sentencing guidelines); *see United States v. Fruchter*, 411 F.3d 377 (2d Cir. 2005) (*Booker* and *Blakely* do not apply to criminal forfeiture for two reasons: because the Supreme Court expressly stated in *Booker* that its decision did not affect forfeiture under 18 U.S.C. § 3554, and because *Booker* applies only to a determinate sentencing system in which the jury's verdict mandates a sentence within a specific range; criminal forfeiture is not a determinate system).

Thus, the policy considerations that prompted the 1991 amendment to Rule 35(a) (and the 2002 amendment to App. Rule 4(b)(5))—i.e., the desire for finality in the calculation of the appropriate period of incarceration under the sentencing guidelines—have nothing to do with the forfeiture portion of the sentence, while at the same time, the policy considerations that militate in favor of motions for reconsideration on other legal issues—i.e., the advantages of allowing the district court to correct its own errors—apply with full force to the complex issues that arise in applying the asset forfeiture statutes in criminal cases. For these reasons, courts may ultimately hold that a motion for reconsideration of the forfeiture aspect of a criminal sentence is not limited by the provisions relating to subject matter or time set forth in Rule 35(a), and that accordingly, such motions will suspend the time for filing an appeal in accordance with the traditional rule.

6. The Department's policy, however, is to assume that Rule 35(a) applies

There is no guarantee, however, that the courts will agree with this view. In the worst case, courts could hold that Rule 35(a) is the only means by which the Government can move to correct any portion of a criminal sentence, including the order of forfeiture, and that accordingly a motion must be filed, and ruled upon, within 7 days of the sentence. Moreover, if the courts were to reach that conclusion, it would follow that the filing of the motion does not suspend the time for filing an appeal. *See* App. Rule 4(b)(5).[75] Accordingly, until this

[75] None of this has an impact on the Government's ability to move to correct a clerical error at any time pursuant to Rule 36. For example, if the error was simply the district court's failure to make the order of forfeiture part of the judgment as required by Rule 32.2(b)(3), in most circuits the error could be corrected pursuant to Rule 36. *See United States v. Bennett*, 423 F.3d 271 (3d Cir. 2005) (if there was a preliminary order of forfeiture to which defendant did not object, the failure to include the forfeiture in both the oral

issue is resolved by the courts or by Congress, in a criminal case in which the order of forfeiture is not entered until sentencing, a prosecutor who files a motion for reconsideration of the order should file the motion, and urge the court to rule on it, within 7 days of the sentence. In addition, the AUSA should not assume that the filing of the motion will extend the time for filing an appeal, but should instead file the notice of appeal before the 30th day under App. Rule 4(b)(1)(B) regardless of the status of a pending motion for reconsideration. As a courtesy to the district court, the prosecutor may want to advise the court of the Government's policy on this matter so that the court understands the reasons why the Government may feel compelled to file its notice of appeal—which divests the district court of jurisdiction—even though the court may have scheduled a hearing on the Government's motion.

In all cases, however, the interests of justice would be better served if the court were to enter a preliminary order of forfeiture as soon as possible after the entry of a verdict or the acceptance of a guilty plea so that the court would have a full opportunity prior to sentencing to correct any legal or factual error. A motion for reconsideration would always be appropriate if filed after the order is entered but prior to sentencing. If that practice is followed, much unnecessary litigation over the scope of Rule 35(a), and many unnecessary appeals, may be avoided.

7. Conclusion

Because the law regarding the application of Rule 35(a) and App. Rule 4(b)(5) to motions to reconsider orders of forfeiture in criminal cases is unclear, AUSAs should act conservatively to protect the Government's right to appeal from the forfeiture portion of a criminal sentence. Until the law on this issue becomes more clear, prosecutors should assume

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pronouncement and the judgment and commitment order is a clerical error that may be corrected pursuant to Rule 36) (collecting cases); *United States v. Loe*, 248 F.3d 449, 464 (5th Cir. 2001) (if district court forgets to include forfeiture in the judgment, it may, pursuant to Rule 36, amend the judgment *nunc pro tunc*); *United States v. Hatcher*, 323 F.3d 666, 673 (8th Cir. 2003) (if there was a preliminary order of forfeiture, the failure to include the forfeiture in the judgment at sentencing is a clerical error that may be corrected at any time pursuant to Rule 36); *United States v. Thomas*, 67 Fed. Appx. 819, 2003 WL 21465365 (4th Cir. 2003) (amendment of the judgment pursuant to Rule 36 to include the forfeiture judgment 4 years after sentencing was appropriate as it accurately reflected the district court's intention at sentencing); *United States v. Arevalo*, 67 Fed. Appx. 589, 2003 WL 21204947 (11th Cir. 2003), *modified* 2004 WL 1253057 (11th Cir. 2004) (failure to make the forfeiture part of the judgment is a clerical error that may be corrected pursuant to Rule 36 as long as the court apprized the defendant of the forfeiture orally at sentencing); *but see United States v. Pease*, 331 F.3d 809, 816-17 (11th Cir. 2003) (the omission of the order of forfeiture from the judgment in a criminal case is not a clerical error that can be corrected pursuant to Rule 36; if the district court does not make the order of forfeiture part of the judgment at sentencing, and the Government does not appeal, the forfeiture is void). Most errors that arise in forfeiture cases, however, are not clerical. *See*, e.g., *United States v. King*, 2005 WL 1111884 (D.S.C. 2005) (where there was no mention of forfeiture either at sentencing or in the judgment, there is a clear violation of Rule 32.2(b) that cannot be corrected as a clerical error under Rule 36).

that any motion for reconsideration of a criminal forfeiture order should be filed and ruled upon within 7 days of sentencing in accordance with Rule 35(a), and that the filing of the motion will not suspend the time for filing an appeal under App. Rule 4(b)(1)(B). In all cases, the Government should urge the district court to comply with Rule 32.2(b)(2) in issuing a preliminary order of forfeiture as soon as possible after the entry of a verdict or the acceptance of a guilty plea so that there is ample time to correct the order prior to sentencing.

V. Preference for Federal Forfeiture

As a general rule, if property is seized as part of an ongoing federal criminal investigation and the criminal defendants are being prosecuted in federal court—or it is anticipated that a federal prosecution will be pursued—the forfeiture action should be commenced administratively by a federal agency or pursued in federal court regardless of whether a local, state, or federal agency made the seizure. Forfeitures should follow the prosecution for both legal and practical reasons. Parallel state forfeitures can jeopardize the pending federal criminal investigation or prosecution and create unnecessary confusion. Where federal resources are expended on an investigation and state and local law enforcement are assisting in a federal prosecution, federal forfeiture, administrative or judicial, should be pursued absent extraordinary circumstances. The efforts of state and local law enforcement should be recognized through formal equitable sharing rather than a division of assets between state and federal forfeiture.

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

(1) a state forfeiture is commenced on the seized asset before the federal agency joins the investigation and has either been concluded or substantial litigation has been conducted;

(2) an existing memorandum of understanding sets forth a different procedure for the handling of the seizures and forfeitures;

(3) the asset was seized by a state or local agency and state law requires a turnover order. A decision not to seek the turnover order must be coordinated with agency counsel and the federal prosecuting official; if an adverse order is entered by the state court, agency counsel, the federal prosecuting official, and the local prosecuting attorney must participate in deciding how to proceed;[76]

[76] *See* chapter 6 for a full discussion of issues involved in adoptive seizures.

(4) the seized asset does not meet the Department of Justice's minimum monetary thresholds; or

(5) the pertinent federal prosecuting official has reviewed the case, declined to initiate forfeiture proceedings, and approved a referral for state forfeiture.

When a federal agency believes a state forfeiture is appropriate, the referral of an asset for state forfeiture must be discussed with agency counsel and the federal prosecuting official responsible for asset forfeiture.

A federal prosecuting official may decline a prosecution if significant assets have been referred for state prosecution after a determination to seek federal prosecution was made and without the prior consultation discussed above.

If there is a state forfeiture related to a federal criminal prosecution, federal equitable sharing requests and decisions must take into account the entire case, and seizures should be reviewed before equitable sharing recommendations or decisions are made.

VI. Firearms Forfeiture Policy Summary

This section provides a brief summary of policies bearing on the forfeiture of firearms. For further details on firearms forfeiture matters, prosecutors and law enforcement agencies should consult AFMLS' *Guide to the Forfeiture of Firearms and Ammunition* (April 2006), which is designated as a law enforcement sensitive document.

A. Firearms are treated differently[77]

Forfeited firearms and ammunition are treated differently from other types of forfeited property in several respects. As explained below, they are not shared with state and local law enforcement, they are not sold, and most often they are destroyed. The minimum value and net equity thresholds do not apply to firearms and ammunition.

Forfeited firearms may be placed into federal official use by the U.S. Marshals Service (USMS) or a federal investigative agency for such purposes as federal law enforcement use, ballistics testing, or display. USMS does not equitably share firearms with non-federal law enforcement agencies, and does not sell them. USMS policy and practice in this respect are consistent with those of DEA, the Bureau of Alcohol, Tobacco, Firearms, and Explosives,

[77] Prosecutors and law enforcement agencies are referred to *Guide to the Forfeiture of Firearms and Ammunition* (April 2006), at 20-22.

Federal Bureau of Investigation, and the General Services Administration (GSA). In rare cases, firearms with specific, certain, and significant historical value are placed into official use for display purposes only by a non-participating federal agency, such as the Smithsonian Institution or one of the four U.S. military museums. USMS approves this type of official use only after the subject firearms have been rendered inoperable.

Minimum value and net equity thresholds do not apply to firearms. As explained in chapters 1 and 4 of this *Manual*, the Department of Justice has established minimum monetary thresholds as to most types of property subject to federal seizure and forfeiture, and generally, will not seize property for forfeiture, or adopt a state or local law enforcement seizure for federal forfeiture, unless the net equity in the seized property meets or exceeds these thresholds. There is an exception to the net equity thresholds where a particular forfeiture serves a compelling law enforcement interest. The Department has concluded that such a compelling interest applies to firearms and ammunition involved in crime. Therefore, unlike most forms of personal property, lawfully forfeitable firearms and ammunition may be, and should be, forfeited and adopted for forfeiture regardless of their monetary value.

There are at least two reasons for exempting firearms and ammunition from the minimum equity thresholds. Because cheap firearms, used criminally, cause just as much harm as expensive ones, there is an equally strong law enforcement interest in removing both types from circulation. Moreover, as discussed below, the Federal Government generally destroys forfeited firearms and ammunition, and never resells them. Therefore, their potential resale value is simply irrelevant to the determination whether or not to forfeit them.

Unlike other types of forfeited property, federally forfeited firearms and ammunition *may not be sold*, except as scrap. Title 18, United States Code, section 3051(c)(3) provides, *"Notwithstanding any other provision of law*, the disposition of firearms forfeited by reason of a violation of *any law of the United States* shall be governed by the provisions of section 5872(b) of the Internal Revenue Code of 1986." 18 U.S.C. § 3051(c)(3) (emphasis added). Section 5872(b) provides that no notice of public sale is required as to forfeited firearms *and that no forfeited firearm may be sold at public sale*. 26 U.S.C. § 5872(b) (emphasis added). Although section 5872(b) permits forfeited firearms to be retained for *federal* official use, forfeited firearms are not transferred to state or local law enforcement agencies as equitable sharing or otherwise. Although section 5872(b) indicates that the Administrator of General Services, GSA could sell forfeited firearms to state or local governments, GSA has determined that it will not do so. GSA's regulations provide that seized and forfeited firearms shall not be sold as firearms, but only as scrap "after total destruction." *See* 41 C.F.R. §§ 101-41, 102-42.1102-10(c) (July 2006). As a result, seized and forfeited firearms cannot be sold, and are generally destroyed.

Because sales of federally forfeited firearms are prohibited, prosecutors should take care not to enter into any agreement calling for the sale of forfeited firearms and the distribution of proceeds from any such sale. Because there can be no sale, there can be no proceeds—a fact that distinguishes forfeitures of firearms from forfeitures of most other types of property. Prosecutors should bring this prohibition on sale of forfeited firearms to the attention of the court whenever necessary to avoid entry of an order calling for such a prohibited sale. The overriding policy concern weighing against the sale or sharing of forfeited or abandoned firearms is that they may subsequently be resold and used in crime.

B. Preference for Forfeiture[78]

Forfeiture is the preferred way to dispose of crime-related firearms and ammunition. Forfeiture is most consistent with congressional intent, as reflected in the many specific and general forfeiture statutes that apply to firearms. Forfeiture proceedings also provide the best and clearest protections for the due process rights of firearms' owners, including the rights of innocent third parties who may have a lawful interest in firearms that have been stolen or otherwise used without the owners' knowledge and consent.

Although there are other lawful ways of disposing of crime-related firearms and ammunition in cases where forfeiture is not possible, including abandonment, non-forfeiture "quiet title" actions, and other equitable proceedings, *see*, *e.g.*, *United States v. Howell*, 425 F.3d 971 (11th Cir. 2005), it is Department of Justice policy to subject seized crime-related firearms to formal forfeiture proceedings wherever possible.

[78] Prosecutors and law enforcement agencies are referred to *Guide to the Forfeiture of Firearms and Ammunition* (April 2006), at 80-90.

Chapter 3

Settlements

I. General Policy

A. Scope

For purposes of this chapter, the term *settlement* includes the following:

- In a criminal forfeiture case—

  (1) A plea agreement with the defendant in a criminal case in which there is an agreement regarding the forfeiture of property; or

  (2) The resolution of a third party claim in the ancillary proceeding in a criminal case;

- In a civil forfeiture case—

  (3) The resolution of a claim filed by any claimant in a civil forfeiture case, either before or after the judicial complaint is filed.

B. Principles

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.

1. Factual basis

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. Consultation

All settlements must be negotiated in consultation with the seizing agency[78] and the USMS.[79] The agency's input is essential in order to reach a settlement that is based on a common understanding of the facts and circumstances surrounding the seizure. This requires that administrative action be taken by the agency to implement those settlements that include a referral back to the agency for administrative forfeiture of all or a part of the seized property. Input from the U.S. Marshals Service (USMS) should be sought to determine current and prospective expenses to ensure that the settlement is fiscally sound from the Government's perspective.

3. Recovery of investigative costs

In general, the Government should not attempt to use a settlement to recover the costs of its investigation. It may be appropriate in unusual circumstances, however, to recover extraordinary expenditures, such as funds needed to clean up environmental damage to the forfeited property.

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[78] 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:

(1) Federal Bureau of Investigation (FBI): assistant special agent-in-charge of the respective field office or designee;

(2) Drug Enforcement Administration (DEA): assistant special agent-in-charge or resident agent-in-charge or designee;

(3) Customs and Border Protection/Immigrations and Customs Enforcement (CBP/ICE): associate/assistant chief counsel (CBP) for the respective field office or designee (*note*: CBP is responsible for processing all seizures for civil forfeiture made by either CBP or ICE);

(4) U.S. Postal Inspection Service (USPIS): inspector-in-charge of respective field division or designee;

(5) Internal Revenue Service (IRS): chief, criminal investigation division of the key district, or designee;

(6) U.S. Secret Service (USSS): special agent-in-charge or designee, asset forfeiture program, headquarters office; and

(7) Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF): resident agent-in-charge of the respective field office or designee.

[79] In Treasury cases where the USMS is not the custodian of the property, the independent contractor will serve as the property manager, and the USMS need not be consulted. It is the responsibility of the seizing agency to contact the independent contractor and inform it of any settlement proposals.

4. Status of administrative forfeiture

Before discussing any settlement, the AUSA and the investigating agent must determine what property, if any, is presently being processed for administrative forfeiture. AUSAs may not reach agreements with defendants or their counsel in a criminal case regarding the return of property that is the subject of a pending or completed administrative forfeiture proceeding without first consulting the seizing agency.[80] 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.

5. Disagreements

If the seizing agency disagrees with the U.S. Attorney's recommended settlement proposal, it may refer the matter to the chief of the Asset Forfeiture and Money Laundering Section (AFMLS) for resolution.

6. Property located in another district

To settle a forfeiture action involving property located in another judicial district, the U.S. Attorney handling the forfeiture must notify and coordinate with the U.S. Attorney in the district where the property is located. It is the responsibility of the U.S. Attorney in the district that forfeits 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.

7. Global settlements

Civil forfeiture, either judicial or administrative, should not be used to gain an advantage in a criminal case. The Government, however, may conclude a civil forfeiture action in conjunction with the resolution of the criminal charges that provided the cause of action against the property. The following principles should be observed in negotiating a global settlement:

[80] 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. Such agreements and arrangements cause great difficulty for the seizing agencies and are improper.

(a) The Government should *not* agree 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.

(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) If a plea agreement in a criminal case is not to conclude a related 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.

(d) 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:

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

(ii) An admission of the facts supporting forfeiture;

(iii) That the claimant/defendant gives up all rights to the property; and

(iv) That he or she gives up any right to contest the forfeiture.

(e) The defendant, in a 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 the plea agreement.

8. Partial payments

Settlements shall not provide for partial payments, except upon the advice and approval of AFMLS in consultation with the USMS, Headquarters Seized Assets Division.[81]

[81] In Treasury and Homeland Security cases, the advice and approval of AFMLS should also be sought.

9. Reacquiring the property

The settlement should state that the claimant/defendant may not reacquire the forfeited property directly or indirectly through family members or any other agent. Family members who already own a partial interest in the forfeited property may, however, purchase the forfeited interest.

10. Effect on taxes and other obligations

Settlement documents should clearly state that 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.[82]

11. Settlement authority

The authority of the U.S. Attorney to settle a forfeiture matter, other than by plea agreement with the defendant in a criminal case, is circumscribed by Attorney General Order No. 1598-92, as described in section II below.[83]

II. Authority of the U.S. Attorney to Enter Into a Settlement

(1) Except as provided in section IX of this chapter, U.S. Attorneys have the authority to settle any civil or criminal forfeiture case in which the amount involved does not exceed $1 million, regardless of the portion of the property that would be released as a result of the settlement.

(2) Except as provided in section IX of this chapter, U.S. Attorneys also have the authority to settle any civil or criminal forfeiture case in which the amount involved exceeds $1 million but does not exceed $5 million, if the amount to be released does not exceed 15 percent of the amount involved.

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[82] USAOs 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), AUSAs should routinely notify the appropriate agency (e.g., IRS) of the proposed settlement.

[83] *See* Attorney General Order No. 1598-92, Appendix to Subpart Y, Part O, Title 28, Code of Federal Regulations, establishing the settlement and compromise authority redelegated to the U.S. 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 Appendix E.

(3) In all other cases, the U.S. Attorney must obtain the approval of the settlement by AFMLS.

For the purposes of this provision, the term *amount involved* is defined as follows:

(1) In a civil forfeiture case, the *amount involved* is the fair market value of the interest claimed by the person with whom the Government is attempting to reach a settlement. If the person is claiming an interest in more than one asset, the amount involved is the aggregate of those interests. For example, if the defendant property is a dwelling with a fair market value of $1.2 million, and the claimant is a lienholder asserting a $400,000 lien, for purposes of reaching a settlement with the lienholder the amount involved is $400,000. In the same case, if the claimant is the owner who acknowledges the validity of the lien but is contesting the forfeiture of the equity in the property, for purposes of reaching a settlement with the owner the amount involved is $800,000. But if the claimant is the owner who is also contesting the forfeiture of three other assets with a combined value of $350,000, the amount involved would be $1.15 million.

(2) In a criminal forfeiture case, the *amount involved* is the fair market value of the defendant's interest in the aggregate value of any property that has been seized, restrained, or specifically identified as property subject to forfeiture in any forfeiture count, allegation, or bill of particulars, including substitute assets, but does not include the amount of a money judgment to the extent that there are no known assets available to satisfy the judgment. For example, if the Government has seized several assets and restrained other assets for the purpose of forfeiture in connection with a criminal prosecution, and has also alleged in the indictment that the defendant is liable for a $2 million money judgment, for purposes of negotiating a plea agreement with the defendant the amount involved is the aggregate value of the defendant's interest in all the assets that have actually been seized or restrained, but would not include the $2 million unless it appears that there are assets that may be forfeited as substitute assets to satisfy the judgment.

(3) In the ancillary proceeding in a criminal case, the *amount involved* is the fair market value of the interest in the forfeited property that is claimed by the third party with whom the Government is attempting to reach a settlement.

The *amount to be released* means the value of the property that a claimant, defendant, or third party in an ancillary proceeding would recover or would be permitted to retain.

III. Authority of AFMLS to Approve a Settlement

The chief of AFMLS[84] has the authority to approve any settlement that must be submitted to that office pursuant to section II, unless the amount to be released exceeds 15 percent of the amount involved *and* is more than $2 million; in such case, the settlement must be approved by the Deputy Attorney General.[85]

A. Examples

(1) The Government brings a civil forfeiture action against an asset with a market value of $1.5 million but in which the sole claimant has only $250,000 in equity. The Government agrees to abandon the forfeiture and release the entire asset to the claimant. Because the total value of the equity involved is less than $1 million, the U.S. Attorney has authority to approve the settlement.

(2) The Government files a civil forfeiture action against seized bank accounts and currency in the amount of $1.8 million, but agrees as part of a settlement to release 20 percent ($360,000) to the claimant. Because the total value of the property exceeds $1 million, the U.S. Attorney does not have authority to settle the case without approval from the Department of Justice; but because the amount to be returned does not exceed $2 million, the chief of AFMLS would have the authority to approve the settlement without having to consult with the Deputy Attorney General, even though the amount to be returned is more than 15 percent of the total value.

(3) A criminal indictment alleges that the defendant must forfeit, upon conviction, various assets in which the defendant has a total equity of $3 million. The assets are neither seized nor restrained, but are listed in the forfeiture allegation in the indictment. As part of a plea agreement, the Government agrees not to go forward

[84] 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, Criminal Division, by paragraph (c) of Attorney General Order No. 1598-92.

[85] This policy is based on 28 CFR §§ 0.160 and 0.161. Section 0.160 provides that "Assistant Attorneys General are authorized, with respect to matters assigned to their respective divisions, to: (1) Accept offers in compromise of claims asserted by the United States in all cases in which the difference between the gross amount of the original claim and the proposed settlement does not exceed $2 million or 15 percent of the original claim, whichever is greater." This is simply another way of saying that if the amount to be returned is greater than both $2 million and 15 percent of the amount involved, it requires approval at a higher level; but if it is less than either figure, it does not. (A number cannot be greater than the greater of two other numbers unless it is greater than both of them: $A > \max(x,y)$ if and only if $A>x$ and $A>y$.) Section 0.161 provides that matters that cannot be approved at the Criminal Division level must be approved by the Deputy Attorney General.

with the forfeiture of most of the assets but instead agrees to accept a lump sum payment of $750,000 in lieu of forfeiture. Because the defendant is being allowed to retain assets worth more than $2 million and representing more than 15 percent of the total value of the property subject to forfeiture, the plea agreement must be approved by the Deputy Attorney General.

IV. Using Administrative Forfeiture to Effect a Settlement

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 USAO prior to finalizing an agreement in order to ensure the agency can accommodate the terms of the agreement.[86] The Department of Justice's policy is to pursue an agreed upon administrative forfeiture where it is possible and economically efficient to do so.

A. Settlement of forfeiture after a claim is filed in an administrative forfeiture proceeding, but before a judicial complaint is filed

The following requirements must be met where a claim has been filed and the case has been referred to the U.S. Attorney, but a settlement is reached before a civil judicial complaint has been filed.

(1) The terms of the settlement should be reduced to writing by the U.S. Attorney and include the following:

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

[86] 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 as follows:

(1) the FBI and DEA: the forfeiture counsel;

(2) CBP/ICE: associate/assistant chief counsel (CBP) for the respective field office or designee (*note*: CBP is responsible for processing all seizures for civil forfeiture made by either CBP or ICE);

(3) USPIS: manager, forfeiture group, or designee;

(4) IRS: chief, criminal investigation division of the key district, or designee;

(5) USSS: Office of Chief Counsel or designee; and

(6) ATF: staff assistant to chief counsel, headquarters.

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

(c) A provision whereby the claimant/defendant agrees not to contest the Government's administrative forfeiture action and waives all deadlines under 18 U.S.C. § 983(a);

(d) 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 (e.g., money to be forfeited is in fact proceeds from illegal drug trafficking);

(e) Specific reference to the withdrawal of the claim; and

(f) A "hold harmless" provision and a general waiver of Federal Tort Claims Act rights and *Bivens* actions, as well as a waiver of all constitutional and statutory defenses and claims.

(2) The case should be referred promptly back to the seizing agency to reinstitute the administrative process. The seizing agency shall reinstitute the administrative forfeiture process to effectuate the agreement upon receipt of a referral in compliance with this policy, consistent with its lawful authority.

Where the agreement provides for the claimant to withdraw the claim to all property subject to forfeiture, the entire case will be referred back to the agency for administrative forfeiture.

Where the agreement provides for the claimant to withdraw only a part of a claim, the case will be referred back to the agency for administrative forfeiture of that portion of the forfeitable property named in the agreement, and the agency may release the remainder to the claimant consistent with the settlement.

Republication of the notice or of the administrative forfeiture action is not necessary, provided publication covering the property to be forfeited occurred prior to the filing of the claim.

B. Settlement of civil judicial forfeiture without prior administrative action

In cases where the judicial action was commenced without a prior administrative forfeiture action, and a settlement agreement has been reached involving a proposed administrative forfeiture of seized property,

(1) The headquarters of the seizing agency must concur in that part of the settlement that would obligate the agency to commence administrative forfeiture proceedings;

(2) The complaint must be dismissed; and

(3) 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.

C. Using administrative forfeiture to settle a criminal forfeiture action

In cases where property has been seized or restrained for forfeiture under criminal statutes, and an agreement has been reached between the U.S. Attorney and the claimant/defendant prior to an order of forfeiture relating to a proposed administrative forfeiture of the property,

(1) The headquarters of the seizing agency must concur in that part of the settlement that would obligate the agency to commence administrative forfeiture proceedings;

(2) The seizure or restraining orders must be dismissed; and

(3) The jurisdiction of the district court over the property must be relinquished. 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.

V. References to the Remission Process in Settlements

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 of Justice 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.

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.

VI. Settlements in Civil Judicial Forfeiture Cases

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:

(1) 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 shortcut the process will not be recognized as a valid forfeiture;

(2) All known parties in interest must be given written notice, and notice by publication must be made;

(3) If no timely claim has been filed pursuant to the Supplemental Rules for Certain Admiralty or Maritime and Asset Forfeiture Claims, a default judgment must be sought pursuant to Fed. R. Civ. P. 55; and

(4) Proposed orders of forfeiture must be filed with the settlement agreement and include the terms of the settlement agreement.

VII. Settlements in Criminal Forfeiture Cases

In any plea agreement, a 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:

(1) There must be a forfeiture count or allegation 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 USAO must ensure that its criminal pleadings are in compliance with Rule 32.2 of the Federal Rules of Criminal Procedure.

(2) The U.S. Attorney must comply with the requirements applicable to third party interests (e.g., 21 U.S.C. §§ 853(n)(1)-(7)), and the provisions of Rule 32.2 of the Federal Rules of Criminal Procedure, including notice of the forfeiture and the right of third parties to obtain an adjudication of their interests in the property.

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

(4) The court must issue a final order of forfeiture that incorporates the settlement and must include the forfeiture order in the judgment at sentencing.

(5) 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.[87]

[87] *See also* section IV.A at page 74.

VIII. Acceptance of a Monetary Amount in Lieu of Forfeiture

If property subject to forfeiture is seized, and a civil or criminal forfeiture action is commenced, the Government may accept a monetary amount in lieu of forfeiture of the seized property pursuant to 19 U.S.C. § 1613(c).[88] The following procedures must be followed:

(1) 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.

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

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

(4) The USMS or the appropriate Treasury agency 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.

(5) Monies received in lieu of forfeiture must be transferred to the USMS's district office or the appropriate Treasury agency in custody of the asset being returned.

(6) In cases where the U.S. Postal Inspection Service or the National Marine Fisheries Service is the primary federal investigative agency, the USMS 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.

[88] 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).

IX. Agreements to Exempt Attorney's 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.[89]

[89] *See United States Attorneys' Manual* § 9-119.203.

Chapter 4

Third Party Interests

I. State and Local Real Property Taxes

A. Civil forfeiture cases

Notwithstanding the enactment of 18 U.S.C. § 983(d)(3), which bars recovery in certain civil forfeiture cases by persons who are not bona fide purchasers for value, it is the policy of the Department of Justice that the United States should pay state and local real property taxes that accrue up to the date of the entry of an order or judgment of forfeiture.[90] The reasons are two-fold. First, the refusal to pay such taxes would draw the United States into conflict with state and local authorities on matters (the collection of real property taxes) that traditionally have been left to state and local control. Second, the refusal to pay state and local real property taxes would, as a practical matter, complicate the interlocutory or post-judgment sale of real property. It would, for example, be difficult for the U.S. Marshals Service (USMS) to market and sell real property on which ad valorem property taxes had not been paid. Title insurers and escrow officers might be reluctant to provide the necessary warranties in the face of unpaid state and local property taxes, thus undermining the marketability of the property.

B. Criminal forfeiture cases

For the same reasons that it is the Department's policy in civil forfeiture cases to pay state and local taxes even if those tax liabilities accrue after the events giving rise to forfeiture, it is the Department's policy to also pay such taxes in criminal forfeiture cases. There is no reason to differentiate. Pursuant to delegated authority the chief of the Asset Forfeiture and Money Laundering Section (AFMLS) may authorize the payment of state and local taxes on criminally forfeited real property in the same manner and to the same extent as

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[90] After the Supreme Court's decision in *United States v. A Parcel of Land (92 Buena Vista)*, 507 U.S. 111 (1993), the Office of Legal Counsel (OLC) opined that the United States must pay state and local taxes on civilly forfeited real property because the innocent owner defense then in effect was broad enough to include tax liens that arose after the events giving rise to forfeiture. The rationale for the OLC opinion was undermined by the Civil Asset Forfeiture Reform Act (CAFRA) of 2000, which created a uniform innocent owner defense applicable to all civil forfeiture cases, 18 U.S.C. § 983(d). In the case of interests acquired after the events giving rise to forfeiture, only bona fide purchasers for value who acquire their interest without knowledge that the property is subject to forfeiture can maintain a meritorious innocent owner defense. 18 U.S.C. § 983(d)(3). Thus, as a matter of law, taxing authorities that acquire liens after the commission of the offense giving rise to the forfeiture would not be able to recover the value of the liens under section 983(d)(3). The OLC opinion is reprinted as Appendix F.

is authorized for the payment of such taxes on civilly forfeited real property pursuant to the policy set forth *supra*.

C. Payment of interest and penalties on state and local real property taxes

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 section 1961(a) (e.g., where tax certificates have been sold to private investors);

(4) U.S. Attorneys, with the concurrence of AFMLS, 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.

II. Guidelines and Procedures for Restoration of Forfeited Property to Crime Victims via Restitution in lieu of Remission

A. Purpose

The guidelines and procedures set forth in this policy are intended to expedite the transfer of forfeited property to the victims of the crimes underlying forfeitures, or related offenses, by releasing forfeited property, in appropriate cases, to satisfy victim restitution orders in forfeiture-related criminal cases in lieu of requiring such victims to petition the Attorney General for remission of the forfeited property.

B. Authority

With respect to property ordered forfeited under the criminal forfeiture statutes, the Attorney General has statutory authority to …

> grant petitions for remission or mitigation of forfeiture, restore forfeited property to victims of a violation of [the applicable chapter or subchapter], or 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]…

18 U.S.C. §§ 1467(h)(1) (obscene material); 1963(g)(1), 2253(h)(1) (sexual exploitation of minors); 21 U.S.C. § 853(i)(1) (controlled substances); and by incorporation of section 853(i)(1) by reference, 18 U.S.C. §§ 793(h)(3) and 794(d)(3) (espionage); 982(b)(1) (money laundering and other offenses).

In civil forfeitures also, the Attorney General is authorized to decide petitions for remission or mitigation. *See*, e.g., 18 U.S.C. § 981(d) and 21 U.S.C. § 881(d). In addition, section 981 authorizes the Attorney General, in section 981 civil forfeitures, to transfer the forfeited property "as restoration to any victim of the offense giving rise to the forfeiture, including, in the case of a money laundering offense, any offense constituting the underlying specified unlawful activity." *See* section 981(e)(6).

The authority of the Attorney General to grant petitions for remission or mitigation in criminal and civil judicial forfeitures is delegated to the chief of AFMLS by Title 28, Code of Federal Regulations, part 9 (28 C.F.R. Part 9), at 28 C.F.R. Part 9.1(b)(2). In addition, the Attorney General has delegated to the chief of AFMLS, the authority pursuant to any civil or criminal forfeiture statute enforced or administered by the Department of Justice, e.g., 18 U.S.C. §§ 981(e)(6), 1963(g)(1), and 982(b)(1) [incorporating section 853(i)(1), "to restore forfeited property to victims or take other actions to protect the rights of innocent persons in civil or criminal forfeitures that are in the interest of justice and that are not inconsistent with the provisions of the statute."[91] Accordingly, in appropriate cases, the chief of AFMLS has discretionary authority to authorize the restoration of forfeited property to compensate victims by means of court-ordered restitution.

Pursuant to this restoration authority, and applying the guidelines for restoration decisions set forth below and the procedures for restoration decisions set forth in section II.D.1 at page 86, the chief of AFMLS, in appropriate cases, may authorize federally forfeited property or proceeds to be transferred to the court for use in satisfaction of orders of restitution entered at sentencing pursuant to 18 U.S.C. § 3363 et seq. Such authority may be used by the chief of AFMLS in lieu of the separate authority and procedures set forth at 28 C.F.R. Part 9 governing petitions for remission or mitigation of forfeited property to victims. However, insofar as is reasonably feasible, such authority will be used to accomplish results that are not inconsistent with the standards set forth at 28 C.F.R. Part 9.8 for determining

[91] *See* Attorney General Order No. 2088-97 (June 14, 1997).

remission of forfeited property to non-owner victims. Additionally, insofar as may be applicable and not inconsistent with the standards or procedures herein, the other provisions of 28 C.F.R. Part 9 also shall apply.

C. Guidelines for restoration decisions

1. Representations

The chief of AFMLS will grant restoration requests submitted in accordance with section II.D.1 at page 86 only when the U.S. Attorney, or his or her delegee, has informed AFMLS of the following in writing:

(1) all known victims have been properly notified of the restitution proceedings and are properly accounted for in the restitution order;

(2) to the best of knowledge and belief after consultation with the seizing agency, the losses described in the restitution order have been verified and reflect all sources of compensation received by the victims, including returns on investments, interest payments, insurance proceeds, refunds, settlement payments, lawsuit awards, and any other sources of compensation for their losses;

(3) to the best of knowledge and belief after consultation with the seizing agency, reasonable efforts to locate additional assets establish that the victims do not have recourse reasonably available to other assets from which to obtain compensation for their losses, including, other assets owned or controlled by the defendant(s); and

(4) there is no evidence to suggest that any of the victims knowingly contributed to, participated in, benefitted from, or acted in a willfully blind manner toward the commission of the offenses underlying the forfeiture or related offenses.

2. Statutory authority

The property to be restored must be forfeited pursuant to a statute that explicitly authorizes restoration or remission of forfeited property to victims. *See*, e.g., sections 981(e)(6) and 982(b)(1) (incorporating the provisions of section 853(i)(1)) and section 1963(g)(1).

3. Pro rata

Restoration will be granted only to the victims and in the amounts described in the court's restitution order, or as a pro rata percentage based on such amounts.

4. Allowed losses

The losses allowed in the restitution order should primarily represent monetary losses directly caused by the illegal activities underlying the forfeiture. The chief of AFMLS may refuse to grant restoration where a pro rata distribution to the victims would be unduly skewed in favor of one or more victims who suffered non-monetary losses or losses associated with torts, physical injuries, interest foregone, or collateral expenses incurred to recover lost property or to seek other recompense (although such expenses may constitute some of the losses allowed in the restitution order).

5. Priority

Restoration decisions must not prejudice the judicial or administrative claims of owners, lienholders, or federal financial institution regulatory agencies pursuant to the Memorandum of Understanding (MOU) Governing Financial Institution Reform, Recovery, and Enforcement Act (FIRREA) Forfeiture Cases.[92] Such claims shall have the same priority over non-owner victims in the restoration process as in the remission process. Accordingly, petitions for remission or mitigation based upon such claims must be decided by the seizing agency (in administrative cases) or the chief of AFMLS (in judicial cases) pursuant to 28 C.F.R. Part 9 and (if granted) paid prior to payment of restoration decisions. Restoration payments will be made from the net proceeds remaining after payment of allowed costs and the claims of owners, lienholders, and others recognized in the final order of forfeiture and/or through petitions for remission.

6. Petitions for remission or mitigation

To expedite resolution of restoration requests, when necessary, decisions on restoration requests may be made *subject to* pending decisions on petitions for remission by owners, lienholders, and federal financial institution regulatory agencies (as opposed to *delaying* a decision on the restoration request until after all petitions for remission or mitigation are decided).

[92] *See U.S. Attorneys' Manual*, section 9-119.500.

D. Procedures for restoration decisions

1. Restoration requests

The U.S. Attorney's Office (USAO) will forward a copy of the restitution order to the chief of AFMLS along with a written request that property forfeited in the same and/or related civil, criminal, or administrative forfeiture proceedings be used to compensate the victims and losses specified in the restitution order. The written request must identify each asset involved including the seizing agency involved and, where applicable, the agency seizure number. The request and order shall be accompanied by the written representations required of the U.S. Attorney, or his or her delegee, by section II.C.1 at page 84. In cases where an order of restitution is anticipated but has not yet been signed and entered, a draft restitution order may be submitted to AFMLS at any time for an informal advance decision, which AFMLS will formally finalize after receipt of a copy of the final restitution order entered. In addition, pursuant to section II.E at page 87, the U.S. Attorney, or his or her delegee, may place a 12-month hold on the final distribution of net proceeds of property subject to civil or administrative forfeiture pending issuance of a criminal restitution order. However, such holds will not apply to administrative forfeitures by non-Department of Justice seizing agencies unless the USAO obtains the written concurrence of the local agency special agent-in-charge (SAC) or other appropriate agency official.

2. Time limits

Restoration requests must be sent to AFMLS within 30 days of the entry of the restitution order into the Consolidated Asset Tracking System (CATS). The USAO must enter restitution orders in CATS within 5 days of sentencing.

3. Evidentiary basis

The USAOs should work closely with the probation office and the investigative agency for the criminal case in formulating restitution awards to ensure that the victims' losses are supported by documentary evidence, including invoices and receipts.

4. Seizing agency investigation

The USAO may direct the investigative agency for the criminal case to investigate the merits of victims' claims, including, specifically, the claimed losses and the eligibility of the victims in accordance with section II.A at page 82. When requested, the investigative agency shall submit to the USAO a report of its investigation and its recommendation on whether the

victims' claims should be recognized or opposed. The USAO shall forward a copy of the investigative agency's report and recommendation, if any, to the chief of AFMLS along with the written request for restoration approval.

5. Decision by AFMLS

Using the guidelines for restoration decisions set forth above in section II.C.1 at page 84, the chief of AFMLS will determine, on a case-by-case basis, whether the restoration request will be granted. In cases involving assets forfeited administratively by a seizing agency other than a Department of Justice seizing agency, the chief of AFMLS will need the concurrence of that agency in order to grant the restoration request as to those assets.

If the chief of AFMLS denies the restoration request, AFMLS will advise the USAO of the denial, and disposition of forfeited property to victims will be decided through the petition for remission process pursuant to 28 C.F.R. Part 9. If the chief of AFMLS grants the restoration request, AFMLS will forward a copy of the restoration decision to the USAO, and to the USMS headquarters (and/or to the appropriate property custodian for any forfeited property being restored that is not held by the USMS), which will coordinate disbursement of the net proceeds of the subject forfeiture(s) (administrative, civil, and/or criminal) after satisfaction of allowed costs and any rulings on petitions for remission or mitigation of forfeiture filed by owners, lienholders, and/or federal financial institution regulatory agencies under the FIRREA MOU to the court for satisfaction of the restitution order. Restoration decisions shall apply to the net proceeds of any and all property forfeited in related administrative, civil, and/or criminal forfeiture proceedings not yet distributed to compensate victims of the offenses underlying the forfeiture or related offenses.

E. Guidelines for imposing 12-month hold pending entry of a restitution order

In appropriate cases (usually fraud cases with forfeited proceeds), the U.S. Attorney, or his or her delegee, may place a 12-month hold on the final distribution of net proceeds of property subject to civil forfeiture or to administrative forfeiture by a Department of Justice seizing agency pending entry of a restitution order.[93] The USAO will enter the hold in CATS as to each asset (including frozen, indicted, restrained, or encumbered assets) and the effective date of the hold will be the date of its entry in CATS by the USAO. The hold will remain in place for up to 12 months unless it is continued by the seizing agency or AFMLS at the end of the 12-month period pursuant to section II.E.1 at page 88 or released by the

[93] The decision of the USAO to forfeit property judicially rather than administratively should not be confused with the hold, which refers only to the proceeds of a completed forfeiture.

USAO at any time pursuant to section II.E.2 at page 89. Once entered into CATS, the hold will prevent the seizing agency (in administrative forfeitures by Department of Justice seizing agencies) or the chief of AFMLS (in judicial cases) from granting petitions for remission or mitigation from non-owner victims. It will also prevent entry or execution of decisions on any official use or equitable sharing requests. The hold will have no effect on the forfeiture proceedings governing such property or the ability to liquidate the property once forfeited or dispose of the property as otherwise ordered by the court. Holds will effectively override all requests for retention or transfer for official use. Further, the hold shall not prevent processing and, where appropriate, payment of petitions for remission or mitigation filed by owners, lienholders (pursuant to 28 C.F.R. Part 9), and federal financial institution regulatory agencies (pursuant to the FIRREA MOU), or the payment of awards and property management expenses, and the hold will not prevent decisions to deny, withdraw, or extinguish petitions for remission or mitigation or requests for equitable sharing or official use.

In deciding whether to place a 12-month hold on proceeds of related administrative or civil forfeitures, the U.S. Attorney, or his or her delegee, should consider whether it is more efficient to compensate all victims through the restoration process or to allow the seizing agency (in administrative cases) or the chief of AFMLS (in judicial cases) to proceed with the remission process. In some cases, it might be better to use the remission process to provide the victims with at least partial compensation immediately rather than to make them wait until completion of a criminal prosecution and entry of a restitution order to obtain any compensation. On the other hand, if a victim could use the remission process to obtain a greater percentage of compensation than similarly situated victims who chose to pursue only the restitution route, then it might be better to require all victims to be compensated through the restoration process.

1. Notification

The USAO will notify, in writing, the USMS and the Department of Justice seizing agency (in administrative cases) or the chief of AFMLS (in judicial cases) of the imposition of a 12-month hold. If the USAO wishes to place a hold on the proceeds of any non-Department of Justice agency's administrative forfeiture, it must notify the local SAC or other appropriate agency official in writing and obtain written concurrence. Upon entry of a hold decision, CATS will not allow decisions on non-owner victim petitions, equitable sharing, or official use requests to be entered for 12 months from the date of the hold decision, but will continue to allow entry of decisions on and payments of owner, lienholder, and federal financial institution regulatory agency petitions, property management expenses, and awards. The USAO will be responsible for monitoring the status of the hold. If the

forfeited property has already been transferred to an owner, lienholder, or federal financial institution regulatory agency, placed into official use, or equitably shared, CATS will not accept entry of the hold decision and will notify the USAO.

2. Release or extension of hold period

If a restitution order is not issued within 12 months, the seizing agency headquarters (for administratively forfeited property) or the chief of AFMLS (for judicially forfeited property), after consulting with the USAO, may decide either to continue holding the property pending entry of a restitution order or to proceed with the petition for remission process for non-owner victims. Entry of a restitution order in CATS will automatically extend a hold for 60 days.

(1) CATS will automatically release the hold if a restitution order is not issued (and entered into CATS by the USAO) or if the hold period is not extended by the seizing agency or AFMLS within 12 months from the date of the hold decision.

(2) At any time during the hold period (e.g., when restitution is denied or the criminal case is dismissed), after consulting with the seizing agency or AFMLS, as the case may be, the USAO may release the hold on property to allow the seizing agency or AFMLS to proceed with the petition for remission process for non-owner victims (as well as equitable sharing and official use decisions).

3. Official use and equitable sharing requests

Owners, lienholders, and federal financial institution regulatory agencies (pursuant to the FIRREA MOU) (in that order) shall have priority over non-owner victims, who in turn shall have priority over official use requests and equitable sharing requests. In appropriate cases, the U.S. Attorney, or his or her delegee, may exempt specific forfeited assets from a 12-month hold to allow for official use or equitable sharing requests to be granted. Such an exemption should be granted only where there will be sufficient proceeds from other forfeited assets to fully compensate any owners, lienholders, federal financial institution regulatory agencies (pursuant to the FIRREA MOU), and non-owner victims.

III. Waiver of Costs to Owner Victims in Remission Cases

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, 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.

IV. Using Civil Forfeiture to Recover Property for Fraud Victims in the Ninth Circuit

A. Summary of the issue

Federal prosecutors frequently use asset forfeiture as a tool for recovering property for the benefit of the victims of crime. Indeed, forfeiture has proven to be particularly effective in fraud cases, where the proceeds of the fraud can be seized or restrained prior to trial and then disbursed to the victims on an equitable basis by the Attorney General in accordance with the remission regulations once the court has entered an order of forfeiture. Between FY98 and FY05, the Attorney General distributed $72,282,061 to 11,388 victims pursuant to this procedure.

Unfortunately, a recent appellate decision has made it difficult for the Government to use the forfeiture statutes for this purpose in the Ninth Circuit. In *United States v. $4,224,958.57*, 392 F.3d 1002 (9th Cir. 2004) (*Boylan*), the panel held that any person who can establish that he or she was the victim of a fraud has standing to contest the forfeiture of the fraudster's property as the potential beneficiary of a constructive trust and therefore is entitled to notice of the forfeiture proceeding. In administrative forfeiture cases, this means that the seizing agency will have to send notice to all of the victims of the fraud, and that the claim of even one victim will force the agency to suspend the administrative forfeiture and turn the case over to the U.S. Attorney. In cases with large numbers of victims, this will make administrative forfeiture of fraud proceeds impractical, even if the fraudster does not oppose the forfeiture.

In civil forfeiture cases, the holding in *Boylan* means that the U.S. Attorney will have to send notice to all persons who appear to be victims of the fraud. The Government will have the right to challenge any claim that is filed on the ground that the claimant is not truly a victim, but any person who establishes his or her status as a victim will have the right to participate in pretrial discovery, to litigate pretrial motions (such as a motion to stay the civil case pending resolution of a criminal trial), and to contest the forfeitability of the property. Moreover, it means that even if the Government establishes forfeitability, the victims who file claims may attempt to establish an innocent owner defense by showing that they satisfy the requirements of a constructive trust. In the end, if any victim-claimant satisfies those requirements, the court will be required to award at least a portion of the property to that victim, thereby reducing the pool of money available for the Attorney General to distribute to the remaining victims on an equitable basis under the remission regulations. In many cases, the pool will be reduced to zero; moreover, in all cases, the Government will be liable to pay the attorney's fees of the prevailing victims even though the Government's purpose in bringing the forfeiture action was to recover the property for the victims' benefit.

In criminal cases, the Government will be able to proceed with the prosecution of the defendant without regard to the potential claims of the victims until the court enters a preliminary order of forfeiture. At that point, however, the Government will have to send notice of the forfeiture to all of the victims and litigate the claim of any victim who asserts his or her status as the beneficiary of a constructive trust as a ground to recover the forfeited property in the ancillary proceeding.

This situation has caused AFMLS to review the use of the forfeiture statutes in fraud cases that must be filed in the Ninth Circuit. This memorandum reflects the input of the forfeiture experts in the USAOs throughout the Ninth Circuit and the federal law enforcement agencies and sets forth the legal advice that AFMLS is giving to those offices

pending the enactment of remedial legislation that addresses the problems caused by the *Boylan* decision.

B. Summary of the legal advice

The *Boylan* decision makes administrative and civil forfeiture of fraud proceeds impractical in cases that involve large numbers of victims and that must be filed in the Ninth Circuit. Accordingly, until Congress has an opportunity to enact remedial legislation, AFMLS strongly urges prosecutors in the Ninth Circuit to employ alternatives to civil forfeiture when seeking to recover fraud proceeds for the benefit of large numbers of victims. Among other things, prosecutors should consider enlisting other Government agencies, such as the Federal Trade Commission (FTC) and U.S. Securities and Exchange Commission (SEC), to file actions to recover fraud proceeds in cases falling within their jurisdiction. Prosecutors may also consider cooperating with bankruptcy proceedings or with private litigation filed on behalf of all of the victims of the fraud offense. Finally, prosecutors may seek to preserve property using the criminal forfeiture statutes in cases where there is a criminal prosecution, but in such cases the prosecutor should withdraw the forfeiture prior to the entry of the preliminary order so that the property can be turned over to the court to apply to a restitution order.

C. Discussion

1. Using forfeiture to recover property for victims

Generally speaking, when the Government seizes fraud proceeds for civil forfeiture, its goal is to forfeit the monies and then, in remission proceedings administered by the Attorney General, distribute funds to all victims on a pro rata basis. The procedure works like this: the Government seizes any property in the fraudster's possession that is traceable to the offense and sends notice of its intent to forfeit that property to the fraudster and to any other person appearing to have a legal interest in the particular assets that have been seized. If no one files a claim, the property is forfeited administratively. If someone does file a claim, the U.S. Attorney files a civil forfeiture complaint, conducts pretrial discovery, and litigates the forfeitability of the property and the applicability of the statutory innocent owner defense with the wrongdoer and the other claimants.[94] If the Government prevails, the court issues a

[94] *See* 18 U.S.C. § 983(a)-(c), setting forth civil forfeiture procedure for cases governed by CAFRA and section 983(d), creating an innocent owner defense.

forfeiture judgment and the Attorney General disburses the property to the victims on a pro rata basis through the remission process.[95]

Because fraud victims generally part with title to their funds by giving them to the fraudster, who then commingles them in his or her own accounts, the victims lack an interest in any specific property of the fraudster. Thus, when the Government seizes the fraudster's property, it need not provide notice to the victims that it has instituted a forfeiture proceeding.[96] The victims, for the same reason (i.e., a lack of an interest in specific property) cannot appear in the forfeiture proceeding and make a claim to the funds.[97] This allows the Attorney General to round up the assets of the fraudster efficiently and inexpensively and distribute them equitably to the victims.

[95] *See* 18 U.S.C. § 981(e)(6) (authorizing the Attorney General to use forfeited property for the purpose of victim restitution); 28 C.F.R. § 9 (setting for the regulations governing the remission process); *United States v. One-Sixth Share*, 326 F.3d 36 (1st Cir. 2003) (explaining why an unsecured creditor of the wrongdoer is not permitted to contest the forfeiture of the wrongdoer's assets: "Congress has provided for justice a different way: it has provided that the Government, which stands for all the citizens, may take the criminal's property by forfeiture, and it has limited those who may asset competing claims"; victims can then petition the Attorney General for remission).

[96] *See United States v. Phillips*, 185 F.3d 183 (4th Cir. 1999) (holding that the Government does not have to send notice to persons who lack standing to contest the forfeiture).

[97] It is well-established that a person does not have article III standing unless that person has a legal interest *in the particular assets subject to forfeiture.* It is not enough to assert a generalized legal interest in the estate of the person from whom those assets have been seized. Unsecured creditors lack any interest in the debtor's assets; they have only a generalized interest in the debtor's estate. Thus, the federal courts have routinely held that unsecured creditors do not have article III standing to contest the civil forfeiture of their debtor's property. *See United States v. One-Sixth Share*, 326 F.3d 36, 44 (1st Cir. 2003) (person with an in personam judgment against the property owner has no secured interest in any particular asset and lacks standing to contest the forfeiture of specific property); *United States v. Carrell*, 252 F.3d 1193, 1207 n.2 (11th Cir. 2001) (woman contesting forfeiture on the ground that the property owner owes her child support payments lacks standing because she is not an owner); *United States v. Cambio Exacto, S.A.*, 166 F.3d 522, 529 (2d Cir. 1999) (entity to whom a money transmitter owes money lacks standing as a general creditor to contest forfeiture of money transmitter's account because there is no injury that would be redressed by successful challenge to the forfeiture); *United States v. $20,193.39 U.S. Currency*, 16 F.3d 344 (9th Cir. 1994) ("Unlike secured creditors, general creditors cannot claim an interest in any particular asset that makes up the debtor's estate. For this reason, the federal courts have consistently held that unsecured creditors do not have standing to challenge the civil forfeiture of their debtors' property."); *United States v. $61,483.00 in U.S. Currency*, 2003 WL 1566553, at *2 (W.D. Tex. 2003) (notwithstanding his claim of ownership, claimant lacked standing because he was an unsecured creditor); *United States v. $124,906 in U.S. Currency*, 2000 WL 360086, at *2 (D. Or. 2000) ("unsecured creditors do not have standing to challenge the civil forfeiture of their debtor's property"); *United States v. $15,060 in U.S. Currency*, 1999 WL 166847, at *2 (D. Or. 1999) (claimant who allegedly loaned money to defendant not knowing defendant intended to use it to facilitate drug trafficking was an unsecured creditor with no legal standing to contest the forfeiture of the seized funds).

2. Problems caused by the *Boylan* decision

Since 1998, the Department of Justice has used this procedure to remit millions of dollars to thousands of victims, but the procedure only works if the Government is able to obtain an order of forfeiture from the court. Until there is an order of forfeiture, the Attorney General is unable to disburse the property pursuant to the remission regulations because the Government cannot remit property to which it does not yet have clear title. By making it difficult if not impossible for the Government to obtain clear title to the fraudster's property, the *Boylan* decision completely upsets the statutory scheme.

The first problem concerns the practicality of providing notice in cases with large numbers of victims and managing cases in which a substantial number of victims choose to file claims. In *Boylan*, the panel held that all victims of a fraud scheme are potential beneficiaries of a constructive trust and thus have "a cognizable legal interest in the property," 392 F.2d at 1003. Because a person with a cognizable legal interest has a due process right to notice and an opportunity to be heard before the property is forfeited, *see Dusenberry v. United States*, 534 U.S. 161, 167 (2002), the Government is required to give notice to all potential claimants who might choose to file a claim. Under the Ninth Circuit's holding, that means that, in a fraud that victimized hundreds or even thousands of persons, the Government must make a good faith effort to identify those potential claimants and then give them personal notice.[98] Any of those claimants may then choose to file a claim. The Government may challenge the claim on the ground that the claimant was not a victim of the fraud,[99] but claimants who establish their status as victims will be able to engage in pretrial discovery and motions practice and contest the forfeitability of the property.[100] The same requirements would apply to administrative forfeiture: the seizing agency would have to give notice to all fraud victims, and any one of them could file a claim, thereby requiring the case to be filed as a judicial forfeiture action.[101]

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[98] *See* Supplemental Rule G(4)(b)(i) (providing that "the government must send notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant").

[99] It is important to note that *Boylan* only grants standing to "victims"; it has no application to other unsecured creditors of the fraudster. *See United States v. Approximately $44,888.35 in U.S. Currency*, 385 F. Supp. 2d 1057 (E.D. Cal. 2005) (*Boylan* only applies to the targets of the fraud; the fraudster's general creditors do not have standing to contest the forfeiture of his property).

[100] *See United States v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66 (2d Cir. 2002) (any claimant who has standing may contest the forfeitability of the property and will prevail if the Government fails to establish forfeitability even if the claimant is not the owner; ownership only comes into play if the Government establishes forfeitability and the court reaches the innocent owner defense).

[101] *See* 18 U.S.C. § 983(a)(3)(A) (providing that the Government has 90 days to file a judicial forfeiture complaint if any claim is filed in the administrative forfeiture proceeding).

Second, the Government will have difficulty prevailing on the merits of the forfeiture case. Notwithstanding the abundant case law holding that unsecured creditors lack standing to contest a civil forfeiture action, a claim filed by an unsecured creditor who qualifies as a victim of the fraud would not be subject to a motion to dismiss on that ground. The applicable statute provides that "any person claiming an interest in the seized property may file a claim asserting such person's interest in the property," 18 U.S.C. § 983(a)(4)(A), and *Boylan* holds that all fraud victims have a right to assert an interest as potential beneficiaries of a constructive trust. In addition, it appears highly likely that any victim who qualifies as the beneficiary of a constructive trust under the court of appeals' test would also qualify as an innocent owner under section 983(d)(2)(A). The constructive trust (according to the Ninth Circuit) is "imposed by law and arises immediately with [the fraudster's] acquisition of the proceeds of the fraud." 392 F.3d at 1004. It thus would appear to qualify as a "property interest in existence at the time the illegal conduct giving rise to the forfeiture took place," held by an "owner who did not know of the conduct giving rise to the forfeiture." 18 U.S.C. § 983(d)(2)(A) (defining innocent owner). Accordingly, if any of the victim-claimants qualified as beneficiaries of a constructive trust, the court would have to award at least a portion of the property to those victims as innocent owners, and could not enter an order of forfeiture giving title to the property to the Government. 392 F.3d at 1005.[102]

Finally, these problems call into question the fairness of the forfeiture process and the efficiency of using civil forfeiture as a means of recovering property for the benefit of victims. Treating victims who are able to satisfy the elements of a constructive trust as innocent owners turns the civil forfeiture action into a liquidation proceeding, with the forfeiture court displacing the role of the Attorney General in administering the remission process and distributing forfeited assets to victims. This is obviously contrary to the statutory scheme and the interests of justice. It renders superfluous the Attorney General's carefully calibrated scheme to ensure an orderly, fair, and inexpensive means of distributing forfeited assets to victims,[103] and creates a situation in which some victims—i.e., those who can trace their property to the assets seized from the fraudster and can otherwise satisfy the elements of a constructive trust—would receive a more generous distribution of the forfeited assets than other victims who either did not file claims in the forfeiture proceeding or who could not satisfy the tracing requirement.[104]

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[102] For these same reasons, if victims are permitted to contest the forfeiture, the Government will not be able to quiet title to the property quickly by way of a settlement with the fraudster.

[103] *See United States v. Bright*, 353 F.3d 1114 (9th Cir. 2004) (holding that the district court may urge the Government to apply the forfeited funds to restitution, but ordering the Government to do so would conflict with section 981(e)(6), which gives the Government the discretion to apply forfeited funds in that fashion).

[104] As discussed *infra*, one of the elements of a constructive trust that the claimant must satisfy is that the defendant property is directly traceable to the property the claimant gave to the fraudster. A given victim's

Converting the forfeiture into a liquidation would also embroil the prosecutor in protracted litigation over matters unrelated to proving the connection between the forfeited property and the underlying crime,[105] and would, as a practical matter, make it impossible to try a forfeiture case before a jury.[106] This is precisely the result Congress sought to avoid when it defined the term *owner* in the innocent owner statute specifically to exclude "a person with only a general unsecured interest in, or claim against, the property or estate of another." 18 U.S.C. § 983(d)(6). Finally, to add insult to injury, treating victims who file claims in court as innocent owners would make the Government liable to pay their attorney's fees as the prevailing parties under 28 U.S.C. § 2465(b).

In an earlier forfeiture case involving thousands of victims of fraud, the District of Columbia Circuit expressed many of these same concerns in explaining why creditor-victims should not be granted standing to contest the forfeiture. "Were it otherwise," the court said, "the court litigating the forfeiture issue would be converted into a bankruptcy court and would not be able to grant forfeiture to the government until it determined that no general creditor would be unable to satisfy its claim against the defendant. That result appears patently at odds with the statutory scheme, which directs parties without an interest in specific property to seek relief from the Attorney General, not the court adjudging the forfeiture. The Attorney General has authority to dispense confiscated funds 'to protect the rights of innocent persons,' and general creditors seem precisely the type of innocent persons Congress had in mind." *United States v. BCCI Holdings (Luxembourg)*, 46 F.3d 1185, 1191-92 (D.C. Cir. 1995) (citations omitted).

For all of these reasons, AFMLS believes that the *Boylan* decision has made using civil forfeiture to recover property for the benefit of a large number of victims impractical in the

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ability to do this will often depend entirely on timing: the last victims of the fraud will be able to trace their money to the funds that were seized from the fraudster when the scheme collapsed, but the earlier victims will find that the fraudster has long since dissipated their money. This is the reason other courts have declined to impose constructive trusts in forfeiture cases involving large numbers of victims. *See United States v. BCCI Holdings (Luxembourg) S.A. (Petition of BCCI Depositors)*, 833 F. Supp. 9, 14 (D.D.C. 1993) (court should not impose a constructive trust even if all elements are otherwise satisfied if to do so would disrupt liquidation proceedings designed to distribute forfeited property equitably and provide an advantage to some victims at the expense of others).

[105] In the *BCCI* case, the court agreed with the Government that the forfeiture proceeding should not be turned into a liquidation, and it limited category of victims who could file claims to those with a legal interest in the specific assets subject to forfeiture. Even so, it took 7 years to resolve the forfeiture. *See United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999).

[106] Every claimant would have a constitutional right under the Seventh Amendment to have his or her forfeiture claim tried before a jury. *See United States v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1014 n.2 (8th Cir. 2003) (claimant has a Seventh Amendment right to a jury trial on her innocent owner defense).

Ninth Circuit. Civil forfeiture is an in rem action designed to give the Government clear title to property derived from a criminal offense. It contains an innocent owner defense to protect the interests of persons who were unaware that their property was being used to commit an offense, but it was never intended to serve as a liquidation proceeding in which the interests of the victims of the crime are sorted out.[107] That is the role of a liquidator appointed to distribute property in accordance with the remission regulations, not of a prosecutor or court presiding over a forfeiture case.

3. Recommendation regarding future cases involving many victims

Until Congress has an opportunity to enact remedial legislation to correct the problems created by the *Boylan* decision, AFMLS strongly urges prosecutors to employ alternatives to civil forfeiture when seeking to recover fraud proceeds for the benefit of large numbers of victims in cases that must be filed in the Ninth Circuit. Among other things, prosecutors should consider enlisting other Government agencies, such as the FTC and SEC, to file actions to recover fraud proceeds in cases falling within their jurisdiction. Prosecutors may also consider cooperating with bankruptcy proceedings or with private litigation, as long as that litigation is filed on behalf of all of the victims of the fraud offense and not for a few who are seeking an advantage over the others.[108]

Most important, where it is possible to do so, the Government should avoid the use of civil forfeiture altogether by filing criminal charges against the fraudster and preserving his or her property pending trial by using the criminal forfeiture statutes. In particular, in criminal cases, the Government may seize the property under 21 U.S.C. § 853(f) or ask the district court to restrain it pursuant to section 853(e).[109] In addition, in some money laundering cases, the Government may seek the appointment of a federal receiver to collect the defendant's assets and hold them for the benefit of the victims. *See* 18 U.S.C.

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[107] *Cf. United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Capital Bank)*, 980 F. Supp. 10 (D.D.C. 1997) (the ancillary proceeding in a criminal forfeiture case is not a liquidation proceeding in which defendant's assets are divided among competing parties).

[108] Prosecutors must be aware, however, that it might not be possible to reveal certain types of restricted information—such as grand jury material, tax disclosures, tips from confidential informants, and wiretap recordings—to private persons or non-law enforcement agencies. Also, the prosecutor must take care not to make a premature disclosure of an ongoing criminal investigation. These considerations may severely limit the ability of the Government to cooperate with other recovery actions in many cases.

[109] *But see United States v. Razmilovic*, 419 F.3d 134 (2d Cir. 2005) (holding that Congress failed to incorporate the pretrial seizure and restraining order provisions from section 853 into the criminal forfeiture provision for fraud cases, 28 U.S.C. § 2461(c). The Ninth Circuit has not yet ruled on this issue. If it should decide to follow *Razmilovic*, however, the criminal forfeiture option may not be available until Congress amends section 2461(c), unless the forfeiture can be sought under another forfeiture statute such as RICO or money laundering.

§ 1956(b)(4). In all of these cases, however, the prosecutor should withdraw the forfeiture prior to the entry of the preliminary order so that the property can be turned over to the court to apply to a restitution order.[110] This is necessary because once the preliminary order of forfeiture is entered, the Government is obligated to commence an ancillary proceeding in which all of the victims would be entitled to notice and the right to attempt to establish standing to contest the forfeiture under section 853(n)(6)(A).[111] This would lead to all of the problems discussed above in connection with civil forfeiture cases involving large numbers of victims.

4. Recommendation regarding pending cases and smaller fraud cases

In cases where a forfeiture complaint has already been filed, and in future cases involving numbers of victims small enough to make direct communication with the victims practical, AFMLS suggests that prosecutors do the following.[112] First, as *Boylan* requires, the U.S. Attorney must send notice to all persons appearing to be victims, notifying them of their right to file claims in the forfeiture proceeding. The notice should also explain, however, that the Attorney General intends to distribute the fraudster's property to all victims on an equitable basis once the district court has entered an order of forfeiture. Filing a claim with the district court, the notice should explain, will only delay that process. Accordingly, the notice should give the victim the option of filing a remission petition with the Attorney General and should include a blank remission form to be used for that purpose. The prosecutor should then send any remission petitions that are filed to AFMLS to obtain a tentative assessment of what distribution will be made to the victims if an order of forfeiture is granted.

Second, if despite being given the remission option, the fraudster and/or some of the possible victims file claims with the district court, the Government may want to file a motion asking the district court to rule that *Boylan* simply does not apply to the particular case. Among other things, the Government might argue that the persons asserting claims are not

[110] *See United States v. Lavin*, 299 F.3d 123 (2d Cir. 2002) (instead of pursuing forfeiture, Government used seized funds to satisfy restitution order); *United States v. O'Connor*, 321 F. Supp. 2d 722 (E.D. Va. 2004) (although the defendant has no right to used forfeited funds to satisfy a restitution order, the Government may, pursuant to section 853(i)(1), ask the court to apply the forfeited funds to restitution for the benefit of the victims).

[111] *See* Fed. R. Crim. P. 32.2(c).

[112] There is also little reason not to proceed with civil forfeiture in cases involving state or federal agencies as victims. Such victims will understand that they have no reason to litigate against the Government in the forfeiture action.

"victims" within the meaning of the *Boylan* decision,[113] or that they do not satisfy the requirements of the case law regarding prudential standing.[114]

In any event, if the case must be litigated, the Government should file a motion for summary judgment with respect to the forfeitability of the property. In serving a copy of this motion on the victims, the prosecutor should explain that this is a necessary step towards the resolution of the case because it establishes that the money in question is, in fact, the proceeds of fraud, but that it does not affect any claimant's right to assert an innocent owner defense under section 983(d). Thus, the prosecutor may advise the victims that they may have no reason to oppose the Government's motion. Moreover, the Government may ask that the court resolve the motion for summary judgment without a hearing so that the court does not have to deal with the logistics of allowing numerous parties to participate by telephone or in person.

Once the court grants summary judgment for the Government on the forfeitability issue, the prosecutor should assess the remaining claims and determine whether they may be settled in a way that treats all victims fairly and leaves an appropriate portion of the property available for remission to the victims who did not file claims and who are waiting for the remission process. Any settlement should include a waiver of attorney's fees for which the Government would otherwise be liable under section 2465(b). Settlements should be pursued, however, only where it is certain that they will not result in unfair treatment of victims who did not file claims. In most cases, it will probably be necessary to oppose the claims, even of sympathetic victims, in order to avoid such unfairness.

If the Government is required to oppose the remaining claims, it should make the following arguments to the district court:[115]

- *Boylan* held only that fraud victims have standing to contest the forfeiture as *potential* beneficiaries of a constructive trust; it did not hold that every victim is automatically

[113] *See* note 99, *supra*.

[114] *See Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 12 (2004) ("prudential standing encompasses the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked") (internal quotes and citations omitted).

[115] AFMLS has posted a legal memorandum, Interim Legal Advice Memorandum 05-2, on its Web site setting forth the legal authority for these arguments. For that reason, we do not include the citations to the case law here.

entitled to that status; thus, the district court must determine, as to each claimant, whether the claimant is able to satisfy the elements of a constructive trust;

- Claimants may prevail in the forfeiture proceeding only if they establish that they are "innocent owners" in terms of section 983(d); a beneficiary of a constructive trust may be an "owner" of the property subject to forfeiture, but only if all of the elements of a constructive trust are satisfied; otherwise, the claimant is only an unsecured creditor barred from asserting an innocent owner defense by section 983(d)(6);

- Because the court will be interpreting the term *owner* as used in a federal statute, it must apply the federal common law definition of a constructive trust; if the court believes that state law must be applied, prosecutors rely on the law in their respective states, distinguishing it where possible from the California law cited in *Boylan*;

- As applied by the federal courts (and most state courts), the elements of a constructive trust include the following:

  (1) tracing: the claimant must be able to trace his or her property to the property subject to forfeiture;

  (2) "clean hands": persons who acted in concert with the wrongdoer cannot be considered beneficiaries of a constructive trust;

  (3) fiduciary relationship: there must have been a fiduciary relationship between the wrongdoer and the victim;

  (4) unjust enrichment: the claimant must show that failure to impose a constructive trust on his or her behalf will result in the unjust enrichment of another person;

  (5) no adequate remedy at law: because a constructive trust is an equitable remedy, the claimant must show the lack of an adequate remedy at law (a number of courts have declined to impose constructive trusts in forfeiture cases on the ground that the remission process gives the victims an adequate remedy at law); and

  (6) fairness: the claimant must show that imposing a constructive trust on his or her behalf will not result in unfairness to similarly situated victims.

In the typical fraud case, the amount of money recovered from the fraudster will be less than the total losses of all of the victims. Thus, it is unlikely that all of the victims will be able to satisfy the tracing requirement. To the contrary, it is highly likely that the persons who were most recently defrauded will be able to trace while the earlier victims will not. Thus, in the typical case, the district court will be faced with three categories of victims: (1) those who filed claims and can trace; (2) those who filed claims and cannot trace; and (3) those who did not file claims and are waiting for the remission process. Thus, the Government should be able to prevail in most cases by showing that the imposition of a constructive trust on behalf of only a few victims would be unfair to the others, including those who filed remission petitions with the Attorney General, in violation of the fairness requirement. In all events, the prosecutors should argue that the remission process gives all of the claimants an adequate remedy at law because the Attorney General intends to distribute the forfeited property to the victims pursuant to the remission regulations.

If the court agrees with the Government, dismisses the claims, and enters an order of forfeiture, the prosecutor should notify AFMLS to go forward with the remission process. (If any of the claimants appeal, the remission will be delayed until the appeal is resolved.) On the other hand, if the district court disagrees and indicates that it will grant the claims on the ground that *Boylan* requires that result, the prosecutor should consider moving to dismiss the forfeiture action and turning over all of the seized property and the remission petitions to the district court so that it may administer the constructive trust as *Boylan* envisions.

Notwithstanding the force of the arguments described above, prosecutors should understand that deciding to file and litigate a civil forfeiture case involving even a relatively small number of victims involves considerable risk. The courts may accept these arguments or they may not, and if they do not, the Government not only stands to lose the case, but will be subject to enormous awards of attorney's fees to the very people the prosecutor was trying to help in the first place.

D. Conclusion

The Ninth Circuit's decision in *Boylan* requires a new approach to recovering property for the benefit of victims in cases that must be filed in the Ninth Circuit. This section sets forth the options that AFMLS considers most appropriate. It is hoped that these measures will be temporary, and that Congress will address these issues with remedial legislation in the near future.

Because these issues are unusually complex, prosecutors in the Ninth Circuit are encouraged to contact AFMLS as early as possible in cases involving victims to seek guidance as to how to proceed.

Chapter 5

Use and Disposition of Seized and Forfeited Property

I. Management and Disposal of Seized Assets

A. Role of the U.S. Marshals Service

The U.S. Marshals Service (USMS) has primary authority over the management and disposal of seized assets in its custody that are subject to forfeiture or are forfeited under laws enforced by agencies within the Department of Justice as well as certain other federal agencies by agreement. Arrangements for property services or commitments pertaining to the management and disposition of such property are the responsibility of the USMS. The authority of the Attorney General to dispose of forfeited real property and warrant title has been delegated to the USMS director by 28 C.F.R. § 0.111(I).

B. Department of treasury property custodians

Management and disposal of assets seized by agencies within the Department of Treasury[116] and other agencies included by agreement (including certain agencies moved from Treasury to the Department of Homeland Security) are handled by property custodians (generally contractors) operating under Treasury guidelines.[117] The Treasury agency case agent is generally the initial point of contact for issues relating to seized property custody, management, and disposal.

C. Preseizure planning

As soon as possible after assets are identified for seizure/forfeiture in a federal case, the USAO or agent in charge of the field office responsible for an administrative forfeiture case should contact the USMS or Treasury to discuss preseizure planning. Such discussions address the impact that such proposed action may have on the USMS or Treasury in undertaking, continuing, or terminating custody of the property. The objective of these discussions is to ensure that informed decisions are made about what property is being seized; how and when it is going to be seized; and most importantly, whether it should be

[116] For a current list of agencies participating in the Department of Treasury Forfeiture Fund, *see* 31 U.S.C. § 9703(o).

[117] Copies of these guidelines, including "Guidelines for Seized and Forfeited Property," are available at www.treas.gov/offices/enforcement/teoaf/guidelines, or by contacting the Executive Office for Asset Forfeiture, Department of the Treasury, 1341 G Street, N.W., Suite 900, Washington, D.C. 20220.

seized. In addition, due consideration should be given to alternatives to seizure, e.g., restraining orders or court-ordered monitoring of assets.

D. Coordination of custody and disposition decisions

Prior to taking any action (e.g., in a settlement or plea agreement) concerning the management or disposition of property, the U.S. Attorney's Office or agent in charge of the field office responsible for an administrative forfeiture case should contact the USMS in cases involving Department of Justice seizing agencies, or Treasury in cases involving Treasury seizing agencies, to discuss any management or disposition issues which may need to be addressed. In the case of any settlement or plea agreements that require the payment of a specific amount, rather than an amount up to the proceeds of sale received in the liquidation of forfeited property, approval must be obtained from the USMS prior to the execution of the settlement or plea agreement.

II. Use of Seized Property

A. Background

Absent an order of forfeiture or declaration of administrative forfeiture affirmatively vesting title to seized property in the United States, the Government does not have title to the property and any use of such 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.

B. Use of seized property by department of justice personnel

Property under seizure and pending forfeiture may not be utilized for any reason by Department personnel, including for official use, until a final order of forfeiture is issued.

Likewise, Department personnel may not make such property available for use by others, including persons acting in the capacity of substitute custodians, for any purpose, prior to completion of the forfeiture. However, court authority may be sought for use of seized property, after consultation with the USMS, 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.

C. 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 that present motor vehicles or other property items for federal adoptions may be asked to serve as substitute custodians of the property, pending forfeiture, at the discretion of the USMS or Treasury, and upon consultation with the U.S. Attorney in judicial forfeiture cases. In addition, the USMS may enter into a storage and maintenance agreement with state and local agencies covering such property. Such agreements are contractual in nature, and do not require district court approval. Under such an agreement the state or local agency has a responsibility to provide adequate storage, security, and maintenance for all assets in their custody.

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

D. Use of seized real property by occupants

Occupants of real property seized for forfeiture may be permitted to remain on the property, pursuant to an occupancy agreement pending the final order of forfeiture, after consultation between the USMS or Treasury and the U.S. Attorney.

A form occupancy agreement has been developed by the Department of Justice that addresses departmental concerns (e.g., maintenance and access to the property, potential for continued illegal activity, threat to health and safety, etc.). The USMS and Treasury have sample occupancy agreements designed to protect the interests of the Government in specific cases.

III. Disposition of Forfeited Property

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, preliminary and final orders of forfeiture should include language directing forfeiture of the property to the United States "for disposition in accordance with law."

In addition, the orders of forfeiture should specifically address any third party claims against the forfeited property that are recognized by the United States. If the interests of claimants are to be satisfied in whole or in part by payments from the proceeds of a sale of property by the USMS or Treasury, the proposed forfeiture order should provide specific guidance for the USMS or Treasury concerning such payments and, where possible, specify that such claims shall be paid only after the costs of the United States are recovered, and shall be paid only up to the amount realized from the proceeds of the forfeited property.

The comptroller general has determined that judgments in excess of the proceeds of sale are to be paid from the Judgment Fund. However, 28 U.S.C. § 524(c)(1)(D) also provides that the Assets Forfeiture Fund is available for the payment of valid liens and mortgages "subject to the discretion of the Attorney General to determine the validity of any such lien or mortgage and the amount of payment to be made…" (The USMS is authorized to pay a lien or mortgage in excess of the proceeds of sale if such payment will facilitate the liquidation of the property and, thus, reduce expenses of such property's continued custody. Requests for approval of liens and mortgages in excess of the proceeds of sale shall be submitted to the Asset Forfeiture and Money Laundering Section (AFMLS) for approval.)

B. Disposition of forfeited property in civil and criminal cases

The Attorney General has been given the authority under 21 U.S.C. §§ 881(e) and 853(h) and other statutes[118] 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.[119] It is clear from the language of the forfeiture statutes, from their legislative history, and from the cases and other authorities that have addressed this issue that the Attorney General has complete authority to dispose of forfeited property.

Forfeiture divests an owner of property of all his or her right, title, and interest therein and vests such right, title, and interest in the Government. In other words, because of the property's or its owner's involvement in criminal activity, forfeiture extinguishes all of the former owner's interests in that criminally derived or criminally involved asset, and vests

[118] *See* 18 U.S.C. §§ 1467(g), 1963(f), and 2253(g).

[119] The Department of Justice takes the position that 28 U.S.C. § 2001 does not apply to judicial forfeiture sales and no judicial confirmation is required.

title in the United States.[120] While the relation back doctrine found in section 853(c) provides that all right, title, and interest in forfeitable property vests in the United States upon the commission of the criminal act giving rise to the forfeiture, the Government's ownership interest therein is not confirmed to the world until a final order of forfeiture is entered by a court.

Since the forfeiture process vests title to the property in the United States, a forfeiture sale is a sale by the Government of 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 he or she deems suitable. After the final order of forfeiture, the court is not involved in the sale or disposal process.

IV. Attorney General's Authority to Warrant Title

A. Background

Section 2002 of the Crime Control Act 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)(9)(A) reads as follows:

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

The authority to execute deeds and transfer title has been delegated to chief deputies or deputy U.S. marshals by 28 C.F.R. § 0.156. The section 0.156 authority predates the asset forfeiture program and applies to all court-ordered sales of property, not just forfeited property.

The preferred means to transfer forfeited real property is by special warranty deed executed by the U.S. marshal. 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

[120] *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 (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 (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).

the property. In effect, the special warranty deed, discussed in part B, *infra*, warrants the forfeiture process.

Under appropriate circumstances a quitclaim deed may be used to transfer property. The quitclaim deed makes no warranty representations. It serves only to convey whatever right, title, and interest the Government had as of the execution date. Finally, property may be transferred by a general warranty deed,[121] but it is Department of Justice policy to use general warranty deeds only in exceptional circumstances as outlined in part C, *infra*.[122]

B. Use of a special warranty deed and indemnification agreement

It is suggested that the language of the special warranty deed be as follows, with the insertion of the specifically applicable circumstances as required:

> 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 that 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

[121] 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.

[122] 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.

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.

C. Use of a general warranty deed

If the buyer of the forfeited property is still unable to procure a title insurance policy, then the U.S. marshal may be authorized to execute a general warranty deed. Any determination to transfer property by a general warranty deed must be approved by the USMS Asset Forfeiture Office.

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 USMS Asset Forfeiture Office, in the exercise of sound business judgment, shall also consider the cumulative potential liability that will accrue over time as a result of each successive use of a general warranty deed.

V. Purchase or Personal Use of Forfeited Property by Justice Employees

Department of Justice employees are generally prohibited from purchasing property that has been forfeited to the Government and is being sold by the Department of Justice or its agents. 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 that would otherwise arise should a Department employee purchase forfeited property.

Under 5 C.F.R. § 3801.104, Department of Justice employees are prohibited 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 Department of Justice or its agents. In addition, Department of Justice employees are prohibited from using such property that has been purchased, directly or indirectly, by a spouse or minor child.

A written waiver to the aforementioned restrictions may be granted by the agency designee upon a determination that, in the mind of a reasonable person with knowledge of the circumstances, purchase or use by the employee of the asset will not raise a question as to whether the employee has used his or her official position or nonpublic information to obtain or assist in an advantageous purchase or create an appearance of the loss of impartiality in the performance of the employee's duties. A copy of this waiver must be filed with the Deputy Attorney General.

VI. Review of Official Use of Forfeited Property

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 Federal Bureau of Investigation and USMS provided the former Executive Office for Asset Forfeiture with advance notice of and an opportunity to review such decisions. Such notification should *now* be made to AFMLS.[123]

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

[123] Treasury's *Guide to Equitable Sharing for Foreign Countries and Federal, State, and Local Law Enforcement Agencies* (April 2004) does not contain a similar requirement.

Chapter 6

Equitable Sharing

I. General Adoption Policy and Procedure

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.[124]

B. Federal adoption form

All state and local requests for adoption must be reported on a request for adoption of state or local seizure form.[125] 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.

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

[124] This policy does not apply to adoption of seizures by Immigration and Customs Enforcement.

[125] *See* Appendix H for a copy of a request for adoption of state or local seizure form.

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.[126]

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.

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 AUSA to conduct this review. Any further review processes established in the future for federal seizures will also apply to adoptive seizures.

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

Preseizure planning is an essential part of the review process. Property management issues must be addressed in consultation with the U.S. Marshals Service (USMS) 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	$2,500
Vessels	$5,000
Aircraft	$5,000
Real property	
Land and any improvements	$10,000 or 20 percent of the appraised value, whichever is greater
All other property	
Currency, bank accounts, monetary instruments, jewelry, etc.[127]	$1,000

The U.S. Attorneys, in consultation with federal seizing agencies and state and local law enforcement, may institute higher or lower district-wide thresholds for judicial forfeiture cases as law enforcement or management needs require. Written notice of any higher or lower thresholds shall be provided to the chief of the Asset Forfeiture and Money Laundering Section (AFMLS).

In individual cases, an overriding law enforcement benefit may require the seizure of an asset that does not meet the thresholds. In such cases, the thresholds may be waived when forfeiture will serve a compelling law enforcement interest—e.g., forfeiture of a crack house, forfeiture of a conveyance with hidden compartments, or forfeiture of a vehicle used in alien smuggling that is seized at an international border. Any downward departure from the monetary thresholds in individual cases must be approved in writing by a supervisory-level official, and an explanation of the reason for the departure must be noted in the case file. The fact that the owner or person in possession of the property has been arrested or will be criminally prosecuted is an appropriate basis for a downward departure.

[127] Firearms may be forfeited regardless of value. *See A Guide to the Forfeiture of Firearms and Ammunition* (April 2006) at 22-21.

Lower thresholds may not necessarily result in increased sharing with state and local law enforcement. Since sharing is always based on net proceeds after recovery of costs, forfeiture of lower dollar-value property may result in no net proceeds to share.[128]

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 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 USMS 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. Preseizure 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.

[128] Net proceeds are calculated based on gross receipts from forfeiture or the sale of forfeited property *minus* (1) qualified third party interests (e.g., liens, mortgages); (2) federal case-related expenses (e.g., advertising costs, out-of-pocket investigative or litigative expenses); (3) any award paid to a federal informant; or (4) federal property management expenses (e.g., appraisal, storage, security, sale).

G. 30–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. U.S. Attorney recommendation

A U.S. 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 U.S. Attorney, the agency must promptly document its reasons for declination in a memorandum and forward copies of the memorandum to AFMLS and the U.S. Attorney. 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.

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.

Once a decision has been made to adopt the seizure of an item of property covered by the notice requirements the adopting agency must take steps to ensure that the statutory notices are served in the most expeditious manner practicable in accordance with 18 U.S.C. § 983(a)(1).

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 USMS. In addition, the USMS must be consulted prior to the adoption of a seizure of real property.

K. Use of anticipatory seizure warrants

If a state or local law enforcement agency commences a forfeiture action under state law, no federal forfeiture action may be commenced as long as the state court has jurisdiction over the subject property. If, however, the state or local authorities determine, for whatever reason, that the state action will be terminated before it is completed, and that the property will accordingly be released, a federal agency may arrange to adopt the forfeiture by obtaining an anticipatory seizure warrant from a federal judge or magistrate. The anticipatory seizure warrant must provide that it will be executed only after the state court has relinquished control over the property.[129]

For purposes of the notice requirements in section 983(a)(1), property seized pursuant to an anticipatory seizure warrant in these circumstances is considered the subject of a federal seizure such that the period for sending notice of the forfeiture action is 60 days, commencing on the date when the anticipatory seizure warrant is executed.

II. Processing Forms DAG–71 and DAG–72

A. Referral of DAG–71 and DAG–72 forms to U.S. 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 U.S. Attorney's Office (USAO) for all (whatever the value) administrative and judicial forfeiture actions. The originals of these

[129] *See United States v. $174,206.00 in U.S. Currency*, 320 F.3d 658 (6th Cir. 2003) (concurrent jurisdiction doctrine does not bar federal court from exercising in rem jurisdiction over property that state court has released to the claimants after state prosecutors failed to commence a forfeiture action within the deadlines specified by state law); *United States v. $490,920 in U.S. Currency*, 911 F. Supp. 720 (S.D.N.Y. 1996) (district court cannot exercise in rem jurisdiction until state court relinquishes it), *motion for reconsideration granted*, 937 F. Supp. 249, 252-53 (S.D.N.Y. 1996) (court may grant anticipatory seizure warrant so Government can seize property as soon as state court relinquishes it); *United States v. One Parcel Property…Lot 85*, 100 F.3d 740, 743 (10th Cir. 1996) (initiation of federal civil forfeiture action does not violate concurrent jurisdiction rule as long as property is not actually seized until after state action is dismissed); *United States v. One 1987 Jeep Wrangler*, 972 F.2d 472, 478-479 (2d Cir. 1992) (federal court may exercise jurisdiction over property under federal forfeiture law once it is released by state court and reseized; state court's order releasing property has no effect on federal forfeiture); *United States v. One Black 1999 Ford Crown Victoria Lx*, 118 F. Supp. 2d 115, 118-19 (D. Mass. 2000) (because only one court may exercise in rem jurisdiction over property at a time, federal court may not exercise jurisdiction while state forfeiture action is pending; but once state court rules that property must be released and the order is obeyed, state jurisdiction evaporates and property may be reseized and made subject to forfeiture under federal law; following *Jeep Wrangler*); *United States v. $3,000,000 Obligation of Qatar National Bank*, 810 F. Supp. 116, 117-19 (S.D.N.Y. 1993) (federal court, though "second in time," may proceed to judgment, assert a lien that will result in seizure of the asset only upon release from state jurisdiction, but stay execution of the judgment until federal jurisdiction is perfected).

forms will be concurrently forwarded to the agency's headquarters decisionmaker. A USAO 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 of Justice Criminal Division

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

III. Equitable Sharing Protocol

A. Background

The furtherance of law enforcement cooperation with state and local law enforcement agencies is one of the primary goals of the Department of Justice'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 decisionmaking authority are set forth at section IX.E of *A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies* (March 1994).[130] All decisionmakers should ensure that every equitable share approved meets the *Guide*'s standards.

[130] 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) multiple districts, or (3) the transfer of real property if AFMLS, the U.S. 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 can be found in Appendix E.

All officials are cautioned not to represent that a sharing request is approved until the final decisionmaker 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.

B. Equitable sharing check disbursement

1. Judicial cases

In cases in which the U.S. Attorney or a Department of Justice official is the decisionmaker, the USMS will mail the check to the USAO, attention "Law Enforcement Coordinating Committee (LECC) Coordinator."

If the U.S. 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 USAO in the second district to determine whether or not that U.S. Attorney wishes to present the check.

2. Administrative cases

In cases in which the federal investigative agency makes the equitable sharing decision, the USMS 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

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

Pertaining to a memorandum dated June 15, 1990, to all U.S. Attorneys from the Associate Deputy Attorney General, LECC coordinators are required to "serve as a clearinghouse for state and local inquiries about the status of pending sharing cases."

To perform these functions, the USMS 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 U.S. Attorneys' Offices and seizing agencies to work together to ensure proper coordination of all equitable sharing activities.

C. 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 USAO, the federal seizing agencies, and the USMS 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, but the interest that can be earned on these funds is also available 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.

Occasionally, travel schedules have permitted the President, the Vice President, and the Attorney General to personally present significant equitable sharing checks. U.S. Attorneys and seizing agencies should contact AFMLS *as far in advance as possible* if they are aware of an upcoming significant sharing opportunity in their 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 or more.

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

D. 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 section V.A of *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 Form 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.

IV. International Sharing of Forfeited Assets

Sharing with foreign governments is an important part of our program. Agencies 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 U.S. law with the assistance of a foreign country.

It is Department of Justice policy to share, in accordance with U.S. law and established procedure, the proceeds of successful forfeiture actions with the country or countries that facilitate the forfeiture of assets under U.S. 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 with 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).

AFMLS is available to assist with the repatriation of forfeitable assets located overseas and with the international sharing of assets forfeited in the United States.

V. Weed and Seed Initiative; Transfers of Real Property

A. 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. Then 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 nonprofit 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.

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 that is entitled to an equitable share of the net proceeds from the sale of the property to be transferred.

B. General authorization

Pursuant to 18 U.S.C. § 981(e)(2) and 21 U.S.C. § 881(e)(1)(A), the Attorney General has the authority 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.

Transfers made pursuant to section 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 section III.C of the *Guidelines*, this policy constitutes supplementary guidance regarding the meaning of section V.A.3 of the *Guidelines*.

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 U.S. 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 nonprofit 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.

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 (AFF). 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 AFF. The payments of these interests are the responsibility of the recipient state or local agency or nonprofit 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 AFF. 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 AFF.

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.

VI. Guidelines for Administering the Permissible Use Policy

On August 13, 1997, the Attorney General approved a change to the former "pass-through policy," under which state and local law enforcement agencies that received equitably shared funds were permitted, at their discretion, to transfer up to 15 percent of the shared funds they received to private, nonprofit organizations and non-law enforcement governmental agencies for specified uses. *See Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement* (March 1994) at section X.A.3.a. The new policy, known as the permissible use policy, was promulgated with the following revision to section X.A.3.a., found in section IV of the *Addendum to the Guide to Equitable Sharing*:

> A state or local law enforcement agency or prosecutor's office may use not more than 15 percent of its shared monies for the costs associated with drug abuse treatment, drug and crime prevention education, housing and job skills programs, or other nonprofit community-based programs or activities, which are formally approved by the chief law enforcement officer (i.e., chief, sheriff, or prosecutor) as being supportive of and consistent with a law enforcement effort, policy, and/or initiative. This provision requires that all expenditures be made by the law enforcement agency and does not allow for the transfer of cash.

With the approval of this permissible use policy, the Attorney General requested that guidelines be promulgated for federal, state, and local law enforcement officials to follow in qualifying, screening, and making disbursements on behalf of agencies and organizations under this new policy. As a result, AFMLS drafted guidelines, which it presented to, and revised based upon the comments of, the Attorney General's Advisory Committee of U.S. Attorneys, the State and Local Law Enforcement Asset Forfeiture Working Group, and the Federal Asset Forfeiture Working Group. AFMLS finalized the guidelines on February 26, 1998.

VII. Transfer of Property Forfeited Under the Magnuson Fisheries Conservation and Management Act

A. Background

The Magnuson Fisheries Conservation and Management Act, 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), Department of Commerce, is responsible for investigating violations that occur under the Magnuson Fisheries Conservation and Management Act. 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 Magnuson Fisheries Conservation and Management Act is held in the court registry pending the outcome of the forfeiture proceeding. A recent review of the Magnuson Fisheries Conservation and Management Act has revealed that a different disposition of the proceeds is possible. The purpose of this policy is to establish guidelines for litigating and processing the act's forfeitures in order to facilitate the transfer of forfeited assets to the NOAA.

B. General Policy

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

Any forfeitures and requests for transfers under the Magnuson Fisheries Conservation and Management Act occurring after June 1, 1992, should be identified and processed pursuant to the following procedures. In all future cases, in addition to USMS expenses, the AFF will retain 10 percent of the total net proceeds of the forfeiture. This amount represents the Department of Justice's share based upon its effort in forfeiting the property.

C. Transfer request procedures

To avoid the necessity of creating new forms and procedures, the transfer to the NOAA should follow established sharing request procedures as enumerated in *The Attorney General's Guidelines on Seized and Forfeited Property*, July 1990. Since forfeitures under the Magnuson Fisheries Conservation and Management Act are judicial, the local NOAA office must request the transfer of funds by submitting a Form DAG-71 to the USAO in the district where the forfeiture action is pending. In preparing the DAG-71, NOAA Administration Headquarters legal counsel will not be required to complete section VII, block B. Upon receipt of the DAG-71, the USAO shall make a decision using Form DAG-72 on forfeitures valued less than $1 million and a recommendation on forfeitures valued $1 million or more. The USAO does not have to consult with any other Department of Justice investigative agencies concerning requests made pursuant to the Magnuson Fisheries Conservation and Management Act. As with other judicial forfeitures involving sharing, the USAO shall forward the DAG-72 recommendation or decision to AFMLS for processing and tracking purposes. AFMLS will have authority for dispute resolution in sharing decisions valued under $1 million 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 the NOAA at the following address:

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

The check should also contain the following information:

case name and number	
account number	AD1000 BL2D02

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).[131]

[131] *See American Bank of Wage Claims v. Registry of the District Court of Guam*, 431 F.2d 1215 (9th Cir. 1970).

Chapter 7

Assets Forfeiture Fund

I. Transfer of Funds From the Seized Asset Deposit Fund to the Assets Forfeiture Fund

The U.S. Attorney's Office (USAO) securing a forfeiture is responsible for initiating transfers from the Seized Asset Deposit Fund to the Assets Forfeiture Fund (AFF) and should provide prompt notification to the 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 AFF unless the U.S. 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 USAO indicates that no motions or requests for additional stays have been filed, then the forfeited cash will be transferred to the AFF on the 11th working day following a summary judgment or a judgment after trial.[132]

[132] *See American Bank of Wage Claims v. Registry of the District Court of Guam*, 431 F.2d 1215 (9th Cir. 1970).

Chapter 8

Attorney's Fees

I. Payment of Attorney's Fees in Civil Forfeiture Cases

A. Summary

The Civil Asset Forfeiture Reform Act (CAFRA) of 2000 amended 28 U.S.C. § 2465(b) to provide for an award of attorney's fees and other litigation costs to any claimant in a civil forfeiture case who "substantially prevails." Such awards will be paid out of the Judgment Fund. Forms for request payments out of the Judgment Fund are available on the Asset Forfeiture and Money Laundering Section (AFMLS) Web site and should be submitted directly to the office that handles Judgment Fund matters.

B. Discussion

Prior to the enactment of CAFRA, there was no provision for liability for attorney's fees and costs that applied specifically to civil forfeitures. Attorney's fees were awarded to prevailing non-government parties pursuant to the Equal Access to Justice Act (EAJA). In 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.[133]

In CAFRA, Congress amended section 2465 to provide for the mandatory award of attorney's fees and other litigation costs to non-government parties who substantially prevail in a civil forfeiture proceeding, regardless of whether the Government was justified in bringing the forfeiture action. To be eligible for attorney's fees, however, the claimant must pursue the claim in court and obtain a judgment that the United States is liable for attorney's fees under section 2465.

When EAJA was enacted, the primary source of funds to pay judgments against the United States was the permanent judgment appropriation. *See* 31 U.S.C. § 1304. The Judgment Fund is by law available to pay final adverse judgments (and certain compromise

[133] "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 any 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." (28 U.S.C. § 2412(d)(1)(A)).

settlements) when "payment is not otherwise provided for."[134] In the past, however, citing the need to establish an aggressive use of forfeiture and considering an EAJA award as a predictable expense incident thereto, the Department of Justice used its legal authority, pursuant to 28 U.S.C. § 524(c)(1)(A), to permit the use of Assets Forfeiture Fund (AFF) monies to pay EAJA awards arising from actions related to the forfeiture, attempted forfeiture, or seizure for forfeiture of property. The Department of Justice developed a policy and three-tier test to review requests for payment of EAJA awards from the AFF and these requests were submitted to AFMLS for review and approval.

The enactment of CAFRA provided specifically for liability for attorney's fees and costs for a prevailing claimant in a civil proceeding. Because the provisions of section 2465 are specific to "any civil proceeding to forfeit property under any provision of civil law," they appear to have displaced EAJA as a means for payment of attorney's fees and costs by prevailing non-government parties in the case of civil forfeitures. Because this liability is unrelated to the strength or weakness of the Government's case and is now a routine part of civil litigation in forfeiture cases, the awards of attorney's fees and costs will no longer come from the AFF. Although the language of the statute is silent as to the source of funding for these payments, Congressman Henry Hyde addressed this issue. Submitted in the Congressional Record on the day CAFRA was passed was the following statement:

> "In addition, this act would make the federal government liable for…attorneys fees, and pre-judgment and post-judgment interest payments on certain assets to prevailing parties in civil forfeiture proceedings…. Compensation payments could come from appropriated funds or occur without further appropriation from the Judgment Fund, or both sources."[135]

Since the AFF consists of non-appropriated funds, and no funds were separately appropriated to pay obligations arising under CAFRA, Congress's intent seems clear that in civil forfeiture proceedings attorney's fees, costs, and interest should be awarded from the Judgment Fund.

C. Procedure for requesting payment of an award from the judgment fund

When there is a judgment awarding attorney's fees, interest, and costs in a civil forfeiture case, the USAO should submit a request for payment of the award to the Financial Management Service (FMS), Department of the Treasury, which manages the Judgment

[134] Section 1304(a)(1).

[135] *Congressional Budget Office Cost Estimate: H.R. 1658 - The Civil Asset Forfeiture Reform Act of 2000*, *reprinted in* 146 Cong. Rec. H2040, H2047–H2049 (daily ed. Apr. 11, 2000).

Fund. FMS has a Web site (http://www.fms.treas.gov/judgefund) on which there are links to procedures for submitting a request for an award of costs and fees and the appropriate forms. (These forms are also found on the AFMLS Web site) In addition to the forms and instructions, FMS's Web site also contains general information about the fund. Upon submitting the appropriate forms to FMS, a courtesy copy should be forwarded to AFMLS.

II. Forfeiture of Attorney's Fees

The policy on the forfeiture of attorney's fees is set forth in the *U.S. Attorney's Manual* and the *Criminal Resource Manual*. As set forth in those sources, any action to forfeit an attorney's fee in a civil or criminal case, as well as any agreement *not* to seek forfeiture of any attorney's fee in such case, requires the approval of the Assistant Attorney General for the Criminal Division.

III. Payment of Attorney's Fees in Criminal Forfeiture Cases

A. Defendant's attorney's fees

1. Summary

The defendant in a criminal forfeiture action may file for an award of attorney's fees under the Hyde Amendment.[136] The Hyde Amendment provides that the court may award attorney's fees to defendants in criminal actions in which the Government's position was vexatious, frivolous, or in bad faith.[137] To prevail on a Hyde Amendment claim, the claimant must prove that (1) he or she was the prevailing party on the underlying action, (2) the Government's position was vexatious, frivolous, or in bad faith, and (3) there are no special circumstances that would make the award unjust. This burden is heavier than the one the Government must meet under EAJA, 28 U.S.C. § 2412, for civil actions.[138] When a request

[136] "During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of enactment of this Act [Nov. 26, 1997], may award to the prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust." The Hyde Amendment to the Department of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997), 18 U.S.C.A. § 3006A, historical and statutory notes.

[137] *Id.*

[138] *See United States v. Gilbert*, 198 F.3d 1293, 1299-1302 (11th Cir. 1999) (discussing legislative history of the Hyde Amendment). In its original form, the Hyde Amendment tracked the EAJA in its burden and standard of proof, but was changed prior to enactment by switching the burden from the Government to the plaintiff and heightening the standard of misconduct that must be shown. *Id.* at 1302. *See also United States v. Wade*,

for attorney's fees under the Hyde Amendment is made based on the criminal prosecution, it should be submitted directly to the Hyde Amendment Committee and the Executive Office for U.S. Attorneys. If the request specifically addresses the criminal forfeiture, a copy should also be submitted to the chief of AFMLS. Hyde claim awards are paid from the Judgment Fund.

2. Discussion

In articulating a standard of misconduct, the Eleventh and Fourth Circuits have relied on *Black's Law Dictionary* to define the terms "vexatious," "frivolous," and "bad faith."[139] These courts found *vexatious* to mean "without reasonable or probable cause or excuse"; *frivolous* to mean "groundless…with little prospect of success; often brought to embarrass or annoy"; and *bad faith* to mean "not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral ambiguity."[140] The court in *United States v. Gilbert* further noted that the amendment was "targeted at prosecutorial misconduct, not prosecutorial mistake."[141]

A court recently considered a defendant's claim for attorney's fees in a criminal forfeiture case where the forfeiture, but not the conviction, was found defective.[142] In *United States v. Pease*, the defendant sought attorney's fees in connection with an appeal of the criminal forfeiture. The Eleventh Circuit reversed the district court's grant of the Government's Rule 36 motion to amend the judgment post-conviction to include the necessary forfeiture language. In connection with the Hyde Amendment request, the district court found that the Government's position was not vexatious, frivolous, or in bad faith.[143] The court reasoned that the lack of clarity of the governing law regarding the use of Rule 36 to amend judgments to include previously ordered forfeitures, the legal merits of the forfeiture, and the consistency of the Government's position supported a finding that the

255 F.3d 833, 839 n.6 (D.D.C. 2001) (discussing in footnote that the Hyde Amendment is a heavier burden for petitioner than the EAJA standard).

[139] *United States v. Gilbert*, 198 F.3d 1293, 1298-99 (11th Cir. 1999); *In re 1997 Grand Jury*, 215 F.3d 430, 436 (4th Cir. 2000).

[140] *Gilbert*, 198 F.3d at 1298-99 (quoting *Black's Law Dictionary* 668 (6th Ed. 1990); *In re 1997 Grand Jury*, 215 F.3d at 436 (quoting *United States v. Gilbert*, 198 F.3d 1293, 1298-99 (11th Cir. 1999)).

[141] *Gilbert*, 198 F.3d at 1304.

[142] *United States v. Pease*, No. 8:98-CR-302-T-24EAJ (M.D. Fla. July 30, 2004) (unpublished).

[143] *Id.*

Government's position was substantially justified—not frivolous, vexatious, or in bad faith.[144]

There are no reported decisions granting a Hyde Amendment claim solely with regard to a criminal forfeiture. However, the analysis conducted by courts in granting Hyde Amendment claims generally is instructive. In *United States v. Adkinson*, the court found the Government acted in bad faith when they enjoined a party to the action knowing at the time of the indictment that there would be insufficient evidence to convict the defendants of bank fraud conspiracy at trial.[145] Furthermore, the court found the Government's position in that case to be foreclosed by binding precedent from the start, thus making it vexatious and frivolous as well.[146]

Likewise, the court in *United States v. Holland* found the Government's position to be vexatious where the Government proceeded with a 31-count indictment concerning bank loans investigated by the Federal Deposit Insurance Corporation (FDIC) on evidence concerning civil, not criminal, wrongdoings.[147] Moreover, the FDIC had already found the evidence insufficient to support even administrative enforcement.[148] The court also found that the Government had insufficient evidence to prove the requisite criminal intent.[149] Applying the test of whether a reasonable prosecutor should have concluded the evidence was insufficient to prove guilt beyond a reasonable doubt, the court found that the Government's position in this case was vexatious.[150]

[144] *United States v. Pease*, No. 8:98-CR-302-T-24EAJ (M.D. Fla. July 30, 2004) (unpublished). The district court also denied the claimant's request for attorney's fees under EAJA, finding that the Government's position was substantially justified.

[145] *United States v. Adkinson*, 247 F.3d 1289, 1293 (11th Cir. 2001).

[146] *Id*.

[147] *United States v. Holland*, 34 F. Supp. 2d 346, 353 & 364 (E.D. Va. 1999).

[148] *Id.* at 365.

[149] *Id.*

[150] *Id*. at 364-75.

Most courts have found a Hyde Amendment action to be civil proceeding despite arising from a criminal action; as a result, the Federal Rules of Civil Procedure apply.[151] Moreover, the amendment provides that the procedures and limitations for granting an award shall be derived from those set forth in EAJA.[152] In pertinent part, EAJA requires the parties seeking an award to file their claims within 30 days of final judgment of the underlying civil action.[153] EAJA also provides for the determination of reasonable attorney's fees and other expenses.[154]

B. Third party petitioner's attorney's fees

1. Summary

Since CAFRA strictly applies to civil forfeiture proceedings, the third party petitioner in an ancillary proceeding to a criminal forfeiture, pursuant to 21 U.S.C. § 853(n), must assert payment for attorney's fees under EAJA. EAJA provides for the award of attorney's fees to prevailing parties in any civil action against the United States in which the Government's position was not substantially justified.[155] A third party claimant's ancillary proceeding to a criminal forfeiture is considered a "civil action" under EAJA.[156] Payment of attorney's fees awarded under EAJA are paid from the AFF. The chief of AFMLS must approve any settlement of an EAJA claim.

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[151] *United States v. Holland*, 214 F.3d 523 (4th Cir. 2000); *United States v. Truesdale*, 211 F.3d 898, 902-904 (5th Cir. 2000); *United States v. Wade*, 255 F.3d 833, 839 (D.D.C. 2001). *But see United States v. Robbins*, 179 F.3d 1268, 1270 (9th Cir. 1999) (finding a Hyde Amendment action was a criminal proceeding to which the appellate rule for criminal actions applies).

[152] "Such awards shall be granted pursuant to the procedures and limitations (but not burden of proof) provided for an award under Title 28, U.S.C. § 2412." Hyde Amendment, *supra* note 1.

[153] Section 2412(d)(1)(B).

[154] Section 2412(d)(2)(A).

[155] "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 any 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." 28 U.S.C. § 2412(d)(1)(A).

[156] *United States v. Douglas*, 55 F.3d 584 (11th Cir. 1995); *United States v. McAllister*, 1998 WL 855498 (E.D. Pa. 1998); *United States v. Bachner*, 877 F. Supp. 625 (S.D. Fla 1995).

2. Discussion

EAJA requires the court to award fees upon finding (1) the applicants were the prevailing parties, (2) the Government's position was not substantially justified, and (3) no circumstances exist that would make an award unjust.[157]

The general test for determining whether an applicant is a prevailing party is if the parties "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."[158] The Supreme Court has held that a party must secure a judgment on the merits or by judicial consent decree in order to prevail under statutes awarding attorney's fees.[159] The court stated that these results create the "material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees."[160] Therefore, to meet the prevailing party requirement under EAJA, a petitioner must achieve some benefit of the litigation either through a judgment on the merits or a judicial consent decree.

In *United States v. One Rural Lot*,[161] the claimants were prevailing parties where they received 60 percent of the sale proceeds from forfeited property. Likewise, the property owner in *In Re Application of Gerard Mgndichian*[162] prevailed for EAJA purposes where the district court denied his motion for return of his motorcycles, but nonetheless ordered the administrative forfeiture proceedings void,[163] giving him the right to contest the reinstated forfeiture proceedings.[164]

For the Government's position to be substantially justified, the Government must show it was "justified to a degree that could satisfy a reasonable person"[165]; that is, its position had a

[157] *Jean v. Nelson*, 863 F.2d 759, 765 (11th Cir. 1988).

[158] *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Sims v. Apfel*, 238 F.3d 597, 600 (5th Cir. 2001).

[159] *Buckhannon Board and Care Home, Inc. v. West Va. Dept. of Health and Human Resources*, 532 U.S. 598, 604-05 (2001).

[160] *Id*. at 604.

[161] *United States v. One Rural Lot*, 770 F. Supp. 66 (D.P.R. 1991).

[162] *In re Application of Gerard Mgndichian for Return of Property*, 312 F. Supp. 2d 1250 (C.D. Cal. 2003).

[163] *Id*.

[164] *Id*. at 1257-60.

[165] *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

"reasonable basis both in law and fact."[166] Relevant factors that may be considered in determining whether the Government's position was reasonable include (1) the legal merits of its position, (2) the clarity of the governing law at the time the action was instituted, (3) the stage at which the litigation was resolved, and (4) the consistency of the Government's position.[167]

[166] *Id*.

[167] *See American Bank of Wage Claims v. Registry of the District Court of Guam*, 431 F.2d 1215 (9th Cir. 1970).

Chapter 9

Grand Jury

I. Disclosures of Grand Jury Information Under 18 U.S.C. § 3322(a)

A. Summary

The Civil Asset Forfeiture Reform Act (CAFRA) of 2000 amended 18 U.S.C. § 3322(a) to allow criminal Assistant U.S. Attorneys (AUSAs) to disclose grand jury information to attorneys for the Government "for use in connection with any civil forfeiture provision of federal law." With this amendment, Congress legislatively overruled a portion of the holding in *United States v. Sells Engineering, Inc*, 463 U.S. 418 (1983), which interpreted Rule 6(e), Fed. R. Crim. P., to prohibit a criminal AUSA from disclosing grand jury information to a civil AUSA who was not part of the prosecution team. But the amendment to section 3322 did not make clear whether the "use" that the civil AUSA could make of the disclosed information included further disclosure to the public in the course of the litigation of a civil forfeiture case without obtaining a court order.

One interpretation of section 3322(a) is that it only permits one AUSA to disclose grand jury information to another AUSA, but still requires the second AUSA to obtain a court order before disclosing the information to the public in the course of civil litigation. The matter is a sensitive one, as the penalty for violating the grand jury disclosure rules set forth in Rule 6(e) is contempt. For that reason, prosecutors will naturally want to act with caution in this area.

Based on fundamental rules of statutory construction and the practice regarding the use of grand jury information in criminal cases, however, we conclude that the intent of section 3322 was to permit the civil AUSA not only to review and rely upon grand jury information in the preparation of civil forfeiture pleadings, but also to disclose that information in publicly filed documents and as evidence at trial.

Section 3322 does not, however, permit any AUSA to disclose grand jury information to seizing agency attorneys to use in administrative forfeiture proceedings. Seizing agency attorneys are not "attorneys for the government" as defined by Rule 1(b), of the Federal Rules of Criminal Procedure. Nor does section 3322 authorize disclosure to government contractors without a court order pursuant to Rule 6(e)(3)(E)(i) and/or 6(e)(3)(A)(ii).[168]

[168] Rule 6(e)(3)(A)(ii) authorizes disclosure to "government personnel," which may include contract personnel, but only upon court order as discussed below. Rule 6(e)(3)(E)(i) authorizes disclosure "preliminary to or in connection with a judicial proceeding" and also requires a court order.

B. Discussion

1. Issue I

May an AUSA to whom grand jury information is disclosed for use in a civil forfeiture matter disclose that information to the public in the course of the civil forfeiture case without obtaining a court order?

CAFRA[169] amended section 3322(a)[170] to allow a criminal AUSA to disclose grand jury information without obtaining a judicial order to a civil AUSA for "use in connection with any civil forfeiture provision of Federal law." This amendment was intended to address the Supreme Court decision in *United States v. Sells Engineering*, which held that Rule 6(e) of the Federal Rules of Criminal Procedure does not authorize automatic disclosures of grand jury information to an attorney for the Government for use in a civil proceeding. The Supreme Court interpreted Rule 6(e) to allow automatic disclosures only to those attorneys and their supervisors who conduct the criminal matters to which the grand jury materials pertain.[171] An attorney with only civil duties, the Court said, lacks both the prosecutor's special role in supporting the grand jury and the prosecutor's own crucial need to know what occurs before the grand jury.[172] Thus, criminal AUSAs were held to have access to grand jury materials only for criminal use.

The Supreme Court refined its decision in *United States v. John Doe, Inc. I*, 481 U.S. 102 (1987), which held that civil attorneys who were members of the prosecution team may, without prior court authorization, continue to use materials or information subject to Rule 6(e) in a companion or related civil proceeding. A recent Third Circuit case, *Impounded*, 277 F.3d 407 (3d Cir. 2002), further lightened the restrictions of *Sells*. The Third Circuit, interpreting an exception to the general non-disclosure rule, allowed an AUSA from one district to disclose grand jury material to an AUSA in another district since the use of the

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[169] CAFRA applies to any forfeiture proceeding initiated on or after August 23, 2000. *See* Pub. L. No. 106-185, § 10, 114 Stat. 202, 217.

[170] Section 3322(a) provides:

> (a) a person who is privy to grand jury information—
>
> (1) received in the course of duty as an attorney for the government; or
>
> (2) disclosed under rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure;
>
> may disclose that information to an attorney for the government for use in…connection with any civil forfeiture provision of Federal law.

[171] 463 U.S. at 429.

[172] *See id.* at 431.

grand jury information was a part of the performance of the recipient prosecutor's criminal law enforcement duties.

The CAFRA amendment to section 3322(a) expanded the holding in *John Doe, Inc. I* to allow disclosures of grand jury information to another "attorney for the government" without a court order for "use in connection with any civil forfeiture provision of federal law." Previously, under the version of section 3322 enacted as part of the Financial Institutions Reform and Recovery Act (FIRREA) of 1989, Congress had authorized such disclosure only in cases involving bank fraud. But the legislative history of CAFRA indicates that Congress recognized that *all* civil forfeiture actions are law enforcement actions, and that grand jury information therefore should be available without a court order to government attorneys in all civil forfeiture cases.[173]

While it is clear that Congress intended to permit an AUSA who obtained grand jury information in connection with a criminal investigation to disclose that information to another AUSA who would be handling a related civil forfeiture matter, neither the statute nor the legislative history provides any guidance as to what the civil AUSA may do with the information once it is disclosed. In particular, it is not clear whether Congress intended to permit the civil AUSA only to review and rely upon the grand jury information while preparing a civil forfeiture case, or whether it intended that the civil AUSA would be permitted to disclose the grand jury information in publicly filed documents, such as complaints and applications for seizure warrants and restraining orders, and as evidence at trial.

A fundamental rule of statutory construction provides that the plain meaning of the words is given the greatest weight in statutory interpretation. *Browder v. United States*, 312 U.S. 335, 336 (1941). In the context of civil litigation, the plain meaning of the phrase "for use in connection with any civil forfeiture provision of federal law" would include using the information in applications for seizure warrants and court orders, in the body of the forfeiture complaint, and as evidence at trial. This comports with the dictionary definition, which suggests that information is *used* when it is "put into action or service."[174] The more limited interpretation—that one "uses" information only to inform him or herself of the facts of a case—seems contrary to common sense and experience. Moreover, the broader reading of the statute is consistent with the use that a criminal AUSA typically makes of grand jury information in a criminal case. It is well-established that a criminal AUSA who is privy to

[173] H.R. Rep. 105-358(I), 105th Cong., 1st Sess. 1997.

[174] Webster's Dictionary 1301 (10th ed. 1999).

grand jury information may use it not only to prepare a case for trial, but may disclose it in the indictment and in the course of the criminal trial.

Accordingly, we conclude that just as the criminal AUSA may disclose grand jury information in an indictment or other document filed in the course of a criminal prosecution, or as evidence introduced in the course of a criminal trial, so may a civil AUSA disclose grand jury information in the course of civil litigation without obtaining a judicial disclosure order.

2. Issue II

May an AUSA (civil or criminal) who is privy to grand jury information disclose that information to agency counsel for use in connection with an administrative proceeding, or to a government contractor who is assisting in the preparation of a civil forfeiture case?

Section 3322(a) provides for automatic disclosures of grand jury information by an AUSA who is privy to that information "to an attorney for the government…for use in connection with any civil forfeiture provision of Federal law." Rule 1(b) of the Federal Rules of Criminal Procedure defines attorney for the Government as the Attorney General, an authorized assistant of the Attorney General, a U.S. Attorney, or an authorized assistant of a U.S. Attorney. Department of Justice attorneys may conduct grand jury proceedings when authorized to do so by the Attorney General. Agency or other non-Department of Justice attorneys may not be present unless they are appointed as special assistants.[175]

In *In re Grand Jury Proceedings*,[176] the Third Circuit emphasized that the "term attorneys for the government is restrictive in its application." "If it had been intended that attorneys for administrative agencies were to have free access to matters occurring before the grand jury," the court said, "the rule would have so provided." The Sixth Circuit, addressing the definition of attorney for the Government, found that an attorney for the Department of Justice Tax Division was not an attorney for the Government because he was not assigned to work on a particular criminal case in any "official" capacity.[177] Seizing agency attorneys and non-Department of Justice attorneys may obtain grand jury information without a disclosure order if they are appointed under 28 U.S.C. § 515 as a Special Assistant U.S. Attorney or

[175] *Federal Grand Jury Practice* (2000), Chap. 2, Sec.10 at 21.

[176] 309 F.2d 440, 443 (3d Cir. 1962).

[177] *United States v. Forman*, 71 F.3d 1214, 1218 (6th Cir. 1995).

Special Assistant to the Attorney General.[178] Otherwise, they are not considered "attorneys for the Government" and cannot receive grand jury information without a court order. As a result, we conclude that section 3322 does not authorize disclosure of grand jury information to a seizing agency counsel for use in connection with an administrative proceeding.

Likewise, we conclude that section 3322 does not authorize disclosure without a court order to government contractors who are assisting the civil AUSA with the preparation of the civil forfeiture case. At first glance, disclosure to the contractor paralegal or attorney who is doing the actual drafting of the document that the civil AUSA is planning to file in the civil forfeiture case would seem to fall within the scope of the use that the civil AUSA may make of the grand jury information. If the civil AUSA, for example, may disclose the grand jury information in the publicly filed civil forfeiture complaint, there would seem to be no reason he or she could not first disclose it to the contractor who is drafting the complaint. But the practice in criminal cases militates against this view.

Rule 6(e)(3)(A)(ii) allows for disclosure of grand jury information without judicial order to "any government personnel…that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law." The term *government personnel* includes not only members of the prosecution support staff, such as economists, secretaries, paralegals, law clerks, and federal criminal investigators, but also employees of any federal agency who are assisting the government prosecutor.[179] But it does not automatically include contractor personnel used in the asset forfeiture program.

It is true that contract personnel have been considered government personnel for purposes of Rule 6(e) in previous instances. In *United States v. Lartey*,[180] the Second Circuit held that a retired IRS agent employed as a contractor to review financial records of the defendant, which were submitted to the grand jury, fell within the government employee exception to the grand jury secrecy rule. Relying on *In re Gruberg*[181] and legislative history,[182] the court found that the exceptions to the grand jury rules were adopted to override decisions highly restrictive of the use of government experts in grand jury investigations. In a similar case, the Tenth Circuit, relying on *Lartey*, held that an expert witness under contract

[178] *In re Perlin*, 589 F.2d 260, 267 (7th Cir. 1978) (Commodity Futures Trading Commission); *United States v. Bates*, 627 F.2d 349 (D.C. Cir. 1980) (Federal Maritime Commission); *Bradley v. Fairfax*, 634 F.2d 1126, 1129 (8th Cir. 1980) (Parole Commission hearing officer).

[179] *Federal Grand Jury Practice* (2000), Chap. 3, Sec. 26, at 57.

[180] 716 F.2d 955 (2d Cir. 1983).

[181] 453 F. Supp 1225, 1233-34 (S.D.N.Y. 1978).

[182] S. Rep. No. 354, 95th Cong., 1st Sess. 7 (1977), reprinted in U.S. Code Cong. & Ad. News 527, 530).

with the Government was government personnel within the class of government personnel to whom disclosure is permissible.[183]

However, in the most recent case to address this issue, *United States v. Pimental*, 380 F.3d 575, 590-96 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 1385 (Feb. 22, 2005), while concluding that temporary employees or persons under contract, including employees of a private company, can be "government personnel" for purposes of Rule 6(e)(3)(A)(ii), where the individuals in question are directly involved in assisting government attorneys in the prosecution of cases, the court held that the prosecutor "must seek court authorization" prior to disclosure to such persons. 380 F.3d at 596.

Therefore, in both civil and criminal cases, the AUSA must first obtain a disclosure order pursuant to either Rule 6(e)(3)(A)(ii) or Rule 6(e)(3)(E)(i) before disclosing grand jury information to a contract employee.[184] That being so, it will remain necessary to obtain a disclosure order before a civil AUSA, who is entitled under section 3322(a) to use grand jury information in a civil forfeiture case, may disclose that information to a government contractor unless the information is first disclosed in a publicly filed document or in open court.

C. Conclusion

Under the CAFRA amendment to section 3322(a), criminal AUSAs may now disclose grand jury information to civil forfeiture AUSAs. This information may be used by the civil AUSAs in their complaints, restraining orders, and any other pleadings filed in a civil forfeiture case, and as evidence at trial, without getting a disclosure order. However, neither criminal nor civil AUSAs may disclose grand jury information to seizing agency attorneys to use in administrative forfeiture proceedings or to government contract employees who may be assisting in the preparation of a civil forfeiture case without obtaining a judicial order.

II. Presenting Forfeiture to the Grand Jury

Federal Rule of Criminal Procedure 32.2(a) provides that the court may not enter a judgment of forfeiture in a criminal proceeding "unless the indictment or information

[183] *United States v. Anderson*, 778 F.2d 602 (10th Cir. 1985).

[184] The practice in a number of districts has been to obtain a standing order from the district court, under either Rule 6(e)(3)(A)(ii) or Rule 6(e)(3)(E)(i), or both, authorizing disclosure to specific contract personnel who are directly involved in assisting attorneys for the Government in the prosecution of cases. Such orders should be updated frequently to reflect any changes in conditions which were considered by the court in support of the order. AFMLS has posted examples on its Web site.

contains notice to the defendant that the Government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute." Fed. R. Crim. P. 32.2(a). Similarly, Federal Rule of Criminal Procedure 7(c)(2) provides that no criminal judgment of forfeiture may be entered "unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute." Fed. R. Crim. P. 7(c)(2).

In light of these rules and related constitutional considerations, what are the best practices for AUSAs to follow in presenting forfeiture allegations and related evidence to the grand jury, and how should the grand jury's finding of probable cause for forfeiture be memorialized and described to the district court?

A. Summary

Because forfeiture is neither an offense nor an element of an offense, but an indeterminate part of the criminal sentence not limited by any statutory maximum amount, the Constitution does not require that the grand jury find probable cause for forfeiture, either generally or with respect to particular property. Applicable statutes and rules also do not mandate such a finding by the grand jury. For several reasons, however, the best practice is to present evidence to the grand jury that permits it to find probable cause to believe that the requisite nexus exists between the charged offenses and any money judgment amount and particular property alleged to be forfeitable, and to request that such a finding be made. The grand jury's finding with respect to forfeiture should be memorialized in the indictment, and may then be represented to the court, in support of pretrial restraining orders or for other appropriate purposes, as the grand jury's probable cause finding on the forfeitability of the listed property and the specified money judgment amount.

B. Discussion

1. The Constitution does not require a grand jury finding of probable cause for forfeiture

The authority to charge crimes in federal court, and the limits to that authority, derive from the Constitution. The Fifth Amendment provides "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." The Grand Jury Clause of the Fifth Amendment serves the "dual function of determining if there is probable cause to believe that a crime has been committed, and of protecting citizens against unfounded criminal prosecutions." *Branzburg v. Hayes*, 408 U.S. 665, 686-687 (1972). Thus, elements of the criminal offense must be charged in the

indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt. *See*, e.g., *Jones v. United States*, 526 U.S. 227, 232 (1999); *see generally* section 11.2, *Federal Grand Jury Practice* (OLE August 2000).

There is no constitutional right to have the grand jury make a probable cause determination as to criminal forfeiture because forfeiture is not an element of a substantive offense. Criminal forfeiture is, instead, part of a criminal sentence. *Libretti v. United States*, 516 U.S. 29, 38-41, 48-49 (1995). Indeed, for that reason, there is no Sixth Amendment right to jury trial on criminal forfeiture. *Id*., 516 U.S. at 48-49.[185]

___*Libretti* is apparently still good law, notwithstanding recent Supreme Court decisions holding that certain facts bearing upon sentencing constitute elements of separate substantive offenses. In *Jones v. United States*, the Court held that the federal car jacking statute, which authorized increased punishment in car jackings resulting in either serious bodily injury or death, created three separate offenses rather than one offense with additional penalty provisions. *Jones*, 526 U.S. at 251-52. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[186] In *Blakely v. Washington*, 124 S. Ct. 2531 (June 24, 2004), the Court applied the *Apprendi* rule to invalidate, under the Sixth Amendment, an upward departure under the Washington State sentencing guidelines system that was imposed on the basis of facts found by the court at sentencing.[187]

The Asset Forfeiture and Money Laundering Section (AFMLS) has taken the position that *Blakely* does not apply to criminal forfeiture for the same reasons that have persuaded the courts not to apply *Apprendi*, and because criminal forfeiture is an open-ended, indeterminate part of the defendant's sentence, in contrast to the determinate sentencing scheme invalidated in *Blakely*. In AFMLS's view, district courts finding facts bearing on forfeiture are not enhancing a defendant's sentence: upon a defendant's conviction, the

[185] As explained more fully below, the Federal Rules of Criminal Procedure provide that in a case where a jury returns a guilty verdict, either the defense or the prosecution may request that the jury also determine whether the Government has established the "requisite nexus" between the property alleged to be forfeitable and the offense committed by the defendant. Fed. R. Crim. P. 32.2(b)(4).

[186] In response to *Jones* and *Apprendi*, the Criminal Division advised prosecutors "Any fact which increases the statutory maximum sentence (other than prior conviction) should be charged in the indictment and proved at trial, and the [trial] jury should be instructed that it is required to find the fact beyond a reasonable doubt." USA Book, http://10.173.2.12:80/usao/eousa/ole/usabook/narc/apprendi/0728memo.htm.

[187] The Department of Justice has taken the position that *Blakely* does not apply to the U.S. Sentencing Guidelines, a question on which the Court has granted certiorari. *See* USA Book, http://10.173.2.12/usao/eousa/ole/tables/subject/blakely.htm.

forfeiture statutes themselves require forfeiture of *all* of the defendant's assets that fall into particular categories—proceeds, facilitating property, property involved in the offense. *See Quick Release*, Vol. 17, No. 7 (July 2004) at 1-2; *see also* Cassella, "Does *Apprendi v. New Jersey* Change the Standard of Proof in Criminal Forfeiture Cases?," 89 *Kentucky Law Journal* 631 (2001).

The first court of appeals to reach and decide the issue of *Blakely*'s application to criminal forfeiture has agreed with this position. In *United States v. Messino*, 382 F.3d 704 (7th Cir. 2004), the court of appeals explained

> We have previously held that *Apprendi* has no effect on criminal forfeiture proceedings because forfeiture provisions have no statutory maximum. *United States v. Vera*, 278 F.3d 672, 673 (7th Cir. 2002). *Apprendi*'s statutory maximum was supplied by the statute of conviction; *Blakely*'s is external—the statutory maximum is found not in the criminal code, but instead, the sentencing guidelines. *See [United States v.] Booker*, 375 F.3d 508, 509 [(7th Cir. 2004)]. The criminal forfeiture provisions do not include a statutory maximum; they are open-ended in that *all* property representing proceeds of illegal activity is subject to forfeiture. *Vera*, 278 F.3d at 673; U.S.S.G. § 5E1.4; 21 U.S.C. § 853. Therefore, we conclude that *Blakely*, like *Apprendi*, does not apply to forfeiture proceedings.

382 F.3d at 713. The court of appeals added the following defense of the preponderance standard for criminal forfeiture:

> *Libretti* states that "the nature of criminal forfeiture as an aspect of sentencing compels the conclusion that the right to jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection." *Libretti v. United States*, 516 U.S. 29, 49 (1995). Furthermore, the Supreme Court's decision in *Patterson* explains that, "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson v. New York*, 432 U.S. 197, 210 (1977). Since forfeiture is not a separate substantive offense, *Libretti*, 516 U.S. at 39-40, due process is also not offended by a preponderance standard.

Messino, 382 F.3d at 713-14.

Other lower courts have uniformly held that *Blakely*'s predecessor, *Apprendi*, does not apply to criminal forfeiture because forfeiture has no statutory maximum amount. *See United States v. Shryock*, 342 F.3d 948, 991 (9th Cir. 2003); *United States v. Keene*, 341 F.3d 78, 85 (1st Cir. 2003); *United States v. Gasanova*, 332 F.3d 297, 300-01 (5th Cir. 2003); *United States v. Najjar*, 300 F.3d 466, 485-86 (4th Cir. 2002); *United States v. Corrado*, 227 F.3d

543, 550-51 (6th Cir. 2000) (*Corrado I*); *United States v. Corrado*, 286 F.3d 934, 937 (6th Cir. 2002) (*Corrado II*) (reaffirming, in related opinion, that forfeiture is part of the defendant's sentence); *United States v. Cabeza*, 258 F.3d 1256, 1257 (11th Cir. 2001).

Accordingly, a defendant has no constitutional right to have the grand jury find probable cause for forfeiture.[188]

2. Criminal forfeiture statutes and the Federal Rules of Criminal Procedure do not require that the grand jury find probable cause for forfeiture

If the Constitution does not require the grand jury to find probable cause for forfeiture, does a statute or rule require it?

Criminal forfeiture statutes typically provide that the court, in imposing sentence on a person convicted of [the predicate] offense…, shall order that the person forfeit to the United States [specified types of property]," 18 U.S.C. § 982(a)(1), or its equivalent, "Any person convicted of a [predicate offense] shall forfeit to the United States [specified types of property]," 21 U.S.C. § 853(a). *See also* 28 U.S.C. § 2461(c) ("If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with…(21 U.S.C. § 853), other than subsection (d) of that section.")

Such criminal forfeiture statutes do not address grand jury process with respect to forfeiture.

[188] Of course, the defendant *does* have a right to indictment and a grand jury finding on the elements of the substantive offense(s) that are predicates for forfeiture. As a recent reminder of the importance of charging all applicable substantive legal theories, and the effect upon forfeiture of a failure to do so, *see United States v. Iacaboni*, 363 F.3d 1, 7 (1st Cir. 2004) (reversing forfeiture judgment based on theory that assets had facilitated money laundering with intent to conceal where indictment charged only money laundering with intent to promote criminal activity). A fact that triggers an enhanced forfeiture penalty, greater than the penalty that would otherwise apply to a given offense, would also seem to qualify as an element of the substantive offense within the meaning of *Apprendi*. *See* 18 U.S.C. § 981(a)(1)(G), made applicable in criminal cases by 28 U.S.C. § 2461(c), (providing for forfeiture of *all* assets of any individual, entity, or organization engaged in certain crimes, but only if the crimes are acts of domestic or international terrorism as defined in 18 U.S.C. § 2331; *see also* 18 U.S.C. § 2332b(g)(5) (defining numerous offenses as "Federal crimes of terrorism" if they are "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct").

The issue is addressed to some extent by the Federal Rules of Criminal Procedure. Criminal Rule 32.2(b)(4) provides that "upon a party's request in a case in which a [trial] jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus[189] between the [allegedly forfeitable] property and the offense committed by the defendant." Fed. R. Crim. P. 32.2(b)(4). If the defendant has a right to have the trial jury determine if the forfeiture nexus exists, then logic (or at least symmetry) would suggest that the defendant might also have a right to a grand jury probable cause finding on that issue.

However, the drafters of the Federal Rules of Criminal Procedure decided that only the trial jury would make this determination. While Rule 32.2(b)(4) creates a right, upon timely request, to have the trial jury determine whether the forfeiture nexus exists, no such determination is assigned to the grand jury. Both Rule 32.2(a) and Rule 7(c)(2) speak only in terms of the indictment's providing notice of forfeiture. This distinction is by design. The 1972 Advisory Committee Note to the then-new Rule 7(c)(2) explained the following:

> Under the common law, in a criminal forfeiture proceeding the defendant was apparently entitled to notice, trial, and a special jury finding on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction. Subdivision (c)(2) provides for notice. Changes in rules 31 and 32 provide for a special jury finding and for a judgment authorizing the Attorney General to seize the interest or property forfeited.

Thus, the Rules Committee, well aware of common law practice, made a studied decision that Rule 7(c)(2), dealing with the contents of the indictment, would only require notice of forfeiture, while Rule 31, dealing with jury verdicts at trial, required only the trial jury to return a special forfeiture verdict.[190]

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[189] *Nexus*, used in Rule 32.2 and commonly appearing in scholarly forfeiture briefs, opinions, and legal advice memoranda, is from the Latin verb *nectere*, meaning "to tie." It simply means "a connection, tie, or link." *Webster's New World Dictionary* (3d College Ed. 1988). In the forfeiture context, the "requisite nexus" is the connection between the asset and the crime that must be shown to make the property forfeitable, e.g., that the property is proceeds or derived from proceeds of the crime.

[190] The decision to require a special forfeiture finding only by the trial jury was made even though the Rules Committee assumed in 1972—contrary to the holding of *Libretti* decades later—that the amount of the interest or property subject to criminal forfeiture was "an element of the offense to be alleged and proved." Advisory Committee Note to 1972 Amendment to Fed. R. Crim. P. 31(e). The reference to forfeiture was deleted from Rule 31 in 2000 in light of the creation that year of Rule 32.2, covering most aspects of criminal forfeiture procedure. Rule 32.2(b) was specifically intended to replace the special verdict requirement of Rule 31(e), a requirement that generated confusion over the scope of the determination to be made by the trial jury. Rule 32.2(b) provides instead that the court, or the jury upon a request by the Government or the defendant, must determine whether the Government has established the requisite nexus for forfeiture. *See* Advisory Committee Note to 2000 Adoption of Fed. R. Crim. P. 32.2(b).

This construction is supported by the 2000 Advisory Committee note upon the adoption of Rule 32.2(a). The note makes clear that an indictment alleging forfeiture need not itemize any particular forfeitable assets: "As courts have held, subdivision (a) is not intended to require that an itemized list of the property to be forfeited appear in the indictment or information itself." Advisory Committee Note to 2000 Adoption of Fed. R. Crim. P. 32.2(a) (also noting "trend in case law" interpreting Rule 7(c)(2) as not requiring detailed description of property subject to forfeiture, or defendant's interest in such property). Because the rules do not require that the indictment list the particular forfeitable property at all, they cannot reasonably be construed as requiring the grand jury to make findings about any such property.

3. Although the constitution, statutes, and rules do not require a grand jury finding of probable cause for forfeiture, the best practice is to request such a finding

Although neither the Constitution, nor the forfeiture statutes, nor the rules require it, it is best to ask the grand jury to find that there is probable cause to believe that the requisite nexus exists between the offenses charged in the indictment and the assets allegedly subject to criminal forfeiture, at least in cases where the indictment identifies specific forfeitable property or a specific amount due as a forfeiture money judgment.

Such a finding serves several useful purposes.

First, the finding provides a basis for restraining directly forfeitable assets identified in the indictment.[191] Section 853(e)(1)(A) provides for entry of a post-indictment restraining order "upon the filing of an indictment or information charging a violation…for which criminal forfeiture may be ordered…and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section." Section 853(e)(1)(A). The legislative history of section 853 indicates that Congress intended for the grand jury's finding in support of forfeiture to be given considerable weight:

> For the purposes of issuing a restraining order, the probable cause established in the indictment or information is to be determinative of any issue regarding the merits of the government's case on which the forfeiture is to be based.

S. Rep. No. 225, 98th Cong., 2d Sess. 203 (1984), reprinted in 1984 U.S. Code Cong. & Administrative News 3182, 3386.

[191] Identified substitute assets may also be restrained in the Fourth Circuit. *In re Assets of Billman*, 915 F.2d 916, 919, 920-21 (4th Cir. 1990).

Although section 853 provides that the court "may" enter a post-indictment restraining order upon the Government's application, suggesting a certain amount of discretion, the Supreme Court in *United States v. Monsanto*, 491 U.S. 600, 612-13 (1989), made it clear that Government applications for such orders should generally be granted, ruling that it was error to import "traditional principles of equity" and equitable balancing tests into the process of issuing and reviewing forfeiture restraining orders:

> This reading seriously misapprehends the nature of the provisions in question. As we have said, § 853(a) is categorical.... Under § 853(e)(1), the trial court "may" enter a restraining order if the United States requests it, but not otherwise, and it is not required to enter such an order if a bond or some other means to "preserve the availability of property described in subsection (a) of this section for forfeiture" is employed. Thus, § 853(e)(1)(A) is plainly aimed at implementing the commands of § 853(a) and cannot sensibly be construed to give the district court discretion to permit the dissipation of the very property that § 853(a) requires be forfeited upon conviction.
>
> ...Whatever discretion Congress gave the district courts in §§ 853(e) and 853(c), that discretion must be cabined by the purposes for which Congress created it: "to preserve the availability of property...for forfeiture." We cannot believe that Congress intended to permit the effectiveness of the powerful "relation-back" provision of § 853(c), and the comprehensive "any property...any proceeds" language of § 853(a), to be nullified by any other construction of the statute.
>
> This result may seem harsh, but we have little doubt that it is the one that the statute mandates. Section 853(c) states that "[a]ll right, title, and interest in [forfeitable] property...vests in the United States upon the commission of the act giving rise to forfeiture." Permitting a defendant to use assets for his private purposes that, under this provision, will become the property of the United States if a conviction occurs cannot be sanctioned.

Monsanto, 491 U.S. at 612-13.

Most circuits deciding the issue have concluded that such post-indictment restraining orders may be entered ex parte, with no prerestraint hearing. *United States v. Jones*, 160 F.3d 641, 647-49 (10th Cir. 1998) (pretrial restraints may be imposed ex parte); *United States v. Jenkins*, 974 F.2d 32, 35-36 (5th Cir. 1992) (no due process violation where post-indictment restraining order was entered ex parte); *United States v. Monsanto*, 924 F.2d 1186, 1192-93 (2d Cir. 1991) (unanimous en banc court on remand from Supreme Court) (strong Government interests and exigent circumstances in forfeiture context justify imposition of pretrial restraints without prerestraint hearing); *United States v. Bissell*, 866 F.2d 1343, 1352 (11th Cir. 1989) (no right to prerestraint hearing, citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974) [upholding ex parte seizure of personal property]);

United States v. Moya Gomez, 860 F.2d 706, 727-28 (7th Cir. 1989) (quoting legislative history to effect that post-indictment restraining order does not require prior notice or opportunity for hearing); *id.* at 730 (holding statutory scheme unconstitutional only to limited extent that it does not provide for *post*-restraint hearing before trial); *United States v. Spilotro*, 680 F.2d 612, 617 (9th Cir. 1982) (forfeiture under exigent circumstances creates exception to predeprivation hearing rule, citing *Calero-Toledo*); *but see United States v. Melrose East Subdivision*, 357 F.3d 492, 499 n.3 (5th Cir. 2004) (leaving question of prerestraint hearing in criminal cases open, but noting authority that due process does not require prerestraint hearing for post-indictment restraining orders); *United States v. Kirschenbaum*, 156 F.3d 784, 792-93 (7th Cir. 1998) (suggesting in *dicta* that issue whether due process requires prerestraint hearing is "difficult" and "close," but not reaching issue); *United States v. Riley*, 78 F.3d 367, 370 (8th Cir. 1996) (declaring preconviction restraints "extreme" measures that may only be imposed where Government demonstrates "at a hearing" that defendant is likely guilty and property to be restrained will be subject to forfeiture upon conviction). *Cf. United States v. Hernandez-Escarsega*, 886 F.2d 1560 (9th Cir. 1989) (in deciding whether probable cause supported issuance of search warrant, magistrate judge entitled to consider that grand jury recently returned an indictment against the subjects of the search).

Second, the grand jury's finding of a probable nexus between the property and the offense may be accorded deference in subsequent proceedings where probable cause is at issue, including challenges to pretrial restraint of assets allegedly needed to pay a defendant's attorney's fees. One circuit views the grand jury's finding of probable cause as sufficient to satisfy the Government's burden to uphold restraints under section 853(e)(1)(A) until trial. *See United States v. Bollin*, 264 F.3d 391, 421 (4th Cir. 2001) (citing *In re Assets of Billman*, 915 F.2d 915, 919 (4th Cir. 1990)). Although "the indictment itself establishes the merits of the government's case" for purposes of post-indictment restraints, other circuits recognize that in extreme situations, due process may require inquiry even into matters decided by the grand jury. *United States v. Real Property in Waterboro*, 64 F.3d 752, 755-56 (1st Cir. 1995); *see United States v. Monsanto*, 924 F.2d at 1191 (due process requires post-restraint hearing where assets needed for attorney's fees are involved).

The recent trend in the law is to continue post-indictment restraints based upon the grand jury's finding of probable cause unless and until the defendant establishes both (1) an actual need for the restrained assets for, among other important purposes, attorney's fees or living expenses, and (2) that there is some substantial evidence that the assets are not forfeitable. *See United States v. Jones*, 160 F.3d 641, 647-48 (10th Cir. 1998) (defendant challenging pretrial restraint of assets alleged to be forfeitable has initial burden of showing that she has no funds other than the restrained assets to hire private counsel or to pay living expenses, and

that there is bona fide reason to believe restraining order should not have been entered); *United States v. Farmer*, 274 F.3d 800, 804-05 (4th Cir. 2001) (defendant entitled to pretrial hearing if property is seized for civil forfeiture and defendant demonstrates no other assets are available; following *Jones*).

Third, the grand jury's finding of probable cause is arguably sufficient to trigger the bar on intervention by third parties set forth in section 853(k)(2). Section 853(k)(2) prevents persons claiming interest in allegedly forfeitable property from

> commenc[ing] an action at law or equity against the United States concerning the validity of his alleged interest in the property *subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture* under this section.

21 U.S.C. § 853(k)(2) (emphasis added).

That the indictment alleges that property is subject to forfeiture indicates that the grand jury has made a probable cause determination. If the indictment only gives notice of forfeiture rather than alleging that particular property is forfeitable, and no explicit probable cause finding is included in the notice, then arguably the filing of the indictment would not bar collateral litigation over the property.

Fourth, that the grand jury has found probable cause to believe certain property is forfeitable, or to believe the defendant is liable for a certain forfeiture money judgment amount, increases the impact of the actual notice of forfeitability received by a hypothetical reasonable attorney or third party upon learning of the indictment. Such notice affects the ability of any such persons to continue to receive or retain forfeitable property of the defendant as "bona fide purchasers…reasonably without cause to believe that the property [is] subject to forfeiture." *See* sections 853(c) and (n)(6)(B); *United States v. McCorkle*, 321 F.3d 1292, 1295 n.4 (11th Cir. 2003) (attorney may lose bona fide purchaser status as to advance fee received from client "because the client is indicted and the attorney learns additional information about his client's guilt"); *see also Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 632 n.10 (1989) ("the only way a lawyer could be a beneficiary of section 853(n)(6)(B)'s bona fide purchaser provision] would be to fail to read the indictment of his client").

Fifth, the grand jury's probable cause finding may help insulate case agents and prosecutors from subsequent liability under *Bivens*[192] or the Hyde Amendment.[193] The grand jury's probable cause determination is at least some evidence tending to negate any inference that an action was commenced without probable cause. *See*, e.g., *Robinson v. Cattaraugus County*, 147 F.3d 153, 163 (2d Cir. 1998) (in malicious prosecution action under 42 U.S.C. § 1983, district court did not err in instructing that grand jury's probable cause determination was evidence that trial jury could consider in deciding whether prosecution was commenced without probable cause).

Finally, the practice of presenting forfeiture evidence to the grand jury, listing particular forfeitable assets in the indictment, and requesting that the grand jury find probable cause for forfeiture of those assets should help to defend indictments against future challenge if *Blakely* is ultimately construed or extended to apply to criminal forfeiture and to require that the facts supporting forfeiture of particular assets be charged in the indictment and proven to the trial jury beyond a reasonable doubt.

For all of these reasons, prosecutors should ask the grand jury to find probable cause to believe that the requisite nexus exists between the crimes charged and any particular property or money judgment amount alleged to be forfeitable.

4. It is not necessary to ask the grand jury to determine the defendant's interest in forfeitable property

A separate issue is whether the prosecutor should also ask the grand jury to find probable cause to believe that "the defendant (or some combination of defendants [charged] in the case) had an interest in the property that is forfeitable under the applicable statute." *See* Fed. R. Crim. P. 32.2(c)(2). Unlike the forfeiture nexus, this issue is not even presented to the *trial* jury. Indeed, the court itself only reaches the issue of the defendant's interest in forfeitable property in cases where no ancillary claims to the property are filed. Moreover, unlike the nexus finding, which serves the various useful purposes outlined above, a finding of probable cause to believe that the defendant has an interest in particular property serves no comparable purpose in most cases. Therefore, it does not make sense to present this issue to the grand jury.[194]

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[192] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[193] Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3006A, historical and statutory notes).

[194] The present wording of Fed. R. Crim. P. 7(c)(2), to the effect that no criminal judgment of forfeiture may be entered unless the indictment or the information provides notice "that the defendant *has an interest* in property" subject to forfeiture, might raise doubts about this conclusion, if not for the Advisory Committee

Nonetheless, in cases where the defendant has attempted to conceal an interest in property subject to forfeiture, it may be important to the grand jury's understanding of the case—and its ability to make necessary findings as to elements of charged offenses—to present evidence concerning the defendant's actual, although hidden, interest in forfeitable property. For example, in a case where the defendant acquires or transfers property in such a way as to "conceal or disguise the nature, the location, the source, the ownership, or the control" of criminal proceeds in violation of 18 U.S.C. § 1956(a)(1)(B)(i), the prosecutor may be required to present evidence to the grand jury tending to show that the defendant in fact had ownership or control of the property involved in such a transaction.

In any event, because only property of the defendant can be forfeited in a criminal case, the prosecutor should make reasonable efforts to establish that any property alleged to be forfeitable, and particularly property sought to be restrained as forfeitable, is property of the defendants within the meaning of the applicable forfeiture statutes, including section 853(c), which voids purported post-crime transfers of forfeitable property other than to bona fide purchasers for value reasonably without cause to believe the property was subject to forfeiture.

5. Presenting forfeiture evidence to the grand jury

Just as most trial evidence relating to forfeiture is usually best, and most easily, presented as an integral part of the overall presentation of the Government's case-in-chief, most grand jury evidence bearing on forfeiture is best, and most easily, presented as an integral part of the evidence establishing probable cause to charge the underlying criminal offenses. Questions about assets and their links to criminal activity should be asked of all witnesses likely to have such knowledge, during both lengthy grand jury investigations and the more abbreviated presentations appropriate to cases investigated primarily outside of the grand jury.

When this practice is followed, a case agent or other government witness can be brought in shortly before an indictment is returned to summarize previous testimony and documentary evidence bearing on forfeiture. In addition to reminding the grand jury of such previously presented evidence, the summary witness should be prepared to present any additional documents and information necessary to calculate the amount of any proposed forfeiture money judgment and identify and describe any particular assets to be alleged as

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Notes to Rule 7(c)(2) explaining that the rule is meant to be read together with Rule 32.2, which provides that no findings need be made with respect to the defendant's interest in forfeitable property until after entry of a preliminary order of forfeiture, and even then only by the court, and only if no ancillary claims are filed. *See* Advisory Committee Notes to Fed. R. Crim. P. 7 (2000) (changes made to reflect Rule 32.2), (2002) (subsequent changes to Rule 7(c)(2) intended to be stylistic only).

forfeitable in the proposed indictment. It is usually best to have previously marked asset-related documents—such as certified copies of public real estate, business, and vehicle registration and title records, authentic photographs of major assets, and stipulated or authenticated bank and other financial account statements—available for examination by the grand jury during its consideration of the proposed indictment, including the forfeiture allegations.

Even if forfeiture has not been an ongoing focus of the investigation, the evidence necessary to establish the required link between the charged offenses and the particular forfeitable assets to be listed in the indictment can usually be presented by a government agent witness in a simple and straightforward manner, not requiring much grand jury time. The focus in such a presentation, as in the summary presentation described above, should be upon (1) the facts that identify the assets with particularity, and (2) the facts that make the assets forfeitable under all applicable theories of forfeiture—e.g., facts indicating that the assets "constitute, or were derived from, proceeds" of the offenses; that the assets were "used, or intended to be used, in any manner or part, to commit, or to facilitate the commission" of the offenses; that the assets constitute "property, real or personal, involved in" the offenses or "property traceable to such property," etc. *See*, e.g., section 853(a) and 18 U.S.C. § 982(a)(1).

6. Instructing the grand jury on forfeiture

If it is consistent with local practice to do so, the prosecutor may explain to the grand jury preliminarily that (1) forfeiture is not a substantive offense, or an element of an offense, but rather a required part of the punishment imposed upon conviction for certain criminal offenses; (2) the forfeiture allegations in the proposed indictment will put the defendant on notice that the Government is seeking to forfeit certain property, or types of property, upon the defendant's conviction; and (3) the Government will seek to forfeit substitute assets of the defendant if some act or omission of the defendant makes the directly forfeitable property unavailable.[195]

[195] Some districts have found it useful to cover these points in an introductory presentation to the grand jury outlining forfeiture law and procedures, as part of the grand jury's orientation during the first few weeks after a new grand jury is empaneled. This can be done by the district's forfeiture AUSA, who is in the best position to cover these issues and to address the grand jurors' questions. The orientation session also provides the prosecutor with the opportunity to explain to the grand jury that forfeiting the defendant's interest in a piece of property does not end the matter, but that an ancillary proceeding is held after a preliminary order of forfeiture is entered to allow third parties who claim to have an interest in the property to petition the court to establish that interest. While that issue is of no direct concern to the grand jurors in their deliberations, it is helpful that they understand that the Government is not seeking to forfeit the property of owners with superior interests to that of the defendant or property belonging to innocent bona fide purchasers of the property.

The prosecutor should then instruct the grand jury with respect to the links that must be found to exist between the charged offenses and the assets alleged to be forfeitable. Generally, this may be done by reading and explaining the pertinent parts of the applicable forfeiture statutes, explaining how each listed asset falls within one or more of the forfeiture provisions, and explaining the basis for calculating or estimating the amount to be alleged as a forfeiture money judgment.

Finally, if the grand jurors have no questions about the forfeiture instructions, the prosecutor should ask the grand jury, during its process of considering the entire indictment, to find probable cause to believe that the listed assets have the required links to the charged offenses and that there is a factual basis for the alleged money judgment amount.

7. Memorializing and describing the grand jury's probable cause finding

As explained in section II.B.3 at page 148, there are several good reasons for asking the grand jury to find probable cause for forfeiture of particular assets. If the grand jury was actually asked to make such a finding in the course of its deliberations on the indictment, prosecutors may properly represent to the court, in connection with an application for a post-indictment restraining order or otherwise, that the grand jury has found probable cause to believe that the requisite forfeiture nexus exists with respect to the money judgment amount and any other property listed in the indictment as forfeitable.

To make the grand jury's probable cause finding readily accessible for seeking and defending pretrial restraints and the other purposes described in section II.B.3 at page 148, it is a good practice to memorialize the finding in the indictment itself. There are several ways to accomplish this.

The grand jury finding as to forfeitability may be set forth in the indictment in a way that simply parallels the presentation of the other substantive charges and allegations in the indictment as to which the grand jury also found probable cause. Practices vary from district to district with respect to whether phrases like "The grand jury charges" appear only at the beginning of the indictment or repeatedly, e.g., "The grand jury further charges", at the beginning of each count. In either case, introducing the forfeiture allegations in the same way as the substantive counts makes it reasonably plain on the face of the indictment that the grand jury has made a probable cause determination with respect to the entire indictment, including the forfeiture allegations.

In a district where there is frequent litigation over pretrial restraints, the prosecutor may wish to give special emphasis to the grand jury's finding of probable cause for forfeiture of particular assets by making that finding explicit in the text of the indictment: "The grand jury further finds probable cause to believe that upon conviction of the offense[s] in violation of _____ set forth in Count[s] [##] of this Indictment/Information, the defendant[s], [NAME(S)], shall forfeit to the United States of America, pursuant to ___ U.S.C. ___, all [insert statutory language], including, without limitation, $_____ in United States currency and the following other particular assets: ____ ." If this approach is used, it should be used consistently to avoid any negative implication that a grand jury returning an indictment with no such explicit finding did *not* find probable cause for forfeiture.

In districts that use the convention of merely giving notice of forfeiture in indictments rather than alleging forfeiture in forfeiture allegations or charging forfeiture in a forfeiture count, it is best practice to include an explicit probable cause finding of forfeitability in the notice section. Doing so will counter any possible implication or argument that the forfeiture notice was merely appended to the indictment without grand jury consideration and determination of probable cause.

Chapter 10

International Forfeiture

I. Background

Federal law enforcement should give priority to pursuing forfeitable assets beyond the borders of the United States. Federal investigators and prosecutors who seek to restrain and forfeit illicit assets located abroad should seek the advice of one of the attorneys in the Asset Forfeiture and Money Laundering Section's (AFMLS's) International Programs Unit (IPU) at 202-514-1263. It is advisable to make this contact as soon as foreign assets that might become subject to a U.S. forfeiture judgment are identified by the investigator or prosecutor. The extent and speed of forfeiture assistance can vary greatly depending upon treaty obligations and the operation of foreign domestic law. International requests for legal assistance can touch upon diplomatically sensitive issues and may require coordination with foreign or other domestic investigations. AFMLS IPU attorneys will help guide you through this often complicated process.

II. Importance of Reciprocal Cooperation

The Department gives high priority to requests by foreign countries for assistance in restraining, forfeiting, and repatriating assets found in the United States that are traceable to violations of foreign law. We can expect cooperation from foreign governments in our efforts to forfeit and repatriate assets found abroad in U.S. cases only if we reciprocate in a timely and effective manner. Additionally, it is important for the United States to act on these incoming requests so that it is not perceived as a haven for foreign criminal proceeds. AFMLS IPU attorneys can offer advice and assistance with the execution of incoming forfeiture requests and, in consultation with the Office of International Affairs (OIA), will attempt to channel incoming foreign requests for forfeiture assistance to established forfeiture contacts within each district.

III. Policy on International Contacts

It has long been the policy of the Department of Justice that all incoming and outgoing international contacts by prosecutors in criminal justice matters be coordinated with and through OIA. OIA is the channel through which the United States must make all formal requests to foreign governments for legal assistance. Federal prosecutors should adhere to established procedures for international contacts and should not contact foreign officials directly on case matters unless such contacts have been approved by, are under the

supervision of, or are in consultation with OIA. Often, OIA will permit prosecutors to have direct contact with foreign officials provided OIA is copied on or informed about all the relevant communications. Federal investigators and prosecutors should consult with OIA regarding the official policy on contact with foreign officials.

IV. Foreign Property Management Issues

Non-fungible assets located abroad may present unique property management issues. Federal prosecutors and investigators should keep in mind that although many countries are willing to restrain or seize assets in support of U.S. forfeiture efforts, some countries lack the resources, experience, or a legal regime that allows for adequate property management pending the resolution of the U.S. forfeiture proceeding. Certain property located abroad may require post-seizure or post-restraint preservation or management, and this will require extensive preseizure planning. Foreign governments may be willing to assume responsibility of preserving assets, or they may ask the United States to do so, and the United States or the foreign government may need to hire, or legally appoint, guardians, monitors, trustees, or managers for certain assets. Prosecutors should be aware that the costs of storing, maintaining, and disposing of certain assets such as vehicles, vessels, or aircraft in a foreign country may—in protracted international forfeiture cases—exceed the value of the asset itself.

When faced with the seizure of non-fungible assets abroad that may require management, a federal prosecutor or investigator should contact the U.S. Marshals Service (USMS) at 202-307-9009. The USMS, if needed, may enlist the assistance of the Diplomatic Security Services, which has been cross-designated by the USMS to provide property management services for property restrained or seized abroad. In cases where the lead law enforcement agency is a Department of Treasury or Department of Homeland Security agency, the federal prosecutor or investigator should contact the Department of Treasury, Executive Office of Asset Forfeiture (TEOAF) at 202-622-9600. Finally, as is true with the forfeiture of businesses located in the United States, AFMLS must be consulted before the United States asks a foreign government to restrain or seize an ongoing business or its assets or to appoint or hire a guardian, monitor, trustee, or manager for same.

V. Publication of Notice Abroad

In civil forfeiture proceedings, the United States will be required to provide notice by publication as set forth in Rule G of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. When forfeitable property is located abroad, Rule G(4)(a)(iv)(B) allows the Government to choose to publish notice in "a newspaper generally

circulated in a district where the action is filed, in a newspaper generally circulated in the country where the property is located, or in legal notices published and generally circulated in the country where the property is located" or under Rule G(4)(a)(iv)(C) on the Government Internet forfeiture site. Rule G is quite new, and accordingly, the appropriateness of publishing notice in the district where the action is filed rather than the foreign country where the property is located is not yet firmly established in the law. Depending on the facts of the case, in cases where the property subject to forfeiture is located abroad, and the potential claimants are not all in the United States, it may be appropriate to publish notice in a newspaper of general circulation in the country where the assets are restrained or seized or via legal notices in that country where known potential claimants are located, and do so in the appropriate foreign language. However, publication on the Internet forfeiture site may be preferable if publication in the foreign country is not practicable or is cost prohibitive.

Publication abroad should be requested in the manner and format that complies with the requirements of domestic publication and, as much as is possible, in the manner requested by the foreign government providing assistance with the publication. Some foreign governments will assist with publication, while other governments allow us to make our own arrangements. In many instances, we can rely upon U.S. law enforcement attachés stationed in foreign countries to arrange for publication. Some foreign governments will not assist the United States with publication but still require that we obtain permission before we publish in their jurisdiction. Other countries do not want publication in their country done at all. Typically, the United States pays for any publication abroad. An AFMLS IPU attorney should be consulted to ascertain a foreign government's preferences when it comes to notice by publication in a foreign country before attempting publication in that country.

VI. Consultation With AFMLS or OIA When Seeking Repatriation of Forfeitable Assets Located Abroad

In cases where a foreign government has restrained or seized assets based upon a formal U.S. request, the prosecutor and investigators should consult an AFMLS IPU attorney or the OIA attorney handling the case before seeking repatriation of those assets. AFMLS IPU attorneys, in consultation with OIA, usually are aware of foreign legal constraints in connection with the repatriation of forfeitable assets, as well as any sensibilities against repatriation that select foreign governments have and, therefore, must be consulted before any action to repatriate such frozen assets is taken. Repatriation of frozen assets will require that the foreign restraint order be lifted, which can only be done with the consent of the appropriate foreign country. In some cases, it may not be possible to lift the foreign restraint

simply by resolving the U.S. matter; for example, in jurisdictions that have mandatory prosecution laws. *See* discussion in section XI at page 167.

Further, federal prosecutors and investigators should always consult with an AFMLS IPU or an OIA attorney before entering into an agreement with a defendant to repatriate criminally derived assets from abroad even when not restrained by the foreign government before seeking an order actually compelling the repatriation of specific assets pursuant to 21 U.S.C. § 853(e)(4). First, the property at issue may be subject to domestic proceedings in the foreign jurisdiction. Second, certain countries deem another government's efforts at repatriating assets located in that country's jurisdiction to be a violation of that country's sovereignty, and in rare instances, deem any persons who instigate or are involved in that process to be involved in a criminal offense such as money laundering. In addition, although many countries often do not object to a negotiated voluntary repatriation of assets and allow such transfers to occur as part of a plea or settlement agreement, these countries often will object to court-ordered repatriations because they regard such a "coercive measure" to violate a person's civil rights under the laws of that foreign state. Other countries take the position that a failure to inform them of forfeitable assets located in their jurisdiction is a violation of specific treaty obligations. Finally, in matters where the United States previously asked a foreign government to restrain an asset, a voluntary repatriation obviously will require the lifting of the foreign restraint, which, although legally permissible, may subject the foreign jurisdiction to unintended legal liabilities under the foreign law, such as attorney's fees.

VII. Probable Cause Finding to Seize or Restrain Assets Abroad

Historically, the United States has made formal requests to foreign governments to seize and restrain assets for forfeiture pursuant to multilateral treaties, Mutual Legal Assistance Treaties (MLATs), letters rogatory, and letters of request without first obtaining a finding of probable cause in the United States. One federal district court case, *Kim v. Department of Justice*,[196] however, holds that such a finding is required. Since that decision was rendered, in the exercise of caution, OIA advises prosecutors seeking the seizure or restraint of property abroad to first obtain a probable cause finding regarding the property in question before asking OIA to make the request.[197] Without conceding that the *Kim* case was correctly

[196] No. CV 05-3155 ABC (FMOx) (C.D. Cal. July 11, 2005) (unpublished). *See also Collello v. Securities and Exchange Commission*, 908 F. Supp. 738 (C.D. Cal. 1995), on which the *Kim* court heavily relied.

[197] Under rare circumstances, OIA may authorize a prosecutor to move forward with a treaty request to seize or restrain assets abroad without the prosecutor first obtaining a finding of probable cause.

decided, we note that there are a number of ways listed below to obtain such a probable cause finding.[198]

A. Background

In *Kim v. U.S. Department of Justice*, the U.S. Attorney for the Central District of California was conducting an investigation involving a fraud perpetrated in that district. In the course of the investigation, an Assistant U.S. Attorney (AUSA) asked OIA to request the Swiss government to restrain funds of a U.S. citizen held in a Swiss bank account. OIA made the request under the applicable mutual legal assistance treaty (MLAT), and the Swiss complied.[199]

The account holder then filed a motion under Rule 65 of the Federal Rules of Civil Procedure for an injunction directing the United States to withdraw its MLAT request and to ask the Swiss to release the funds. In support of his motion, the account holder argued that the MLAT request and subsequent restraint violated his Fourth Amendment rights because they were made without a finding of probable cause to believe that the restrained funds were subject to forfeiture as the proceeds of an offense.

The United States made three arguments in response: (1) that the Fourth Amendment does not apply to the restraint of funds overseas pursuant to an MLAT request because the foreign government, not the United States, actually restrains the funds; (2) that even if the Fourth Amendment applies, the applicable clause is the "reasonableness" clause (the right of

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[198] OIA will consider making a formal request without a probable cause determination where the assets located in a foreign state are held by a person "with no voluntary attachment to the United States." *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). If the facts support this conclusion, the prosecutor should discuss this possibility with OIA.

[199] The MLAT request provided sufficient facts to assure Swiss authorities that U.S. authorities had "reasonable suspicion that acts have been committed which constitute the elements of" the offenses for which the MLAT request sought assistance. Article 1(2) of the MLAT requires that the requesting state (here, the United States) make such a showing to the requested state (here, Switzerland). The showing required to trigger assistance under the MLAT as between the treaty partners neither alters nor substitutes for any showing U.S. authorities are required to make to a U.S. court to satisfy any applicable Fourth Amendment requirements. As expressed in the Technical Analysis to the MLAT:

> The "reasonable suspicion" standard is less stringent than the "probable cause" standard *applicable in the United States for the issuance of arrest and search warrants*. (Emphasis added.)

The MLAT standard was intended to set the threshold showing for securing assistance from the treaty partner (e.g., compelling testimony and production of evidence) at a reasonably low level so that the treaty partners could expect assistance early in an investigation. As stated in the Technical Analysis to the MLAT:

> [The "reasonable suspicion" standard] permits the verification of suspected offenses, which is one of the principal purposes of the Treaty.

the people to be secure against unreasonable searches and seizures) and not the "probable cause" clause (no warrant shall issue but upon probable cause); and (3) even if the probable cause standard (rather than the reasonableness standard) were applied, the requirement was satisfied because courts in California had previously issued two seizure warrants for other property in the United States in the same case.

The district court rejected all three arguments and granted the account holder's request for the injunction. First, the court said that the Government could not hide behind the actions of the Swiss government because in this case the Swiss were not engaged in a joint venture, conducting their own investigation based on evidence provided by the United States, but instead were merely acting as the agent of the United States pursuant to the treaty. Therefore, the Fourth Amendment applied.

Second, under the Fourth Amendment, the seizure or restraint of a bank account requires a finding of probable cause, not merely reasonable suspicion. Because a treaty cannot override the requirements of the Fourth Amendment, it was irrelevant that the treaty required a showing of reasonable suspicion and nothing more.[200]

Finally, the court held that the Government could not rely on the finding of probable cause in connection with the two seizure warrants issued in the same case because those warrants related to other property, not the property restrained in the Swiss bank account. A probable cause finding has two parts: probable cause to believe that a crime was committed and probable cause to believe that the property in question was derived from that crime. The findings made in connection with the other warrants may have established probable cause with respect to the commission of the offense, but said nothing about the nexus between the funds in Switzerland and that offense.

Accordingly, the court concluded that the Government's MLAT request violated the Constitution and should be enjoined.

B. Discussion

The following discussion sets forth the alternative ways in which a probable cause finding can be obtained before making a request of a foreign government to seize or restrain assets for forfeiture. Nothing in this section is intended to suggest that such a probable cause

[200] The court correctly held that the MLAT cannot override constitutional requirements. The court incorrectly imputed that motive to the Government's negotiated reasonable suspicion standard in the MLAT. More fundamentally incorrect, in OIA's view, is the court's determination that seeking a freeze pursuant to the MLAT requires a probable cause determination, presumably (1) by a U.S. court (2) before OIA makes the request.

finding is necessary other than as a matter of policy while the issues discussed in *Kim v. Department of Justice* are litigated in the appellate courts.[201]

1. Civil forfeiture cases

In a civil forfeiture case, the first option is to obtain a civil forfeiture seizure warrant for the property pursuant to 18 U.S.C. § 981(b) based upon a finding of probable cause by a judge or magistrate judge. This can be done on an ex parte basis. Section 981(b) applies to all civil forfeitures under section 981(a) (the general forfeiture statute for most federal crimes), 21 U.S.C. § 881(a) (the civil forfeiture statute for drug offenses), and any other forfeiture statute that contains language incorporating the procedures in chapter 46 of title 18 of the U.S. code, such as the alien smuggling provisions in 8 U.S.C. § 1324(b).[202] Accordingly, section 981(b) is available as a means of obtaining a probable cause finding in the vast majority of federal civil forfeiture actions; however, where a statute does not incorporate section 981(b), the prosecutor will have to make sure that there is an alternative statutory basis for the precomplaint seizure of the foreign property on a related finding of probable cause.

The second option is to wait until a civil forfeiture complaint is filed and then obtain an arrest warrant in rem from the district court (as opposed to the clerk of the court). Supplemental Rule G(3)(b)(ii) and (c)(iv) require a probable cause finding by a judge or magistrate judge before any arrest warrant in rem is issued for property that is not already in the custody of the Government, and provide for sending the warrant to a foreign country if the property is located abroad. Accordingly, obtaining an arrest warrant in rem under Rule G will be the preferred means of obtaining the required probable cause finding in support of MLAT requests in most civil forfeiture cases in which a forfeiture complaint has been filed.

Finally, whether or not a complaint has been filed, the Government may ask the court to issue a restraining order pursuant to 18 U.S.C. § 983(j). A restraining order may be issued on an ex parte basis. Restraining orders may only be issued upon a showing of probable cause—usually in the form of an affidavit submitted along with the application for the

[201] OIA will consider making a formal request without a probable cause determination where the assets located in a foreign state are held by a person "with no voluntary attachment to the United States." *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). If the facts support this conclusion, the prosecutor should discuss this possibility with OIA.

[202] *See also* 18 U.S.C. § 1594 (forfeiture provisions for human trafficking).

order.[203] Thus, the issuance of a restraining order will constitute the probable cause finding required to support the MLAT request.

2. Criminal cases

If a pending indictment contains a criminal forfeiture allegation relating to property located abroad, and the grand jury has made a finding of probable cause to believe that the property listed in the indictment is subject to forfeiture, the indictment itself will serve as the necessary probable cause finding for purposes of the MLAT request. Alternatively, once the indictment is returned, the Government may obtain a post-indictment ex parte restraining order pursuant to 21 U.S.C. § 853(e). Such a restraining order requires a finding of probable cause; therefore, the issuance of the restraining order will also provide the necessary probable cause determination.

The restraining order may be obtained in either of two ways: if the property is specifically listed in the indictment, most courts hold that the grand jury's finding of probable cause will be sufficient to support the issuance of a restraining order without any further submission by the Government.[204] However, unless the foreign authority has requested a restraining order to use in its proceeding, it should not be necessary for purposes of complying with Kim to obtain such an order where the property was listed in the indictment. Alternatively, if the property is not specifically listed in the indictment but is named in a bill of particulars, the Government may support its application for the restraining order with a probable cause affidavit.[205]

The legal authority for the issuance of a criminal seizure warrant against foreign based property is unclear. Section 853(f) authorizes an AUSA to obtain a seizure warrant from the court in the same manner as a search warrant under Rule 41, and section 853(l) provides that a federal court has "jurisdiction to enter orders as provided in this section *without regard to the location of any property which may be subject to forfeiture*." Rule 41(b) of the Federal Rules Criminal Procedure arguably limits the international reach of criminal search and seizure warrants. Rule 41 permits a federal court to issue warrants for foreign-based

[203] *See United States v. Melrose East Subdivision*, 357 F.3d 493 (5th Cir. 2004) (applying the probable cause requirement in *United States v. Monsanto*, 491 U.S. 600 (1989), to section 983(j)(1)(A)). Form applications for post-complaint restraining orders are available on the AFMLS Web site. *See, e.g.*, forms CIV1612 and CIV1613.

[204] *See United States v. Jamieson*, 427 F.3d 394, 405 (6th Cir. 2005) (initial issuance of restraining order may be based on grand jury's finding of probable cause); *United States v. Bollin*, 264 F.3d 391, 421 (4th Cir. 2001) (the grand jury's finding of probable cause is sufficient to satisfy the Government's burden).

[205] *See* forms CRM1104-09 for use in obtaining a post-indictment restraining order.

property, but only in domestic and international terrorism investigations, and not for any other types of investigations. Fed. R. Crim. P. 41(b)(3). Section 981(b) expressly overrides the conflicting language in Rule 41(b), whereas section 853(l) does not.

Additionally, section 853(f) is not as broad as the corresponding authority for civil seizure warrants under section 981(b). Criminal seizure warrants may only be obtained if it appears that a restraining order would be inadequate to preserve the availability of the property for forfeiture. The actual—as opposed to the constructive—restraint or seizure of property located abroad for U.S. criminal cases rarely, if ever, turns upon the type of U.S. preventive measure obtained. The type of protective measure obtained in the United States or the fact that the Government obtained such an order is usually irrelevant to the outcome of the deliberative process for obtaining a foreign preventive measure on behalf of the United States. Thus, the Government, for the most part, will be unable to present a strong argument to a U.S. court that a Rule 41 seizure warrant will better protect the availability for forfeiture of property located abroad than will a restraining order pursuant to section 853(e), mostly because the foreign government does not execute such orders, but instead obtains and enforces orders obtained pursuant to foreign law. For purposes of satisfying the holding in *Kim* in criminal cases it should always be sufficient to obtain a restraining order rather than risk litigating the scope of Rule 41(b) or trying to satisfy the higher showing needed to get a seizure warrant under section 853(f), or both.

VIII. Approval Process for Section 981(k) Seizure From Correspondent Bank Account

Section 981(k) authorizes the United States to restrain, seize and forfeit property held in bank accounts located outside of the United States by permitting the restraint, seizure, and forfeiture of an equivalent amount of funds from any correspondent/interbank account that the foreign financial institution holds in the United States. *See* 18 U.S.C. § 981(k). It is irrelevant for the purpose of section 981(k) whether the foreign funds to be forfeited ever transited through the foreign bank's U.S. correspondent account that is the subject of the section 981(k) forfeiture effort. Section 981(k) can be used to constructively restrain, seize, and forfeit assets abroad without having to resort to a treaty or letter rogatory request. However, use of this provision must be formally approved by AFMLS and will be approved only in extraordinary cases where the foreign government is unable or unwilling to provide assistance.

Approval to use section 981(k) rests with the chief of AFMLS in consultation with the appropriate officials from OIA, the Department of the Treasury, and the Department of State. Because these stakeholders in the policy issues implicated by the potential use of section

981(k) need an opportunity to review the proposed section 981(k) request to consider its ramifications, formal approval to utilize section 981(k) should be sought well in advance of the intended attempt to restrain or seize assets from any foreign bank's correspondent accounts. Applications requesting approval to use section 981(k) should be submitted in writing to the chief, AFMLS, and presented through the deputy chief of AFMLS' IPU, who has responsibility for coordinating the approval process. Sample section 981(k) approval requests can be obtained from the AFMLS IPU. Prosecutors should be mindful that requests for authority to use section 981(k) as the basis for forfeiting funds on deposit in accounts located outside the United States will only be approved if there are no other viable means of effecting forfeiture of the foreign property and should be considered only as a last resort. An application will not be approved solely because it is deemed more expedient than using the treaty mechanism.

Section 981(k) requests will be approved only in limited cases, such as when:

(1) There is no applicable treaty, agreement, or legal process in the foreign nation that would allow it to restrain, seize, or forfeit the target assets for the United States;

(2) There is a treaty or agreement in force, but the foreign nation does not recognize the U.S. offense that gives rise to forfeiture;

(3) There is a treaty or agreement in force, and in spite of its treaty obligation, in the past the foreign nation has failed to provide forfeiture assistance, or provided untimely or unsatisfactory forfeiture assistance;

(4) There is a treaty or agreement in force, but the foreign nation has no domestic enabling legislation that would permit it to fully execute U.S. forfeiture orders or judgments; or

(5) There is another significant reason that in the view of the stakeholders justifies use of section 981(k), e.g., corruption within the foreign government that may compromise the execution of a treaty request, or the inability to repatriate or return victim money to the United States after forfeiture.

IX. Lack of Administrative Forfeiture Authority for Overseas Property

Forfeiture of assets located abroad must be initiated as part of a pending criminal case or judicial civil forfeiture action. There is no authority under federal law to initiate the

administrative forfeiture of property that is not physically located in the United States or its territories or possessions. Administrative forfeiture, of course, can be pursued against property properly repatriated to the United States pursuant to section VI at page 160, to the extent that there is no other prohibition to forfeiting such property administratively.

X. Consultation for Civil Forfeiture of Property Located Overseas

According to section 9-119.103 of the *U.S. Attorney's Manual* (USAM), AUSAs shall consult with OIA before filing an in rem forfeiture 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.

XI. Settlements, Plea Agreements, and Attorneys Fees

Federal prosecutors should neither agree to, nor enter into, any settlement or plea agreement affecting assets located abroad and should not make any representation about the availability of assets abroad to pay for legal fees incurred by a defendant without first speaking to an AFMLS IPU attorney about the foreign consequences of those decisions. *See, generally*, USAM 9-113.100 *et seq*. and USAM 9-119.200 and 9-119.202. In addition, prosecutors should be aware of limitations on negotiating with fugitives and persons fighting extradition. The policy considerations underlying the consultation and approval procedures that apply to settlement and plea agreements and agreements to use forfeitable funds to pay for attorney's fees apply with even greater force in the international context, particularly in light of the problems inherent in releasing funds held abroad. *See* section VII at page 160. In some cases, a U.S. request to restrain or seize assets will precipitate the initiation of a foreign criminal investigation, as many jurisdictions are required to prosecute all criminal matters brought to their attention. Thus, it may not be possible to make commitments to defendants or claimants regarding the disposition of funds restrained or seized abroad because the funds will remain restrained or seized under foreign law, and the United States has no authority to bind a foreign jurisdiction regarding the disposal of assets made in any U.S. proceedings. In addition, all plea and settlement agreements should include broad waiver and indemnification language that protects both U.S. officials and foreign officials and their governments from any liability for seizing, restraining, or forfeiting assets located abroad. Finally, prosecutors should also get the defendant or claimant to specifically agree to waive any right to attorney's fees under foreign law as well as agree not to oppose any legal action in any foreign jurisdiction related to U.S. forfeiture efforts or any U.S. request for related financial records.

XII. Enforcement of Judgments

With increasing frequency, countries are able to afford full faith and credit to U.S. forfeiture judgments affecting property within their borders. Before transmitting a forfeiture judgment via OIA to another jurisdiction to be given effect, prosecutors should verify that the judgment is final under U.S. law. In other words, the judgment must be final and no longer on appeal, or, where no appeal has been filed, the time for filing an appeal must have expired. These facts should be noted in the legal assistance request to the foreign authority in the jurisdiction where such judgment is to be enforced. In criminal cases, great care should be taken to obtain a final order or judgment of forfeiture. In no case should a preliminary order of forfeiture, which is only valid as to the criminal defendant, be sent to a foreign authority for execution instead of the completed final order of forfeiture. This is particularly true in cases where an asset forfeited to the United States is not in the name of the defendant, where the defendant has a legal spouse or common law spouse, or when another person could claim a valid interest in the forfeited property even if the defendant has agreed to forfeit the asset in a plea or settlement agreement. Prosecutors should be mindful that third parties who did not appear in the U.S. proceedings may still be permitted to challenge enforcement of the U.S. forfeiture orders under foreign law. Thus, when transmitting a U.S. forfeiture judgment for execution in a foreign country, it is always advisable to show the jurisdiction that third parties were provided or sent notice of the forfeiture proceedings, had an opportunity to challenge the forfeiture, and were either unsuccessful in their challenge or failed to avail themselves of the right to contest the forfeiture.

XIII. International Sharing

It is the policy of the United States to encourage international asset sharing and to recognize all foreign assistance that facilitates U.S. forfeitures so far as consistent with U.S. law. International sharing is governed by 18 U.S.C. § 981(i), 21 U.S.C. § 882(e)(1)(E), and 31 U.S.C. § 9703(h)(2), and is often guided by standing international sharing agreements or the subject of a future case-specific forfeiture sharing arrangement to be negotiated by AFMLS and approved by the Department of State. The decision to share assets forfeited to the United States with a foreign government is a completely discretionary function of the Attorney General or the Secretary of the Treasury. It requires the concurrence of the Secretary of State, and, in certain circumstances, it is a decision that can be vetoed by Congress. The 1992 international sharing memorandum of understanding between the Departments of State, Justice, and Treasury expressly prohibits investigators or prosecutors from making representations to foreign officials "that assets will be transferred in a particular case, until an international agreement and commitment to transfer assets have been approved by the Secretary of State and the Attorney General or the Secretary of the Treasury."

Prosecutors and federal law enforcement agencies always should be mindful that any domestic sharing occurs after all international sharing is completed, and that the domestic sharing of assets located abroad will occur from and come of the federal share, which is the amount of money that the United States has available after completion of the international sharing process. Thus, federal prosecutors and investigators should take care not to make any representations about the sharing of forfeitable assets located abroad or forfeited domestically with the assistance of a foreign government to either representatives of the foreign government or any of the domestic law enforcement partners whose assistance may have contributed to the seizure and ultimate forfeiture of the assets in question.

Foreign governments are not required to follow a specific process to submit a sharing request to the United States. They may do so pursuant to a treaty, a sharing agreement, or even via other diplomatic or law enforcement channels. Prosecutors and law enforcement agencies can and should make spontaneous sharing recommendations whenever they receive foreign assistance that facilitated the forfeiture of an asset in a U.S. case, particularly when that asset is located in the United States. When the United States forfeits assets in a judicial forfeiture case with the help of a foreign state and the seizing agency is a Department of Justice component or participant in the Department of Justice forfeiture fund, it is the responsibility of the federal prosecutor assigned to the case to send a formal sharing recommendation to AFMLS. In an administrative forfeiture matter, the seizing agency is responsible for the recommendation. In cases that implicate the Treasury forfeiture fund, the seizing agency, e.g., Internal Revenue Service, U.S. Secret Service, or Immigration and Customs Enforcement has the responsibility to send a sharing recommendation to TEOAF. However, the seizing agency should consult the prosecutor on the case first. For Department of Justice forfeiture fund international sharing recommendations, AFMLS IPU prepares the sharing recommendations for approval by the Deputy Attorney General. For Treasury forfeiture fund international sharing recommendations, the director of TEOAF approves the sharing recommendations. AFMLS and TEOAF also obtain State Department and each other's concurrence for each proposed transfer to a foreign government after it is approved by their respective designees. This interagency process can be lengthy. To avoid delays, it is advisable to make the international sharing recommendation as soon as is practicable, or immediately after the final order forfeiting the foreign assets is obtained. At the earliest possible time, the seizing agency should note in any electronic asset tracking system, such as CATS or TALONS, that a particular asset might be, is, or will be subject to an international sharing request or recommendation—and definitely before that asset has been liquidated.

Prosecutors and federal law enforcement agencies always should be mindful that domestic sharing will occur only after completion of the international sharing process, and

will be taken from the federal share, which is the amount of money that the United States has available at that time.

Lastly, with increasing frequency countries are enacting laws to permit them to share domestically forfeited assets with other countries. Accordingly, if U.S. prosecutors or investigators assisted in foreign cases that resulted in a foreign forfeiture, they are encouraged to contact an AFMLS IPU attorney to see whether it would be fruitful to submit a sharing request to that country.

Chapter 11

Appointment of Trustees and Monitors

I. Quick Points

A. Purpose

The purpose of the trustee and monitor policy is to provide guidance for the appointment of court-appointed trustees and monitors in cases involving complex assets or business enterprises in Department of Justice federal forfeiture cases.

B. Responsibilities of trustees and monitors

The key distinction between a monitor and a trustee is that a trustee has the authority to manage an enterprise. A monitor observes and reports findings. Note: a receiver is a fiduciary who is responsible only to the court and cannot be paid from the Assets Forfeiture Fund (AFF).

C. Circumstances in which a trustee or monitor should be engaged

In almost all cases, the value of an ongoing business can be preserved without appointment of a trustee or monitor. In the typical forfeiture case where property has been restrained criminally or civilly, the U.S. Marshals Service (USMS) has the capability with its own resources or with a property management contract to manage and to sell property, including most businesses.

Appointment of a trustee or monitor will occur only when (1) it is plainly necessary, (2) other alternatives have been considered and rejected, and (3) there is clearly sufficient net equity in the asset to cover the cost of the trustee or monitor. The Government must avoid involvement in the management of businesses that require aggressive action, capital investment to remain competitive, or the assumption of considerable risk. In rare cases, compelling law enforcement or policy considerations warrant the appointment of a trustee or monitor where there may be insufficient equity in the enterprise to cover the cost of the trustee.

D. Preseizure planning

In cases involving the appointment of trustees and monitors, prompt comprehensive preseizure planning with the USMS is mandatory.

E. Federal acquisitions regulations

All federal procurement rules and regulations must be followed in order to award a contract to a trustee or monitor. Under the federal acquisitions regulations (FAR), only the government contracting officer (CO) and contracting officer's technical representative (COTR) of record are authorized to direct the work of a trustee or monitor. All instructions to the trustee or monitor, whether from the U.S. Attorney's Office (USAO) or USMS, are communicated through the COTR.

F. Selection and appointment of a trustee or monitor

The USMS Office of Procurement will award a contract to a trustee or monitor based on a court order or competitive procedures outlined in the FAR. A sole source contract, although discouraged, can be awarded to a trustee or monitor as long as an appropriate justification is provided to the CO. Typical justification includes *urgent and compelling* circumstances or where only one known source can provide the required services.

G. Payment of monitor and trustee fees and expenses

Prior to entry of a final order of forfeiture, the AFF, 28 U.S.C. § 524(c), is available under certain circumstances to pay trustee and monitor fees in cases where a *Department of Justice* agency is the lead law enforcement agency. Upon the entry of an order of forfeiture, payment of fees charged by a trustee ordinarily will be made from the proceeds of the business unless compelling law enforcement or policy considerations warrant payment from the AFF. Charges to the AFF for trustees and monitors are to be recovered, as a cost, from the proceeds of sale prior to the payment of restitution, restoration, remission, and equitable sharing.

H. Goals, duties, and powers of the trustee or monitor

The restraining order or other order appointing a trustee or monitor and a statement of work define the goals of the trustee or monitor. Prior to appointment, an initial assessment must be made to determine the purpose of the trusteeship or monitorship, i.e., to prevent dissipation of the asset or to prevent the enterprise from engaging in illegal activity, or both.

I. Reporting requirements of the trustee or monitor

The trustee or monitor reports directly to the COTR. The USAO and USMS Asset Forfeiture Office (AFO) are encouraged to consult with and work with the trustee or monitor in carrying out the contract, but it is the COTR who directs the work of the trustee or monitor.

J. Dispute resolution

The USAO and USMS must consult and work closely together to address issues related to the need for engaging a trustee or monitor, as well as issues related to the duties and responsibilities of a trustee or monitor. Dispute resolution must be sought from the Asset Forfeiture and Money Laundering Section (AFMLS). Timely resolution of disputes is critical.

- The USAO must consult with AFMLS before seeking the appointment of a trustee or monitor.

- The USMS field office must notify USMS headquarters when it becomes aware that a trustee or monitor may be appointed.

- The USAO or USMS must notify the Asset Forfeiture and Management Staff (AFMS) when they become aware that a business is losing money, has insufficient equity, or will be sold at a loss.

II. Department of Justice Policy: Trustees and Monitors in Forfeiture Cases

A. Purpose

The purpose of the trustee and monitor policy is to provide guidance that best serves the interests of the Department of Justice components in Department of Justice federal forfeiture cases on the court appointment of trustees and monitors in diverse cases involving complex assets, or business enterprises, including assets located in foreign countries. These guidelines seek to achieve the following:

(1) Preserve assets for the Government in order to achieve the ultimate goals of separating criminals from assets that are the proceeds of or have facilitated criminal activity and of dismantling criminal enterprises;

(2) Clarify our procurement obligations, while enhancing communication between USAOs and the USMS;

(3) Clarify responsibilities with respect to preseizure planning in any case in which there is the potential for the appointment of a trustee or monitor;

(4) Provide mechanisms for dispute resolution;

(5) Provide guidance in determining whether the AFF is an appropriate source of funding for the expenses of trustees and monitors and to promote efficient use of resources.

The following principles underlie this policy:

(1) Unless compelling circumstances exist, the United States shall seek appointment of a trustee or monitor only in cases involving complex assets and/or enterprises and where the United States will recoup its expenses.

(2) Given the labor-intensive nature and the high cost of administering a trusteeship or monitorship, and the potential for ongoing litigation or resolution of other issues even following a final order of forfeiture, trustees and monitors are appointed only when other means of protecting the United States' interests are plainly inadequate or inappropriate.

(3) The least intrusive method of operating a business (in which all or a part of the enterprise or its ownership is subject to forfeiture) should be employed, particularly prior to entry of a final order of forfeiture.

B. Statutory authority

The authority to appoint a trustee or monitor derives from 18 U.S.C. §§ 1963(d) and (e), 21 U.S.C. §§ 853(e) and (g), and 18 U.S.C. § 983(j), which permit a court to act to preserve property. 18 U.S.C. §§ 1964(a) and (b) grant courts broad injunctive and remedial authority in RICO cases. Unless the trustee or monitor is engaged through an already existing contract, the FAR must be followed. 48 C.F.R. Part 1.000 *et seq*.

C. Definitions and responsibilities

Historically, the terms *trustee*, *monitor*, *receiver*, and *custodian* have been used somewhat interchangeably in forfeiture cases. The key distinction between a monitor and a trustee is that only a trustee has the authority to manage an enterprise. A monitor reports findings. A receiver is a fiduciary who is responsible only to the court. *Custodian* is a very general term that refers to a fiduciary who takes custody of property.

A trustee is appointed by a court and is granted the authority to manage and/or dispose of property.[206] Trustees may be appointed before or after property has been seized or forfeited.

A monitor is appointed by the court and is responsible for examining the operations of a business or enterprise. A monitor also reports findings to the court as to whether the assets of a business or enterprise are dissipating and will be available for forfeiture to the United States. Monitors do not control the operations of a business or enterprise, but report on their findings. Similarly, monitors do not dispose of property. In some cases, a monitor may be responsible for approving payments (e.g., all payments over $10,000; payments not in the ordinary course of business) or performing other limited oversight functions.[207]

A CO is the only employee with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The CO is responsible for ensuring that (1) the requirements of pertinent laws, regulations, etc., have been met; (2) sufficient funds are available for obligation; and (3) contractors receive impartial, fair, and equitable treatment.

The CO typically manages multiple contracts and is rarely the subject matter expert with respect to the contracted goods and services. The COTR is the individual who manages the performance of the contract from a technical perspective after it is awarded. COs appoint COTRs to be the eyes and ears of the CO. The COTR is responsible for directing the work of a trustee or monitor in consultation with the USAO and USMS AFO. While consultation with the trustee and the USMS, USAO, and other government personnel is appropriate and encouraged, only the CO and COTR may direct the work of the trustee. The COTR is given express authority by the CO and typically performs the following functions:

- Assists the contractor in interpreting technical requirements of the contract;
- Recommends changes in contract terms to the CO;

[206] Examples of a trustee's responsibilities include, but are not limited to, those described in Appendix J at J–1.

[207] Examples of a monitor's responsibilities include, but are not limited to, those described in Appendix J at J–3.

- Monitors and evaluates contractor performance;
- Reviews and approves invoices;
- Recommends corrective actions; and
- Inspects, accepts, or rejects contract deliverables.

Section II.G discusses at length procurement procedures for trustees and monitors under the FAR.

D. Determining when a trustee or monitor should be engaged

The ultimate goal in a forfeiture case is to dismantle a criminal enterprise and to deprive a criminal of property used in or acquired as a result of illegal activity. Prior to the Government obtaining custody of an asset as a result of seizure or forfeiture, the Government has an interest in preserving the property for forfeiture and preventing further illegal activity.

Prior to forfeiture, the owners and management of an ongoing business will usually continue to operate the business unless there is probable cause to believe that the owners or management have been or are involved in criminal conduct in operating the business.

In almost all cases, the value of an ongoing business can be preserved without appointment of a trustee or monitor. In the typical forfeiture case where property has been restrained (sections 853(e), 1963(g), and 983(j)) or seized pursuant to a criminal forfeiture warrant (section 853(f) or, civilly, section 981(b)(1), etc.), the USMS has the capability with its own resources or with an existing property management contract to manage and to sell property, including most businesses.

Depending on the nature of the criminal conduct, appointment of a trustee or monitor may be appropriate. The type of oversight required depends on the stage of the case, the degree of ownership targeted for forfeiture, and the nature of the ownership interests (i.e., shares, partnerships, etc.). For example, it is usually preferable to monitor a minority partnership or stock interest. If a trustee is appointed to protect that Government's minority interest, the Government may encounter great difficulties dealing with possibly hostile majority interest holders. Similarly, if the Government has identified a majority interest for forfeiture, it must take into consideration the minority interests when fashioning a trusteeship or monitorship.

Alternatives to the appointment of a monitor or trustee must be considered to determine the least intrusive means of accomplishing and protecting the Government's goals and interests, including, but not limited to:

(1) Particularized restraining order with or without USMS oversight and consequences for violations of the order (such as the appointment of a trustee or monitor or contempt proceedings);

(2) Appointment of a business or property manager by USMS contract;

(3) Restraint or seizure of valuable assets, equipment, or inventory (restraint is preferred);

(4) Oversight and/or management by state or local regulatory agencies;

(5) Filing of a *lis pendens*;

(6) Interlocutory sale;

(7) Foreclosure by a lienholder;

(8) Retention of a professional by agreement of the business and at its own cost, to provide oversight and ensure there are no future violations;

(9) Enforcement of state or local nuisance laws;

(10) Seizure of property to satisfy outstanding tax obligations; and

(11) Performance bond, or some combination of the above.

The Department of Justice must endeavor to avoid involvement in the management of businesses that require aggressive action, capital investment to remain competitive, or the assumption of considerable risk. It may be permissible to restrain or seize such a business if it is the only alternative for accomplishing the Government's objectives.

Generally, a protective order must be sought any time an ongoing business entity is targeted for forfeiture. This order should seek to restrain the owners from further encumbering the business, dissipating its assets, or selling the business. If the protective order alone, or in combination with the preceding alternatives, will not ensure the availability of the asset for forfeiture, the appointment of a manager or monitor arranged by a preexisting contract with the USMS may be appropriate. If the appointment of an outside monitor or trustee is sought, FARs must be followed. When considering a monitor or trustee, the

business must be determined to be financially viable. Appointment of a trustee will occur only when it is clearly necessary and all other alternatives have been considered and rejected. In some cases, compelling law enforcement or policy considerations may warrant the appointment of a trustee or monitor even though there is not or may not be sufficient equity in the enterprises to cover the cost of the trustee or monitor. In insufficient equity cases, the USAO must thoroughly document the reasons for rejecting alternatives to the appointment of a trustee or monitor.

In addition, the AFMS must be notified as soon as the USAO or USMS become aware that a business is losing money, has insufficient equity, or will be sold at a loss. Once it is determined that continued operation of the business is not financially viable, absent compelling circumstances, the USAO will seek to terminate the business as soon as practicable, with due regard for the ownership rights of the defendant/owner (prior to forfeiture) and other partners, shareholders, and third parties. Alternatively, the business could be sold by interlocutory sale, with the assets of the business sold and disposed of, even if such sale may result in a loss.

E. Prerequisites to the selection of a trustee or monitor: Preseizure planning and other requirements

The determination of the appointment of a trustee or monitor is made only after the interested components (USAO, USMS, and investigative agencies) agree on a preseizure plan, as discussed below. The USMS field office is required to notify USMS headquarters as soon as it becomes aware that a trustee or monitor appointment is being contemplated. In cases involving the sort of complex assets that may require a trustee or monitor, preseizure planning with the USMS is mandatory. USMS headquarters will notify the USMS Office of Procurement if preexisting contracts will likely not be suitable.

The guidelines for preseizure planning require that a USAO:

(1) Contact the USMS to engage in formal preseizure planning prior to seizing or restraining certain types of assets, including businesses and real property;

(2) Engage in timely preindictment coordination with the USMS in criminal forfeiture cases;

(3) Consult with the USMS prior to the submission of any proposed orders to a court that impose any restraint, seizure, property management, or financial management requirements relating to property in USMS custody;

(4) Consult with AFMLS before initiating a forfeiture action against, or seeking a temporary restraining order affecting, an ongoing business;

(5) Obtain the concurrence of AFMLS before initiating a forfeiture action under a money laundering facilitation theory; and

(6) Consult with AFMLS before seeking the appointment of a trustee or monitor.

Preseizure planning includes a financial assessment of the enterprise subject to forfeiture and a determination as to whether it is in the best interest of the Government to take over or to continue the operation of a business. The preseizure plan must develop (or include) to the extent feasible an estimate of the (1) net equity subject to forfeiture; (2) cash flow of the business; (3) fees and other costs of the trustee or monitor; and (4) likely duration of the trusteeship or monitorship.

With respect to businesses continuing in operation, once the Government obtains access to business records and other information, a business review must be developed specifically identifying the challenges faced by the business and the requirements for it to succeed. The business review must identify key historic financial data, the current operating environment (including financial activity), and projections for the next 2 years. Projections should address best and worst case scenarios for the operation of the business as well as exit strategies. If the business is likely to lose money or be sold at a loss, the business plan should include a plan to mitigate loss or a plan for liquidation. If necessary, the USMS and AFMS can provide contract services to assist in developing a business plan, which expenses may be paid from the AFF.

The need to maintain confidentiality before indictment, or while an indictment is sealed, may also be critical. Appropriate measures will be taken to ensure that sensitive law enforcement information is protected while consultation and coordination occurs among the involved components.

F. Selection and appointment of a trustee or monitor

1. Qualifications of the trustee or monitor

The purpose of a trusteeship or monitorship will determine the appropriate qualifications of the trustee or monitor. The trustee or monitor (and personnel on their staff) must have expertise in the enterprise's industry. For example, if the purpose is to manage a business to prevent its dissipation, a trustee with a business and accounting background is preferred. A

trustee cannot provide actual law enforcement, such as that provided by federal agents or police personnel. (The AFF is not available to fund law enforcement activities.) It may be necessary for a trustee to retain a consultant or provide personnel to address compliance and enforcement issues which would ordinarily be performed by a business.

It is required that a trustee or monitor undergo a background review to ensure that nothing in the individual's past indicates an inability to act as a trustee or monitor. A background check may be conducted by the USMS or any federal investigative agency.

2. Sources for potential trustees and monitors

As previously discussed, the USMS may have existing contracts or access through AFMS to existing contracts with companies that provide accounting, business, and monitoring services. If those preexisting contracts are not suitable, some possible sources for potential trustees and monitors include retired Department of Justice or Treasury law enforcement agents or trustees from existing panels of private trustees utilized in U.S. bankruptcy cases. The Securities and Exchange Commission and other regulatory agencies are also sources for competent experienced trustees. Trustees and monitors are available from the private sector, particularly the local business community or accounting firms that provide business management services.

G. Procurement under FAR

1. Three methods of contracting with a trustee or monitor

Unless the trustee or monitor is engaged through an already existing contract, the USMS Office of Procurement will award a contract to a trustee or monitor based on a court order or competitive procedures outlined in the FAR. If the total cost of the trustee or monitor is estimated at under $100,000, a simplified process is used. A simplified acquisition typically takes 60 days to award.

If the cost of a trustee or monitor is estimated at over $100,000, the FAR requires open competition involving procedures which are lengthy, since it is necessary to perform multiple steps in order to award a contract. A typical large purchase contract takes 180 days to award. In that case a sole source acquisition may be considered.

A sole source acquisition is defined as a contract for the purchase of supplies or services that is entered into or proposed to be entered into by an agency after soliciting and negotiating with only one source. A sole source contract, although discouraged, can be

awarded to a trustee or monitor as long as an appropriate justification is provided to the CO. Typical justification includes "urgent and compelling" circumstances, where only one source can provide the required services or where a court orders the appointment of a particular trustee or monitor. *See* section II.J at page 183. A sole source justification must be completed prior to the award of a sole source contract. The justification must meet the necessary requirements for the CO to approve. The sole source acquisition process can take up to 60 days or more to complete.

2. Statement of work

A statement of work (SOW) sets forth the duties and responsibilities of the trustee or monitor. The SOW is an integral part of the contract with the trustee or monitor.[208] A typical example of a duty of a monitor in a SOW could be reviewing books and records of a business under restraint. Ideally, the SOW should be a part of the restraining order either as a section of the order or an attachment. The SOW should reflect the duties and responsibilities likely to be needed and should not be a laundry list addressing every potential task. A SOW can be expanded or contracted depending on the changing circumstances of the case.

3. Use of staff, consultants, and private counsel by trustees and monitors

Consultants and administrative staff are often required by trustees and monitors to support their work. The CO and COTR, in consultation with the USAO or the USMS, must approve such expenditures in advance. Staff needs, including professional and administrative staff who report directly to the trustee or monitor, and outside consultants, including private counsel, must be negotiated during the interview of the trustee or monitor and included in the SOW.

4. Cautionary note

Difficulties with the execution of the contract usually occur when individuals other than the COTR interact with a trustee or monitor resulting in the failure of the Government to "speak with one voice." This can be the result of the trustee or monitor receiving contradictory or erroneous directions from unauthorized personnel. Additionally, when government personnel direct the trustee or monitor *without* the requisite authority to do so, such direction exposes the Government to claims for additional costs, adjustments to the contract schedule, and adjustments to other contract terms and conditions. Such direction

[208] A list of possible examples or duties and responsibilities are set forth in Appendix J at J–1.

may also provide the contractor an opportunity to avoid the obligation to perform under the contract. Finally, while the Government may avoid liability for an unauthorized act, the person who provided such direction may find him or herself personally liable in an action brought by the contractor.

H. Payment of monitor and trustee fees and expenses

1. Availability of Department of Justice Assets Forfeiture Fund

AUSAs and USMS personnel must be aware that the costs of a trustee or monitor are a cost of the forfeiture action. Such costs may be paid out of the proceeds of the ongoing business or directly from the AFF (28 U.S.C. § 524(c)), as discussed above. If the costs are paid directly from the AFF, the AFF is reimbursed upon sale of the asset just as any other forfeiture cost is reimbursed (e.g., liens, maintenance, storage, etc.) prior to payment of restitution and equitable sharing. The only time the AFF would not be reimbursed is if the sale resulted in a loss, a situation which should be avoided unless compelling circumstances exist. *See* discussion below and elsewhere in this policy.

Prior to entry of a final order of forfeiture, the AFF is available to pay trustee and monitor fees when (1) an asset has been seized for forfeiture pursuant to a civil or criminal forfeiture proceeding or is subject to a criminal or civil restraining order; (2) the court declines to order payment from the proceeds of the ongoing business, or an evaluation of the business reveals there are insufficient funds available to pay the costs of the trustee or monitor, but compelling law enforcement or policy considerations warrant the appointment of a trustee or monitor; and (3) the services of a trustee or monitor are needed to protect the Government's interests and less intrusive means for accomplishing the Government's goals are unavailable. *See* section II.D at page 176.

Upon the entry of a preliminary or final order of forfeiture, payment of fees charged by a trustee ordinarily will be made from the proceeds of the business, unless compelling law enforcement or policy considerations warrant payment from the AFF. *See* section II.E at page 178, 18 U.S.C. § 1963(e), and 21 U.S.C. § 853(g).

Payment of the fees of a trustee or monitor shall be charged against the AFF by the USMS. The COTR reviews invoices from the trustee or monitor and approves payment from the AFF. (In some cases the COTR may dispute the invoice because the services were not included in the contract.)

I. Defining the goals, duties, and powers of the trustee or monitor

1. Defining

The restraining order or other order appointing a trustee or monitor must define the goals of the trustee or monitor. Prior to appointment, an initial assessment must be made to determine the purpose of and need for the trusteeship or monitorship (i.e., to prevent dissipation of the asset or to prevent the enterprise from engaging in illegal activity, or both), as well as its goals.

The theory of forfeiture under which the property is seized and the nature of the business itself will inform the goals and duties of the trustee or monitor. For example, if the business subject to forfeiture was acquired with proceeds of illegal activity and is self-supporting or is subject to forfeiture as a substitute asset, the goal of the Government generally is to prevent dissipation of the business and its assets. Monitorship or trusteeship of such an asset usually requires less oversight and more often results in a profitable forfeiture than the forfeiture of an enterprise used to facilitate illegal activity.

In contrast, a business used to facilitate illegal activity often requires intense oversight to prevent further illegal activity and frequently presents difficult management, safety, or public relations issues, depending on the nature of the business. The AFF is not available to pay expenses occurred when a law enforcement function is performed. *See* section II.F.1 at page 179. Additionally, when a business which is or was facilitating illegal activity is identified for forfeiture, restrained, or forfeited, the illegal funds that have supported the business typically disappear. Such businesses often have no real value when they are operated in a legitimate manner. They may also require investment of capital to meet state and local regulatory standards. Unless compelling circumstances exist, appointment of a trustee or monitor in such cases, and indeed seizure and forfeiture, should be avoided.

J. Reporting—trustees and monitors

The issue of to whom a trustee or monitor is responsible is complex. The trustee or monitor reports directly to the COTR. The trustee or monitor is also answerable to the appointing court and to the Government, which has appointed them to protect and prevent dissipation of the asset. They may have fiduciary responsibilities to the defendant and owners of property identified for forfeiture until the entry of a preliminary order of forfeiture and may have continuing responsibilities to non-defendant owners, partners, shareholders, and third parties. Their costs are approved by the COTR and usually paid by the AFF.

The requirement that the COTR direct the trustee or monitor does not mean that the USAO or USMS is prevented from communication or discussion with the trustee or monitor about the assets and, in fact, such discussions are important and encouraged; however, only the COTR actually directs the trustee or monitor.

An example might be where drug sales and prostitution are occurring near or in a business subject to forfeiture and a trusteeship. The trustee and AUSA may propose additional security. It is the COTR and CO's responsibility to determine that (1) additional security is required and is within the terms of the SOW; (2) the contract does not provide for additional security and modification is necessary; or (3) what is needed is law enforcement, something which the trustee cannot prove and for which the AFF is not available to pay. Preferably, the discussions about additional security would take place in a conference call or ongoing conference calls with the interested parties.

Depending on the nature of the case, personal interest, or style of the court, the court may take a greater or lesser degree of oversight of the trustee or monitor. It is not uncommon, however, for the court itself to recommend a specific trustee or monitor. In that situation, the trustee or monitor may feel a greater responsibility and accountability to the court. The COTR is ultimately responsible for directing the work of the trustee or approving payment from the AFF, but modification to the contract can be made if ordered by the court. Payment from the AFF is only available through a contract, not a court order. (*See* section II.G at page 180.)

The USAO and USMS should be aware that it is difficult to direct the trustee or monitor and to control costs in a situation where the court has appointed a trustee or monitor without input from the COTR, USAO, or USMS, or where a court wants close control over a trustee. The USAO and USMS, through the COTR, must exercise some degree of control over a trustee or monitor and their costs in order for the AFF to be a source of payment. *See* section II.G at page 180.)

Any fiduciary obligation of a trustee to the defendant's interest in the enterprise ends following a preliminary order of forfeiture. An obligation to non-defendant owners and third parties continues until those interests are resolved through the ancillary hearing process and final order of forfeiture. Similarly, the court's oversight usually diminishes as the Government moves toward completion of forfeiture. Once the appellate process has ended and a final order of forfeiture has been entered, the court normally is not involved unless residual issues remain, such as final sale of the property and distribution of proceeds.

Chapter 12

Litigation Issues

I. Avoiding Accusations of Vindictive Prosecution

Relying primarily on the different burdens of proof applicable to criminal as opposed to civil cases, the Supreme Court has held that an acquittal in a criminal case does not bar a subsequent civil forfeiture action. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972). However, prosecutors initiating a civil forfeiture proceeding after a decisive event in the criminal case should be mindful of the potential for a claim of vindictiveness.

In *United States v. Goodwin*, 457 U.S. 368 (1982), the Supreme Court held that prosecutors possess wide discretion in making charging decisions. In the few cases where the Court has found it necessary to presume vindictiveness, it has done so where the defendant has exercised some right, and there exists reasonable likelihood that the prosecutor acted vindictively in response to the assertion of that right.[209] The prosecutor can overcome this presumption by providing the court with objective evidence supporting the prosecutor's decision.[210]

Though it is difficult to generalize, the following considerations influence the vindictive prosecution analysis. One consideration is the timing of the prosecutorial decision at issue. Decisions made in a pretrial setting, at a time when the prosecutor may still be discovering and assessing relevant information, are less likely to merit a presumption.[211] In contrast, a prosecutorial decision made after trial begins is more likely to merit a presumption.[212] A second consideration is the nature of the right the defendant seeks to invoke. If the defendant merely invokes pretrial procedural rights, e.g., the right to a jury trial, to move to suppress, to plead an affirmative defense, or to challenge the sufficiency of the indictment, "it is unrealistic to assume that a prosecutor's probable response to such motions is to seek to

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[209] *United States v. Goodwin*, 457 U.S. 368, 373 (1982).

[210] *Id*. at 376, n.8.

[211] *Id*. at 377.

[212] *Id*.

penalize and to deter."[213] In contrast, if the defendant invokes a right to a new trial to collaterally challenge the conviction, the likelihood of vindictiveness may be greater.[214]

Given these considerations, care should be exercised to avoid the appearance that the Government has pursued criminal charges vindictively because the defendant exercised a right in the parallel civil forfeiture proceeding.[215] If the criminal charge follows a routine pretrial event in the civil forfeiture case, e.g., the filing of an administrative or judicial claim, the risk of a court indulging a presumption of vindictiveness is negligible.[216] In contrast, if the defendant prevails on the merits of a civil judicial forfeiture case, and criminal charges come afterwards, the prosecutor should be prepared to articulate the reasons for the timing of the criminal charges.

Care should also be exercised in the inverse situation, i.e., where the Government pursues civil forfeiture after the initiation of a parallel criminal case. However, in most instances a civil forfeiture action filed after events in a criminal case—even decisive events—should not give rise to a presumption. The initiation of a civil forfeiture action prior to the trial of the criminal case should not give rise to a presumption because pretrial proceedings in criminal cases usually involve routine events. Moreover, even after decisive events have occurred in the criminal case, e.g., a jury has returned an acquittal verdict against one or more of the defendants, there are often sound reasons why a prosecutor may decide to pursue an alternative remedy such as civil forfeiture. For example, the Civil Asset Forfeiture Reform Act (CAFRA) of 2000 grants the Government 90 days after a claim is filed contesting the forfeiture of an asset in which to commence a judicial forfeiture proceeding against that same asset. A prosecutor who elects to file a claim within that 90-day period—even if a decisive event occurs in the criminal case before the expiration of the 90-day period—would not be acting vindictively.

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[213] *Id*. at 381.

[214] *See Blackledge v. Perry*, 471 U.S. 21 (1974) (defendant exercised his right to a trial de novo and consequently, during the retrial, the state increased the charge from a misdemeanor to a felony; the Court held that although there was no evidence that the prosecution acted vindictively by increasing the misdemeanor charge to a felony, the concern is the defendant's "fear of such vindictiveness" may deter him from exercising his legal right to appeal, violating due process).

[215] *See United States v. Bouler*, 799 F. Supp. 581 (W.D.N.C. 1992) ("A defendant may be able to prove vindictive prosecution in a case such as the instant one in which the Government prosecutes the defendant after he files a claim in a civil forfeiture action." However, the defendant did not pursue such a claim, and thus, the court did not address it further).

[216] *United States v. White*, 972 F.2d 16 (2d Cir. 1992) (prosecution indicted defendant after he subsequently challenged the forfeiture of his vehicle; court declined to hold that by opposing the Government's forfeiture, the Government should be precluded from bringing criminal charges).

The vindictive prosecution issue can likely be avoided altogether if the civil forfeiture action is filed (and stayed) before the criminal case is concluded. While this involves extra work, if the prosecutor can anticipate that there is a substantial chance of acquittal, and that the Government will pursue civil forfeiture in such an event, filing the civil forfeiture case before adjudication of the criminal case can be a useful method to avoid the issue of vindictiveness altogether.

II. Is a Prosecutor Bound, Ethically or Otherwise, to Forego Forfeiture in Favor of Restitution?

Forfeiture and restitution are two separate components of many criminal sentences. Both are mandatory upon conviction. In 1996, the Mandatory Victims Restitution Act (MVRA) made restitution mandatory for most federal crimes where a victim suffers a loss. *See* 18 U.S.C. § 3663A(a)(1).[217] If a court concludes to order restitution, it must order full restitution for the victim's loss, regardless of the defendant's ability to pay. *E.g.*, *United States v. Newman*, 144 F.3d 531 (7th Cir. 1998) ("Under the MVRA, a defendant's financial status is relevant only to fixing a payment schedule for the mandated restitution"). Likewise, courts must order forfeiture when a defendant is convicted of a statute that provides for forfeiture as part of the penalty. *See, e.g.*, 18 U.S.C. § 982: "The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, *shall order* that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." (emphasis added); *United States v. Monsanto*, 491 U.S. 600, 607 (1989) ("Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applie[s]"); *United States v. Johnston*, 199 F.3d 1015, 1022 (9th Cir. 1999) (criminal forfeiture is mandatory and designed to ensure that a defendant does not profit from his crimes). Given the mandatory nature of the two components of a sentence, it is entirely appropriate for a defendant to pay both a forfeiture and restitution. *See United States v. Emerson*, 128 F.3d 557, 566-67 (7th Cir. 1997); *United States v. Tencer*, 107 F.3d 1120, 1135 (5th Cir. 1997) (affirming restitution order for $451,000 to fraud victims plus criminal forfeiture of $1 million, which included the fraud proceeds plus commingled funds). And defendants have no right to a credit against a restitution order for the amount forfeited. *United States v. Alalade*, 204 F.3d 536 (4th Cir. 2000).

[217] "Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense…"

The perceived tension between forfeiture and restitution emerges when, as is often the case, a defendant lacks the financial ability to pay both the forfeiture and restitution. When a defendant lacks the resources to make full restitution, Department of Justice policy is to collect and marshal assets for the benefit of victims using available means. These means include discontinuance of a forfeiture before a final order and asking the court to direct the custodian to turn over liquid assets to the clerk of court to be applied to restitution; the forfeiture of the defendant's assets and the handling of victim claims through the petition for remission or mitigation process; or the completion of the forfeiture action and the restoration of forfeited assets to victims through a restoration process approved by the Asset Forfeiture and Money Laundering Section (AFMLS).

The Justice for All Act, 18 U.S.C. § 3771, obligates "officers and employees of the Department of Justice and other departments and agencies engaged in the detection, investigation or prosecution of crime [to] make their best efforts to see that crime victims are…accorded[] the rights…." under the act,[218] including the right to full and timely restitution as provided by law. Does this mean that a prosecutor should not seek forfeiture if to do so would compromise a victim's ability to collect restitution? The answer is clearly no.

At present, there is only a limited ability to restrain assets prior to trial solely for the purpose of restitution.[219] The restraint mechanisms provided by the asset forfeiture statutes are often the only effective mechanisms to prevent a criminal defendant from dissipating assets prior to sentencing. As there are at least three means whereby restrained or forfeited property may be turned over to victims, there is nothing improper in seeking forfeiture in cases where the prosecutor knows early on that a defendant is unlikely to be able to pay restitution if the assets are forfeited. Restraint and forfeiture do not preclude those same assets from being turned over to victims. Indeed, without the restraint mechanisms of the forfeiture statutes, a victim has much less chance of ever receiving restitution.

Thus, a prosecutor who uses forfeiture tools as a means to provide remission or restoration of assets to crime victims fulfills any obligation that prosecutor may have under the Justice for All Act to crime victims.[220] Various courts have acknowledged this use of the forfeiture statutes. *See United States v. O'Connor*, 321 F. Supp. 722 (E.D.Va. 2004)

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[218] 18 U.S.C. § 3771(c)(1).

[219] Under 18 U.S.C. § 1345(a)(1), the pretrial restraint of assets is authorized in fraud-type cases, but only in limited circumstances.

[220] An adverse court of appeals decision from the Ninth Circuit makes the administrative and civil forfeiture of fraud proceeds impractical in cases that involve large numbers of victims and that must be filed in the Ninth Circuit. Prosecutors in the Ninth Circuit who seek to use civil or administrative forfeiture in a case involving victims should consult section IV of chapter 4 of the *Asset Forfeiture Policy Manual* (January 2006).

(although defendant has no right to use forfeited funds to satisfy a restitution order, the Government may, pursuant to 21 U.S.C. § 853(i)(1), apply the forfeited funds for benefit of the victims through restoration or remission); *United States v. Lavin*, 299 F.3d 123 (2d Cir. 2002) (instead of pursuing forfeiture, Government used seized funds to satisfy restitution order).

III. Negotiating With Fugitives

A. Summary

Absent compelling circumstances, prosecutors should not negotiate with fugitives. Before undertaking such negotiations, prosecutors should exhaust all potentially viable pretrial motions, including any possible fugitive disentitlement motion. Even when the case cannot be resolved by pretrial motion, prosecutors should enter into negotiations reluctantly. In many instances, the policy considerations of declining to negotiate with fugitives will outweigh the potential benefit to an individual civil forfeiture case. Only in instances where other considerations, e.g., the cost of maintaining the asset subject to forfeiture, militate towards negotiating a settlement should prosecutors entertain fugitive negotiations. In such circumstances the prosecutor handling the negotiations should consult closely with the prosecutor handling the parallel criminal case.

B. Discussion

Periodically, a situation arises where an individual has been indicted, becomes a fugitive, and seeks to challenge or negotiate with the Government regarding a civil forfeiture case. Prior to the enactment of CAFRA, a fugitive in a related criminal case was not barred from opposing the civil forfeiture of property: *Degen v. United States*, 517 U.S. 820 (1996) (fugitive disentitlement doctrine cannot be created by case law); *United States v. Funds Held in the Name of Wetterer*, 17 F. Supp. 2d 161 (E.D.N.Y. 1998) (because of *Degen*, claimant that is alter ego of fugitive may file claim challenging forfeiture of bank account held by perpetrator of mail fraud/child sex abuse scheme who is resisting extradition in Guatemala); *United States v. One 1988 Chevrolet Cheyenne Half-Ton Pickup Truck*, 357 F. Supp. 2d 1321 (S.D. Ala. 2005) (tracing the history of the fugitive disentitlement doctrine and discussing the impact of *Degen*).

CAFRA reinstated the fugitive disentitlement doctrine with the passage of 28 U.S.C. § 2466, which permits a court to "disallow a person from using the resources of the courts of the United States in furtherance of a claim in any related civil forfeiture action or a claim in third party proceedings in any criminal forfeiture action" if certain conditions are met. *See Collazos v. United States*, 368 F.3d 190 (2d Cir. 2004) (section 2466 is Congress's response

to the Supreme Court's decision in *Degen*; it does not violate the claimant's constitutional right to due process); *One 1988 Chevrolet Cheyenne Half-Ton Pickup Truck*, 357 F. Supp. 2d at 1326 (section 2466 is a "forceful legislative response" to the void created by *Degen*).

While it may have made financial sense to negotiate with fugitives when they were allowed to litigate civil forfeiture actions, the Government now has less incentive to negotiate with those who are barred by the fugitive disentitlement doctrine from challenging a forfeiture. If a court agrees to apply the fugitive disentitlement doctrine, the Government should be able to obtain a default judgment, at least as to the fugitive's interest, in most cases. Thus, there would be no reason to negotiate with a party who is barred from challenging a forfeiture, and negotiation is thus discouraged in that circumstance.

Even in cases where a court may decline to apply the fugitive disentitlement doctrine, the Government may be able to prevail on a pretrial motion.[221] For example, fugitives often will decline to appear for deposition or otherwise participate in discovery. Rule 37, Federal Rules of Civil Procedure, allows the court to order a party to comply with a discovery request, and if the party fails to comply, the court can impose sanctions that include (1) an order that certain facts shall be taken as established, (2) an order refusing to allow the disobedient party to support or oppose designated claims or defenses or introduce matters in evidence, and (3) rendering judgment by default against the disobedient party. Fed. R. Civ. P. 37(b)(2).

Where pretrial motions are not viable or are unsuccessful, prosecutors should pursue negotiations with fugitives reluctantly, and only as a last resort. As a general matter, it is rarely in the Government's interest to negotiate with fugitives. *See In re Grand Jury Subpoenas Dated March 9, 2001*, 179 F. Supp. 2d 270, 277 (S.D.N.Y. 2001) (noting a response by the USAO in the Southern District of New York in the Marc Rich case that "it is our firm policy not to negotiate dispositions of criminal charges with fugitives. Such negotiations would give defendants an incentive to flee, and from the Government's perspective, would provide defendants with the inappropriate leverage and luxury of remaining absent unless and until the Government agrees to their terms."). Forfeiture AUSAs should be sensitive to these considerations and not take any actions that may undermine the policy considerations noted in the Rich case, and should in all circumstances coordinate closely with prosecutors handling the parallel criminal case.

In the exceptional case where negotiations with a fugitive are appropriate, prosecutors should limit the factors that influence the conduct of the negotiations. It is legitimate to take into account the Government's litigation risk at trial, or expenses the Government may incur

[221] Section 2466 "'does not mandate the court to disallow the claimant,' but rather confers upon the Court discretion to determine whether or not disentitlement is warranted." 357 F. Supp. 2d at 1328.

in maintaining an asset if the case would otherwise be delayed indefinitely. For example, if the forfeiture involves tangible property that is incurring storage expenses or property where a lien is continuing to accrue and erode the equity, it may be in the Government's financial interest to resolve the forfeiture matter quickly. If a court declined to invoke the fugitive disentitlement doctrine, negotiation may be necessary in order to resolve the matter. But in no circumstances should a prosecutor agree to exchange assets for a defendant's agreement to surrender and face criminal charges.

IV. Criminal Forfeiture and *Brady* Obligations

In criminal forfeiture matters, the Government has not only an ethical but a legal duty to disclose information favorable to the defendant as to either guilt or punishment. *See Brady v. Maryland*, 373 U.S. 83 (1963) ("suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution").[222] Forfeiture is an element of the sentence, and thus forms part of the punishment imposed on the defendant. *Libretti v. United States*, 516 U.S. 29, 38-39 (1995). Accordingly, *Brady* requires the Government, even absent a request by the defendant, to disclose evidence favorable to the defendant that relates to criminal forfeiture.

[222] *United States v. Agurs*, 427 U.S. 97, 110-11 (1976), extended the rule announced in *Brady* to apply to evidence that "is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request."