U.S. Department of Justice

Asset Forfeiture Manual

Volume III
Policy Compendium

CRIMINAL DIVISION
Washington, D.C. 20530

Dear Federal Prosecutor:

I am pleased to send to you Volume III of the new three-volume *Asset Forfeiture Manual.* This volume, entitled *Policy Compendium,* consists of policy directives issued by senior Department officials relating to the asset forfeiture program in the past seven years. I think you will find it extremely helpful to have these directives in one place, along with a subject matter index to locate all official policies on any given forfeiture related issue.

I welcome any suggestions you may have for future publications in the forfeiture field. Wise and effective use of asset forfeiture make it a valuable law enforcement tool. Knowledge of the forfeiture policies contained in this volume, and your adherence to these policies, will further enhance and strengthen the asset forfeiture program.

Sincerely,

John C. Keeney
Acting Assistant Attorney General
Criminal Division

Preface

This is Volume III of the new three-volume *Asset Forfeiture Manual* being published by the Asset Forfeiture Office, Criminal Division, which is intended to supersede two previous publications: *Asset Forfeiture: Law, Practice, and Policy,* and *Quick Reference to Federal Forfeiture Procedures.* These three new volumes are being published in loose-leaf form to facilitate their regular supplementation. Volume I will contain a discussion of asset forfeiture law and practice along with policy information relevant to the practice of asset forfeiture. Volume II will contain the statutes, regulations, and advisory materials related to asset forfeiture, including various Criminal Division and *United States Attorneys' Manual* policies.

Volume III consists primarily of the various policy directives issued by the Executive Office for Asset Forfeiture since it was first established in October 1989. However, it also contains forfeiture related policy directives issued by the Deputy or Associate Attorneys General since 1986. Because of their special importance, *The Attorney General's Guidelines on Seized and Forfeited Property,* the *Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies,* and the Department policy on attorneys' fees forfeiture from the *United States Attorneys' Manual* are also included.

Each directive and other document appear under a separate divider with its own tab number. The directives and other documents are filed in chronological order starting with tab 2, making them easy to identify and retrieve. Behind tab 1 is a summary of the various approval requirements set forth in the directives and other documents which follow in this volume.

We have also numbered each of the policy directives consecutively within the year in which they were issued: e.g., 86-1, 86-2, 87-1, 87-2, etc. These numbers appear at the top of the first page of each directive. They also appear on each directive at the bottom right-hand corner of each page to facilitate replacing pages and tracking missing pages.

The most significant feature of this volume is the subject matter index. A reader will be able to locate all directives and other policy documents pertinent to a given subject by consulting the appropriate subject heading in the index and seeing the relevant tab number(s). In a few cases, the page number(s) of the document will be given as well as the tab number because the discussion of the particular topic in the document is confined to the page(s) in question. **Please note that the page numbers referred to in the index correspond to the numbers located at the bottom right-hand corner of the page, which may be different from the document's original page numbering system.** Bear in mind that this index covers only this volume. Separate indices will be provided for Volumes I and II.

We hope this new format will make our publication easier to use. As always, we welcome your suggestions, corrections, and other comments.

Lee J. Radek
Director
Asset Forfeiture Office
Criminal Division

Volume III

Policy Compendium

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1993	45. Sixty-Day Notice Period in All Administrative Forfeiture Cases	93-4	01/15/93

Tab No. 1

Policy Compendium
Approval Requirements

Tab	Policy Title	Date Issued	Approval Procedure Required
6	Seizure of Forfeitable Property	1/11/90	In all cases, Department of Justice personnel must obtain *ex parte* judicial approval prior to a seizure of realty.
7	Forfeiture Policies	2/14/90	Prior approval of the Asset Forfeiture Office, Criminal Division, is required to seek the forfeiture of substitute assets and to make an *ex parte* application for a temporary restraining order in criminal forfeiture cases.
10	*The Attorney General's Guidelines on Seized and Forfeited Property*	7/00/90	The Attorney General must approve the placement of real property into official use by any federal agency. The seizing agency head (or designee) may approve placement of personal property into the agency's own official use, but the Director, Executive Office for Asset Forfeiture, must approve the decision if liens on the property equal $25,000 or one-third of the value, whichever is greater. The U.S. Marshals Service must approve the placement of personal property into official use by non-seizing federal agencies, but the Director, Executive Office for Asset Forfeiture, must approve the decision if: (1) the property is $25,000 or more in value; (2) liens on property equal or exceed $25,000 or one-third of the value, whichever is greater.

Tab	Policy Title	Date Issued	Approval Procedure Required
10	*The Attorney General's Guidelines on Seized and Forfeited Property* (continued)	7/00/90	The Deputy Attorney General (or designee) must approve equitable sharing: (1) in cases involving $1,000,000 or more in forfeited assets; (2) in multi-district cases; (3) in cases involving real property transfers to a state or local agency for a law enforcement related use. The U.S. Attorney may approve equitable sharing in judicial cases involving less than $1,000,000 in forfeited assets (including transfer of personal property for official use). The seizing agency may approve equitable sharing in administrative cases involving less than $1,000,000 in forfeited assets (including transfer of personal property for official use). The Deputy Attorney General (or designee) must approve allocations from the Assets Forfeiture Fund to program participants for statutorily designated uses. Personal approval of the U.S. Attorney is required for discontinuance of federal forfeiture action in favor of state proceedings.

Tab	Policy Title	Date Issued	Approval Procedure Required
11	Repatriation Of Foreign Assets And International Sharing Of Forfeiture Proceeds (See also Tab 24)	9/07/90	Commitments to share internationally in specific cases may only be made with the approval of the Attorney General and the Secretary of State. Prior commitments regarding sharing with foreign governments should be scrupulously avoided.
15	Attorney Fee Guidelines *United States Attorneys' Manual* 9-111.000 *et seq.*	10/01/92	No criminal or civil forfeiture proceedings may be instituted to forfeit an asset transferred to an attorney as fees for legal services without the prior approval of the Assistant Attorney General, Criminal Division. No formal or informal, written or oral, agreements may be made to exempt an asset transferred to an attorney as fees for legal services from forfeiture without the prior approval of the Assistant Attorney General, Criminal Division.
24	Equitable Sharing Issues (See also Tab 11)	5/20/91	The Asset Forfeiture Office, Criminal Division, is to be advised in writing of any foreign assets that have been forfeited, or are about to be forfeited, under United States law with the assistance of a foreign country.
28	Forfeiture Procedures Pursuant To Increased Administrative Forfeiture Authority	7/05/91	The Asset Forfeiture Office, Criminal Division, must approve the forfeiture of property judicially which is supposed to be forfeited administratively under the aggregation policy.

Tab	Policy Title	Date Issued	Approval Procedure Required
32	Policy Regarding Forfeiture By Settlement	10/31/91	Settlements should not provide for unsecured partial payments except with the approval of the Asset Forfeiture Office, Criminal Division, in consultation with the U.S. Marshals Service.
33	Delegation Of Authority To Approve Exceptions To Cash Management Policy (See also Tabs 3, 7, 9, and 26)	12/13/91	The Department of Justice cash management policy requires that all seized cash be deposited promptly into the Seized Asset Deposit Fund. Cash may be retained only when its retention serves an essential evidentiary purpose. The United States Attorney may approve this retention for amounts under $5,000. Otherwise, the retention of the cash for evidence must be approved by the Assistant Attorney General, Criminal Division. Requests for approval should be sent to the Asset Forfeiture Office, Criminal Division, which will forward them to the Assistant Attorney General.
34	Departmental Policy On Attorney General's Authority To Warrant Title	2/12/92	Approval must be sought from the Seized Assets Division, U.S. Marshals Service, to convey title through a general warranty deed or its equivalent.
35	Clarification of AFO Authorities	2/20/92	The Asset Forfeiture Office, Criminal Division, may waive the rule that DAG-71s must be filed within sixty days of seizure. Seizing agencies may grant waivers where the DAG-71s are late only fifteen days or less.

Tab	Policy Title	Date Issued	Approval Procedure Required
35	Clarification of AFO Authorities (continued) (See also Tab 27)	2/20/92	The Asset Forfeiture Office must authorize the payment of any mortgage holder's attorney's fees under the *Expedited Forfeiture Settlement Policy for Mortgage Holders*, and then only in defined exceptional circumstances.
38	Weed and Seed Initiative	5/26/92	The Deputy Attorney General (or designee) must approve a transfer of real property to a state or local agency (or to HUD) for further transfer to other government agencies or non-profit agencies for use in the Weed and Seed Program.
40	Criminal Division's Redelegations of Settlement Authority (A.G. Order 1598-92) 57 Fed. Reg. 30395 (1992) (See also 28 C.F.R. §§ 0.160, 0.161)	7/09/92	Consultation with the Asset Forfeiture Office, Criminal Division, is required regarding a proposed settlement if a civil or criminal forfeiture claim is over $500,000, unless the original claim is between $500,000 and $5,000,000 and the difference between the original claim and the settlement amount does not exceed 15 percent of the original claim. U.S. Attorneys have authority to independently settle civil or criminal forfeiture cases: (a) involving amounts not exceeding $500,000; and (b) involving amounts between $500,000 and $5,000,000 when the settlement releases not more than 15 percent of the original claim. The Deputy Attorney General's approval is required for a settlement in which the difference between the

Tab	Policy Title	Date Issued	Approval Procedure Required
40	Criminal Division's Redelegations of Settlement Authority (continued)	7/09/92	original claim and the proposed settlement exceeds $2,000,000 or 15 percent of the original claim, whichever is greater.
42	General Adoption Policy and Procedure	1/15/93	If a federal agency declines to adopt a seizure despite the recommendation of the United States Attorney, the agency must promptly document its reasons for declination in a memorandum and forward copies of the memorandum to the United States Attorney and the Executive Office for Asset Forfeiture (EOAF). EOAF will resolve any disagreements and may authorize direct adoption of state or local seizures by United States Attorneys for judicial forfeiture in appropriate circumstances.
43	Policy on *In Forma Pauperis* Petitions	1/15/93	In cases where the seizing agency believes there are clear and articulable reasons for denial of an *In Forma Pauperis* petition, the request for waiver shall be referred to the Executive Office for Asset Forfeiture for final determination.
44	Expedited Payment of Lienholders in Forfeiture Cases	1/15/93	The Executive Office for Asset Forfeiture must approve in writing any agreement to pay liens and mortgages to a lienholder prior to forfeiture under the *Expedited Forfeiture Settlement Policy for Mortgage Holders.*

Tab	Policy Title	Date Issued	Approval Procedure Required
45	Sixty-Day Notice Period in All Administrative Forfeiture Cases	1/15/93	In all administrative forfeitures, the written notice under 19 U.S.C. § 1607 to possessors, owners, and other interested parties, including lienholders, known at the time of seizure, shall occur no later than 60 days from the date of seizure. For parties whose identity is determined after seizure, the written notice shall occur within 60 days after such determination. Waivers of this 60 day rule may be obtained in writing in exceptional circumstances from a designated official within the seizing agency.

Tab No. 2

Office of the Deputy Attorney General

The Deputy Attorney General — Washington, D.C. 20530

June 25, 1986

MEMORANDUM

TO: All United States Attorneys

FROM: D. Lowell Jensen
Deputy Attorney General

SUBJECT: Anticipating and Avoiding Problems Relating to the Management and Disposition of Seized and Forfeited Assets

I. Introduction

Forfeiture has become an extremely effective and powerful tool in our fight against organized crime and drug trafficking. Forfeiture is also a relatively new area of law and its current scope is considerably wider than it was prior to passage of the Comprehensive Crime Control Act of 1984. The ability of the government to remove the proceeds of crime from individual defendants and destroy the economic power of drug trafficking organizations is a great power that holds great promise. At the same time, we have a responsibility to operate the asset forfeiture program in a way that maximizes the collateral economic return to the government and recognizes the interests of innocent third parties. As a consequence, I am issuing the following guidelines which must be observed in order to help minimize or avoid the possibility that the government will assume unnecessarily difficult or insurmountable problems in the management and disposition of seized assets.

II. Initial Decision to Seize or Seek Forfeiture: the need for planning and consultation

Consistent with the purposes of the Act as stated above, there are some situations in which pre-seizure planning will enable the United States Marshals Service to anticipate certain maintenance and disposition problems. Examples of such situations include instances in which (1) liabilities exceed assets; (2) the nature of ownership is such that it is difficult to manage the property; (3) a business may be involved in activities the nature of which would be inappropriate for the government to be sponsor

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for any lenghth of time; (4) the nature of the asset is such that it is beyond the capacity of the government to manage or rapidly dispose of it; and (5) the nature of the business is such that the government would become involved in lengthy collateral litigation as a defendant. Prosecutorial discretion must be exercised wisely in making forfeiture decisions as with all other types of prosecution decisions.

Consequently, pre-seizure planning in cases involving assets that require complex or long-term management responsibilities is a necessity. When real property, operating businesses, or other assets are targeted for forfeiture, investigative agents, case attorneys, and federal marshals must address the investigative, litigative, financial, and property management problems and needs before a seizure decision is reached by the United States Attorney. Investigative agents and case attorneys must determine critical asset-related information during the pre-seizure planning phase, including how title to the property is held, who holds title, and the existence of liens or other encumbrances.

United States Marshals and the regional offices in the Marshals Service's National Asset Seizure and Forfeiture Program are available to assist in the development of asset management plans. An asset management plan developed prior to seizure can be especially important when deciding whether to continue operating a business subject to forfeiture or whether to evict occupants of an arrested residence.

Prior to reaching a settlement or plea agreement in a forfeiture case or preparing a proposed order of forfeiture in a case, or otherwise making a final decision to seize or forfeit an asset that will entail significant management responsibilities, you or your trial assistant shall meet with the United States Marshal or his representative who has or will have custody of the property in order to assess the financial impact of a proposed action. The United States Marshal will provide the necessary financial and disposal information.

The Asset Forfeiture Office (FTS 272-6420) shall serve as a consultant to the United States Attorney and the United States Marshal in the following situations: (1) if it appears that the net liabilities or a particular business or piece of property under consideration may exceed assets; (2) that management responsibilities will have to be shared with a criminal defendant or other potentially non-cooperating party; (3) that non-severable ownership interests of innocent third parties might be significantly impaired by a forfeiture; (4) that the property is subject to significant lawsuits which may impede the ability of the government to properly manage or rapidly dispose of it; or (5) if other unique or unusually difficult management problems are anticipated.

As part of the consultation process in these difficult situations, the United States Attorney, in cooperation with the Marshal, should consider the utility of a written feasibility assessment arrived at by mutual decision. At any rate, the United States Attorney and the Marshal should provide the Asset Forfeiture Office appropriate documentation as necessary to facilitate the evaluation process. The final decision on what action is to be taken remains with the United States Attorney subject to the approval and review requirements previously set forth in 28 C.F.R. 0.160 and Directive No. 116 issued pursuant thereto.[1]

III. Alternatives to Immediate Seizure or Forfeiture

It should be emphasized that the existence of one or more of the above potential problems should not ordinarily mean that forfeiture will be forsaken. In most cases, proper planning should resolve any problems. However, if it is determined that forfeiture of a particular asset is not desirable, there are alternatives.

A fine of double the proceeds of illegal activities may be imposed pursuant to 18 U.S.C. §1963(a) or 21 U.S.C. §853(a) either in lieu of or in addition to forfeiture. Further, under a provision of the Fine Enforcement Act of 1984 (18 U.S.C. §3565(a)(5)), a lien can be placed on any of a defendant's assets pending payment of the fine which, like a tax lien, will take priority over ordinary creditor liens. If the asset is sold at a profit by the defendant or by the defendant's business, the United States could then collect the fine and the defendant will have been deprived of the proceeds of his unlawful activity.

There are two limitations on this alternative: it is discretionary with the court and typically it is not as readily enforceable as seizing the asset itself. However, it is worth considering where potential management or disposition problems are overwhelming.

Short of declining to forfeit a particular asset, there are other possibilities to be considered.

First, the new enforcement tools prescribed in 18 U.S.C. §1963(e) and in 21 U.S.C. §853(e) provide for the restraint of

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[1] Directive No. 116 requires consultation with the Asset Forfeiture Office for any settlement where the value of the settlement differs from the value of the assets subject to forfeiture by an amount exceeding $200,000, and approval by the Deputy Attorney General if the difference exceeds $750,000.

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property subject to criminal forfeiture pending the outcome of the case. In some instances, the procurement of a restraining or similar order may obviate the need for parallel civil forfeiture case in which the United States must take custody of the property.

Second, in civil forfeiture cases, an interlocutory sale may be appropriate, particularly when the projected management costs of the property are disproportionate to the potential sales value at the time of forfeiture. United States Marshals are available to assess the economic feasibility of pursuing such a course of action.

Finally, it is possible to proceed with a criminal prosecution without forfeiting one or more assets as part of that prosecution, and later civilly forfeiting that asset or assets, or a successor asset or assets, when circumstances are more propitious.

IV. Management and Disposal of Seized Assets

Once the decision to pursue a forfeiture has been made, primary responsibility for the arrest, management, and disposal of assets subject to forfeiture and forfeited assets lies within the United States Marshals Service. All arrangements for property services or commitments pertaining to the property are the responsibility of the United States Marshal. United States Attorneys shall not make independent property management decisions.

Further, the disposition of property declared forfeited by the court is an executive branch decision and not a matter for the trial court. Consequently, all orders of forfeiture are to be written with broad language directing the forfeiture of the property to the Attorney General, with "disposal to be in accordance with law".

It is not necessary to request the United States District Court to confirm the manner and conditions of sale of forfeited property except in certain civil settlements. It is the United States Marshals' responsibility to determine the best method and conditions of sale.

V. Cash Management

The need to fully implement the Departmental procedures for managing non-evidentiary cash that is subject to forfeiture is well-founded in sound cash management practices. In addition, the procedures assist in the processing and accounting of forfeited cash to be shared with participating law enforcement agencies.

All non-evidentiary cash subject to forfeiture must be deposited by the United States Marshal into the new Seized Asset Deposit Account (15X6874) administered by the Marshals Service. This step will facilitate the deposit of such cash upon forfeiture into the Department of Justice Assets Forfeiture Fund (15X5042) at the time of forfeiture, and in turn, the equitable transfer to participating state and local law enforcement agencies.

VI. Conclusion

Finally, I wish to emphasize that the forfeiture case is not over until the disposal of the property and all pending claims are completed. Until that time, United States Marshals and United States Attorneys must continue to coordinate their efforts and devote the requisite time and attention to the case.

The tool of forfeiture is a powerful and effective tool in our fight against crime. We have to use it fairly, honestly, efficiently, and justly. The application of a little consideration, a little cooperation, and a little common sense will maximize the effectiveness of these laws. It is crucial that all federal agencies coordinate their efforts and respect the responsibilities of companion agencies.

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Tab No. 3

Memorandum

DIRECTIVE NO. 87-1

Subject	Date
Seized Cash	March 13, 1987

To
All United States Attorneys
and Criminal Division
Section Chiefs
Administrator, DEA
Director, FBI
Commissioner, INS
Director, USMS

From
Stephen S. Trott
Associate Attorney General

The security, budgetary, and accounting problems caused by retention of large amounts of cash is causing great concern within the Department and the Congress. A just released GAO report has estimated that there is $220 million in cash being retained by various federal law enforcement agencies. Consequently, effective May 1st, all currency seized which is subject to criminal forfeiture or to civil forfeiture, is to be delivered to the United States Marshals Service (USMS) for deposit in the USMS Seized Asset Deposit Fund either within sixty days after seizure or ten days after indictment, whichever occurs first.1/ Where appropriate, photographs or videotapes of the seized cash should be taken for later use in court as evidence.

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 Assistant Attorney General, Criminal Division, and are to be sought through

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1/ 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.

the Asset Forfeiture Office, Criminal Division.2/ Retention of currency will be permitted when retention of that currency, or a portion thereof, serves a significant independent, tangible, evidentiary purpose due to, for example, the presence of fingerprints, packaging in an incriminating fashion, or the existence of a traceable amount of narcotic residue on the bills. If the amount of a seizure is less than $5000, permission need not be sought from the Criminal Division for an exception, but any exception granted is to be granted at a supervisory level within a United States Attorney's Office using the above criteria.3/

The co-mingling of cash seized by the government under 21 U.S.C. §881(a)(6), will not deprive the court of jurisdiction over the res. Unlike other assets seized by the government (e.g. real property, conveyances), cash is a fungible item. Its character is not changed merely by depositing it with other cash. While it is true that the jurisdiction of the court is derived entirely from its control over the defendant res, court jurisdiction does not depend upon control over specific cash. As stated in United States v. $57,480.05 United States Currency and Other Coins and $10,575.00 United States Currency, 722 F.2d 1459 (9th Circuit 1984), " ... jurisdiction did not depend upon control over specific bits of currency. The bank credit of fungible dollars constituted an appropriate substitute for the original res." This has been a time-honored practice in the area of civil forfeiture law. See, American Bank of Wage Claims v. Registry of the District Court of Guam, 431 F.2d 1215 (9th Circuit 1970).

Please review your existing cases and property storage sites and make all required transfers or requests for exemption by May 1, 1987.

2/ Requests for an exemption will be filed by the United States Attorney's Office or Criminal Division Section responsible for prosecuting, or reviewing for prosecution, a particular case. Investigative agencies holding cash should immediately inventory any cash on hand being retained for evidentiary purposes and consult the appropriate prosecutor's office. While implementation of this policy has been delayed until May 1st in order to give agencies time to complete this inventory, prompt compliance wherever possible would be appreciated.

3/ We will be consulting with the Customs Service regarding this new policy. The criteria and procedure for obtaining exemptions remains the same for cash retained by Customs.

Tab No. 4

Thank you for understanding the immediate necessity for this directive. It will be reviewed at the next United States Attorneys Advisory Committee meeting to determine whether it requires modification. Additional actions or controls are possible after we have had an opportunity to review the GAO report.

For further information or questions regarding implementation of this policy, contact Brad Cates, Director, Asset Forfeiture Office, Criminal Division, at (FTS) 272-6420.

U.S. Department of Justice

Office of the Deputy Attorney General

DIRECTIVE NO. 89-1

The Deputy Attorney General

Washington, D.C. 20530

June 21, 1989

MEMORANDUM

TO: All United States Attorneys
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, United States Marshals Service

FROM: Edward S.G. Dennis, Jr.
Acting Deputy Attorney General

SUBJECT: Processing of Pending Forfeiture Cases

In reliance upon the representations of the Department that additional forfeiture personnel in United States Attorneys' offices would yield a net gain for the Treasury, Congress approved the additional resources we requested. It is imperative that we fulfill the commitment that was made to increase forfeiture production.

To enhance production during the remaining weeks of FY 1989, the Attorney General has authorized me to issue the following guidance and performance goals:

(A) **FORFEITURE PERFORMANCE GOALS**

(1) To All Addressees.

(a) Commencing immediately and continuing through September 15, 1989, processing and completion of pending forfeiture cases are to be accorded the HIGHEST PRIORITY.

(b) Forfeiture documents must promptly be forwarded to the Marshals Service so that cases can be completed and deposits made and credited to the Assets Forfeiture Fund.

(2) To All United States Attorneys.

(a) By August 1, 1989, all cash forfeiture cases pending as of May 1, 1989, must be brought fully current. A written report detailing compliance with this goal is due in the Executive Office for United States Attorneys (EOUSA) on August 4, 1989.

(b) By September 1, 1989, all other forfeiture cases pending as of May 1, 1989, must be brought fully current. A written report detailing compliance with this is due in EOUSA on September 5, 1989.

(c) Requests from other U.S. Attorneys' offices for assistance in clearing clouds on title and other forfeiture-related actions that cannot be undertaken in the District of forfeiture should be brought fully current within 30 days of receipt.

(d) A matter will be considered to be "fully current" when all pertinent pleadings have been filed and the matter is in a posture where nothing further can be done to advance the cause pending court action. Even as to such fully current matters, however, courts should routinely be urged to act on the pleadings filed.

(e) If inadequate forfeiture resources are available to achieve the above goals, you will be expected to divert personnel from other activities or to seek assistance from other U.S. Attorneys' offices, the Criminal Division, and the Executive Office for United States Attorneys.

(f) The new asset forfeiture positions approved in the Anti-Drug Abuse Act of 1988 are "dedicated" resources intended to supplement and not to supplant prior asset forfeiture personnel. Please ensure that the new positions allocated to your Office are being used consistent with this clear intent of Congress and of the Department of Justice.

(3) To the FBI, DEA, and INS.

(a) By August 31, 1989, all cash seizures valued at $10,000 or more pending as of May 1, 1989, should be administratively forfeited. A report detailing compliance with this goal is due in the Office of the Deputy Attorney General on September 6, 1989.

(b) All requests for investigative support in connection with the processing of the judicial or administrative forfeiture of a seized property should be

acted upon expeditiously, within five business days of receipt whenever possible.

(4) To USMS. Steps should be taken to ensure that deposits are made and credited to the Assets Forfeiture Fund by September 30, 1989, in all cash forfeiture matters where service of forfeiture documents upon the Marshals Service is effected by close of business on September 15, 1989.

(B) **EQUITABLE SHARING GUIDELINES**

While we want to ensure that the Department is fair in its equitable sharing decisions, please be certain that you comply with the established sharing guidelines as set out below:

In determining the equitable share for participating agencies, the governing factors to be considered are whether the seizure was adopted or was the result of a joint investigation, and the degree of direct law enforcement participation of the requesting agency taking into account the total value of property forfeited and the total law enforcement effort. Additional factors to be taken into account are:

(a) Whether the agency originated the information that led to the ultimate seizure, and whether the agency obtained such information by use of its investigative assets, rather than fortuitously;

(b) Whether the agency provided unique or indispensable assistance;

(c) Whether the agency initially identified the asset for seizure;

(d) Whether the state or local agency seized other assets during the course of the same investigation and whether such seizures were made pursuant to state or local law; and,

(e) Whether the state or local agency could have achieved forfeiture under state law, with favorable consideration given to an agency which could have forfeited the asset(s) on its own but joined forces with the United States to make a more effective investigation.

(C) **DEPOSIT OF SEIZED CASH**

You are reminded of the guidelines governing retention of cash which were issued by former Associate Attorney General

Trott. Those guidelines continue in effect. A copy of the Trott memorandum is attached for ready reference.

In conclusion, my sense is that substantial progress has been made toward our production targets even though this increased activity is not yet reflected in the reports of deposits to the Assets Forfeiture Fund. The purpose of the above guidance and performance goals is to assist you in enhancing your production. The Department expects a maximum effort from all of you.

Attachment

Ta No.

Office of the Attorney General
Washington, D. C. 20530

October 30, 1989

DIRECTIVE NO. 89-2

MEMORANDUM

TO: Addressees

FROM: Dick Thornburgh
Attorney General

SUBJECT: Management of the Department's Asset Seizure and Forfeiture Program

FORFEITURE BENEFITS

One of the Department's most effective weapons in combatting drug trafficking and organized crime is the seizure and forfeiture of the instrumentalities and proceeds of these illegal activities. Experience has shown that forfeitures can permanently dismantle the financial underpinings of criminal enterprises and, because of the massive resources of drug and organized crime syndicates, we have also found that forfeiture has enormous potential as a source of revenue for law enforcement at all levels of government. In each of the last five years, the amount of property we have seized and forfeited has grown significantly.

AREAS OF NEEDED IMPROVEMENT

While we have enjoyed many successes, I am convinced that we can do much better. The rapid growth of our asset forfeiture program has created difficult management challenges. Case processing delays, incomplete caseload information, inadequate financial management, and a lack of commitment to forfeiture in some areas have, I believe, prevented us from realizing the full potential of forfeiture as a law enforcement weapon and revenue source. Simply put, the Department's very successful program has outgrown the informal systems and control processes that worked when the program was small. To achieve improvements in these areas, I believe we need closer coordination of forfeiture activities at the highest levels of the Department.

NEW EXECUTIVE OFFICE FOR ASSET FORFEITURE

I have established an Executive Office for Asset Forfeiture to oversee all aspects of the Department's forfeiture program. The Executive Office for Asset Forfeiture will be located in the Office of the Deputy Attorney General and will report to Associate Deputy Attorney General Barry Stern who will also have responsibility for overseeing the Organized Crime Drug Enforcement Task Forces. Cary Copeland will be the Director of this new office. Katherine K. Deoudes and Michael A. Perez have been designated Assistant Directors for the new office. Initially, the Executive Office will be staffed with detailees from other components.

While the basic operational responsibilities within the forfeiture program will remain with each of the appropriate Departmental components, some adjustments can be anticipated and I expect each component to exhibit appropriate flexibility in responding to Executive Office initiatives. These will include the prompt resolution of pending policy recommendations, establishment of uniform procedures for documenting and processing forfeiture actions, improvement of financial controls over use of program funds, and implementation of a single Departmental forfeiture information system. One of the principal missions of the Executive Office will be to recommend any reorganizations or transfers of functions needed to achieve our goal of a truly effective and efficient Departmental forfeiture program.

I am confident that with your cooperation and support, our forfeiture efforts will be enhanced through this initiative. Attached are charts which show how this Office will fit into the organizational structure.

Attachments (3 Organizational Charts)

ADDRESSEES:

William S. Sessions
Director
Federal Bureau of Investigation

John C. Lawn
Administrator
Drug Enforcement Administration

Gene McNary
Commissioner
Immigration and Naturalization Service

Laurence S. McWhorter
Director
Executive Office for U.S. Attorneys

Edward S.G. Dennis, Jr.
Assistant Attorney General
Criminal Division

John J. Twomey
Acting Director
United States Marshals Service

James G. Richmond
Chairman
Attorney General's Advisory Committee
of United States Attorneys

Harry H. Flickinger
Assistant Attorney General
Justice Management Division

STAFFING PROFILE:

1 Director
3 Assistant Directors
1 Staff Assistant
2 Secretaries

7 Total Staffing

EXECUTIVE OFFICE FOR ASSET FORFEITURE

(Director)
(Staff Assistant)
(2 Secretaries)

Policy and Legislation
(Assistant Director)

Responsibilities:

- Policy Formulation
- Legislative Proposals
- Litigation Strategy
- Appellate Issues
- International Forfeitures
- Dispute Resolution

Operations
(Assistant Director)

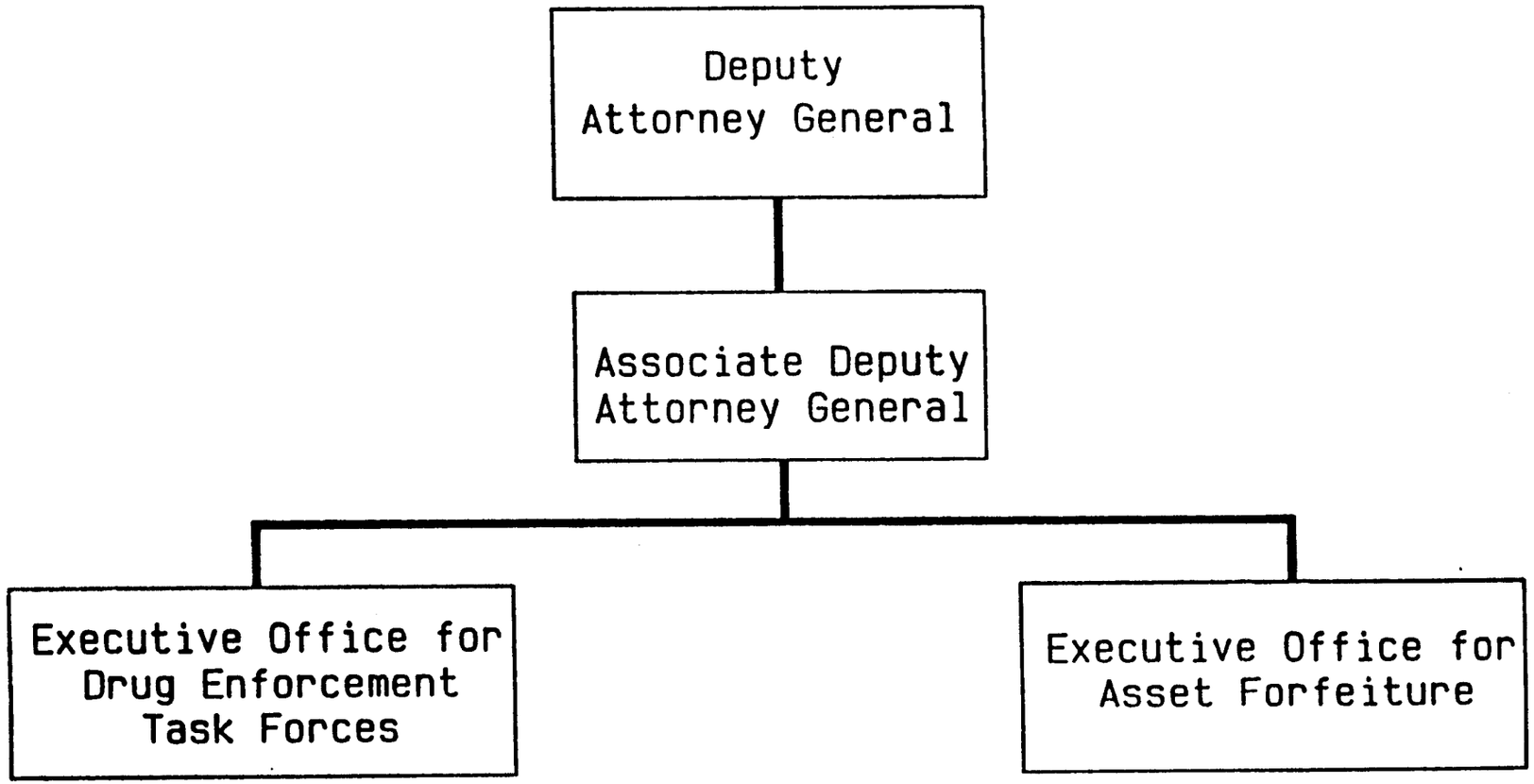
Responsibilities:

- Strategic Planning
- Policy Implementation Oversight
- Standardization of Procedures
- Process Improvement
- Operational Contract Support
- Operational Coordination
- Training
- Equitable Sharing Request Processing

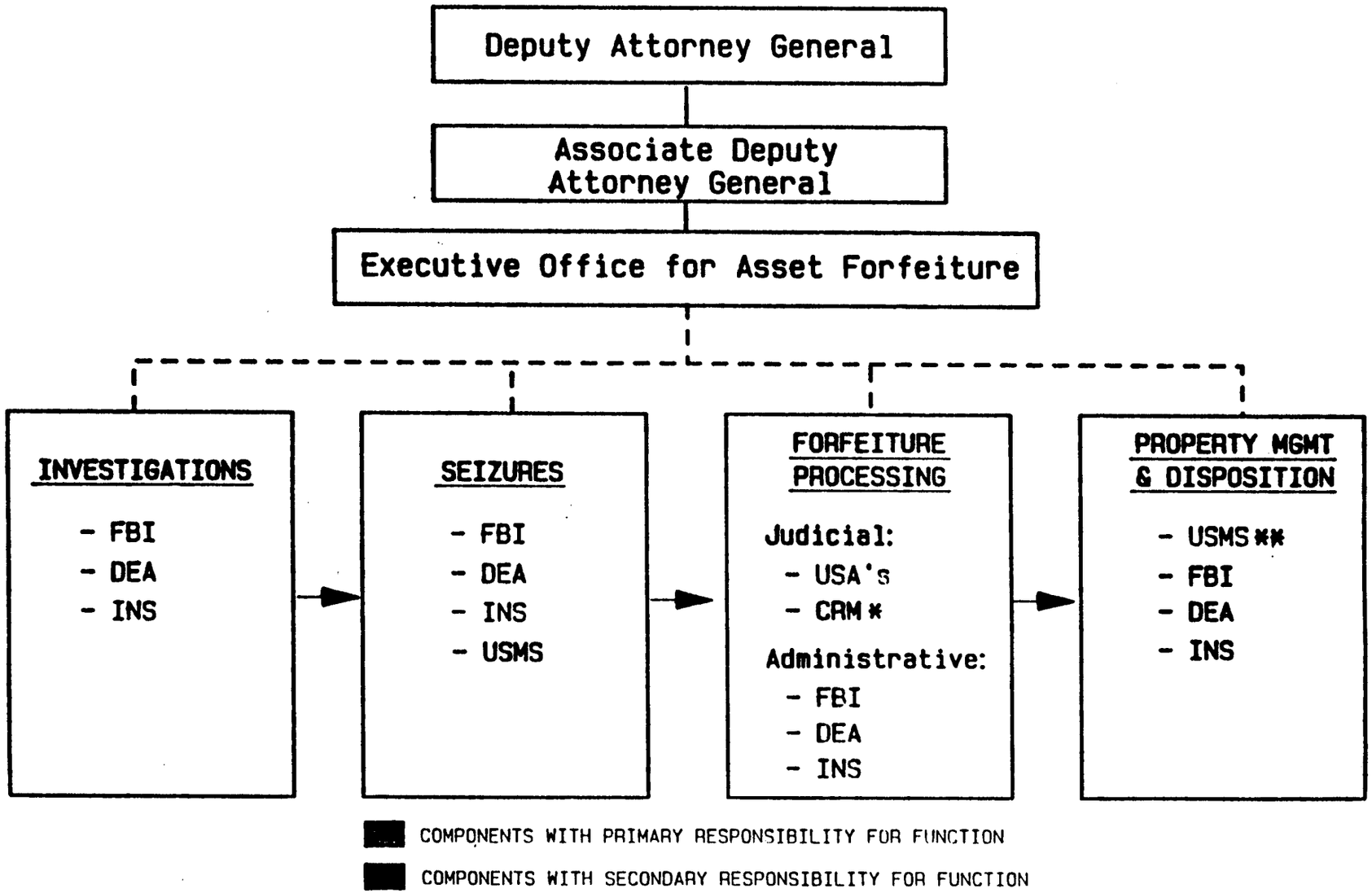
Financial Management
(Assistant Director)

Responsibilities:

- Budget and Resource Planning
- Financial Management and Reporting
- Audits and Evaluations
- Performance Assessment
- Information Systems Development
- Tracking Systems Implementation
- Tracking Internal Controls


Deputy
Attorney General
Associate Deputy
Attorney General
Executive Office for
Drug Enforcement
Task Forces
Executive Office for
Asset Forfeiture

OVERSIGHT FOR THE DOJ FORFEITURE PROGRAM



* The Criminal Division's Asset Forfeiture Office also provides asset seizure and forfeiture policy guidance and legal advice to the U.S. Attorneys and other Departmental components.

** The USMS also administers the Assets Forfeiture Fund.

Tab No. 6

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

DIRECTIVE NO. 90-1

Washington, D.C. 20530

January 11, 1990

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, United States Marshals Service

FROM: Cary H. Copeland CHC
Director
Executive Office for Asset Forfeiture

SUBJECT: Seizure of Forfeitable Property

I. Ex Parte Pre-Seizure Judicial Review. Pre-seizure judicial authorization of property seizures serves multiple purposes, including the following:

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

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

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

II. Pre-Seizure Judicial Review Required for Seizure of Real Property. In all cases, Department of Justice officials shall obtain ex parte judicial approval prior to seizure of realty. 1/

1/ The stated 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 forfeiture in connection with a plea agreement. Neither does it apply to the

(continued...)

III. Pre-Seizure Judicial Review Favored for Seizure of Personal Property. Whenever practicable, Department of Justice officials should obtain ex parte judicial approval prior to seizure of personalty. 2/

IV. Forms of Process To Be Used.

A. Warrant of Arrest In Rem

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

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

A form of warrant of arrest in rem has been developed which combines the historic form with a probable cause finding; see attached. As this combined warrant of arrest in rem and determination of probable cause accomplishes two purposes with one filing, it should be used for real property seizures as well as for seizures of personalty which can only be forfeited judicially. 3/

1/(...continued)
adoption for federal forfeiture of property previously seized by state or local law enforcement agencies.

2/ See Footnote 1, supra.

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

B. Warrant of Seizure

A second and newer form of process for seizing forfeitable property is the warrant of seizure authorized by 21 U.S.C. 881(b) and 18 U.S.C. 981(b)(2). This form of process secures a judicial determination of probable cause but does not confer jurisdiction upon the court issuing the warrant. Note that the Administrative Office of United States Courts will shortly issue a form of Warrant of Seizure and application therefor; copies of drafts of these new forms are attached. Once issued, these forms should be used for seizure of personalty which may be subject to administrative forfeiture.

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

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

Where a district is employing 881(j) or 981(h) to arrest property outside the district, there are two remedies that can be employed. First, the U.S. Attorney's Office commencing the action may obtain the warrant of arrest and the U.S. Attorney's Office where the property is located may obtain the warrant of seizure.

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

Attachments

CODE: WARRANT2.RE

UNITED STATES DISTRICT COURT

DISTRICT OF

UNITED STATES OF AMERICA,	:	
	:	
PLAINTIFF,	:	
	:	
v.	:	CIVIL NO.
	:	
ONE PARCEL OF PROPERTY LOCATED AT [1]	:	
	:	
, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON,	:	
	:	
DEFENDANT.	:	

WARRANT OF ARREST IN REM

To the United States Marshal for the District of :

WHEREAS, a verified complaint of forfeiture has been filed on [2], in the United States District Court for the District of , alleging that the real property and premises located at [3], with all appurtenances and improvements thereon, more specifically described in Exhibit A, attached hereto and fully incorporated herein by reference, [[4a] was used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of Title II of the Controlled Substances Act, 21 U.S.C. §§ 801 et seq., punishable by more than one (1) year's imprisonment and is, therefore, subject to seizure and forfeiture to the United States pursuant to 21 U.S.C. § 881(a)(7).] [[4b] constitutes proceeds traceable to the exchange of controlled substances in violation of Title II of the Controlled Substances Act. 21 U.S.C. §§ 801 et seq.]

and is, therefore, subject to seizure and forfeiture to the United States pursuant to 21 U.S.C. § 881(a)(6).

And, the Court being satisfied that based on the verified complaint of forfeiture there is probable cause to believe that the real property and premises so described was so used or intended for such use, and that grounds for application for issuance of a seizure warrant exist, title having vested in the United States by operation of law;

YOU ARE, THEREFORE, HEREBY COMMANDED to arrest and seize said property, entering said property for the purpose of determining the physical condition of the property at the time of the seizure, and to maintain custody of said property as provided by 19 U.S.C. § 1605 until further order of this Court respecting the same. The United States Marshals Service shall use its discretion and whatever means appropriate to protect and maintain said defendant property.

YOU ARE FURTHER COMMANDED TO POST upon said real property in an open and visible manner notice of such seizure at the time thereof, making the government's seizure open and notorious;

AND FURTHER TO SERVE upon the record owner thereof a copy of this warrant in a manner consistent with the principles of service of process of an action in rem under the Supplemental Rules For Certain Admiralty and Maritime Claims, Federal Rules of Civil Procedure, within a reasonable time of seizure;

The United States Marshal shall have at his discretion the authority to dispose of, by any means available, perishable, contaminated, flammable, explosive, or violable items. An inventory

will be kept as to those items and the method of disposal.

[[5] All persons, animals, and property located within the premises and not subject to seizure pursuant to this Order shall be removed from the premises no later than . Such removal shall be accomplished making due provisions for the rights of innocent parties.]

AND UPON APPLICATION of the plaintiff, United States of America, and pursuant to the All Writs Act, 28 U.S.C. § 1651(a), the Court shall issue any order necessary to effectuate and prevent the frustration of the execution of this warrant;

[[6] FURTHER, IT IS HEREBY ORDERED that the occupants of said real property and premises described in Exhibit A, if there be any, upon execution of this seizure warrant, acknowledge in writing the seizure of said property and service of this warrant, [7] and quit the premises no later than [8].]

It is further ORDERED that the owners and occupants of the defendant property not make any changes or improvements whatsoever to said property without the written consent of the United States Marshal.

[[9] The United States Marshal, at his discretion, shall be accompanied by federal, state, or local law enforcement officers to assist him in the execution of this Warrant.]

A RETURN of this warrant shall be promptly made to the Court identifying the individuals upon whom copies were served and the manner employed, and a statement as to the satisfaction of the orders herein issued.

All persons claiming an interest in said property shall file their claims within ten (10) days after the execution of the Warrant or notice of this seizure, whichever occurs first, pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims, and shall serve and file their answers within twenty (20) days after the filing of the claim with the Office of the Clerk, United States District Court, , , , with a copy thereof sent to Assistant United States Attorney .

Additional procedures and regulations regarding this forfeiture action are found at 19 U.S.C. §§ 1602-1619, and Title 21, Code of Federal Regulations (C.F.R.), Sections 1316.71-1316.81. All persons and entities who have an interest in the defendant property may, in addition to filing a claim or in lieu of the filing of a claim, submit a Petition for Remission or Mitigation of the forfeiture for a non-judicial determination of this action pursuant to 28 C.F.R. Part 9.

Dated this day of , 19 .

UNITED STATES DISTRICT JUDGE

****
COMMENTS
****

Note that there is no "[ ]" to the right of the Civil Number on this form. Generally, this document is prepared and filed prior to this number being available.

This alternative warrant may be used in those districts where either policy or judicial decision requires an ex parte determination of probable cause before the issuance of a Rule C warrant for the arrest of real property. This warrant eliminates the need for a Writ of Entry For Inspection, Code: INSPECT.WRT, since it constitutes a court order authorizing the entry onto the property by the United States Marshal. It also eliminates the need for a motion for authorization for the appointment of a substitute custodian, since it specifically authorizes the United States Marshal to hire anyone necessary to assist him in the maintenance of the property.

[5 and 8] [Optional] These provisions can be extremely controversial and the decision to evict should in all instances be reserved by the United States Attorney and the United States Marshal based upon judicial and public climate weighed against the best interest of the case.

[6] A signed acknowledgement will eliminate subsequent issues of notice and may be used in support of an order to vacate the property.

[8] [Optional] to be used in conjunction with #5.

[9] [Optional] This has been added in response to the U.S. v. Ladson, 774 F.2d 436 (11th Cir. 1985) and U.S. v. Showalter, 858 F.2d 149 (3d Cir. 1988), decisions and provides explicit authority for the United States Marshal to be assisted in the execution of the warrant when, for example, there is a potential for violence or where numerous tenants need to be interviewed.

"Posting" the property. In a few instances it may not be advisable to make the seizure open and notorious, e.g., when the building is occupied solely by innocent tenants.

Where the seized property is vacant, you may want to include this paragraph:

> If the property seized is vacant, or becomes vacant, the United States Marshal, or any of his agents, shall, in addition to an inspection, secure the premises and inventory the contents of the premises to the extent the United States Marshal deems appropriate, and take such action as the United States Marshal or his agents deem necessary to protect the personal property of the owner or the former tenants of the property.

Where it is anticipated that occupants of the seized property will request to remove their non-forfeitable personal property, you may want to include this paragraph:

> When the seizure of the real estate property includes the contents, the occupants will be given the opportunity to remove from the location all of their personal belongings. A Deputy United States Marshal will accompany the occupants during the collection and packing of these belongings to ensure that only personal articles are removed from the location and to provide security for government agents and other seized assets. After the identification, collection, and removal of the personal belongings by the occupants, the occupants shall depart the location pursuant to the Order to Vacate.

Where it would be desirable to rent or lease the seized property during the pendency of the forfeiture action, you may want to include this paragraph:

> The United States Marshals Service, or any of its authorized agents or designees, shall have at its discretion the authority to rent/lease any vacant seized properties. Continued vacancy may result in deterioration and a diminished value to said property. The rental or leasing shall help assure any claimants and the United States Marshals Service that the property's value and integrity shall be maintained in at least the same condition as

existed at the time of seizure.

AO 108 (8/89) Affidavit for Seizure Warrant

United States District Court

DISTRICT OF

In the Matter of the Seizure of
(Address or brief description of property or premises to be seized)

APPLICATION AND AFFIDAVIT FOR SEIZURE WARRANT

CASE NUMBER:

I _____ being duly sworn depose and say:

I am a(n) _____ and have reason to believe
Official Title

that in the _____ District of _____
there is now certain property which is subject to forfeiture to the United States, namely (describe the property to be seized)

which is (state one or more ~~basis~~ bases for seizure under the United States Code)

concerning a violation of Title _____ United States Code, Section(s) _____
The facts to support a finding of Probable Cause for issuance of a Seizure Warrant are as follows:

Continued on the attached sheet and made a part hereof. ☐ Yes ☐ No

_____
Signature of Affiant

Sworn to before me, and subscribed in my presence

_____ at _____
Date City and State

_____ _____
Name and Title of Judicial Officer Signature of Judicial Officer

DIRECTIVE NO. 1
pg. 12/14 - 1990

United States District Court

DISTRICT OF

In the Matter of the Seizure of
(Address or brief description of property or premises to be seized)

SEIZURE WARRANT

CASE NUMBER:

TO: _____ and any Authorized Officer of the United States

Affidavit(s) having been made before me by _____ who has reason to
Affiant

believe that in the _____ District of _____ there is now
ce[illegible] property which is subject to forfeiture to the United States, namely (describe the property) to be seized

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the property so described is subject to seizure and that grounds exist for the issuance of this seizure warrant.

YOU ARE HEREBY COMMANDED to seize within 10 days the property specified, serving this warrant and making the seizure (in the daytime—6:00 A.M. to 10:00 P.M.) (at any time in the day or night as I find reasonable cause has been established), leaving a copy of this warrant and receipt for the property seized, and prepare a written inventory of the property seized and promptly return this warrant to _____
U.S. Judge or Magistrate
as required by law.

_____ at _____
Date and Time issued City and State

_____ _____
Name and Title of Judicial Officer Signature of Judicial Officer

11 20 1999 12:15 [illegible] 202 272 4220 P.10

109 (8/89)

Seizure Warrant

RETURN

DATE WARRANT RECEIVED	DATE AND TIME WARRANT EXECUTED	COPY OF WARRANT AND RECEIPT FOR ITEMS LEFT WITH

INVENTORY MADE IN THE PRESENCE OF

INVENTORY OF PROPERTY SEIZED PURSUANT TO THE WARRANT

CERTIFICATION

I swear that this inventory is a true and detailed account of the property seized by me on the warrant.

Subscribed, sworn to, and returned before me this date.

DIRECTIVE NO. 1
pg. 14/14 - 1990

U.S. Judge or Magistrate

Date

Tab No. 7

U.S. Department of Justice

Office of the Deputy Attorney General

DIRECTIVE NO. 90-2 *Executive Office for Asset Forfeiture*

Washington, D.C. 20530

February 14, 1990

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, United States Marshals Service

FROM: Cary H. Copeland CHC
Director
Executive Office for Asset Forfeiture

SUBJECT: Forfeiture Policies

The policies set out below are provided in response to questions which have arisen regarding the issues covered:

I. CLARIFICATION OF ADOPTIVE SEIZURE POLICY

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 use of forfeiture requires a willingness on the part of federal law enforcement agencies to adopt State and local seizures for federal forfeiture. 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.

B. Construction of Notice Requirements in Sec. 6079 and 6080 of P.L. 100-690.

As applied in the case of adopted seizures, the requirements of written notice "At the time of seizure" set out at 21 U.S.C. 881-1(b) and at the editorial note to 21 U.S.C. 881 are construed to mean at the time of the federal seizure, i.e. the decision to adopt the seizure for federal forfeiture. This construction reflects the intent of Congress and no other interpretation is feasible because seizing State and local law enforcement agencies cannot know that the property they seize will be accepted for federal forfeiture until the appropriate federal officials review the seizure and agree to adopt it.

Once a decision has been made to adopt the seizure of an item of property covered by the notice requirements set out at 21 U.S.C. 881-1(b) or the note to 21 U.S.C. 881, the adopting agency must take steps to ensure that the statutory notices are served in the most expeditious manner practicable. Each component of the Department should adjust its internal policies and procedures as necessary to give force to this construction.

C. Fifteen-Day Rule for Presentation for Federal Adoption.

Because the Congress, in enacting the two provisions of law discussed above, clearly intended to avoid situations where seized properties are held for interminable periods of time prior to the commencement of forfeiture proceedings, all Department of Justice components should ask State and local seizing agencies to file any requests for federal adoption within fifteen business days of the State or local seizure (Saturdays, Sundays, and holidays excepted). This new fifteen-day rule should be waived whenever the requesting State or local agency can set out circumstances justifying the delay. Moreover, waivers should be granted generously during the initial weeks of implementation so that State and local officials will have a reasonable opportunity to learn of and adapt to the federal policy in favor of prompt initiation of forfeiture proceedings against seized property.

D. 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. Adopted cash and real property must, however, be turned over to the custody of the U.S. Marshals Service. In addition, the Marshals Service must be consulted prior to the adoption of a seizure of real property.

II. RESTATEMENT OF LONGSTANDING POLICIES.

A. Administrative Forfeiture.

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

1. The Department policy in favor of aggregation requires judicial forfeiture, i.e. the items of property (1) have an aggregate appraised value of over $100,000, (2) are subject to forfeiture under the same statutory authority, (3) are forfeitable on the same factual basis, and (4) have a common owner;

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

3. The property subject to administrative forfeiture was seized along with property that requires judicial forfeiture (e.g. real estate or personalty [other than hauling conveyances] valued at over $100,000) with the result that all will be forfeited in a consolidated civil judicial forfeiture action; or

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

B. Seized Cash.

Seized cash, except where it is to be used as evidence, is to be deposited promptly in the Seized Asset Deposit Fund pending forfeiture. The Assistant Attorney General, Criminal Division, may grant exceptions to this policy in extraordinary circumstances. Transfer of cash to the United States Marshal should occur within sixty days of seizure or ten days of indictment.

Investigative agencies are asked to canvass their offices to identify cash subject to forfeiture being held as evidence and to report to this office by March 16 regarding the amounts of cash being held in each office. Moreover, to the extent that parcels of cash are being held as evidence, the report should provide the names, offices and telephone numbers of the prosecutors who have asked that the cash be so held.

C. Notifying the Department's Criminal Division.

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

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

D. Equitable Sharing Etiquette.

Complaints are sometimes received of instances in which equitable sharing checks are presented to State or local law enforcement agencies without inviting or recognizing the efforts of participating federal agencies. This is detrimental to the Department's forfeiture program which is dependent upon the close cooperation of investigators, prosecutors, and Marshals.

cc: Barry H. Stern
Associate Deputy Attorney General

Philip Renzulli
U.S. Postal Service

Glenn McAdams
Internal Revenue Service

Tab No. 8

U.S. Department of Justice

Office of the Deputy Attorney General

DIRECTIVE NO. 90-3 *Executive Office for Asset Forfeiture*

Washington, D.C. 20530

June 29, 1990

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, United States Marshals Service

FROM: Cary H. Copeland CHC
Director
Executive Office for Asset Forfeiture

SUBJECT: Departmental Policy Regarding the Seizure and Forfeiture of Real Property that is Potentially Contaminated, or is Contaminated, with Hazardous Substances

Congress enacted the Superfund Amendment and Reauthorization Act of 1986 (SARA) 1/ to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). 2/ Section 120(a) of the Act 3/ imposes the liability provisions of Section 107 4/ upon the United States. Section 120(h) 5/ of the Act sets forth notice and warranting requirements which apply whenever any agency, department or instrumentality of the United States enters into a contract for the sale or other transfer of real property which is owned by the United States and on which any hazardous

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1/ Public L. No. 99-499, 100 Stat. 1966.

2/ 42 U.S.C. 9601 et seq.

3/ 42 U.S.C. 9620(a).

4/ 42 U.S.C. 9607.

5/ 42 U.S.C. 9620(h).

substance 6/ either (1) has been stored 7/ for more than one year; (2) is known to have been released; 8/ or (3) is known to have been disposed 9/ of.

The Department issued its initial policy on the seizure and forfeiture of real property that is contaminated with hazardous waste on June 23, 1989. This initial policy was based on the Environmental Protection Agency's (EPA) proposed implementing regulations to Section 120(h) of SARA.

However, on April 16, 1990, the EPA promulgated its final regulations interpreting Section 120(h). 10/ (Attachment A.) Additionally, the Environment and Natural Resources Division (Environment Division), formerly Land and Natural Resources, Department of Justice, has issued a memorandum providing guidance to federal agencies involved in forfeitures regarding notice and liability under the statute. (Attachment B.) In light of the significant changes contained within the final regulations and the Environment Division guidance, the Department is now promulgating a revised policy which supersedes the initial Departmental policy and any intervening directives by Department components.

6/ Hazardous substance means that group of substances defined as hazardous under CERCLA (42 U.S.C. 9601(14)) and 40 C.F.R. § 300.6), and that appear at 40 C.F.R. 302.4. See also 40 C.F.R. 261 App. VII, App. VIII and 40 C.F.R. 373.4(a).

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

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

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

10/ 40 C.F.R. 373.

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

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

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

This policy is based on the ability of the United States to invoke an "innocent owner" defense from liability for hazardous substance contamination found on real property, if such contamination resulted from a prior owner's activities, when the real property is acquired through involuntary means (this includes seizures and forfeitures, which are involuntary to the owner) if that federal agency (1) exercises due care once it takes possession of the property, (2) secures the property from other third party actions, and (3) provides notice 11/ of those hazardous substance conditions about which the United States knows when it transfers or sells the property. 12/

11/ Specifically,

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

40 C.F.R. 373.1.

12/ 42 U.S.C. 9601(35) and 9607(b)(3).

To insure that the United States can avail itself of the "innocent owner" defense in cases involving this class of real property, once the property is seized, federal law enforcement agencies will exercise due care in relation to the property and take precautions against foreseeable acts or omissions of possible third parties. Furthermore, such real property that is forfeited will only be transferred or sold with notice of the potential or actual contamination. 13/ Notice must be based on information that is available on the basis of a complete search of agency files. 14/ This notice will be included in the contract of sale and the deed. A proposed notice is at Attachment C.

In light of the "innocent owner" defense, real property that is contaminated or potentially contaminated with hazardous substances due to the activities of a prior owner, should be transferred or sold "as is" and an environmental assessment

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13/ The notice required

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

40 C.F.R. 373.2. The notice required

> for the known release of hazardous substances applies only when hazardous substances are or have been released in quantities greater than or equal to the substance's CERCLA reportable quantity found at 40 C.F.R. 302.4.

40 C.F.R. 373.2.

14/ 42 U.S.C. 9620(h)(3); 40 C.F.R. 373.1. It is envisioned that this search will involve the seizing agency's casefile(s) relating to the real property. Additionally, the search must include any documentation generated from an environmental assessment or the removal of hazardous substances from the real property.

and/or remediation of the contamination need not be undertaken. 15/ Whenever possible, a commitment from the buyer to clean-up the property should be obtained as a part of the contract of sale.

However, if the real property becomes contaminated with a hazardous substance after the United States becomes the owner, 16/ then the "innocent owner" defense is inapplicable to that contamination. This situation normally will arise when the United States operates a business or activity on the property that results in the storage, release or disposal or hazardous substances (e.g., gasoline stations, metal plating shops, dry cleaners, printers, etc.). In this circumstance, the United States is responsible for (1) all costs of hazardous substance removal and/or remedial action; 17/ (2) providing notice of the hazardous substance to a subsequent transferee or purchaser; and (3) a warranting covenant to a subsequent transferee or purchases. 18/ Because of the potential resulting liability and

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

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

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

18/ 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

(continued...)

expense, the USA should approve the operation of such a business or activity only in unusual circumstances.

This policy envisions United States Attorneys exercising discretion in the seizure and forfeiture of real property that is contaminated or potentially contaminated with hazardous substances. Normally, such properties should not be forfeited unless there is at least $30,000 in net equity belonging to the defendant. **Furthermore, such properties should not be forfeited when there is reason to believe the property is substantially contaminated with hazardous substances and that such contamination would render the property unmarketable.** Clean-up costs can be considerable particularly when the water table is involved. In making this determination, the USA may order an environmental assessment which will be paid from the Assets Forfeiture Fund. 19/

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

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

2. the filing of some other document in the county deed records containing notice of the significant contamination, if such filing is permitted under state law);

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

4. notification of any lienholders of the significant

18/(...continued)
after the date of such transfer shall be conducted by the United States.

42 U.S.C. 9620(h)(3)(B).

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

contamination for such action as they may want to take; and

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

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

Questions concerning this policy should be directed to the Asset Forfeiture Office, Criminal Division (202-514-1263 or FTS 368-1263).

Attachments

cc: Barry H. Stern
Associate Deputy Attorney General

Federal Register

Monday
April 16, 1990

Part IV

Environmental Protection Agency

40 CFR Part 373
Reporting Hazardous Substance Activity When Selling or Transferring Federal Real Property; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 373

[SWH FRL-3383-9]

Reporting Hazardous Substance Activity When Selling or Transferring Federal Real Property

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is today promulgating regulations in response to requirements established by section 120(h) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. 99-499). Under section 120(h), whenever any agency, department, or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is owned by the United States, and on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, the contract must include notice of the type and quantity of such hazardous substance, and the time at which such storage, release, or disposal took place. EPA is to prescribe the form and manner of such notice. Today's final rule defines when these requirements apply, and prescribes the form and manner of notice, as required by section 120(h).

EFFECTIVE DATE: This final rule is effective October 17, 1990. These regulations and other requirements of section 120(h) of the Act apply to real property owned by the United States that is sold or transferred after October 18, 1990.

ADDRESSES: The official record for this rulemaking is identified as Docket Number 120FP-TR and is located in the EPA Superfund Docket Room (LG 100), 401 M Street, SW., Washington, DC 20460. The docket is open from 9 a.m. to 4 p.m. Monday through Friday except for public holidays. To review docket materials, make an appointment by calling 202-382-3046. The public may obtain copies of docket materials as provided for in 40 CFR part 2. A fee may be charged for copying services.

FOR FURTHER INFORMATION CONTACT: For general information contact the RCRA/CERCLA Hotline at 1-800-424-9346 (toll-free) or in the Washington Metropolitan Area at 202-382-3000. For information on specific aspects of this final rule, contact the Office of Waste Programs Enforcement (OS-510), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, 202-475-6770.

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I. Introduction

A. Statutory Authority

The Superfund Amendments and Reauthorization Act (SARA), Public Law 99-499, amended the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. section 9601 *et seq.* SARA added section 120(h)(1) of CERCLA which states that

> • • • whenever any department, agency, or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is owned by the United States and on which any hazardous substance was stored for one year or more, known to be released, or disposed of, the head of such department, agency, or instrumentality shall include in such contract notice of the type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent such information is available on the basis of a complete search of agency files.

Section 120(h)(2) requires the Environmental Protection Agency (EPA) to promulgate regulations specifying the form and manner of such notice no later than 18 months after enactment of SARA. The notice is required for U.S. property, as described below in further detail, that is sold or transferred six months after the effective date of the regulation.

On January 13, 1988, EPA published proposed rules that would implement the notice requirements of section 120(h)(1).

B. Interagency Coordination

The statute specifies that EPA is to develop the notice regulations required by section 120(h)(2) in consultation with the Administrator of the General Services Administration (GSA). The Agency worked closely with GSA in the development of the proposal, and has consulted with GSA throughout the development of this final rule. Additionally, EPA actively solicited information and comment from other potentially affected agencies during the proposal stage, and received a number of comments on the proposed rule.

II. Responses to Major Public Comments on the Proposed Rule

A document summarizing the comments and responses thereto is available in the public docket to this final rule. The major issues raised by the commenters, and the Agency's response to those issues, are discussed below.

A. "Transfer" of Real Property

Section 120(h) of CERCLA states that its requirements apply to the sale or *other transfer* (emphasis added) of real property which is owned by the United States. In the proposed rule, EPA did not define "transfer" but presumed that the term "transfer" in the statute is used pursuant to its definition in the Federal Property Management Regulations (FPMR) found at 41 CFR part 101-47, and that the proposed regulations would apply to agencies undertaking the activity defined therein. Several problems were noted with this definition.

First, several commenters noted that they were unable to find the definition of "transfer" in the FPMR. Second, one commenter stated that since the Agency used the FPMR to define transfer, EPA should also use the FPMR's definition of "real property."

Determining what constitutes a "transfer" of real property is important for implementing the requirements of section 120(h). EPA referred to the FPMR at 41 CFR 101-47.203-2 in order to make sure that federal agencies realized that the proposed regulations applied to transfers of property *between* agencies. EPA believes that, since the statute consistently uses the word "any" as in "whenever *any* department, agency, or instrumentality enters into *any* contract for the sale or transfer of property owned by the United States • • • *each* deed shall contain covenants • • •" it appears clear that the statute and today's rules must apply to federally owned real property sales and transfers between agencies of the United States, between the United States and private parties, and between the United States and state and local governments.

As previously stated, one commenter suggested that "real property" should be

defined pursuant to the definition found in the FPMR at § 101–47.103–12. However, that definition excludes many types of public lands from being considered real property. As discussed above, EPA believes that real property is a broad concept. Using the definition of real property in the FPMR would greatly limit the applicability of section 120(h), and consequently undermine protection of human health and the environment.

In summary, EPA intends that the regulations implementing section 120(h) apply to the sale or transfer of all real property, and that today's final rule applies whenever any agency, department or instrumentality of the United States enters into any contract for the sale or other transfer of real property.

One commenter suggested that grants of easements permanently conveying use, occupancy, and control of real property, and leases with options to buy, be treated as the equivalent of fee simple conveyances. However, another commenter suggested that the requirements of section 120(h)(1) apply only to fee simple conveyances, and not to transfers of property rights such as easements. Still another commenter suggested that the rule implementing section 120(h)(1) not apply to transfers of leases between government agencies.

The questions of whether and to what extent leases and easements should be included among the types of property subject to these regulations was not addressed by EPA in developing the proposed rule. These questions involve a complicated area of real property law, and may be affected by specific deed or lease terms and by state common law. Accordingly, EPA has not addressed these issues in the final rule.

B. Department, Agency, or Instrumentality

Early in the development of the proposed rule, EPA received several informal inquiries regarding whether or not a particular organization was to be considered a department, agency, or instrumentality of the United States and, therefore, subject to the requirements of section 120(h)(1). To clarify this, EPA stated in the proposed rule that, for the purposes of implementing the requirements of section 120(h)(1), "department, agency, or instrumentality of the United States" means those entities or organizations created or chartered by the legislative, executive or judicial branches of the federal government, including those corporations that are chartered by the federal government.

Several organizations commented on the applicability of section 120(h) with regard to their status as "instrumentalities" of the United States. One commenter suggested that, because the term "instrumentality" of the United States is a "term of art" applicable to many entities created by the United States for widely varying purposes, the term must be used with great care in regulatory proceedings to avoid misinterpretation or unintended application to particular circumstances. The commenter also stated that its organization was not a department, agency or instrumentality of the United States within the meaning of section 120 of CERCLA. However, the commenter later stated that EPA itself should not seek to determine by regulation the significant policy and technical issues surrounding the interpretation of section 120(h)(1) with respect to certain federal instrumentalities, including the commenter.

From the above, it appears that the commenter considers itself to be, under certain conditions, an instrumentality of the United States. However, EPA believes that the commenter's status as an instrumentality of the United States is not so flexible as to allow its consideration as such under some circumstances but not under others. Therefore, since the commenter has stated that it is a federal instrumentality, and since the statute clearly states that the requirements of section 120(h) apply to "*any* department, agency, or *instrumentality* of the United States" (emphasis added), EPA believes that the requirements of section 120(h)(1) are applicable to the commenter. However, EPA does agree with the commenter that the precise definition of what is or is not an "instrumentality" of the United States is beyond the scope of today's rule. Rather than attempt such a definition here, EPA has decided to leave this determination to a case-by-case basis. Therefore, the Agency has deleted the definition of "department, agency or instrumentality" from the final rule.

Another commenter stated that, while generally considered an instrumentality of the United States, there are specific differences between itself and other entities of government which show that federal control over its organization is far from complete. While EPA agrees that the examples provided by the commenter illustrate the differences between the commenter's organization and most other federal entities, the Agency believes that this rulemaking is not the appropriate place to make a determination of whether the commenter is or is not an "instrumentality" for the purposes of implementing section 120(h).

In a related comment, the second commenter stated that property acquired by its organization through foreclosure and, therefore, potentially subject to the requirements of section 120(h)(1) when sold, is owned by the corporate instrumentality rather than the United States. Since section 120(h) applies only to property owned by the United States, the commenter believes that property it owns and sells as a corporate instrumentality acting for the United States would not be subject to the requirements of section 120(h)(1).

This comment thus raises the broader question of when and under what conditions property owned by a federal instrumentality is owned by the United States. EPA believes that the resolution of this question involves considerations beyond the scope of today's rule and, therefore, should not be attempted here. EPA expects that existing statutory and case law will be applied in the appropriate circumstances to determine whether property is owned by the United States and therefore subject to this rule.

C. The Concept of Real Property

As noted in II. A. above, EPA received comment on, and has decided not to use, the definition of "real property" found in the FPMR for the purposes of implementing the requirements of section 120(h)(1). Because the law of real property has evolved primarily at the state level, EPA believes it is most appropriate to take into consideration the common law of the state in which the property lies in determining whether a particular ownership right constitutes "real property" for the purposes of this rule. However, as a general guide, EPA notes that the term real property is generally used to "designate both things which are permanent, fixed, and immovable, as lands, and rights arising out of, or connected with, lands; and includes land and whatever is affixed thereto, and rights arising out of, or annexed to or exercisable within or about, the land" (73 C.J.S. *Property* section 16, 1983).

D. Application to Custodial Property

In the preamble to the proposed rule, EPA expressed doubt that Congress intended the notice and covenant requirements of this sub-section to apply to properties obtained by the United States through foreclosure and held in a custodial manner until sale. A number of commenters also argued more broadly that the sub-section should not apply in

a variety of circumstances where the storage, release or disposal occurred before the federal government owned the property. EPA agrees with these commenters in part, and disagrees in part, as discussed below.

EPA believes that the concern of Congress in enacting section 120(h) was with federally owned facilities whose own operations might involve storage, disposal or release of hazardous substances. The types of facilities cited in Congressional discussion of section 120 included military bases, Department of Energy nuclear production facilities, and other civilian installations. Moreover, nothing in the text or legislative history of the statute suggests that Congress meant to require agencies which had not in some manner been responsible for the storage, release or disposal of hazardous substances to unilaterally assume the obligation in section 120(h)(3) of remedying the contamination prior to sale and warranting that contamination that came to light after sale would also be corrected. In addition, section 120(h)(1) requires the notice to contain information about the type and quantity of hazardous substance stored, released, or disposed of, and the time at which such storage, release or disposal took place. It is unlikely that the agency would be expected to have such detailed information with respect to an activity which took place before the agency held the property.

Therefore, it is EPA's belief, in the light of the overall statutory scheme, that section 120(h)(1) was meant to apply where the storage, release, or disposal referred to in the statute occurred during the time the property was owned by the Federal government. It is EPA's view, after considering the comments it has received, that this is a more appropriate interpretation of section 120(h)(1) than its earlier approach (and similar approaches suggested by some commenters) which focused on the manner in which the property was acquired.

The proposed rule contained a specific exemption for small residential properties acquired by foreclosure. As discussed above, EPA now views such an exemption as inappropriate. Moreover, EPA believes that it is inappropriate to include substantive exemptions in the rule itself, because by statute the rule is primarily intended to address the "form and manner" of the notice to be given. Therefore, the rule promulgated today does not contain any such exemptions.

One commenter stated that the proposed exclusion for residential property should extend to all real property, including commercial and industrial real property, that may be acquired by Federal lending agencies through foreclosure or settlement. Specifically, the commenter, which is an organization that makes non-residential loans, recommended that "* * * Federal lending agencies which obtain property through foreclosure or settlement, and then hold that property in a custodial manner until resale, should be exempt from the requirements set forth not only in the proposed regulations, * * * but also in 42 U.S.C. section 9620(h) and, indeed, in all other sections of CERCLA, including 42 U.S.C. 9607(a), which impose obligations and liability upon persons merely because they are deemed to be owners or operators of a facility." In particular, the commenter suggested that the "innocent landowner" defense in 101(35)(A) of CERCLA might exempt federal lending agencies from the notice requirement of section 120(h)(1) as well as from liability under section 107.

EPA does not believe that a generic exemption for commercial or industrial property acquired by foreclosure would be consistent with congressional intent. In EPA's view, the duty to give notice is not a function of the manner in which property was acquired but of what circumstances occur while it is owned by the government. The policy concerns underlying the request for such an exemption would not arise under EPA's interpretation of 120(h)(1) as applying only where storage, release or disposal occurs while the property is owned by the government.

With respect to the commenter's suggestion that liability under 42 U.S.C. 9607 should not extend to property acquired by the government through foreclosure, EPA believes it would be inappropriate to attempt to resolve in today's rulemaking the application of CERCLA provisions other than section 120(h)(1). EPA also notes that the "innocent landowner" defense cited by the commenter contains its own notice requirement at section 101(35)(C), which may be relevant to agencies acquiring previously contaminated property, whether or not they must also give notice under section 120(h)(1).

E. Requirement to Search Agency Files

Several commenters stated that the Agency's proposed definition of a complete search of agency files would impose a significant financial burden on the agencies selling or transferring real property, and would prolong the length of time it takes to sell such property. Additionally, one commenter suggested that EPA did not have the authority to define each agency's responsibilities for conducting the file search. Yet another commenter requested that EPA clarify what was meant by the phrase "obtainable without undue burden" in the definition of a complete search of agency files.

EPA anticipates that federal agencies will make a reasonable and good faith effort to identify potential hazardous substance contamination on federally owned real property. Beyond this general statement, it would be very difficult to reasonably define this term without reference to the myriad of situations under which the different agencies will become subject to the requirements of section 120(h)(1). It is, therefore, difficult to provide an effective yet reasonable framework in the regulation for a complete search. EPA has therefore dropped the definition of "complete search of agency files" from the regulation.

F. Definitions

EPA did not receive any comments on the specific definitions that were proposed for *hazardous substances, storage, release,* and *disposal.* Therefore, the proposed definitions for those terms have been incorporated into today's final rule.

However, one commenter requested clarification on whether or not the notification requirement for section 120(h) applies to asbestos-containing products that are structurally integrated into any buildings that are part of Federal real property that is sold or transferred. While EPA under CERCLA has broad authority to regulate asbestos, defining the circumstances of where that jurisdiction applies goes beyond the scope of today's rule.

Additionally, several comments were received on the proposed quantitative level below which the notice requirement for the storage of hazardous substances would not apply (in other words, the storage trigger), and on the possibility of establishing triggers for release and disposal. These comments are addressed below.

1. Storage Trigger

In the proposed rule, EPA stated that requiring Federal agencies disposing of real property to report on very small quantities of hazardous substances that have been stored on the property would be burdensome and probably would not contribute significantly to the protection of human health and the environment. Additionally, the Agency stated that the storage of hazardous substances is not tantamount to their release and/or disposal and, in turn, may present less of an environmental threat. For various

reasons discussed in the proposal, but especially because generators of 100 kilograms or less per month of hazardous waste are allowed to store up to 1000 kilograms on site, EPA proposed that 1000 kilograms would be an appropriate trigger level for the section 120(h)(1) notice requirement for the storage of hazardous substances.

Several commenters suggested using the reportable quantities (RQs) for CERCLA hazardous substances found at 40 CFR 302.4 as the quantitative level below which the storage of hazardous substances would not require notice under section 120(h).

EPA has considered such an approach, and has adopted it in part in today's final rule. The Agency still maintains that there is a significant difference between the storage and the release of hazardous substances. Because the RQ values are based on the relative degree of hazard presented to human health and the environment when hazardous substances are released, EPA believes that their general use as the trigger for the notification of the storage of hazardous substances would be overly conservative. However, in some instances, the RQ for a particular hazardous substance is well over the proposed 1000 kilogram storage trigger, resulting in situations where the storage of a hazardous substance would require notification while its release would not. Therefore, in order to avoid this contradiction, today's final rule sets the quantitative level below which the storage of hazardous substances for one year or more would not require notification under section 120(h)(1) at the greater of either 1000 kilograms or the reportable quantity for the particular hazardous substance found at 40 CFR 302.4. Additionally, it should be noted that reporting the storage of hazardous substances will only be required when the greater of either 1000 kilograms or the RQ is stored for a period of one entire year. As in the proposed rule, the exception to this is for those items that are both CERCLA hazardous substances and acutely hazardous wastes under the Resource Conservation and Recovery Act (RCRA). Today's final rule establishes the notice trigger for the storage of those substances at one kilogram.

2. Triggers for release and disposal.

Several commenters suggested using the RQs to establish triggers for notifying buyers of the release of hazardous substances under section 120(h)(1). EPA has considered this approach, and believes that it is logical, reasonable, and appropriate to use the RQ values as levels below which the release of hazardous substances will not require notification under section 120(h), and has incorporated these release triggers into today's final rule.

One commenter suggested using RQ values as quantitative levels below which the notice requirement for the disposal of hazardous substances under section 120(h)(1) would not apply. EPA has considered incorporating such an approach into the final rule. However, since the disposal of hazardous substances is normally managed under the Resource Conservation and Recovery Act (RCRA), which has not established any type of quantitative triggers for such an activity, EPA has not promulgated a trigger for reporting the disposal of hazardous substances under section 120(h)(1) in today's final rule.

C. Form and Manner of Notice

Several commenters stated that while the information proposed to be required in the section 120(h)(1) notice is appropriate, EPA should require that GSA form 118b be used whenever property is sold or transferred through GSA. One commenter also stated that property that is transferred to private ownership without GSA involvement should use the information required by EPA as additional language in the conveyance rather than by creating a new form.

EPA agrees that GSA form 118b is the appropriate vehicle for the disclosure of information required by section 120(h)(1) when the property is sold or transferred by GSA. However, since GSA has indicated that it will amend the information requirements of 118b to reflect the type of information proposed by EPA to implement the requirements of section 120(h), EPA sees no need to state that 118b is specifically required. In today's final rule, EPA simply requires that the specific information described in the proposed rule be included with the contract of sale, and notes that standard GSA operating procedure will require the modified form 118b in properties handled by GSA.

III. Regulatory Analyses

A. Regulatory Impact Analysis

Executive Order No. 12291 requires EPA to assess the effect of contemplated Agency actions during the development of regulations. Such an assessment consists of a quantification of the potential benefits and costs of the rule, as well as a description of any beneficial or adverse effects which cannot be quantified in monetary terms. In addition, Executive Order 12291 requires that regulatory agencies prepare an analysis of the regulatory impact of major rules. Major rules are defined as those likely to result in:

1. An annual cost to economy of $100 million or more; or

2. A major increase in costs or prices for consumers or individual industries; or

3. Significant adverse effects on competition, employment, investment, innovation, or international trade.

Because this proposed rule affects only agencies, departments, or instrumentalities of the United States, no formal Regulatory Impact Analysis was conducted. However, EPA has concluded, based on a survey of the number of properties federal agencies sell or transfer each year, and the cost to the agency of complying with the notice provisions of section 120(h)(1), that the cost of the regulation to the government falls well below the $100 million threshold of a major rule.

This rule has been submitted to the Office of Management and Budget for review as required by Executive Order No. 12291.

B. Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act, 5 U.S.C 601 *et seq.*, whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). Since this final rule affects only agencies, departments, or instrumentalities of the United States, no regulatory flexibility analysis is required. Therefore, EPA certifies that the rule will not have significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

This proposed rule only affects entities of the Federal Government. Therefore, the reporting and notification requirements contained in this rule are not subject to approval by the Office of Management and Budget (OMB) under provisions of the Paperwork Reduction Act of 1980. 44 U.S.C. 3501, *et seq.*

IV. References

(1) U.S. EPA. "Background Document for the Federal Real Property Transfer Regulations as Authorized by section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act." U.S. EPA, OWPE, Washington, DC, 1987.

List of Subjects in 40 CFR Part 373

Federal facilities, Federal real property transfer, Environmental protection, Hazardous substances, Hazardous materials, Reporting and recordkeeping requirements, Superfund, Hazardous substance storage, release, and disposal.

Dated: April 6, 1990.

William K. Reilly,

Administrator.

Therefore, for the reasons set out in the preamble, chapter I of title 40 of the Code of Federal Regulations be amended as follows:

1. Part 373 is added to read as follows:

PART 373—REPORTING HAZARDOUS SUBSTANCE ACTIVITY WHEN SELLING OR TRANSFERRING FEDERAL REAL PROPERTY

Sec.

373.1 General requirement.
373.2 Applicability.
373.3 Content of notice.
373.4 Definitions.

Authority: Section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*

373.1 General requirement.

After the last day of the six month period beginning on April 16, 1990, whenever any department, agency, or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is owned by the United States and at which, during the time the property was owned by the United States, any hazardous substance was stored for one year or more, known to have been released, or disposed of, the head of such department, agency, or instrumentality must include in such contract notice of the type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent such information is available on the basis of a complete search of agency files.

§ 373.2 Applicability.

(a) Except as otherwise provided in this section, the notice required by 40 CFR 373.1 applies whenever the United States enters into any contract for the sale or other transfer of real property which is owned by the United States and on which any hazardous substance was stored for one year or more, known to have been released, or disposed of.

(b) The notice required by 40 CFR 373.1 for the storage for one year or more of hazardous substances applies only when hazardous substances are or have been stored in quantities greater than or equal to 1000 kilograms or the hazardous substance's CERCLA reportable quantity found at 40 CFR 302.4, whichever is greater. Hazardous substances that are also listed under 40 CFR 261.30 as acutely hazardous wastes, and that are stored for one year or more, are subject to the notice requirement when stored in quantities greater than or equal to one kilogram.

(c) The notice required by 40 CFR 373.1 for the known release of hazardous substances applies only when hazardous substances are or have been released in quantities greater than or equal to the substance's CERCLA reportable quantity found at 40 CFR 302.4.

§ 373.3 Content of notice.

The notice required by 40 CFR 373.1 must contain the following information:

(a) The name of the hazardous substance; the Chemical Abstracts Services Registry Number (CASRN) where applicable; the regulatory synonym for the hazardous substance, as listed in 40 CFR 302.4, where applicable; the RCRA hazardous waste number specified in 40 CFR 261.30, where applicable; the quantity in kilograms and pounds of the hazardous substance that has been stored for one year or more, or known to have been released, or disposed of, on the property, and the date(s) that such storage, release, or disposal took place.

(b) The following statement, prominently displayed: "The information contained in this notice is required under the authority of regulations promulgated under section 120(h) of the Comprehensive Environmental Response, Liability, and Compensation Act (CERCLA or "Superfund") 42 U.S.C. section 9620(h)."

§ 373.4 Definitions.

For the purposes of implementing this regulation, the following definitions apply:

(a) *Hazardous substances* means that group of substances defined as hazardous under CERCLA 101(14), and that appear at 40 CFR 302.4.

(b) *Storage* means the holding of hazardous substances for a temporary period, at the end of which the hazardous substance is either used, neutralized, disposed of, or stored elsewhere.

(c) *Release* is defined as specified by CERCLA 101(22).

(d) *Disposal* means the discharge, deposit, injection, dumping, spilling, leaking or placing of any hazardous substance into or on any land or water so that such hazardous substance or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwater.

[FR Doc. 90-8639 Filed 4-13-90; 8:45 am]
BILLING CODE 6560-50-M

U.S. Department of Justice
Land and Natural Resources Division

ATTACHMENT B

Office of the Assistant Attorney General

Washington, D.C. 20530

May 16, 1990

MEMORANDUM

TO: Edward S. G. Dennis, Jr.
Assistant Attorney General
Criminal Division

FROM: Richard B. Stewart DS
Assistant Attorney General
Environment and Natural Resources Division

SUBJECT: Environmental Liability in Relation to Federal Property Ownership: New EPA Regulation

Attached is a comprehensive memorandum regarding new regulations which will affect federal agencies that own contaminated property and later sell or transfer it. As you know, concerns about such liability prompted former Acting Associate Attorney General Whitley to issue a letter which limits law enforcement forfeiture activities due to such liability.

The new EPA regulation should allow greater use of forfeiture without liability for contamination which was not caused by the agency which takes ownership.

After you review this memorandum, I propose discussing it with the Advisory Committee of United States Attorneys (at the upcoming meeting on May 21) as well as other appropriate components in order to help develop operational guidelines for law enforcement agencies, and determine the best way to communicate these guidelines. We have already been engaged in discussions with the Asset Forfeiture Office.

Please let Deputy Assistant Attorney General Barry Hartman or me know if you have questions or concerns.

cc: Barry H. Stern
Cary Copeland

Office of the Assistant Attorney General

Washington, D.C. 20530

May 16, 1990

MEMORANDUM

TO: Edward S. G. Dennis, Jr.
Assistant Attorney General
Criminal Division

FROM: Richard B. Stewart RBS/kwww
Assistant Attorney General
Environment and Natural Resources Division

SUBJECT: Environmental Liability in Relation to Federal Property Ownership: New EPA Regulation

SUMMARY

This is to advise you of a recent regulation promulgated by the Environmental Protection Agency (EPA) concerning the hazardous substance activity reporting requirements for federal agencies when selling or transferring federal real property. The regulation implements Section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), 42 U.S.C. § 9620(h). The regulation should assist the law enforcement components in the Department in establishing procedures for seizure and forfeiture of property that may be contaminated with hazardous substances.

EPA's regulation governs the notice federal agencies must give when selling or transferring real property on which hazardous substances have been stored, released or disposed of. Federal agencies must include in the contract of sale or transfer notice of any hazardous substance which "during the time the property was owned by the United States" was "stored for one year or more, known to have been released, or disposed of." The notice must include the "type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent such information is available on the basis of a complete search of agency files." 55 Fed. Reg. 14212 (April 16, 1990), to be codified at 42 C.F.R. § 373.1. Because the regulation focuses on hazardous substance

conditions which occurred during the federal ownership, federal law enforcement agencies will not bear the burden of concern over waste problems created by prior owners.

The regulation constitutes a government interpretation of Section 120(h), which establishes special conditions for federal agencies when they transfer property. Many agencies, including the Department, have been concerned over their exposure to clean up and other costs under the environmental laws, in particular CERCLA, when they obtain real property particularly as a result of forfeiture proceedings in connection with law enforcement activities. To assist the Department in both understanding this regulation, and assessing its potential liability for environmental contamination on real property, I am providing an additional explanation of the pertinent provisions of federal environmental law.

CERCLA BACKGROUND

Liability Scheme. CERCLA establishes both funding and authority for EPA to undertake clean up of hazardous substance sites, and also structures a liability scheme under which persons who fund clean up of hazardous substances may recover their costs. EPA's funds, known as the Superfund, are generally not available for response actions on federally owned property.1/ As a result, federal agencies must plan and budget for clean up of hazardous substances at their own property.

The heart of CERCLA rests in its liability scheme, found primarily in Section 107, which establishes classes of persons who may be liable for clean up costs. Liable parties include (1) owners and operators of facilities; (2) certain prior owners and operators; (3) generators, i.e., those who arrange for the disposal of waste; and (4) transporters of waste. 42 U.S.C. § 9607(a). Facility is a broadly defined term, including landfills, pits, buildings, vehicles, and "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9). Consumer products in consumer use are excluded.

Liable parties may be held liable for the costs of removal or remedial actions, natural resource damages and health assessments, as each of these terms is used in CERCLA. 42 U.S.C. § 9607(a). Generally these costs are incurred by a federal or state governmental entity, which then seeks to recover from liable parties. CERCLA also permits actions for contribution

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1/ See Section 111(e)(3), 42 U.S.C. § 9611(e)(3), E.O. 12580 §§ 2(a), 2(e), 9(i). Short term or emergency responses, known as removal actions, may be undertaken by the Superfund at federally owned properties at the discretion of EPA.

among and between liable parties. 42 U.S.C. § 9613(f)(1). In such suits, the court is to "allocate response costs among liable parties using such equitable factors as the court deems are appropriate." Id.

Defenses Available. CERCLA recognizes few defenses. Under Section 107(b), the only defenses to liability require proof that the

> "release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by --
> (1) an act of God;
> (2) an act of war;
> (3) an act or omission of a third party other than an employee or agency of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant. . ."

To invoke the CERCLA "third party" defense, the liable party must also demonstrate (1) exercise of "due care with respect to the hazardous substance concerned" and (2) taking of "precautions against foreseeable acts or omissions" of possible third parties. See 42 U.S.C. § 9607(b)(3).2/

Government "innocent landowner" defense. In 1986, when Congress amended CERCLA, it supplemented the third party defense to address the so-called innocent landowner. Concerned that the contracts for sale and transfer of property would put subsequent purchasers in a "contractual relationship" that would vitiate the availability of the third party defense, Congress added detailed definitional requirements to address such circumstances. Section 101(35) defines "contractual relationship" to include land transfer arrangements with specified limitations; a party meeting these limits is, notwithstanding the land transfer, eligible to invoke the third party defense.

The conditions established in Section 101(35) for the innocent landowner defense are as follows:

2/ Federal agency compliance with EPA's Section 120(h) property transfer regulations does not constitute a defense to liability for cost recovery under CERCLA. The liability regime governs when someone else may seek to hold a party liable for cleanup costs. The property transfer regulation, on the other hand, does effect the federal agencies' obligation to clean up property, since the pendency of suits or claims by third parties is irrelevant to Section 120 responsibilities.

- acquisition of the property "after the disposal or placement of the hazardous substance on, in, or at the facility," and;
- either:

no knowledge of the hazardous substance, or

"The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation" or

acquisition of the property by inheritance or bequest, but;

"if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge" no defense under Section 107(b) will be available.

Together, Section 107(b)(3), with the definitions in Section 101(35), allows a government entity which acquires through involuntary means (this includes seizures and forfeitures, which are "involuntary" to the law enforcement violator) to invoke a defense from liability for hazardous substance contamination found on real property as a result of prior owner's activities if that federal agency (1) exercises due care once it owns the property, (2) secures the property from other third party actions, and (3) provides notice to any transferee of those hazardous substance conditions about which it knows.3/

Section 120 Obligations. In 1986, Congress expressed particular concern about the slow pace of clean up at major federal facilities. For the most part, the debate concerned large federal properties such as military bases and defense production facilities, nuclear and conventional. CERCLA had, since its enactment in 1980, included a waiver of sovereign

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3/ Steps necessary to meet these conditions will, of course, vary from site to site.

immunity, subjecting federal agencies to the requirements of the federal statute. However, compliance had been slow. Congress responded in 1986 with detailed provisions in Section 120, designed to assure that federal facility clean up was made subject to EPA oversight, and that federal agencies thoroughly inventoried and reported on hazardous substance practices in their operations.

The Section 120 obligations are organized around reporting of hazardous waste facilities and subsequent clean up schedules for those sites posing sufficient threat to warrant inclusion on EPA's National Priorities List. Thus Sections 120(b) and (c) require federal agencies to report to EPA, for maintenance on a Federal Agency Hazardous Waste Compliance Docket, facilities engaged in the storage, treatment or disposal of hazardous waste (see 42 U.S.C. § 3016); any information provided in permit applications or other reports required for the storage, treatment or disposal of hazardous wastes (see 42 U.S.C. §§ 3005, 3010)4/; and any information required to be reported when notice is given of a hazardous substance release (see 42 U.S.C. § 9603). From this information, EPA is to oversee the conduct of "preliminary assessments" of the federal properties, and evaluate such facilities to determine if they should be listed on the National Priority List. 42 U.S.C. § 9620(b), (c).

For federal facilities on the National Priority List, Section 120(e) provides a detailed arrangement for conduct of appropriate remedial investigations and feasibility studies (the RI/FS) necessary to select a remedy, and schedules for the conduct of such remedial actions as are found to be needed. 42 U.S.C. § 9620(e).

Section 120(j) allows the President to issue special orders exempting Department of Defense and Department of Energy facilities from any CERCLA requirements, if necessary to protect the national security interests of the United States. There are conditions on this authority, including notification to Congress and a limitation of one year, with the authorization to extend. 42 U.S.C. § 9620(j).

Section 120(h) Requirements. Section 120(h) addresses property transferred by Federal agencies. The section, which has been construed in EPA's recent regulations, provides in brief the following: Subsection (1) requires notice in the contract of sale or transfer of hazardous substances stored, released or disposed of at federally owned property; Subsection (2) requires EPA to promulgate regulations establishing the form of the notice

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4/ These basic reporting requirements are found in a companion statute, the Resource Recovery and Conservation Act, addressed briefly below.

required; Subsection (3) requires notice in any deed transferring federal property of the hazardous substances on the property and any remedial action taken. It also provides that such deed will include a covenant that necessary remedial action has been undertaken and that the United States will conduct any additional remedial action found to be necessary after the transfer of the property.

On its face, Section 120(h) might be read to impose onerous obligations on federal property owners, resulting in a situation where the United States would be perpetually responsible for hazardous substances found on any of its properties, without regard to how long the property was held or what government function was performed at the property. It appears from the legislative history of the 1986 amendments, however, that in Section 120 Congress was principally concerned with federal facilities engaged in waste generating practices. There is no indication that Congress intended law enforcement agencies, who come to own property temporarily and in the course of punishing violations of the law, to carry the burden and expense of perpetual clean up of such properties. As a result, EPA's regulation construes Section 120(h) to provide a more reasonable reading, consistent with legislative purpose.

The preamble to the regulation explains this interpretation:

> EPA believes that the concern of Congress in enacting section 120(h) was with federally owned facilities whose own operations might involve storage, disposal or release of hazardous substances. The types of facilities cited in Congressional discussion of section 120 included military bases, Department of Energy nuclear production facilities, and other civilian installations. Moreover, nothing in the text or legislative history of the statute suggests that Congress meant to require agencies which had not in some manner been responsible for the storage, release or disposal of hazardous substances to unilaterally assume the obligation in section 120(h)(3) of remedying the contamination prior to sale and warranting that contamination that came to light after sale would also be corrected. In addition, section 120(h)(1) requires the notice to contain information about the type and quantity of hazardous substance stored, released, or disposed of, and the time at which such storage, release or disposal took place. It is unlikely that the agency would

> be expected to have such detailed information with respect to an activity which took place before the agency held the property.
>
> Therefore, it is EPA's belief, in light of the overall statutory scheme, that section 120(h)(1) was meant to apply where the storage, release, or disposal referred to in the statute occurred during the time the property was owned by the Federal government.

55 Fed. Reg. 14210. Consistent with this interpretation, EPA's regulation requires:

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

55 Fed. Reg. 14212 (emphasis added).

The regulation does not directly address the Section 120(h)(3) deed and covenant requirement. Although it could be argued that subsection (h)(3) should be read more broadly than subsection (h)(1),5/ we believe that it should be read in

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5/ The deed must provide information about the nature of hazardous substance activity, "to the extent such information is available on the basis of a complete search of agency files." The covenant is to warrant that "(i) all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer" and that any additional remedial action found to be necessary will be conducted by the United States. See 42 U.S.C. § 9620(h)(3)(A), (B). Since Congress again tied the federal agency's obligations to a search of its own files, using language parallel to subsection (h)(1), it is logical that the obligation to clean up and warrant the

(continued...)

consonance with subsection (h)(1). As a result, the obligation to include information in the deed, including warranties with regard to clean up, will cover only those hazardous substance activities which are subject to the notice requirement of Section 120(h)(1). On the same reasoning which supports not requiring agencies to give Section 120 (h)(1) notice of events which did not occur during their ownership, the statute does not support requiring the agencies to provide warranties for hazardous waste activities which did not occur during their ownership.

Relationship of CERCLA Notice Requirements. Although EPA's regulation limits the burden of notice required of federal agencies under Section 120(h), federal agencies must take care to assure that they can invoke the so-called "innocent landowner" defense described above. In order to do so, notice of known hazardous substance activities on federal properties must be provided prior to sale or transfer. We recommend that Departmental components establish routine practices of assembling sufficient information to give notice to prospective purchasers of those hazardous substance activities which the agency knows have occurred on the property, even where our information reflects that the hazardous substances were stored, released or disposed of prior to governmental ownership. Even though the EPA Section 120(h) regulation might permit an agency to give notice of solely those hazardous substance activities which occur during governmental ownership, Section 107(b), as clarified by Section 101(35) mandates that the governmental entity who seeks to invoke an "innocent landowner" defense must provide notice to purchasers of known hazardous substance activities. For Section 120(h) disclosure, practices during federal ownership are sufficient; to

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5/ (...continued)
clean up applies to the same property as the obligation to give notice. A broader reading would make the United States perpetually the guarantor of the environmental health of any property that ever enters government inventories, even if the agency had no knowledge of the conditions and no obligation to provide notice. It is more likely that Congress intended governmental responsibility under subsection 120(h)(3) to cover the same property as the notice requirements of subsection 120(h)(1).

This reading also makes sense since Section 120(h) does not exculpate federal agencies from CERCLA liability parties under Section 107(a) even where it does not have a notice or covenant responsibility under Section 120(h), although those circumstances should be rare. Thus, in the event an agency provides notice and covenants based on a complete search of its files, but additional information demonstrates other hazardous substances for which the agency is a responsible party, the agency may bear liability for cleanup costs incurred.

qualify for the defense, however, any information about activities prior to federal ownership should also be disclosed.6/

In sum, while CERCLA Section 120 addresses supplemental responsibilities for federal agencies, governmental entities must also observe their obligations under other sections of CERCLA. Departmental components should take the steps necessary to assure that they can invoke the one defense from liability which Congress made specifically available to the governmental property acquirer.7/

RCRA BACKGROUND

While the primary purpose of this memorandum is to advise you of requirements under CERCLA, federal agencies handling hazardous substances also need to be familiar with the companion statute, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 - 6992. RCRA is designed generally to manage ongoing activities involving handling of solid and hazardous waste. A few provisions are pertinent to this memorandum's discussion of CERCLA. Broadly, while the CERCLA provisions addressed herein concerned federal real property, RCRA concerns itself with the personal property--the hazardous substances, containers, equipment or other materials.8/

6/ For example, property used as a drug lab may be seized with certain hazardous chemicals on site, which law enforcement officers will dispose of properly. Information obtained from witnesses or informants may address where other drugs were processed, where wastes or bad batches were dumped or other information about contamination at the site. The information concerning what we do with hazardous substances during our ownership is pertinent to the Section 120(h) requirements. The information concerning previous disposals is pertinent to invoking the "innocent landowner" defense and should be disclosed for that reason only.

7/ As addressed above, CERCLA subjects federal agencies to potential suit from any party who incurs costs as a result of cleaning up hazardous substance contamination. Federal agency compliance with Section 120(h) is not a defense to claims by these governmental or private entities that they have spent money to clean up contamination resulting from governmental property or activities. Rather, allegations of non-compliance with the Section 120(h) obligations would provide a different cause of action against the federal agency, likely arising under the "citizen's suit" provision, 42 U.S.C. § 9659(a)(1).

8/ Under RCRA, sovereign immunity has been waived to state and local regulation of solid and hazardous waste. Federal agencies (continued...)

Where federal agencies have hazardous waste on their property, they will generally have to comply with RCRA in the handling and disposal of that waste. RCRA governs storage, treatment and disposal of hazardous waste, requiring entities who conduct such activities to have permits. All persons must assure that hazardous waste is stored, treated or disposed of at permitted RCRA facilities. For Department components taking property in the course of law enforcement efforts, this will generally mean securing and disposing of any hazardous waste in accordance with RCRA, usually by contracting for transport and disposal in a permitted facility. Without going through all of the details of RCRA regulation, it is important to note that storage of most hazardous wastes at a location for longer than 90 days requires that the facility be permitted as a storage facility. As you review Departmental practices, please assure that waste materials are being handled lawfully and are not maintained or disposed of at unpermitted facilities.

You should also be aware that federal agencies engaging in hazardous waste activities may be required to give notice of those activities to EPA. As summarized above, RCRA Section 3016 requires federal agencies to maintain an inventory of sites at which hazardous wastes are stored, treated or disposed. 42 U.S.C. § 6937. Under these requirements, for example, a federal entity which takes real property on which hazardous waste has been stored could, after the passage of time, itself become responsible for a RCRA storage facility, and have to give notice to EPA.

CONCLUSION

Department components involved with property on which hazardous substances are found must consider the potential responsibility under federal environmental laws outlined in this memorandum. The recent EPA Federal Property Transfer Regulations reflect an effort to reduce the burden that CERCLA places on law enforcement agencies. As there are a multitude of specific circumstances in which the statutes and regulations are applied, we are happy to continue to work with the Department components in applying these laws.

Attachments

8/ (...continued)
must therefore comply not only with federal law, but with state and local law as well. See 42 U.S.C. § 6961.

NOTICE, COVENANT and WARRANTY

NOTICE [For Contract of Sale and for Deed]

This notice provides information concerning hazardous substances known or believed to have been stored, released or disposed of at [provide common identification of the property, such as a site name or street address; followed by a proper legal description]. The United States of America owned the described property as a result of deed [dated; record book entry]. The [name of agency(s)] has (have) provided the information contained herein for the time period(s) indicated based on a complete search of agency files.

This notice is to be recorded with the deed transferring title of this property to _____ pursuant to a contract or option dated [fill in date].

A. Hazardous Substances Known to have been Released, Disposed of or Stored during United States Ownership

Information provided in this part addresses the period from [date of deed] to [date of sale], [being the period when the [name of agency] had administrative jurisdiction over the subject land, or being the entire period in which title was vested in the United States,] based on a complete search of agency files. [repeat for other agency(s) if needed]

1. **Identify any hazardous substances removed from the site for disposal.** _____

[e.g., provide information from, summarize or attach manifests identifying any hazardous substances disposed of from site by United States or other notification of hazardous substances provided to federal, state or local agency.]

2. **Identify any hazardous waste storage, treatment or disposal units on the site.** _____

[e.g., provide information from, summarize or attach any permit or permit application or other notice provided by U.S. Environmental Protection Agency or state or local agency with responsibility for hazardous substances.]

3. **Identify any other information concerning hazardous substances stored, disposed or released on the property** _____

[e.g., summarize any information concerning hazardous substance activity reported by witnesses.]

4. **Where property was used, in whole or in part, for, or potentially affected by, continuing operations which generate**

hazardous substances, identify all such operations and substances _____ [e.g., for property on which hazardous substances were in use during United States ownership, provide information from, attach or summarize any permits, notifications, reports or documentation concerning hazardous substances prepared, filed or submitted during the time of United States ownership. Include such documentation whether prepared by the United States, its agencies, or private tenants, residents or occupants on the real property.]

B. Actual Knowledge of Hazardous Substances at Property, without regard to United States Ownership

Information in this part addresses hazardous substances which may have been stored, released or disposed of prior to United States ownership. To the extent possible, this notification also describes the source of the information. The United States cannot assure that information based on reports by other persons, indirect evidence or other sources is accurate in all respects.

1. Describe any known instances of authorized or permitted storage, disposal or release of hazardous substances at the property _____ [e.g., provide information from, attach or summarize any permits, notifications, reports or documentation concerning hazardous substances issued to prior owners or prior operators and located at property]

2. Describe any known instances of unauthorized or unpermitted storage, disposal or release of hazardous substances at the property _____ [e.g., indirect evidence from conditions at site, reports from informants, witnesses, evidence from state or local regulatory entities.]

C. Definitions

1. "Hazardous substances" has the meaning provided in 42 U.S.C. § 101(14) and 40 C.F.R. §§ 300.6 and 302.4 and thus includes all hazardous wastes identified and listed pursuant to 40 C.F.R. part 261.

2. Descriptions of hazardous substances shall include, to the extent such information is known and is appropriate, the common name, the chemical abstracts name, the chemical abstracts number and the EPA hazardous waste number, or other information

Tab No. 9

sufficient to describe the substance. Material safety data sheets should be provided to prospective buyers.

3. "Disposal" and "storage" shall have the meanings set forth in 42 U.S.C. §§ 6903(3), (33) and regulations promulgated thereunder. "Release" shall have the meaning set forth in 42 U.S.C. § 9601(22) and regulations promulgated thereunder.

COVENANT and WARRANTY [for Deed]

The United States hereby covenants and warrants that--

(i) all remedial action necessary to protect human health and the environment with respect to any such substance identified in part A of this Notice remaining on the property has been taken before the date of such transfer, and

(ii) any additional remedial action found to be necessary with respect to any such substance identified in part A of this Notice after the date of such transfer shall be conducted by the United States.

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

DIRECTIVE NO. 90-4

July 3, 1990

MEMORANDUM

TO: All United States Attorneys Offices
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, United States Marshals Service

FROM: Cary H. Copeland CHC
Director
Executive Office for Asset Forfeiture
Office of the Deputy Attorney General

SUBJECT: Forfeiture Policies

A. The Payment of State and Local Taxes on Seized or Forfeited Property

An issue that is arising with increasing frequency is whether the Department of Justice may pay State and local taxes on property seized for forfeiture. This issue arises most often with respect to real property. The Department's position is that the doctrine of sovereign immunity precludes the payment of State and local taxes on property which has been seized for federal forfeiture.

While there is some precedent for a consensual waiver of sovereign immunity, courts have consistently held that they will only compel the United States to pay State or local taxes where there has been a "clear, express and affirmative" waiver of sovereign immunity. United States v. City of Adair, Iowa, 539 F.2D 1185, 1189 (8th Cir. 1976).

Congress has, in an analogous area, enacted legislation explicitly directing payment of State and local taxes on properties financed by the Farmers Home Administration. 42 U.S.C. § 1490(h). Although it has been suggested that our authority to pay "valid liens" against forfeited property (28 U.S.C. § 524(c)(1)(D)) could be construed to encompass State and

local tax liabilities, we do not believe that this provision of law was intended to waive sovereign immunity from State and local taxation. The contrast between 42 U.S.C. § 1490(h) and 28 U.S.C. § 524(c)(1)(D) is striking.

It is the Department's position that the date of the seizure marks the imposition of sovereign immunity. Therefore the Department will not pay State or local taxes incurred after the property is seized for forfeiture. If tax liens have already been levied against the property prior to seizure, these liens will be honored. They may be paid under the authority provided in 28 U.S.C. § 524(C)(1)(d) or, if state law allows, conveyed to a purchaser by the United States. If conveyed to a purchaser, the U.S. Marshals Service shall assure that the corresponding reduction in sales price does not exceed the lien if paid by the United States.

B. Purchase or Personal Use of Forfeited Property by DOJ 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.

A proposed rule to the above effect will soon be published in the Federal Register. The rule will provide a very narrow waiver provision with the approval of the head of the employee's component.

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

C. Seized Cash Held for Evidence

My memorandum dated February 14, 1990, reiterated the longstanding Department policy requiring seized cash to be deposited promptly in the Seized Asset Deposit Fund except where its retention for use as evidence is essential. In those cases, a waiver must be obtained from the Assistant Attorney General of the Criminal Division. A recent review of cash being held as evidence identified over $20 million that should have been deposited. In view of this experience, we will conduct similar

reviews of cash being held as evidence each quarter. A separate memorandum will be sent out shortly to the seizing agencies requesting an inventory of cash being held as of June 30, 1990.

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

The September 7, 1989, statement of policy on the timing of transfers from the deposit fund to the forfeiture fund continues in force. You should be aware that we look to the United States Attorney's Office securing the forfeiture order to be responsible for the initiation of the transfer process through its prompt notification to the U.S. Marshals Service. The subject statement of policy provided that:

> (1) In the case of either a consent judgment or a default judgment, the USMS will immediately transfer the forfeited cash to the Assets Forfeiture Fund, unless the United States Attorney determines that execution of the judgment should be delayed.
>
> (2) In the case of a judgment after trial or upon summary judgment, there is an automatic stay of execution of the judgment of 10 working days. If the United States Attorney's Office indicates that no motions or requests for additional stays have been filed, then the forfeited cash will be transferred to the Assets Forfeiture Fund on the 11th working day following a summary judgment or a judgment after trial.

cc: Barry H. Stern
Associate Deputy Attorney General

Tab No. 10

U.S. Department of Justice
Washington, D.C. 20530

DIRECTIVE NO. 90-5

The Attorney General's Guidelines on Seized and Forfeited Property

July 1990

The Attorney General's Guidelines on Seized and Forfeited Property

July 1990

Prepared by the Executive Office for Asset Forfeiture,
Office of the Deputy Attorney General

THE ATTORNEY GENERAL'S GUIDELINES ON SEIZED AND FORFEITED PROPERTY

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THE ATTORNEY GENERAL'S
ON
SEIZED AND FORFEITED

I. STATEMENT OF GOALS AND PURPOSES

The Department of Justice asset fo
primary goals: (1) to punish and deter
depriving criminals of property used o
activities; (2) to enhance cooperation
state and local law enforcement agenci
sharing of assets recovered through th
product, (3) to produce revenues to en
strengthen law enforcement.

To meet these goals it is essenti
administered in a fiscally responsible
the costs incurred by the United State
impact on criminal enterprises. Morec
entire forfeiture program depends upor
of forfeited property and the proceeds

The Law Enforcement Coordinating
and facilitate the Department of Just
federal, state and local law enforcem

These Guidelines are not intende
rights, privileges or benefits on prc
claimants, defendants or petitioners.
intended to have the force of law. S
Caceres, 440 U.S. §471 (1979).

II. DEFINITIONS

A. Adoptive Seizure refers to
forfeiture of property seized exclus
state or local agencies. Investigat
statute or regulation may adopt such
forfeiture where the conduct giving
violation of federal law. Forfeitur
accepted in this manner have the sam
had originally been seized by the in

B. Appraised Value means the
at the time of seizure of the same c
vehicles, this will generally mean t
the N.A.D.A. Appraisal Guides. For
generally mean estimated fair market
businesses and certain personal pro
determined by experts qualified to

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the value shall be
ch determinations.

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O. State and local agencies refers to state and local law enforcement agencies.

P. Transfer and "sharing" are synonymous under these Guidelines.

III. GENERAL PROVISIONS

A. Whenever reference is made to a specific Department official, such reference shall also be deemed to include any duly authorized person acting for that official by law, regulation or delegation. References to the Executive Office for Asset Forfeiture include any successor organization.

B. Whenever a statute, regulation or official form cited in these Guidelines is replaced by a substantially identical one, the citation shall be deemed to refer to the replacement.

C. The Deputy Attorney General or his designee may issue supplementary and interpretative guidance to address issues that arise under these Guidelines. The Executive Office for Asset Forfeiture, Office of the Deputy Attorney General, shall provide assistance to the Deputy Attorney General in the oversight and management of the Department's forfeiture program.

IV. FEDERAL RETENTION AND USE OF FORFEITED PROPERTY

A. General Authorization

The Attorney General has the authority to retain any civilly or criminally forfeited property for official use by any federal agency. No seized property shall be placed into official use until a final determination of forfeiture has been made and the request to place the property into official use has been approved by the appropriate official.

B. Real Property

The Attorney General does not delegate his authority to place real property into official use. A department component may request authority to place real property into official use only if the proposed usage of that property would be and remain thereafter consistent with a law enforcement purpose. Transfers of real property to other federal components may be considered, if such transfers will serve a significant and continuing federal purpose.

C. Cash means currency, negotiable instruments or securities.

D. Department component refers to agencies, divisions, offices, sections or units of the Department of Justice.

E. District refers to the federal judicial district.

F. The Fund refers to the Department of Justice Assets Forfeiture Fund as established by 28 U.S.C. §524(c)(1).

G. Investigative bureau refers to Department of Justice agencies authorized by federal statute to investigate and enforce forfeiture statutes. These agencies are: the Federal Bureau of Investigation, the Drug Enforcement Administration and the Immigration and Naturalization Service. It also refers to other federal agency investigative units whose forfeitures result in deposits into the Fund (e.g., U.S. Postal Inspection Service, Internal Revenue Service, and the Bureau of Alcohol, Tobacco and Firearms).

H. Joint investigation means cases in which one or more foreign, state or local agencies participates in an investigation with a federal law enforcement agency empowered to forfeit property.

I. Law enforcement means the investigation or prosecution of criminal activity and the execution of court orders arising from such activity.

J. Net proceeds means the forfeited cash or gross receipts from the sale of forfeited property less allowable asset management and case related expenses, third party interests and any award based on the value of the forfeiture.

K. Official use means utilization by a law enforcement agency in the direct performance of law enforcement activities.

L. Property means tangible personal and real property, other than cash, when used in the context of the equitable transfer of property.

M. Seized Asset Deposit Fund refers to the holding account administered by the U.S. Marshals Service for seized cash pending resolution of forfeiture cases.

N. Sharing means the transfer of cash, property or proceeds realized through federal forfeitures pursuant to these Guidelines.

4. Transfer of Forfeited Property to Other Federal Agencies

All requests by other federal agencies shall be referred to the Director, U.S. Marshals Service. In exceptional circumstances, the U.S. Marshals Service may transfer personal property suitable for official use to a requesting federal agency which did not participate in the acts which led to a seizure or forfeiture.

In all such cases, the U.S. Marshals Service shall consult with the investigative bureau responsible for the investigation which led to the forfeiture. Careful consideration shall be given to the value of the property requested, its potential benefit to the United States for law enforcement purposes and its impact on the Fund.

A decision to grant a request for personal property with an aggregate value of less than $25,000 shall be approved in writing by the Director, U.S. Marshals Service. The recipient agency shall pay expenses incurred by the Department of Justice in connection with the forfeiture and transfer of such property. A report on all such transfers shall be prepared by the U.S. Marshals Service on a quarterly basis and submitted to the Executive Office for Asset Forfeiture.

A decision to grant a request for any property valued at $25,000 or more shall be approved in writing by the Director, Executive Office for Asset Forfeiture. The recipient agency shall pay expenses incurred by the Department of Justice in connection with the forfeiture and transfer of such property.

E. Investigative Bureau and Department Component Official Use Policies

Each investigative bureau and department component shall promulgate internal guidelines consistent with these Guidelines governing the placement of property into official use. Such guidelines and any subsequent supplements or revisions shall be filed with the Executive Office for Asset Forfeiture ten (10) days in advance of issuance.

All official use guidelines shall:

C. Cash

No forfeited cash, nor any proceeds from the sale of forfeited property, may be transferred to or retained by any federal agency except as provided for in Chapter X or by statute.

D. Personal Property

The Attorney General delegates his authority to place personal property into official use in the order of priority set forth below. Written notice to the Director, Executive Office for Asset Forfeiture is required at the time property valued at $50,000 or greater is placed into official use. The Director, Executive Office for Asset Forfeiture, shall determine which agency may place property into official use if more than one Department component seeks to retain the same forfeited property for official use. All property should be promptly turned over to the local U.S. Marshal after seizure, including property intended to be placed into official use, unless it is intended that such property will be used in an undercover capacity.

1. Seizing Investigative Bureau

The head of the seizing investigative bureau will determine whether to place forfeited property into official use.

2. Other Investigative Bureaus

If the property is not equitably transferred to a foreign, state or local agency, and the seizing investigative bureau chooses not to place the forfeited property into official use, then another investigative bureau or the U.S. Marshals Service may, by written request to the Director, U.S. Marshals Service, seek the transfer of the property for its use.

3. Other Department Components

If no investigative bureau chooses to place the property into official use and the property has not been equitably transferred, other Department components may, by written request to the Director, U.S. Marshals Service, seek the transfer of the forfeited property for its official use.

2. The uniqueness of the property and the likelihood of securing similar property through seizures in the near future;

3. The relative percentage of the requesting agency's participation in the cases in addition to the other factors pertinent to the determination of equitable transfer;

4. The likelihood that the requesting agency will be eligible for an equitable share of property from additional seizures arising from the same investigation or from seizures in other cases in the near future;

5. The impact that a decision to place the property into official use might have on federal, state and local relations in the district; and

6. The number and value of past equitable transfers to the federal, state or local agency.

G. Payment of Liens on Personal Property Placed Into Federal Official Use

Liens on personal property placed into official use by investigative bureaus and the U.S. Marshals Service may be paid from the Fund provided that:

1. There is an intent to place the property into official use for at least two (2) years;

2. The total amount to be paid from the Fund amounts to less than one-third the appraised value of the property; and,

3. The total amount to be paid from the Fund is less than $25,000.

Requests for exceptions may be submitted in writing to the Director, Executive Office for Asset Forfeiture.

V. EQUITABLE TRANSFER OF FORFEITED PROPERTY TO PARTICIPATING STATE AND LOCAL AGENCIES

Pursuant to 21 U.S.C. §881(e)(1) and 19 U.S.C. §1616a, as made applicable by 21 U.S.C. §881(d) and other statutes, the Attorney General has the authority to equitably transfer forfeited property and cash to state and local agencies that directly participate in the law enforcement effort leading to the

1. Prohibit the placement into official use of any seized property prior to the entry of a final determination of forfeiture and the appropriate approval of the request to place the property into official use;

2. Require that all seized property be recorded and tracked in an official inventory of seized property without regard to its intended disposition;

3. Require that a written justification be prepared in each instance detailing the reasons why the forfeited property was placed into official use and that these justifications be retained for three (3) years;

4. Require that a specific supervisory-level official be responsible and accountable for the decision to place each item of forfeited property into official use and for ensuring appropriate official use of such property following its transfer;

5. Require that property placed into official use shall be identified and tracked in an accountable property system; and

6. State that the property may not be transferred or retained if it is primarily for purposes of trade or sale, or home-to-work transportation or other uses not expressly authorized for property acquired through the expenditure of appropriated funds. There must be an intention to place the property into official use for two (2) years.

F. Competing Requests for Property for Official Use by Investigative Bureau and Other Federal, State or Local Agency

When the head of an investigative bureau seeks to place forfeited property into official use and a federal, state or local agency has filed a request for an equitable share of that property, the head of the investigative bureau shall consider the following factors in making a determination regarding the disposition of the property:

1. The relative need of the requesting agency and the investigative bureau for the particular property;

calculated after the determination of a
value of the forfeiture. Asset manage
calculated on a pro rata basis where e
be determined for a specific asset.

In determining the amount of
each participating agency, the followi
considered:

1. Whether the seizure was
of a joint investigatio

2. The degree of direct pa
enforcement effort by t
resulting in the forfe
the total value of all
total law enforcement e
related criminal prose
violation of law on wh
(21 U.S.C. 881(e)(3));

3. Whether the state or l
information that led t
the agency obtained su
or by use of its inves

4. Whether the state or l
or indispensable assis

5. Whether the state or l
identified the asset(s

6. Whether the state or l
assets during the cour
and whether such seizu
state or local law; a

7. Whether the state or
achieved forfeiture u
favorable considerati
could have forfeited
joined forces with th
more effective invest

C. Sharing Percentages

1. In cases involving ad
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cannot reasonably

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e or local agency
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forfeiture is based

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seizure and forfeiture of the property. Requests for equitable transfers shall be filed in the form prescribed by the Director, Executive Office for Asset Forfeiture.

A. Equitable Transfers Generally

1. All equitable shares shall be based on the **net** proceeds of the forfeiture.

2. State and local investigative and prosecutive agencies may share in forfeited cash and property and the proceeds from the sale of forfeited property.

3. All property transferred to state and local agencies and any income generated by this property shall be used for the law enforcement purposes specified in the request.

4. A state or local agency may file a request for an equitable share of cash or property where it can demonstrate that it participated directly in the law enforcement effort that resulted in the forfeiture.

5. No request shall be considered if it is submitted after sixty (60) days following the seizure.

6. Cash and property shall be equitably shared with a state or local agency only where it will increase and not supplant law enforcement resources of the specific state or local agency that participated in the forfeiture.

7. The deciding official shall ensure that the share approved has a value that bears a reasonable relationship to the degree of direct participation of the state or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based.

B. Factors Governing the Amount of the Equitable Transfer

The amount of equitable transfer of proceeds from the sale of forfeited property shall be based upon the **net** proceeds realized from the sale of the property or liquidation of negotiable instruments. Equitable sharing amounts shall be

D. Decision-Making Authority

Sharing decisions should be made during the period when forfeiture proceedings are being conducted. Decision-making authority shall be as follows:

1. Administrative Forfeitures Valued at Less than $1,000,000

The head of the seizing investigative bureau shall determine the appropriate equitable transfer of assets forfeited in a single administrative proceeding where the appraised value of the asset(s) is less than $1,000,000.

2. Judicial Forfeitures Valued Less Than $1,000,000

The United States Attorney shall determine the appropriate equitable distribution of asset(s) forfeited in a single judicial proceeding in his or her district where the appraised value of the asset(s) is less than $1,000,000.

3. Administrative and Judicial Forfeitures Valued at $1,000,000 or Greater and Multi-District Cases

In the case of a single administrative or judicial proceeding where the appraised value of the asset(s) forfeited is $1,000,000 or more and in multi-district cases, the United States Attorney(s) shall, after consultation with the investigative bureau(s), forward his (their) evaluation(s) and recommendation(s) to the Deputy Attorney General or his designee for determination.

4. Real Property Forfeitures

The Deputy Attorney General or his designee shall approve any equitable transfer of real property. Where appropriate, any such transfer shall include a provision for reversion of title to the United States if the property is not used for the agreed upon purposes.

percent of the total net proceeds realized through the disposition of forfeited property.

In cases involving adoptive seizures that are forfeited in contested judicial proceedings, the determining official shall allocate to the United States twenty (20) percent of the total net proceeds realized through the disposition of the forfeited property. These amounts represent the federal equitable share based upon its effort in forfeiting the property.

These sharing percentages shall be applicable to property seized on or after September 1, 1990.

2. In non-adoptive cases the determining official shall allocate to the United States at least the applicable percentages set forth in paragraph 1.

3. The United States' equitable share will normally be satisfied by the allocation of one or more of the items forfeited (or a portion of the proceeds thereof) to the United States.

In cases where only one asset or item is forfeited and a state or local agency requests that asset in lieu of proceeds from the disposition of the property, the determining official shall ensure that the United States receives its costs and equitable share to reflect total federal participation in the forfeiture effort. If the requesting agency is unable to pay the costs and federal share in such a one-asset forfeiture case, the property shall be sold by the U.S. Marshals Service and the proceeds distributed in accordance with these Guidelines.

Exceptions to this requirement may be granted by the deciding official upon assurances that (1) the requesting state or local agency lacks funds or authority to satisfy the United States' equitable share and costs; and (2) the forfeited item will fill a demonstrable need of the requesting agency. Such exceptions shall be liberally granted where the two above showings are made.

4. Nothing in this section shall alter the ability of the U.S. Marshals Service to pay appropriate expenses from the Fund or to recover costs directly from participating agencies.

VII. THE DEPARTMENT OF JUSTICE ASSETS FORFEITURE FUND

A. Administration of the Fund

1. The Attorney General delegates the administration of the Fund to the Director, U.S. Marshals Service under the supervision of the Deputy Attorney General.

2. The U.S. Marshals Service shall prepare annual reports on the Fund in accordance with 28 U.S.C. §524(c)(6).

3. Pursuant to these Guidelines, federal agencies reimbursed by or contributing to the Fund, shall provide information necessary to prepare these reports as requested by the U.S. Marshals Service.

4. The U.S. Marshals Service shall submit a monthly financial statement reflecting the current status of the Fund to the Director, Executive Office for Asset Forfeiture.

5. The U.S. Marshals Service shall prepare annual budget estimates for the Fund based on information submitted by the requesting agencies.

B. Payments and Reimbursements

Payments and reimbursements are permitted in six (6) general categories. In any fiscal year, reimbursement for program management expenses and investigative expenses expressly identified in 28 U.S.C. §524(c)(1) shall not exceed the amount specified in the annual appropriation limitation on the Fund. The categories listed in order of priority are as follows:

1. Asset management expenses. Asset management expenses are those expenses that are incurred in connection with the seizure, inventory, appraisal, packaging, movement, storage, maintenance, security and disposition (including destruction) of the asset(s).

   Asset management expenses include payments for contract services and the employment of outside contractors to operate and manage properties or provide other specialized services as necessary to dispose of such properties. If the asset is an on-going business, the normal and customary expenses of operating the business are asset

VI. SALE OF SEIZED AND FORFEITED PROPERTY

A. Pre-Forfeiture Sale of Seized Property

1. Pre-forfeiture sale of property (i.e., interlocutory or stipulated sale) is favored as a means of preserving asset value and mitigating asset management expenses.

2. The United States Attorney shall consult with the investigative bureau and the U.S. Marshals Service to determine the status of any requests for equitable transfer or petitions for remission or mitigation prior to seeking a pre-forfeiture sale of property pending judicial forfeiture.

3. Proceeds from any pre-forfeiture sale shall be promptly deposited into the Seized Asset Deposit Fund unless otherwise ordered by the Court.

B. Sale of Forfeited Property

1. Upon the successful completion of the forfeiture action and if the property is not placed into official use or transferred to a federal, state, or local agency, it shall be promptly sold and the proceeds of sale promptly deposited in the Fund.

2. Investigative bureaus and the United States Attorneys' offices shall promptly notify the U.S. Marshals Service of all relevant facts affecting the forfeited property. Relevant facts include, but are not limited to:

   a. Outstanding bills, invoices, orders of mitigation and remission of forfeiture;

   b. Orders of transfers to federal, state and local agencies;

   c. Orders of designation for official use by Department components if known; and,

   d. Appraisals.

   Based upon these and other relevant factors, the U.S. Marshals Service shall promptly and appropriately dispose of the property.

5. Program management expenses. Program management expenses are those expenses incurred in conducting program responsibilities that are not related to any specific asset or to any one specific seizure or forfeiture. Expenses included under this heading are:

a. Automatic Data Processing

(1) Expenses for the purchase or lease of automatic data processing equipment which is utilized the majority of the time for asset forfeiture program related work;

(2) Expenses for the development of computer software that will enhance the capability of the Department of Justice to identify, track, manage, process and dispose of forfeitable property may be approved by the Director, Executive Office for Asset Forfeiture.

(3) Each investigative bureau and Department component receiving monies from the Fund for automatic data processing purposes shall develop internal guidelines consistent with these Guidelines governing the use of and accountability for automatic data processing resources acquired with monies from the Fund. Copies of such internal guidelines shall be filed with the Director, Executive Office for Asset Forfeiture.

(4) The design of all systems to be developed in whole or in part with Fund monies shall be submitted to the Director, Executive Office for Asset Forfeiture, for approval. The design of such software shall be consistent with and advance the overall objective of the Department to implement and maintain an integrated asset seizure and forfeiture information system.

b. Contracting for services directly related to the processing, data entry and accounting for forfeiture cases.

management expenses only to the extent they are not covered by the income of the business.

2. Case related expenses. Case related expenses are those expenses that are incurred in connection with normal proceedings undertaken to perfect the United States' interest in seized property through forfeiture. This includes fees and other costs of advertising, translation, court and deposition reporting, expert witness, courtroom exhibit services, employment of attorneys or other specialists in state real estate law by the U.S. Marshals Service, travel and subsistence related to a specific proceeding, and other related items as approved by the Director, Executive Office for Asset Forfeiture.

   The Director, Executive Office for Asset Forfeiture, may approve the expenses incurred in connection with retention of foreign counsel to gain access to information needed to conduct pre-seizure planning on identified assets, to effect a seizure of assets or to perfect title of forfeited property in a foreign country.

3. Payment of qualified third party interests. Qualified third party interests are those expenses incurred in the payment of valid liens, secured mortgages and debts owed to qualified general creditors pursuant to court order or a favorable ruling on a petition for remission or mitigation of the forfeiture. This includes the restoration of the proceeds of sale pursuant to a court order or an administrative determination. Nothing in this section shall preclude a departmental component from seeking reimbursement from the state or local agency that received the property that is the basis of the claim.

4. Equitable sharing payments. Equitable sharing payments are those payments which represent amounts paid directly to foreign governments or agencies and state or local agencies. Pursuant to 21 U.S.C. §881(e)(3)(a), these amounts shall reflect the degree of participation in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based.

(b) any exclusively asset forfeiture training program that is conducted for other personnel, for whom asset forfeiture is an ancillary duty, to enable them to be more effective in performing asset forfeiture program functions; and

(c) that portion of a broader law enforcement training program that is directly related to the identification, tracking, evaluation, seizing, processing, accounting for, management or disposition of property subject to forfeiture (e.g., 25 percent of the expenses of a money laundering conference or a drug investigation conference if 25 percent of the conference program deals directly with the asset forfeiture program).

Exceptions may be granted on a case-by-case basis by the Director, Executive Office for Asset Forfeiture.

e. Other types of general program management and operational costs as approved by the Director, Executive Office for Asset Forfeiture.

6. Investigative expenses. Investigative expenses are those expenses normally incurred in the identification, location and seizure of property subject to forfeiture. Investigative expenses statutorily eligible to be paid from the Fund include such items as:

a. Awards for information concerning violations of the criminal drug laws;

b. Awards for information leading to the forfeiture of property under the Comprehensive Drug Abuse Prevention and Control Act of 1970 or the Racketeer Influenced and Corrupt Organizations (RICO) statute;

c. Printing and graphic services reasonably necessary to effectuate program goals.

d. Training

(1) The Executive Office for Asset Forfeiture shall have responsibiity for oversight of forfeiture training and will assist Department components in coordinating asset seizure and forfeiture training conferences. Goals of the Department's training program shall be to provide consistent treatment of identical topics, to take advantage of opportunities for joint training, and to foster cooperation and appreciation of the needs of all components.

(2) Any agency that anticipates requesting reimbursement for training personnel shall submit a justification indicating numbers of persons to be trained, the purpose and scope of training, the location and approximate cost of such training, an outline of topics in need of coverage, and the priority of training needs, as requested by the Director, Executive Office for Asset Forfeiture.

(3) A consolidated training calendar shall be maintained by the Executive Office for Asset Forfeiture for asset seizure and forfeiture training for Department components.

(4) The Assets Forfeiture Fund may be used to finance necessary training expenses directly related to the asset forfeiture program. Generally, this will include:

(a) any required training for employees or contractors dedicated to the asset forfeiture program (e.g., trial advocacy for asset forfeiture attorneys, training on agency computers for contract employees);

D. Limitations on Use of the Fund

1. Items not payable from the Fund include:

   a. Personnel expenses (e.g., salaries, overtime and benefits) for employees of the United States;

   b. Expenses in connection with the seizure, detention and forfeiture of property where the seizure was effected by a U.S. Postal Inspection Service or a U.S. Customs Service officer and the proceeds of forfeiture, if any, are to be deposited into the Postal Fund or the Customs Forfeiture Fund, respectively;

   c. Purchase of real property or any interest therein except to acquire full title to or to satisfy liens or mortgages on forfeited property;

   d. Payments to equip property transferred to federal agencies (other than investigative bureaus or the U.S. Marshals Service) or state or local agencies;

   e. Expenses in connection with the seizure, detention and disposition of property where the seizure was effected for debt collection or other non-forfeiture purposes; and

   f. Reception and representation expenses (e.g., refreshments, meals, gifts or entertainment).

2. Claims of unsecured creditors generally may not be paid from the Fund, particularly if such payment may jeopardize the legitimate claims of existing lienholders.

   Pursuant to 28 C.F.R. §9.6(b), claims of unsecured creditors for debts incurred within one hundred and twenty (120) days before seizure may be paid by the U.S. Marshals Service in order to preserve the continued operation of a seized business. Such payable expenses include the following:

   a. Payment of reasonable salaries and benefits of employees not believed to have been involved in the unlawful activities giving

c. Awards for information concerning the killing or kidnapping of a Federal drug law enforcement agent;

d. Purchase of evidence of any violation of the Controlled Substances Act, the Controlled Substances Import and Export Act, RICO or 18 U.S.C. §§1956 and 1957;

e. Contracting for services directly related to the identification of potentially forfeitable assets;

f. Equipping of conveyances for drug law enforcement functions; and,

g. The storage, protection and destruction of controlled substances.

C. Liens and Mortgages

1. Liens or mortgages on real property placed into federal official use or transferred to state or local agencies are not payable from the Fund unless expressly approved by the Director, Executive Office for Asset Forfeiture.

2. Liens and mortgages shall be satisfied after the sale of forfeited property pursuant to a determination to remit or mitigate the forfeiture or an order of the court, except under the following conditions where payments **may** be made from the Fund:

a. Where the payment prior to sale will improve the United States' ability to convey title to the property;

b. Where the United States has substantial equity in forfeited real property and payment prior to sale will not result in a net loss to the United States; or

c. Where the property is approved for placement into official use by an investigative bureau or the U.S. Marshals Service and all necessary approvals have been obtained.

the requesting agency. Transfers shall not be made based upon estimated obligations.

f. If a payment requested is in excess of funds available, the U.S. Marshals Service shall not process the request and shall advise the requesting agency of the reason.

g. If the U.S. Marshals Service and the requesting agency cannot agree on deferral or cancellation of the request, the parties shall seek in writing a determination from the Deputy Attorney General or his designee. The U.S. Marshals Service shall provide notice of the decision to the agency submitting the SF-1081.

E. Preparation of Estimates of Anticipated Expenses and Reimbursement Agreements

1. By June prior to the fiscal year in which the expenses are anticipated and as necessary during the fiscal year, any agency that anticipates requesting reimbursement for expenses from the Fund shall submit requests to the Director, Executive Office for Asset Forfeiture, based upon estimates of anticipated expenditures. Prior to submission to the Director, Executive Office for Asset Forfeiture, these requests shall be reviewed and approved in accordance with the agency's internal procedures for budget submissions.

2. Requests for anticipated reimbursements with accompanying justification shall be submitted in the format required by the Director, Executive Office for Asset Forfeiture. Information regarding appropriated resource levels shall be provided as part of the justification.

   These requests shall include information regarding the effect that any reprogramming of appropriated resources had on the need for additional resources from the Fund.

3. In evaluating the requests and approving allocations, the Deputy Attorney General or his designee shall ensure that:

rise to forfeiture and not having an ownership interest in the business entity;

b. Payments to third party contractors for goods or services essential to carry on the business and who continue to provide those goods or services as in the regular course of business; and,

c. Utilities.

3. Payment of Expenses

a. Asset management expenses incurred by the U.S. Marshals Service, qualified third party interests and equitable sharing payments as set forth above will be obligated against and paid directly from the Fund in accordance with standard Departmental financial management and accounting policies and procedures.

b. Pursuant to a properly executed Reimbursement Agreement Between Agencies (DOJ-216), all other obligations incurred under these Guidelines will be paid by the agency incurring the obligation and will be reimbursed from the Fund on a monthly basis where practicable by means of an Inter-Agency Fund Transfer (SF-1081).

c. It is the responsibility of the agency incurring the obligation to prepare the DOJ-216 and SF-1081 forms and obtain the proper authorization from the Director, U.S. Marshals Service. Each DOJ-216 and SF-1081 shall identify the appropriation to be reimbursed from the Fund.

d. Approved DOJ-216's and SF-1081's will be registered upon receipt by the U.S. Marshals Service. Properly authorized requests (SF-1081's) will be processed for payment in order of receipt. If sufficient funds are available, the U.S. Marshals Service shall approve the transfer of funds to the appropriation identified.

e. All transfers from the Fund shall be based upon certification of actual expenditures by

F. Payment of Awards

Monies from the Fund may be used to pay awards for specific information or instances of assistance. These monies are not to be used to pay retainers or to pay cooperating informants in the expectation of future specific information or assistance.

1. Applications for awards will be accepted on behalf of any individual. (The term "individual" encompasses corporations and associations.)

2. Applications for awards shall be submitted in a format developed and approved by the Director, Executive Office for Asset Forfeiture.

3. Awards pursuant to 28 U.S.C. §524(c)(1)(C) shall be paid only after disposition of the forfeited property.

4. Awards will not be paid to individuals who are representatives of state or local agencies. Any information or assistance provided by an individual who represents a state or local agency will be compensated under rules governing transfers of forfeited property.

5. Any awards pursuant to 28 U.S.C. §524(c)(1)(B) shall not exceed $250,000. Any award pursuant to 28 U.S.C. §524(c)(1)(B) or (C) shall preclude the recipient of such award from any additional award based on a forfeiture resulting in any way from the same information or assistance.

   Any award pursuant to 28 U.S.C. §524(c)(1)(C) shall not exceed the lesser of $250,000 or one-fourth the amount realized by the United States from the property forfeited.

   a. If forfeited property is sold, then the "amount realized by the United States from the property forfeited" is the net proceeds.

   b. If forfeited property is retained for official use, the "amount realized by the United States from the property forfeited" is the value of the property at the time of seizure minus expenses paid from the Fund under Section VII.B (1, 2 and 3).

a. Overall amounts recommended for authorization in a budget for any fiscal year do not exceed appropriation limitations for that year; and

b. Overall amounts recommended for authorization in a budget for any fiscal year do not exceed an agreed upon estimate of amounts available for obligation, to include current year income plus any carry-over from the prior year.

4. To the extent possible, the Deputy Attorney General or his designee shall approve a budget of expenses prior to the beginning of the fiscal year. This budget will form the basis for the establishment of reimbursement agreements between the U.S. Marshals Service as the administrator of the Fund and the participating agencies.

5. An agency may change the distribution of its allocation among particular categories of reimbursable expenses during a fiscal year without approval of the Deputy Attorney General or his designee, subject to the following conditions:

a. A redistribution cannot increase the total amount allocated for expenses subject to appropriation (i.e., program management and investigative expenses).

b. A proposal for any redistribution shall be submitted with supporting justification to the Director, Executive Office for Asset Forfeiture, thirty (30) days in advance of the proposed effective date of the proposal. A copy of the proposed redistribution shall also be provided to the U.S. Marshals Service.

The Director, Executive Office for Asset Forfeiture, may deny such proposed redistribution with notice to the agency and U.S. Marshals Service.

6. Forfeiture funds allocated for specific purposes shall supplement and not supplant appropriated funds provided explicitly or implicitly for those purposes. The calculation of appropriated funds available for specific purposes shall take into account any completed reprogrammings.

a. Identify the property or properties regarding which information or assistance was provided, including agency and/or federal district court case numbers;

b. Identify which of those properties were forfeited and when;

c. Identify the recommended dollar amount of the award, the degree to which the information or assistance aided in the forfeiture and whether the information or assistance provided was unique or indispensable; and

d. Identify costs incurred under Section VII.B 1-3 with respect to the property forfeited. A report on those costs shall be obtained from the U.S. Marshals Service.

11. Approval of awards will be in accordance with 28 U.S.C. §524(c)(2) and any subsequent delegations of authority.

G. Purchase of Evidence

1. Pursuant to 28 U.S.C. §524(c)(1)(G) the Attorney General is authorized to utilize monies from the Fund for purchase of evidence of any violation of the Controlled Substances Act, the Controlled Substances Import and Export Act, 18 U.S.C. Ch. 96 or 18 U.S.C. §§ 1956 and 1957.

2. Approval of amounts for the purchase of evidence will be in accordance with 28 U.S.C. §524(1)(G) and any subsequent delegations of authority.

3. Each investigative agency shall develop internal guidelines covering the use of monies from the Fund for the purchase of evidence. Such guidelines shall be filed with the Executive Office for Asset Forfeiture.

4. If a participating agency recovers part or all of the monies that are used to purchase evidence for which it has obtained reimbursement from the Fund, the recovered monies shall be returned to the Fund.

6. All applications for awards shall be directed to the field office of the investigative bureau responsible for processing the forfeiture. Non-Department of Justice agencies (e.g., Organized Crime Drug Enforcement Task Force members such as Internal Revenue Service) should be instructed to direct any inquiries concerning these awards to the investigative bureau responsible for processing the forfeiture.

7. The investigative bureau field unit receiving or initiating an application for an award will prepare a written report that will evaluate the value of the information or assistance provided by the applicant and recommend an amount to be paid.

8. If more than one application for an award pursuant to 28 U.S.C. §524(c)(1)(C) is received in a single action for forfeiture, the applications should be handled in a consolidated manner. Decisions on all applications should be made at the same time, and should consider the comparative value of information or assistance provided by each applicant and the aggregate amount of award(s) to be made. In these cases, the limits discussed in paragraph VII. F (3 and 4) apply to the aggregate amount of the awards to be made.

9. Recommendations for payment of awards pursuant to 28 U.S.C. §524(c)(1)(B) shall:

   a. Identify the investigation, including agency and/or federal district court case numbers;

   b. Identify the recommended dollar amount of the award; and,

   c. Include the recommendation of the amount of the award, the seriousness and scope of the criminal activity involved, the degree to which the information or assistance aided the investigation, and whether the information or assistance provided was unique or indispensable.

10. Recommendations for payment of awards pursuant to 28 U.S.C. §524(c)(1)(C) shall:

I. Cash Management

Seized cash, except where it is to be used as evidence, is to be deposited promptly in the Seized Asset Deposit Fund pending forfeiture. The Director, Executive Office for Asset Forfeiture, may grant exceptions to this policy in extraordinary circumstances. Transfer of cash to the United States Marshal should occur within sixty (60) days of seizure or ten (10) days of indictment.

VIII. TRANSFER OF FORFEITED PROPERTY TO FOREIGN COUNTRIES

A. The Attorney General may transfer any forfeited personal property or the proceeds from the sale of any forfeited personal or real property, as authorized by statute, to a foreign country which participated directly or indirectly in any acts which led to the seizure or forfeiture of the property, if such transfer:

1. Has been agreed to by the Secretary of State;

2. Is authorized in an international agreement between the United States and the foreign country; and,

3. Is made to a country which, where applicable, has been certified under §481(h) of the Foreign Assistance Act of 1961.

B. Requests by a foreign agency shall be in the form prescribed by the Director, Executive Office for Asset Forfeiture.

IX. DISCONTINUANCE OF FEDERAL FORFEITURE PROCEEDINGS

A. Federal Judicial Forfeiture Proceedings

1. A decision to discontinue a federal judicial forfeiture proceeding against any seized asset in favor of a state or local forfeiture proceeding requires the personal approval of the United States Attorney after review of the evaluation and recommendation of the presenting investigative bureau.

2. In making this decision, the United States Attorney shall consider the impact of such decision on the financial status of the Fund.

H. Payments to Equip Conveyances for Drug Law Enforcement Functions

1. Decisions to equip a government-owned or leased conveyance (vehicle, vessel, or aircraft) for drug law enforcement functions shall be made by the organizational component within the agency which is responsible for management of the conveyance.

2. Reimbursable payments may be made to equip conveyances which are used the majority of the time for activity relating to the investigation or apprehension of violators of the federal drug laws and the seizure and forfeiture of their assets.

   Monies from the Fund may not be used for recurring expenses such as fuel, spare or replacement parts, maintenance, or replacement of equipment due to wear and tear by the agency using the conveyance.

3. Equipping should generally occur before the conveyance is placed into official use and only if it is intended to be in service for at least two (2) years.

   Exceptions may be made to this guidance only under extraordinary circumstances and shall be documented.

4. Unreasonable amounts shall not be spent on equipping Government-owned or leased conveyances for drug law enforcement purposes. Purchased equipment must be affixed to the conveyance and used integrally with the conveyance.

5. Each agency shall establish internal guidelines which shall ensure the effective utilization of monies from the Fund budgeted for equipping forfeited, leased or owned conveyances for drug law enforcement purposes. These guidelines should consider the estimated useful life of the conveyance and the availability of similarly equipped conveyances. Such guidelines, and any subsequent revisions, are to be filed with the Executive Office for Asset Forfeiture. Agencies shall maintain records, by conveyance, of amounts from the Fund spent on equipping.

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

DIRECTIVE NO. 90-7

Washington, D.C. 20530

September 15, 1990

MEMORANDUM

TO: All United States Attorneys

FROM: Cary H. Copeland CHC
Director
Executive Office for Asset Forfeiture

SUBJECT: Statutory Increase in Administrative Dollar Caps

This is to advise that Sec. 122 of the Customs and Trade Act of 1990, Public Law 101-382, has increased the dollar ceilings applicable to administrative forfeitures. These increases took effect upon the President's approval of the Act, August 20, 1990.

Under the new statutory provision (attached), the prior $100,000 dollar ceiling has been increased as follows:

(1) "Any monetary instrument" including cash can now be administratively forfeited without regard to value; and

(2) Any other property valued up to $500,000 can now be forfeited administratively.

Note: "Hauling conveyances" continue to be administratively forfeitable without regard to value.

We expect to apply these increases only to properties seized on or after August 20, 1990. All real property seizures will continue to be processed judicially.

Attachment

cc: Asset Forfeiture AUSAs

3. Decisions to discontinue judicial forfeitures in favor of state or local proceedings are to be documented.

B. Federal Administrative Forfeiture Proceedings

1. A decision to discontinue a federal administrative forfeiture proceeding against any seized asset in favor of a state or local forfeiture proceeding requires the approval of the head of the investigative bureau.

2. In making this decision, the head of the investigative bureau must consider the impact of such decision on the financial status of the Fund and where appropriate consult with the U.S. Marshals Service in that regard.

3. Investigative bureaus shall develop guidelines for recording these decisions and providing reports to the Director, Executive Office for Asset Forfeiture, as requested.

X. U.S. CUSTOMS SERVICE FORFEITURES

A. Pursuant to 28 U.S.C. §524(c), all proceeds from the forfeiture of property under any law enforced or administered by the Department are to be deposited in the Department of Justice Assets Forfeiture Fund, except as specified in 28 U.S.C. §524(c)(4) and except to the extent that the seizure was effected by a U.S. Customs Service officer or to the extent that custody was maintained by the Customs Service, in which case the provisions of 19 U.S.C. §1613b (Customs Forfeiture Fund) shall apply.

B. To the extent that the U.S. Marshals Service may have the authority and the capacity and pursuant to a Memorandum of Understanding between the Department of Treasury and the Department of Justice, the Marshals Service may store and maintain seized property for the U.S. Customs Service. The reimbursement for expenses incurred by either the U.S. Marshals Service or the U.S. Customs Service attendant to custody of seized property shall be in accordance with this agreement.

C. Pursuant to 19 U.S.C. §1616a, requests for transfers of forfeited property by federal agencies or by participating foreign, state and local agencies in forfeitures where the seizure was effected by a U.S. Customs Service officer or custody was maintained by the Customs Service shall be directed to the Customs Service for processing and disposition pursuant to

SEC. 122. INCREASE IN VALUE SUBJECT TO ADMINISTRATIVE FORFEITURE; PROCESSING OF MONEY SEIZED UNDER THE CUSTOMS LAWS.

Section 607 of the Tariff Act of 1930 (19 U.S.C. 1607) is amended—

(1) by striking out "$100,000" in subsection (a)(1) and inserting "$500,000";

(2) by striking out "or" at the end of subsection (a)(2);

(3) by inserting "or" after the semicolon at the end of subsection (a)(3);

(4) by inserting after paragraph (3) of subsection (a) the following new paragraph:

"(4) such seized merchandise is any monetary instrument within the meaning of section 5312(a)(3) of title 31 of the United States Code;";

(5) by adding at the end thereof the following new subsection:

"(c) The Commissioner of Customs shall submit to the Congress, by no later than February 1 of each fiscal year, a report on the total dollar value of uncontested seizures of monetary instruments having a value of over $100,000 which, or the proceeds of which, have not been deposited into the Customs Forfeiture Fund under section 613A within 120 days of seizure, as of the end of the previous fiscal year."; and

(6) by striking out "$100,000" in the section heading and inserting "$500,000".

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

DIRECTIVE NO. 90-8

Washington, D.C. 20530

September 25, 1990

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U. S. Marshals Service

FROM: Cary H. Copeland CHC
Director

SUBJECT: Equitable Sharing Protocol

The furtherance of law enforcement cooperation with state and local law enforcement agencies is one of the primary goals of the Department's asset forfeiture program. Since the equitable sharing program began, we have shared over a half-billion dollars in cash and property with state and local law enforcement agencies: $450 million in cash and $60 million in property (primarily motor vehicles).

The following equitable sharing protocols expand upon the statement in my February 14, 1990 forfeiture policy memorandum and supersedes any existing guidance in this area.

I. Equitable Sharing Check Disbursement

A. Judicial Cases

In cases in which the United States Attorney or a Departmental official is the decision maker, the U. S. Marshal will mail the check to the United States Attorney's office, attention "Law Enforcement Coordinating Committee (LECC) Coordinator."

If the United States Attorney makes an equitable sharing decision on a request from a state or local law enforcement agency from a different judicial district, the Coordinator should contact the United States Attorney's office in

Tab No. 13

Attorney's office, the federal seizing agencies and the U.S. Marshal should routinely be included in these ceremonies.

One of the goals we must all work toward is expediting the processing of equitable sharing requests. We discourage the holding back of delivery of equitable sharing monies or transfers of property for purposes of ceremonial presentation without the knowledge of receiving agency.

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

III. Transmittal Letters for Equitable Sharing Checks

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

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

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

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

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

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

A sample letter that sets forth these points is attached.

Attachment

the second district to determine whether or not that United States Attorney wishes to present the check.

B. Administrative Cases

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

C. Role of Law Enforcement Coordinating Committees .

Pursuant to the Attorney General's Guidelines on Seized and Forfeited Property, July 1990, the "Law Enforcement Coordinating Committees shall promote and facilitate the Department of Justice forfeiture program with federal, state and local law enforcement agencies." By memorandum dated June 15, 1990 to all United States Attorneys from the Associate Deputy Attorney General, LECC Coordinators were required to "serve as a clearinghouse for state and local inquiries about the status of pending sharing cases."

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

II. Equitable Sharing Ceremonies

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

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

Equitable sharing ceremonies present a unique opportunity for federal and state and local law enforcement to bask in the collective limelight of a job well done. Such ceremonies should be inclusive and not exclusive. Officials from the United States

John Doe
Sheriff
State or Local Law Enforcement Agency
Address

Re: United States v. $1,000,000.00
Civil Action Number:

Dear Sheriff Doe:

I am pleased to forward to you the enclosed United States Treasury check in the sum of $_____ (or title to tangible property), which represents your department's equitable share of the net proceeds of the forfeiture in the above referenced case.

These funds must be used for the law enforcement purposes stated in your Application for Transfer of Federally Forfeited Property (Form DAG 71). As the intent of this transfer is to enhance law enforcement, these funds must increase and not supplant your appropriated operating budget. Any interest earned on these funds must also be used for law enforcement purposes. (See: The Attorney General's Guidelines on Seized and Forfeited Property, July 1990.)

On behalf of the U.S. Department of Justice, I want to commend your department for its effort which led to the seizure(s) in this case. Your continuing cooperation with this Office and the (federal seizing agency) in the war against crime in our community is important and greatly appreciated by your federal law enforcement colleagues.

Sincerely,

John Q. Prosecutor
United States Attorney

or

John Q. Agent
Special Agent-in-Charge

Enclosure

cc: United States Attorney
or
Special Agent-in-Charge

U.S. Marshal

Tab No. 14

U.S. Department of Justice

Office of the Deputy Attorney General

DEPARTMENT OF JUSTICE

'90 SEP 26 A10:04

DIRECTIVE NO. 90-9

The Deputy Attorney General EXECUTIVE SECRETARIAT *Washington, D.C. 20530*

September 25, 1990

MEMORANDUM

TO: United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, United States Marshals Service
Director, Executive Office for Asset Forfeiture

FROM: William P. Barr
Deputy Attorney General

SUBJECT: Designation Regarding Equitable Sharing Decisions in Forfeiture Cases

Part V, D, 3 of The Attorney General's Guidelines on Seized and Forfeited Property, specify that final determinations of equitable sharing in forfeitures of $1,000,000 or greater and in multi-district cases are to be made by "the Deputy Attorney General or his designee."

I hereby designate Associate Deputy Attorney General George J. Terwilliger III to make such determinations.

Tab No. 15

Attorney Fee Guidelines

UNITED STATES ATTORNEYS' MANUAL

DIRECTIVE NO. 90-11

DETAILED
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9-111.000 POLICY WITH REGARD TO FORFEITURE OF ASSETS WHICH HAVE BEEN TRANSFERRED TO ATTORNEYS AS FEES FOR LEGAL SERVICES

9-111.100 FORFEITURE UNDER RICO (18 U.S.C. § 1963) AND DRUG FELONY STATUTES (21 U.S.C. § 853)

The Comprehensive Crime Control Act of 1984 [1] extensively revised criminal forfeiture law and procedure. New 18 U.S.C. § 1963(c) and 21 U.S.C. § 853(c) provide that criminal forfeitures under sections 1963(a) and 853(a), respectively, ''relate back'' to the commission of the act which gives rise to the forfeiture. Thus, the interest of the United States in the property vests at that time and is not extinguished simply because a defendant subsequently transfers the property to another person. As explained in the Senate Report: ''[a]bsent application of this principle a defendant could attempt to avoid criminal forfeiture by transferring his property to another person prior to conviction.'' [2] S.Rep. No. 98-225, 98th Cong., 1st Sess. at 200 (footnote omitted). More specifically, the report notes that ''[t]he purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms' length transactions.'' *Id.* at 200-201.

As an equitable measure, 18 U.S.C. § 1963(c) and 21 U.S.C. § 853(c) both provide that forfeiture shall not be ordered if a transferee establishes, at a hearing pursuant to sections 1963(m) or 853(n), that he/she was a *bona fide* purchaser *and* was reasonably without cause to believe that the property was subject to forfeiture.

9-111.200 APPLICATION OF FORFEITURE PROVISIONS TO ASSETS TRANSFERRED TO ATTORNEYS AS FEES FOR LEGAL SERVICES

As a result of the amendments to the forfeiture provisions, assets transferred by a defendant to an attorney for payment of legal fees may be subject to forfeiture if the government proves that the fee was paid from assets that are forfeitable. An attorney would be entitled to keep the assets only if he/she could prove at a post-forfeiture proceeding that he/she was a *bona fide* purchaser *and* was reasonably without cause to know the asset was subject to forfeiture.

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1 Pub.L. No. 98-473, 98 Stat. 1837 (Oct. 12, 1984).

2 The Senate Report also noted that the 18 U.S.C. § 1963(c) codified ''the 'taint' theory which has long been recognized in forfeiture cases.'' Indeed, under most civil forfeiture statutes, the forfeiture relates back to the time of the acts which give rise to it. *See, e.g., United States v. Stowell,* 133 U.S. 1 (1980); *United States v. $84,000 in U.S. Currency,* 717 F.2d 1090 (7th Cir.1983), *cert. denied,* 469 U.S. 836, 105 S.Ct. 131 (1984). The Seventh Circuit, however, twice rejected the government's argument that the ''relation back'' doctrine was applicable to criminal forfeitures. *See United States v. Alexander,* 741 F.2d 962 (7th Cir. 1984); *United States v. McManigal,* 708 F.2d 276 (7th Cir.), *reaff'd in pertinent part,* 723 F.2d 580 (7th Cir.1983). Thus, the new legislation effectively reverses the Seventh Circuit's holding in *Alexander and McManigal.*

may be true even in the absence of a pretrial restraint if the defendant has sufficient funds at the time of the judgment of forfeiture to satisfy it.[4] Also, a defendant who is indigent by virtue of a restraining order may have counsel of choice appointed, provided counsel is willing to accept appointment under the Criminal Justice Act. Finally, if a defendant transfers forfeitable assets to an attorney and has no assets to satisfy a forfeiture judgment, an attorney still can retain the fee if he/she was an unwitting participant and can establish by a preponderance of the evidence that he/she was reasonably without cause to believe the property was subject to forfeiture.

In view of the foregoing, the argument that the forfeiture provisions are constitutional only if they exempt attorney fees is an extreme and unwarranted interpretation of the Sixth Amendment. It amounts to arguing that the qualified right to counsel of choice includes the right to use the proceeds of criminal activity to obtain counsel to defend against charges arising from that very criminal activity. The Sixth Amendment does not incorporate any such guarantee. Perhaps the most elementary qualification on the right to counsel of choice is economic. A defendant if entitled only to counsel of choice who he/she can afford. *See United States v. Rogers*, 471 F.Supp. 847, 851 (E.D.N.Y.1979) (''Economic realities impose one obvious limitation on the defendant's right to be represented by a particular attorney.'') If a defendant cannot afford a particular attorney, he/she is not entitled to have the government provide funds to pay that attorney. But that is what would happen if forfeitable assets transferred to an attorney were exempt from the third party forfeiture provisions.[5]

Most courts have not directly confronted the question of whether the subsequent forfeiture of assets transferred to an attorney for legitimate fees violates the qualified right to counsel of choice. Several courts, however, have held that a defendant can be prevented from using assets which are subject to forfeiture to pay counsel of choice. *See, e.g., United*

4 After obtaining a forfeiture judgment, the government may be entitled to satisfy the judgment from any funds in the hands of the defendant even if it cannot trace those funds. In *United States v. Conner*, 752 F.2d 566 (11th Cir.1985), the court held that the government has no duty to trace cash proceeds of racketeering to specific assets owned by the defendant at the time of the forfeiture verdict in order to forfeit such assets. Presumably, the government may collect the forfeited sum from any assets owned by the defendant. As the court noted, ''money is a fungible item. It matters not that the government received the identical money which the defendants received as long as the amount that was received in violation of the racketeering statute is known. The forfeiture in this case is for a specific amount of money. It is *in personam* and is money judgment against the defendant for the same amount of money which came into his hands illegally in violation of Title 18, Section 1963(a)(1) [RICO].'' *Id.* at 576.

5 Upon conviction, a defendant is divested of any title to forfeitable assets, and title passes to the United States as of the date of the offense. In the case of the forfeitable proceeds generated by the crime itself (*e.g.*, proceeds of drug trafficking, loan sharking, bribery), operation of the relation back doctrine means that a convicted defendant is not just divested of any interest but that he/she never acquires any interest in such property. Unquestionably, to argue that such property may be used to pay counsel is to argue that the government must subsidize the payment of counsel of choice. But the Sixth Amendment only requires that counsel be appointed if a defendant cannot afford counsel, and the appointee does not have to be counsel of choice.

9-111.210 Sixth Amendment Considerations

The Sixth Amendment guarantees a defendant the absolute right to counsel in federal criminal prosecutions that may result in imprisonment. *See Scott v. Illinois*, 440 U.S. 367, 373 (1979); *Arsinger v. Hamlin*, 407 U.S. 25, 37 (1972) (defendant may not be imprisoned unless afforded the right to counsel). Accordingly, a defendant who establishes indigency is entitled to the assistance of court-appointed counsel at each critical stage of the proceedings, including the first appeal as of right. *See, e.g.*, 18 U.S.C. § 3006A; Fed.R.Crim.P. 44(a). Additionally, a solvent defendant is entitled to retain counsel of choice. But this guarantee of the right to *counsel of choice* is neither absolute nor unqualified. A court may restrict a defendant's choice when there is a significant countervailing public interest.[3]

Some district court's have held that the third party forfeiture provisions interfere with a defendant's Sixth Amendment rights when they are applied to legitimately paid attorney fees. *See, e.g., United States v. Rogers*, 602 F.Supp. 1332 (D.Colo.1985); *United States v. Badalamenti*, 84 Cr. 236 (PNL) (S.D.N.Y. July 10, 1985); *United States v. Ianiello*, S 85 Cr. 115 (CBM) (S.D.N.Y. Sept. 3, 1985). As a result, they have reasoned, the statutes must be construed to exempt legitimate attorney fees from forfeiture to avoid unconstitutionality. The Department believes, however, that these decisions are incorrect.

The application of the third party forfeiture provisions to attorney fees impacts only the *qualified* right to counsel of choice and not a defendant's absolute right to be represented at all critical stages. A defendant who is effectively rendered indigent by their potential application is entitled to appointed counsel. *Cf., United States v. Bello*, 470 F.Supp. 723, 725 (S.D.Cal.1979) (''the ... restraining order does not deprive [the defendant] of counsel, but only of the attorney of his choice. [He] will still be entitled to court-appointed counsel, if he has no means to hire an attorney.''); *see also United States v. Brodson*, 241 F.2d 107 (7th Cir.) *cert. denied*, 354 U.S. 911 (1957).

The impact of the third party forfeiture provisions upon the ability to obtain counsel of choice in any event has been severely overstated and does not amount to an unconstitutional interference. The third party forfeiture provisions do not prohibit a defendant from paying attorney fees with assets which have not been generated or obtained from criminal activity. Additionally, if prior to conviction a defendant voluntarily restrains sufficient property to satisfy the judgment of forfeiture, it will not be necessary for the government to void any third party transfers. The same

3 *See, e.g., United States v. Brown*, 591 F.2d 307, 310 (5th Cir.1979), *cert. denied*, 442 U.S. 913 (1979); *United States v. Burton*, 584 F.2d 485, 489 (D.C.Cir.1978), *cert. denied*, 439 U.S. 1069 (1979); *United States v. Gary*, 565 F.2d 881, 887 (5th Cir.1978), *cert. denied*, 435 U.S. 955 (1978); *United States v. Robinson*, 553 F.2d 429, 430 (5th Cir.1977), *cert. denied*, 434 U.S. 1016 (1978).

Re Grand Jury Subpoena, (Simels), No. M-11-188 (DNE) (S.D.N.Y., March 11, 1985) *rev'd on other grounds*, No. 85-6066 (2d Cir. June 27, 1985) stated: ''[f]ees paid to attorneys cannot become a safe harbor from forfeiture of the profits of illegal enterprises. In the same manner that a defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from these same tainted funds.... To permit this would undermine the purpose of forfeiture statutes, which is to strip offenders and organizations of their economic power.'' Slip Op. at 18, n. 14. It is hard to overestimate how significantly Congress' intent could be undermined by excluding attorney fees. A defendant could take full advantage of his/her ill-gotten gain by intentionally transferring tainted assets in payment of attorney fees and retaining only legitimate assets.[7]

9-111.230 Policy Limitations on Application of Forfeiture Provisions to Attorney Fees

While there are no constitutional or statutory prohibitions to application of the third party forfeiture provisions to attorneys fees, the Department recognizes that attorneys, who among all third parties uniquely may be aware of the possibility of forfeiture, may not be able to meet the requirements for equitable relief without hampering their ability to represent their clients. In particular, requiring an attorney to bear the burden of proving he/she was reasonably without cause to believe that an asset was subject to forfeiture may prevent the free and open exchange of information between an attorney and a client. The Department recognizes that the proper exercise of prosecutorial discretion dictates that this be taken into consideration in applying the third party forfeiture provision to attorney fees. Accordingly, it is the policy of the Department that application of the forfeiture provisions to attorney fees be carefully reviewed and that they be uniformly and fairly applied.

9-111.300 DIVISION APPROVAL

No forfeiture proceedings under 18 U.S.C. § 1963 or 21 U.S.C. § 853 may be instituted to forfeit an asset transferred to an attorney as fees for legal

7 The conclusion that attorney fees constitutionally can be forfeited upon conviction also dispenses with the additional argument that the *threat* that attorney fees may be forfeited unconstitutionally interferes with the right to counsel of choice. It is axiomatic that if forfeiture of fees upon conviction does not violate the right to counsel of choice, then the threat that forfeiture might occur also does not violate that right. Moreover, in the absence of a restraining order, the inability to retain counsel when forfeiture is alleged is due solely to counsel's desire to be guaranteed payment of his/her fee. In this regard, the third party forfeiture provisions are not unlike other economic limitations. They mean only that the government's claim to forfeitable assets is superior to any other claims arising after commission of the offense, including counsel's claim to a fee. This does not interfere with a defendant's ability to retain counsel any more than a prior mortgage or tax lien which may encumber a defendant's assets. If counsel refuses to represent a prospective client because he/she believes that the client does not have the financial ability to pay as a result of these prior encumbrances there is no interference with the right to counsel of choice. Likewise, the forfeiture provisions do not impermissibly deny a defendant his/her counsel of choice.

States v. Raimondo, 721 F.2d 476, 478 (4th Cir.1983), *cert. denied*, 105 S.Ct. 133 (1984); *United States v. Long*, 654 F.2d 911, 915-17 (3d Cir. 1981); *United States v. Bello*, 470 F.Supp. 723, 725 (S.D.Cal.1979). The only cases to actually consider application of the third party forfeiture provisions to attorney fees are *United States v. Rogers*, 602 F.Supp. 1332 (D.Colo.1985) and *United States v. Ianniello*, S 85 Cr. 115 (CBM) (S.D.N.Y. Sept. 3, 1985).[6]

As noted above, these courts held that any ''legitimate'' attorneys' fees and costs are immune from forfeiture, apparently even if the attorney knows they are being paid with forfeitable assets. The holdings, however, were based principally upon the courts' reading of congressional intent and only secondarily on constitutional grounds. The courts surmised that Congress intended the third party forfeiture provisions to apply only to sham transactions and not to transfers for legitimate fees. As discussed below, the Department believes that the courts' conclusion concerning Congressional intent is erroneous.

9-111.220 Congressional Intent

There is very little from which to conclude that Congress intended to create an exemption for attorney's fees from the operation of the third party forfeiture provisions. Indeed, such a conclusion effectively would render meaningless the ''reason to know'' requirement for equitable relief. More significantly, however, it is facially contrary to the plain language and history of the legislation.

The statutes themselves do not contain any language exempting from their operation property which an attorney accepts as payment for legal services and which he/she has reasonable cause to know is subject to forfeiture. In subsections (c) both statutes simply state that property subject to forfeiture becomes so at the time of the offense and in subsections (a) they define the types of property subject to forfeiture. None of the subsections contain any exception for property transferred to attorneys for legal fees.

The legislative history indicates that Congress explicitly rejected the notion that attorney fees are exempt from forfeiture. The Senate Report cited with approval *United States v. Long*, 654 F.2d 911 (3d Cir.1981), which it characterized as ''holding that property derived from a violation of 21 U.S.C. § 848 remained subject to criminal forfeiture although transferred to the defendant's attorneys more than six months prior to conviction, and that an order restraining the attorney from transferring or selling the property was properly entered.'' S.Rep., *supra*, at 200 n. 28.

Exemption of attorney fees also would undermine substantially the purpose of the third party forfeiture provisions. As the district court in *In*

6 *Badalamenti, supra*, discussed the issue in *dicta* in considering a motion to quash a subpoena to an attorney.

the benefit of the client or to an account or corporation that is controlled by the client. The evidence, however, need not establish that the attorney was a participant in the criminal activity giving rise to the forfeiture or that he/she otherwise violated any law.

9-111.420 Forfeiture of Assets Transferred to an Attorney for Representation in a Civil Matter

Forfeiture of an asset transferred to an attorney as payment for legal fees for representation in a civil matter may be pursued, notwithstanding the fact that the asset may have been transferred for legitimate services actually rendered, when there are reasonable grounds to believe that the attorney had reasonable cause to know that the asset was subject to forfeiture at the time of the transfer. *See* USAM 9-111.520, *infra*.

9-111.430 Forfeiture of Assets Transferred to an Attorney for Representation in a Criminal Matter

Forfeiture of an asset transferred to an attorney as payment for legal fees for representation in a criminal matter may be pursued, notwithstanding the fact that the asset may have been transferred for legitimate services actually rendered, where there are reasonable grounds to believe that the attorney had actual knowledge that the asset was subject to forfeiture at the time of the transfer. However, such reasonable grounds must be based on facts and information other than compelled disclosures of confidential communications made during the course of the representation. *See* USAM 9-111.512 and 9-111.610, *infra*.

9-111.500 DISCUSSION OF ACTUAL KNOWLEDGE AND/OR REASONABLE CAUSE TO KNOW

The principal issue to be addressed in the application of these guidelines is what constitutes ''actual knowledge'' or ''reasonable cause to know'' that an asset is subject to forfeiture ''at the time of the transfer.'' This issue must be resolved on a case-by-case basis. However, the following principles shall be applied in determining whether the prerequisite of actual knowledge or reasonable cause to know exists in a particular case.

9-111.501 At the Time of the Transfer

For purposes of these guidelines, a transfer occurs at the time an attorney becomes entitled to the asset free from any claim by the defendant or others. For example, if an asset is transferred to an attorney to be held in trust for the defendant, with the understanding that the attorney shall be entitled to a portion of the asset for legal services rendered, the time of the transfer will be the time at which the attorney renders the services and becomes entitled to the asset. If he/she has the requisite knowledge at that time, the asset may be subject to forfeiture.

services without the prior approval of the Assistant Attorney General, Criminal Division, pursuant to the guidelines herein.

No civil forfeiture proceedings under any statute may be instituted to forfeit an asset transferred to an attorney as fees for legal services without the prior approval of the Assistant Attorney General, Criminal Division, pursuant to the guidelines herein.

No formal or informal, written or oral, agreements may be made to exempt an asset transferred to an attorney as fees for legal services from forfeiture under 18 U.S.C. § 1963 or 21 U.S.C. § 853 or any civil forfeiture statute without the prior approval of the Assistant Attorney General, Criminal Division. *See* USAM 9-111.700, *infra*.

9-111.400 ATTORNEY FEE FORFEITURE GUIDELINES

The purpose of these guidelines is twofold. First, it is to insure that any forfeiture of assets transferred to attorneys as fees for legal services has been reviewed carefully. Second, it is to insure that the public's interest that those convicted of certain offenses do not realize any economic benefit from their illegal activity is pursued fairly and with due consideration for the individual's right to counsel in a criminal matter.

These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal, nor do they place any limitations on otherwise lawful litigative prerogatives of the Department of Justice.

9-111.410 Forfeiture of Assets Transferred to an Attorney in a Fraudulent or Sham Transaction

Forfeiture of an asset transferred to an attorney as fees for legal services may be pursued where there are reasonable grounds to believe the transfer was a fraudulent or sham transaction designed to shield from forfeiture assets which otherwise are forfeitable.

The mere fact that an attorney has received a forfeitable asset as payment for legal fees by itself does not provide reasonable grounds to believe the transfer was a fraudulent or sham transaction. There must be reasonable cause to believe the asset was transferred for the purpose of impeding or defeating the government's ability to forfeit it. Generally, there should be some proof that a scheme existed to maintain the client's interest in the asset or ability to use it to his/her benefit. This may be shown, for example, by proof that the value of services actually rendered and that there was agreement by the attorney to transfer the asset or some portion of it back to the client. In other situations there may be evidence that the attorney agreed to transfer the asset to another third party for

National Bank, Downtown Branch in the name[illegible] [illegible]efendant.'' It can set forth a generic description of certain pro[illegible] [illegible]mount and/or type, such as ''ten shares of stock in XYZ Corp.'' or s[illegible] [illegible]200,000.'' Finally, it can allege a broad all-inclusive descript[illegible] [illegible]roperty subject to for- feiture by incorporating statutory langu[illegible] [illegible]as ''any and all pro- ceeds or profits of the criminal enterpri[illegible]

If property is specifically describe[illegible] [illegible]ttorney undoubtedly has actual knowledge of its forfeitability if [illegible]is aware of the contents of the indictment. However, if property [illegible]luded in the forfeiture count only under a generic description or [illegible]inclusion of the all-in- clusive statutory language, an attorney [illegible]have actual knowledge based on that fact alone that any partic[illegible]et is forfeitable. In- stead, reasonable grounds to believe that [illegible]rney has actual knowledge that the asset is subject to forfeiture wo[illegible] [illegible]to be based on evidence that the attorney knew the asset in fact w[illegible] [illegible]criminal misconduct. Of course, the fact that an all-inclusive for[illegible] [illegible]allegation or a generic description was included in the indictment[illegible] [illegible]be relevant evidence to establish such knowledge. *See* USAM 9-111.[illegible] *Infra*.

9-111.512 Knowledge that the Asset in Fa[illegible] [illegible]s from Criminal Misconduct

Regardless of whether any criminal or ci[illegible] [illegible]ceedings have been insti- tuted or whether a forfeiture count speci[illegible] [illegible]ly describes an asset, an attorney may have actual knowledge that an[illegible] [illegible]t in fact is from criminal misconduct. Evidence that the attorney le[illegible] [illegible]from the client or another involved in the criminal activity that the[illegible] [illegible]t was from an illegitimate source would be compelling proof of the att[illegible] [illegible]'s knowledge. Except when the use of such communications involves co[illegible] [illegible]led disclosure of a confi- dential communications made during the[illegible] [illegible]e of representation, such communications may be relied upon to esta[illegible] [illegible]actual knowledge that the asset came from criminal misconduct. *S*[illegible] [illegible]AM 9-111.430, *supra*. For example, a client's testimony at trial or[illegible] [illegible]tary disclosure of his/her communications with his/her attorney may[illegible] [illegible]ied upon to establish actu- al knowledge. *See* USAM 9-111.610, *infra*.

While generic or all-inclusive descri[illegible] [illegible]s of property alleged to be forfeitable by themselves do not establi[illegible] [illegible]ual knowledge that a partic- ular asset has been alleged to be fo[illegible] [illegible]ble, such descriptions are probative and relevant evidence to p[illegible] [illegible]hat an attorney had actual knowledge that an asset was from crim[illegible] [illegible]sconduct. Also relevant is evidence of the method of manner of pay[illegible] [illegible]the attorney's knowledge of the client's means of livelihood, so[illegible] [illegible]it is based on information other than compelled disclosure of con[illegible] [illegible]al communications during the course of the representation. *See* US[illegible] [illegible]1.610, *infra*. Additionally, the presence or absence of an order r[illegible] [illegible]ing assets is relevant.

9-111.510 Actual Knowledge of Forfeitability

For purposes of these guidelines, actual knowledge refers not simply to knowledge that some of a client's assets are either subject to forfeiture or from criminal misconduct. Rather, an attorney must have actual knowledge that the *particular* asset he/she received was subject to forfeiture. The guidelines require that there be reasonable grounds to believe that actual knowledge exists.

Reasonable grounds exist for believing that an attorney has actual knowledge that an asset is subject to forfeiture when there is evidence that it was *known to the attorney* at the time of the transfer either: (a) that the government had asserted that the particular asset is subject to forfeiture or (b) that the particular asset in fact is from criminal misconduct. *See* USAM 9-111.530, *infra*.

9-111.511 Knowledge that the Government has Asserted that a Particular Asset is Subject to Forfeiture

Generally an attorney will have actual knowledge that the government has asserted a claim that an asset is subject to forfeiture based upon some proceedings instituted by the government. Normally the government will do this by initiating civil forfeiture proceedings against the asset, or by applying for pre-indictment or pre-conviction restraining orders under 18 U.S.C. § 1963 or 21 U.S.C. § 853, or by obtaining an indictment containing a forfeiture count.

A civil forfeiture proceeding, if known to an attorney, will establish actual knowledge of the forfeitability of any assets which are the subject of the proceeding since such assets must be specifically identified in the complaint.[8] For the same reason an attorney has actual knowledge of the forfeitability of any asset which he/she knows is subject to a restraining order based upon a forfeiture allegation in a criminal proceeding. However, when the government asserts a claim only by including a forfeiture count in an indictment and no assets have been restrained, the return of the indictment by itself will not necessarily establish actual knowledge that a particular asset is forfeitable. It will depend upon how specifically the asset is described in the forfeiture allegation.

There are essentially three means by which an indictment can describe property that is alleged to be subject to forfeiture. It may specifically describe the property, such as ''ten shares of stock in XYZ Corp. certificate nos. 1-10, purchased on January 1, 1985'' or ''account 12345 at First

8 This is because in a civil forfeiture proceeding the *res* is the defendant and it must be sufficiently identified to allow seizure. A defendant, in most cases, will not be able to transfer an asset which is the subject of a civil forfeiture action to an attorney because the asset is actually seized as soon as the proceeding is instituted. However, in the rare case where a transfer takes place after the suit is initiated but before the seizure occurs, an attorney who has knowledge of the civil forfeiture action has actual knowledge that the particular asset is subject to forfeiture.

In other situations, all of the facts known to the attorney will have to be considered. The quantum of evidence required to establish reasonable cause to know will be substantially less than that needed to establish actual knowledge. However, the mere fact that an indictment alleges that ''all profits or proceeds of the criminal activity'' are subject to forfeiture will not meet the level of proof required to demonstrate reason to know. Similarly, forfeiture allegations which describe assets generically are sufficient to put an attorney notice that any assets of the type described potentially are subject to forfeiture, but they are not sufficient by themselves to establish reasonable cause to know. An attorney who accepts any such assets acts at his or her peril, and circumstantial evidence may establish that there was reasonable cause to know. Perhaps the only fact that *prima facie* would negate reasonable cause is the presence of a restraining order. For example, if an indictment alleges that $200,000 is subject to forfeiture, the existence of a restraining order applying to that same amount of cash could negate reasonable cause to believe that other money is forfeitable. *See* note 9, *supra*.

9-111.530 Policy Concerning Issuance of Notification Letters to Attorneys

There may be cases where there are reasonable grounds to believe that all of a defendant's assets are subject to forfeiture. Under these guidelines, however, the only assets which an attorney conclusively would be held to have actual knowledge of forfeitability are those specifically named in the indictment or subject to a restraining order or civil forfeiture proceeding. There would have to be some evidence in addition to the forfeiture allegations to establish actual knowledge of the forfeitability of those assets which are not specifically described or subject to restraint. *See* USAM 9-111.510, *supra*. As a result, it may be extremely difficult in cases where all of a defendant's illegitimate assets have not been discovered to prove actual knowledge, even though there are grounds to believe no legitimate assets exist. Although this may limit the cases in which actual knowledge may be established, the Department believes it is inappropriate to give written notice to an attorney that a particular asset or that all assets belonging to a defendant are from an illegitimate source or subject to forfeiture simply to meet the requirement of actual knowledge imposed by these guidelines.

Sending written notice of the forfeitability of assets that are not specifically described or under restraint no doubt would be attacked as impermissibly interfering with the qualified right to counsel of choice. The argument could be made that if the notice is not based upon a probable cause determination that the assets are subject to forfeiture, it was sent only to harass the attorney or cause him/her to abandon the case and not because the asset legitimately is subject to forfeiture. Thus, the government may be sidetracked into prolonged litigation which is only ancillary to the criminal charges. Additionally, if there is probable cause that a particular asset or all of a defendants assets are forfeitable, the written

The existence of actual knowledge that an asset is from criminal misconduct will have to be determined on a case-by-case basis, taking into consideration all of the relevant evidence. For example, if an indictment alleges that ''all profits and proceeds, including $200,000'' are subject to forfeiture and $200,000 has been restrained, there would have to be other evidence of an attorney's knowledge of the source of his/her fee to prove that he/she had actual knowledge that other cash he/she received is from the criminal misconduct.[9] On the other hand, if there were no order restraining a sufficient amount of cash and the fee was paid in cash, circumstantial evidence may establish that the attorney had actual knowledge that the fee was paid from the proceeds of criminal misconduct. For example, actual knowledge might be established if a forfeiture count was based on a drug felony charge, the fee was paid in a manner suggesting that it was the proceeds of drug trafficking and there was evidence—other than from confidential communications—that the attorney knew the client had no legitimate source of income. This latter evidence might exist where a pauper's petition was filed by the attorney for the client in other proceedings, and the client had not been gainfully employed since that time.

9-111.520 Reasonable Cause to Know that an Asset is Subject to Forfeiture

''Reasonable cause to know that an asset is subject to forfeiture'' means that there is information known to an attorney which if known to a reasonably prudent person would cause such person to believe that the asset is forfeitable.[10] Just as with actual knowledge, the starting point for deciding if an attorney has reasonable cause is an examination of the evidence of the attorney's knowledge of any legal proceedings instituted by the government for forfeiture of assets.

If civil proceedings have been instituted by the government to forfeit a particular asset or if a particular asset has been restrained, as discussed above, an attorney who has knowledge of the proceedings has actual knowledge of forfeitability. *See* USAM 9-111.511, *supra*. The same is true if the asset is specifically described in an indictment and the attorney knows the contents of the indictment. In these situations, any requirement under these guidelines that there be reasonable cause to know that an asset is forfeitable is met.

9 In any event, if the government sought to forfeit a fee in such a case without direct evidence of the attorney's knowledge, the attorney could probably obtain equitable relief. He may be able to rely on the fact that sufficient cash was restrained to establish that he/she reasonably was without cause to believe that other cash is not subject to forfeiture.

10 The standards set forth herein concerning proof of reasonable cause to know express no opinion concerning the Department's position as to what proof constitutes that a third party was ''reasonably without cause to believe that the property was subject to forfeiture.'' Rather, the standards herein apply only to the Department's policy of not seeking forfeiture in certain cases unless there is evidence that an attorney had reasonable cause to know. *See* USAM 9-111.420, *supra*.

tions made during the course of the representation. *See* USAM 9-111.430, *supra*. This limitation upon compelled disclosure of confidential communications does not preclude the use of these confidential communications when they are voluntarily disclosed. For example, the testimony of the defendant at trial may be relied upon. This limitation also does not preclude the use of a subpoena to obtain non-privileged fee information, such as the amount, source and method of payment. *See* USAM 9-111.620, *infra*. But the subpoena may not seek to obtain any confidential communications.

This limitation on compelled disclosures does not recognize or imply that all confidential communications between a client and an attorney are protected either by that attorney-client privilege or the constitutional right to counsel. Only those confidential communications which meet all the requirements for privilege or which relate to defense preparation are protected. *See, e.g., United States v. Melvin*, 650 F.2d 641, 645 (5th Cir.1981); *United States v. King*, 536 F.Supp. 253, 264-65 (C.D.Cal.1982). The Department imposes this limitation in recognition of the fact that the need for clients to make full and free disclosure to their attorneys outweighs the detriment of placing limitation on the use of some non-privileged communications in certain limited situations.

9-111.620 Subpoenas Issued to Attorneys to Obtain Fee Information

The Department requires that any grand jury or trial subpoenas to an attorney for information relating to the representation of a client must be authorized by the Assistant Attorney General, Criminal Division. *See* USAM 9-2.161(a). Information concerning the amount, source and method of payment of a fee paid to an attorney is information ''concerning the representation of a client.'' Consequently, before a subpoena may be issued for such information, each of the requirements of that policy must be met. Most of these requirements should be easily met when issuing a subpoena to an attorney for fee information.

The requirements that the information be non-privileged and relevant can be satisfied when the subpoena calls for fee information. Generally, courts have held that fee information is not privileged. *See, e.g., In re Shargel*, 742 F.2d 61 (2d Cir.1984); *In re Ousterhoudt*, 722 F.2d 591 (9th Cir.1985); *In re Special Grand Jury (Harvey)*, 676 F.2d 1005 (4th Cir.) *vacated and withdrawn*, 697 F.2d 112 (1982) (*en banc*). *In re Grand Jury Subpoena (Slaughter)*, 694 F.2d 1258 (11th Cir.1982); *In re Grand Jury Proceedings, United States v. Jones*, 517 F.2d 666 (5th Cir. *cert. denied*, 449 U.S. 1083 (1981); *United States v. Strahl*, 590 F.2d 10 (1st Cir.1978, *cert. denied*, 440 U.S. 918 (1979); *United States v. Haddad*, 527 F.2d 537 (6th Cir.1975) *cert. denied*, 425 U.S. 974 (1976). They also have recognized that fee information may be relevant to a criminal case or investigation. It may prove unexplained wealth which is relevant to show that a

notice is unnecessary. The assets which are known to the government at the time of indictment can be specifically described in the forfeiture count.[11] Additional assets discovered after return of the indictment can be included in a superseding indictment or can be subjected to a restraining order by making an appropriate showing to the court. Therefore, actual knowledge will be established by the restraining order or the specific description in the indictment.[12]

Another reason cautioning against written notice is that if it is not routinely and uniformly given, it will be argued that the government is targeting certain attorneys and attempting to prevent them from representing criminal defendants in certain cases. The Department does not have or endorse such a policy and believes it is unwise to create even an appearance that such a policy exists.

The limitation herein does not apply to written notice of the government's intent to seek forfeiture of an asset when it has been concluded that an attorney has actual knowledge—based on facts and information other than that contained in the written notice—that the asset is subject to forfeiture. However, where the criminal case giving rise to the forfeiture has not been concluded, such notice should be given only in extraordinary cases and may not be given without the approval of the Assistant Attorney General, Criminal Division.

9-111.600 DISCOVERY OF INFORMATION CONCERNING AN ASSET TRANSFERRED TO AN ATTORNEY AS FEES FOR LEGAL SERVICES

Proceedings to forfeit an asset transferred to an attorney may be instituted only after the requirements of these guidelines and the approval of the Assistant Attorney General, Criminal Division have been obtained. Of course, this requires that a certain amount of information concerning the transfer of the asset be known. The discovery of information concerning the payment of a fee may be carried out as set forth herein.

9-111.610 Compelled Disclosure of Confidential Communications During the Course of the Representation

As set forth above, actual knowledge of the forfeitability of an asset, cannot be established by compelled disclosure of confidential communica-

11 Including the assets in the indictment would not only have the benefit of establishing knowledge, but also would allow a restraining order to be obtained without a further showing.

12 Perhaps the only situation in which some forfeitable assets would not be covered in this manner is when there is evidence that all assets belonging to a defendant are from criminal activity, but the government has not been able to locate all of them. In such cases, if there is probable cause to establish that all of the defendant's assets acquired after a particular date were from the criminal misconduct, the evidence could be presented to the grand jury and an allegation to that effect could be included in the forfeiture count. This allegation would be relevant and probative to prove that an attorney had actual knowledge that an asset he/she received was forfeitable. *See* USAM 9-111.510, *supra*. Actual knowledge could be established by evidence, from sources other than confidential communications, that the attorney knew the asset he/she received was obtained by the defendant after the date alleged in the indictment.

of records by an attorney concerning the transfer of assets for legal services, the requirement set forth in USAM 9-111.620, *supra*, that there be reasonable grounds to believe that the fee information will be evidence either of the disposition of forfeited assets or lead to the discovery of forfeited assets shall apply.

It should be noted that since these statutory proceedings will occur after trial, the likelihood for any adverse impact upon the attorney-client relationship will be diminished substantially. In particular, the potential for disqualification of the attorney from representation of the client because of the need to testify at trial should not arise. Therefore, when fee information is sought solely for purposes of forfeiture and it is feasible, the discovery of such information should be deferred to the post-trial proceedings rather than proceeding by way of grand jury or trial subpoena.

9-111.700 AGREEMENTS TO EXEMPT FROM FORFEITURE AN ASSET TRANSFERRED TO AN ATTORNEY AS FEES FOR LEGAL SERVICES

Agreements may be entered into to exempt from forfeiture an asset transferred to an attorney as fees for legal services, but only with the prior approval of the Assistant Attorney General, Criminal Division. *See* USAM 9-111.300, *supra*. Agreements may be approved only if: (1) there are reasonable grounds to believe that the particular asset is not subject to forfeiture; and (2) the asset is transferred in payment of legitimate fees for legal services actually rendered or to be rendered.

Efforts should be made to assist in identifying the assets, if any, belonging to a defendant which are not subject to forfeiture. In this regard, any proffer of evidence by an attorney as to the source of the assets may be relied upon. However, an agreement to exempt fees based on such a proffer must contain an express condition that the agreement is not binding if full and accurate disclosure has not been made or if the proffer is false or misleading.

In determining whether an asset is being transferred in payment of a legitimate fee, the amount of the fee may be taken into consideration. However, the focus should not be on whether the fee is reasonable. The focus must be on whether it is a legitimate transaction or a sham transaction designed to shield assets from forfeiture. If the transaction is legitimate, the fee, even if it appears exorbitant, may be exempted if it is paid from a source that meets the first requirement. Conversely, a fee, even if reasonable, may not be exempted from forfeiture by agreement if the first requirement is not met. Any agreement to exempt a fee from forfeiture, however, may be limited to specific amount if there is basis to believe that only assets in that amount are not subject to forfeiture.

defendant obtained substantial income from his/her illegal activities. It may show that the fee for one or more alleged conspirators was paid by another co-conspirator which is relevant to prove ''association in fact'' or may lead to the discovery of other co-conspirators. Finally, it may show the disposition of forfeitable assets or lead to the discovery of forfeitable assets which have been hidden by a defendant. The requirement that reasonable attempts to obtain the information from alternative sources must be exhausted will have to be considered on the facts of each case, but it should pose no special problem. The remaining two requirements, however, do involve some special considerations.

The requirement that there be ''reasonable grounds to believe ... that the information sought is reasonably needed'' is straight-forward when the fee information is sought to prove association in fact or unexplained income. But where the purpose of a subpoena is solely or principally to obtain evidence relevant to a forfeiture count, this requirement translates into reasonable grounds to believe that the fee information is evidence of or will lead to evidence either of the disposition of forfeitable assets or the existence of hidden assets. This means that there must be a basis to conclude that there are assets subject to forfeiture which have not been identified or located. This may exist, for example, if there is evidence that a defendant either had no legitimate income or derived all of his/her income from an illegitimate source at the time the fee was paid. It may also exist if there is evidence that a defendant derived a certain and substantial amount of income from his/her illegal activity, the disposition or whereabouts of which are unknown, and he/she had no substantial legitimate income at the time the fee was paid.

The final requirement is that the need for the information must outweigh the potential adverse effects on the attorney-client relationship. If the fee information is sought solely or principally to obtain evidence concerning a forfeiture count, the availability of post-judgment discovery may mean that the need to subpoena the information, particularly at trial, does not outweigh the potential for disqualification. *See* USAM 9-111.630, *infra*.

9-111.630 Post-Judgment Discovery Proceedings Under 18 U.S.C. § 1963 and 21 U.S.C. § 853

Both the RICO and drug felony forfeiture statutes provide that the court may order that depositions be taken or that records be produced after an order of forfeiture is entered in order to identify and locate property declared forfeited. *See* 18 U.S.C. § 1963(l); 21 U.S.C. § 853(m). Consequently, if an order of forfeiture is entered covering property which is described generically or by incorporation of the statutory language, the government may make application to the court to obtain records, documents or testimony concerning the identity and location of that property. When an application is made for the deposition of an attorney or the production

Tab No. 16

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

DIRECTIVE NO. 90-10

Washington, D.C. 20530

October 9, 1990

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service

FROM: Cary H. Copeland
Director

SUBJECT: Departmental Policy Regarding Seizure of Occupied Real Property

I. General Policy

As previously stated in this Office's memorandum styled "Seizure of Forfeitable Property", January 11, 1990, it is the Department's policy that ex parte judicial approval is required prior to the seizure of all real property.

However, it is not required that the U.S. Marshal actually seize property and take dominion and control of it in order to establish the Court's jurisdiction over the res. An alternative method of initiating the forfeiture of property is to "arrest" the property under the Admiralty Rules.

In certain circumstances it may be advisable to use this less intrusive means of bringing the property into the jurisdiction of the Court for purposes of commencing a civil in rem forfeiture action. Moreover, as "arresting" property through the service of process does not interfere significantly with an owner's possessory interests, advance ex parte judicial review is not required as a matter of law or policy.

The determination of whether to initiate real property forfeitures through a "seizure" or "arrest" of the property requires an exercise of discretion by the Attorney for the Government taking into account the circumstances of the case at hand.

(amended)

believe that failure to remove the occupants will result in one or more of the following:

a. Danger to law enforcement officials or the public health and safety;

b. The continuation of illegal activity on the premises; or

c. Interference with the Government's ability to manage and conserve the property.

If appropriate under 19 U.S.C. 1612(a), consideration should be given to effecting an interlocutory sale of the defendant property if it is in the best interest of the United States. See A Guide to Sales of Property Prior to Forfeiture: The Stipulated and Interlocutory Sale, Criminal Division, 1990.

II. Notice and Opportunity for Hearing Prior to Seizure

It is the Department's position that no advance notice or opportunity for an adversary hearing is statutorily or constitutionally required prior to the seizure of property, including real property.

This is the Department's national policy and practice, with the exception of districts within the Second Circuit that are currently subject to United States v. The Premises and Real Property at 4492 South Livonia Road, 889 F.2d 1258 (2nd Cir. 1989), reh'g denied, 897 F.2d 659 (1990). The Court in Livonia Road did note that under exigent circumstances there is no need for a pre-seizure hearing (supra at 1265). The Second Circuit recently stated in United States v. 141st Street Corporation, 911 F.2d 870 (2nd Cir. 1990) that an exigent or extraordinary circumstance exists if: "1) seizure was necessary to secure an important governmental or public interest, 2) very prompt action was necessary, and 3) a governmental official initiated the seizure by applying the standards of a narrowly drawn statute."

III. Circumstances Supportive of Immediate Removal of Occupants

A. Reason to believe that leaving occupants in possession will result in danger to the health and safety of the public or to law enforcement may be based upon the following:

1. The nature of the illegal activity;

A. Arresting Real Property without Taking Actual Possession

The Clerk of Court may issue a Warrant of Arrest pursuant to Rule C(3) of the Supplemental Rules for Admiralty and Maritime Claims which is then posted upon the real property by the U.S. Marshal. This process establishes the jurisdiction of the Court. The simultaneous filing of a complaint and a lis pendens should also occur to prevent the transfer or encumbrance of the real property subject to forfeiture.

B. Effecting the Seizure Where the U.S. Marshal Takes Dominion and Control

1. Permitting Continued Occupancy

As a general rule, occupants of real property seized for forfeiture should be permitted to remain in the property pursuant to an occupancy agreement pending forfeiture provided that:

a. The occupants agree to maintain the property, which shall include but is not limited to keeping the premises in a state of good repair or in the same condition as existed at the time of seizure, and continuing to make any monthly payments due to lienholders or to make timely rent payments to the U.S. Marshal or his designee if the occupants are tenants;

b. The occupants agree not to engage in continued illegal activity;

c. The continued occupancy does not pose a danger to the health or safety of the public or a danger to law enforcement;

d. The continued occupancy does not adversely affect the ability of the U.S. Marshal or his designee to manage the property; and,

e. The occupants agree to allow the U.S. Marshal or his designee to make reasonable periodic inspections of the property with adequate and reasonable notice to the occupants.

2. Removal of Occupants Upon Seizure

Immediate removal of all occupants at the time of seizure should be sought if there is reason to

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2. Presence of weapons, "booby traps," or barriers on the property;

3. Information that occupants will intimidate or retaliate against cooperating individuals, neighbors, or law enforcement personnel;

4. Presence of serious safety code violations; or

5. Contamination by or presence of dangerous chemicals.

B. Reason to believe that leaving occupants in possession will result in **continued use of the property for illegal activities** may be based upon:

1. The nature of the illegal activity (e.g., repetitive drug sales);

2. The history of the property's and/or occupant's involvement in illegal activities;

3. Evidence that all occupants have been involved in the illegal activity;

4. The inability of non-participating occupants to prevent continued illegal activity; or

5. The failure of other sanctions to stop illegal activity.

C. Reason to believe that leaving occupants in possession might undermine **the U.S. Marshal's or his designee's ability to manage the property** may be based upon all the factors set out above or information that the occupants intend to waste or destroy the property.

D. The above list of circumstances is not intended to be exclusive. Attorneys for the Government may find other circumstances justifying immediate removal of the occupants based upon demonstrable and articulable information provided by credible sources.

IV. Nature of Adversary Pre-Seizure Hearing

Notwithstanding our legal position regarding pre-seizure adversary hearings, some courts have required such hearings prior to the seizure of occupied real property. It is the Department's position that any such adversary hearing should be carefully restricted.

In terms of its scope, such a hearing should be limited to a proffer by the Government of evidence supporting probable cause. Such evidence may be circumstantial or hearsay. Claimants may then be heard, and upon the Court's satisfaction that probable cause exists and that there is no mistake in the identification of the property to be seized, the warrants for arrest should issue.

In terms of timing, given the limited nature of such a hearing it may be scheduled within 24 hours of notice of intent to seize. The Supreme Court has repeatedly indicated that the simple opportunity for an individual to speak and be heard in court has inherent value for purposes of due process. (See e.g., Marshall v. Jericho, 446 U.S. 238, 242 (1980)). Following initiation of the forfeiture action, a full trial on the merits will follow, prior to a judgment of forfeiture.

This policy does not create or confer any rights, privileges or benefits on prospective or actual claimants, defendants or petitioners. Likewise, this policy is not intended to have the force of law. See, United States v. Caceres, 440 U.S. 471 (1979).

cc: George J. Terwilliger III
Associate Deputy Attorney General

Philip M. Renzulli
U.S. Postal Inspection Service

Glenn McAdams
Internal Revenue Service

James Wooten
Bureau of Alcohol, Tobacco and Firearms

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

DIRECTIVE NO. 90-11

Washington, D.C. 20530

October 15, 1990

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U. S. Marshals Service
Chief Postal Inspector, Postal Inspection Service
Asst. Commissioner, Internal Revenue Service
Asst. Director, Bureau of Alcohol, Tobacco and Firearms

FROM: Cary H. Copeland CHC
Director
Executive Office for Asset Forfeiture

SUBJECT: Seizures of Financial Instruments

Your assistance is requested to ensure compliance with the attached procedures for handling of financial instruments seized for forfeiture. The value of such monetary instruments can be lost if proper procedures are not followed. The U. S. Marshals Service prepared the attached procedures which incorporate comments from the various seizing agencies.

Thank you for your help.

Attachment

cc: George J. Terwilliger III
Associate Deputy Attorney General

CASHIERS CHECKS

SEIZING AGENCY: (See personal checks)

MARSHALS SERVICE: (See personal checks)

CERTIFICATES OF DEPOSIT

SEIZING AGENCY: Immediately following seizure, notify the bank which issued the certificate of deposit (CD) that it has been seized for forfeiture and instruct the bank officials to take whatever steps are necessary to freeze the funds covered by the certificate so the CD will be negotiable by the Marshals Service after forfeiture.

MARSHALS SERVICE: The Marshals Service will take appropriate action, in accordance with established procedures, to liquidate the CD after forfeiture.

TRAVELER'S CHECKS

SEIZING AGENCY: Immediately following seizure, notify the company issuing the checks that they have been seized for forfeiture. Determine what procedures will be required in order to redeem the checks. If they can be redeemed prior to forfeiture, take appropriate steps to liquidate the checks and have the issuing company issue a cashier's check to the Marshals Service. If liquidation cannot occur until after forfeiture, turn the checks over to the Marshals Service with verification that the issuing company has been notified.

MARSHALS SERVICE: Accept custody of all traveler's checks which cannot be liquidated until after forfeiture. Upon receipt of a declaration or order of forfeiture, liquidate the asset in accordance with established procedures.

INVESTIGATIVE AGENCY AND MARSHALS SERVICE
RESPONSIBILITIES REGARDING
THE SEIZURE OF FINANCIAL INSTRUMENTS

POSTAL MONEY ORDERS

SEIZING AGENCY:	Immediately following seizure, (1) send a letter containing a list of the serial numbers, the amount of each money order, and a statement that the Government has recovered the money orders and is entitled to them under forfeiture laws, to the National Money Order Coordinator, St. Louis Postal Data Center, P.O. Box 388, St. Louis, MO. 63166-0388, and (2) provide the Marshals Service with a copy of this letter at the time the money orders are transferred to the Marshals Service for custody.
MARSHALS SERVICE:	Upon forfeiture of the money orders, the Marshals Service will complete a Domestic Money Order Inquiry, PS Form 6401, for each money order and 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.

PERSONAL CHECKS

SEIZING AGENCY:	Immediately following seizure, notify the bank upon which the check is drawn that the check has been seized for forfeiture and directing the financial institution to take whatever steps are necessary to prevent the withdrawal or transfer of funds necessary to pay the Government after forfeiture. A copy of this notice must be provided to the Marshals Service at the time the check is transferred for custody.
MARSHALS SERVICE:	Accept custody of all checks as to which the investigative agency has contacted the bank on which it was drawn and negotiate them after receipt of a declaration or order of forfeiture in accordance with established procedures.

AIRLINE TICKETS

SEIZING AGENCY: Immediately upon seizure, notify the issuing carrier of the Government's intention to forfeit. Determine what procedures will be required in order to redeem the tickets. If they can be redeemed prior to forfeiture, take appropriate steps to liquidate the tickets and have the issuing carrier secure a cashier's check made payable to the U.S. Marshals Service. If liquidation cannot occur until after forfeiture, turn the tickets over to the Marshals Service with verification that the issuing company has been notified.

MARSHALS SERVICE: Accept custody of all airline tickets which cannot be liquidated until after forfeiture. Upon receipt of a declaration or order of forfeiture, liquidate the tickets in accordance with established procedures.

STOCKS AND BONDS

SEIZING AGENCY: Immediately following seizure, contact a certified stock broker (State and National) to establish the fair market value (FMV) of the asset and determine how the instrument is traded.

(Note: The USMS will not accept custody of any financial instrument with a FMV equal to $0, or any stocks or bonds which are privately or closely held, or were issued by a "shell corporation" and are not traded on an open market. Stocks and bonds of privately or closely held corporations should be "quick released" unless the seizing agency can document that they have a significant value.

MARSHALS SERVICE: Accept custody of all stocks and bonds for which the seizing agency can document a significant worth.

(Note: As a general rule the Marshals Service will try to liquidate stocks and bonds through interlocutory sale whenever possible.)

U.S. SAVINGS BONDS

SEIZING AGENCY: Immediately following seizure, notify the Department of Treasury, by certified letter, listing: (1) serial numbers, (2) the bond denominations, (3) to whom payable, and (4) the reason for which they were seized. Send this information to: Bureau of the Public Debt, Savings Bond Division, Parkersburg, W. Va., 26106. Provide the Marshals Service with a copy of this letter at the time the savings bonds are transferred for custody.

MARSHALS SERVICE: Accept custody of all savings bonds, maintain until forfeiture, and dispose of in accordance with established procedures.

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Tab No. 19

U.S. Department of Justice

Office of the Deputy Attorney General

DIRECTIVE NO. 91-2

The Deputy Attorney General

Washington, D.C. 20530

February 26, 1991

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service
Chief Postal Inspector, Postal Inspection Service
Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco and Firearms

FROM: William P. Barr WPB
Deputy Attorney General

SUBJECT: Increased Administrative Forfeiture Caps

Since 1984 virtually all forfeitures of properties valued over $100,000 have been conducted judicially. 1/ On August 20, 1990, the President signed Public Law 101-382 which authorizes the administrative forfeiture of cash and monetary instruments without regard to value and other property up to a value of $500,000.

The legislative history of this new law makes clear that Congress: (1) sought to increase the speed and efficiency of uncontested forfeiture actions, and (2) has confidence in the notice and other safeguards built into administrative forfeiture laws. Accordingly, the Attorney General has promulgated revised asset forfeiture regulations to implement the higher statutory ceilings for administrative forfeitures.

To ensure that United States Attorneys can continue to be effective in their role as Chairmen of the Law Enforcement Coordinating Committees in our various judicial districts, one

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1/ Conveyances used to transport controlled substances have been administratively forfeitable without regard to value.

Office of the Attorney General
Washington, D.C. 20530

FOREWORD

The Department of Justice has placed a high priority on the forfeiture of proceeds and instrumentalities of crime as an integral part of our law enforcement program. Dismantling the economic underpinnings of criminal activity is critical to our anti-crime effort.

In 1984, it was the Department of Justice that secured the enactment of provisions in the Comprehensive Crime Control Act which gave us the authority to share federally forfeited property with cooperating State and local law enforcement agencies. The equitable sharing program is a dramatic success story. Through Fiscal Year 1990, we have shared over $474.3 million in cash and $69.5 million in tangible property with our State and local colleagues.

The increased cooperation that the equitable sharing program has fostered among federal, State and local law enforcement agencies is outstanding. We must all be vigilant in maintaining the integrity of the program so that it will continue to be available to us for years to come. It is a program that can continue to help those of you on the front lines in the war on crime.

Dick Thornburgh
Attorney General

December 1990
Washington, D.C.

change is being made in the processing of equitable sharing payments in administrative cases, as follows:

If sharing is requested in an administrative forfeiture case involving property valued in excess of $100,000, the seizing agency shall, prior to final agency action, provide the appropriate United States Attorney's Office (USAO) with a copy of the completed DAG-71 and the DAG-72 reflecting the agency's proposed sharing transfer. The USAO shall review the proposed sharing decision and complete the recommendation section providing the seizing agency with a sharing recommendation. If no USAO recommendation is received within ten days, concurrence with the agency's proposed action will be assumed.

Let me take this opportunity to re-iterate several existing policies relating to administrative forfeitures:

1. Prior Judicial Approval of Seizures. In all cases involving real property and wherever practicable in cases involving personal property (including cash and monetary instruments), seizing agents shall, in consultation with the appropriate United States Attorney's Office (USAO), secure a federal seizure warrant or a federal warrant of arrest in rem.

2. Forfeiture of Real Property. All forfeitures of real property or interests therein shall be conducted judicially.

3. Aggregation of Seizures. Where several items of property are subject to forfeiture (a) under the same statutory authority, (b) on the same factual basis, (c) have a common owner, and (d) have a combined appraised value of over $500,000 or include an item of real property, all such items shall be aggregated and forfeited judicially. This rule shall not apply if the seizures occur over a period of weeks with the result that aggregation would substantially delay the forfeiture.

I am confident that the increased administrative forfeiture authority will be exercised with utmost care and prudence. We will be monitoring implementation closely. Any questions regarding this memorandum or other forfeiture issues should be directed to the Executive Office for Asset Forfeiture, Office of the Deputy Attorney General.

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U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

DIRECTIVE NO. 91-3

Washington, D.C. 20530

March 20, 1991

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service
Chief Postal Inspector
Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco and Firearms

FROM: Cary H. Copeland
Director CHC

SUBJECTS: Effect of Delay in Notice Required by the Anti-Drug Abuse Act of 1988

Sections 6079 and 6080 of the Anti-Drug Abuse Act of 1988 create expedited procedures for the release of certain classes of seized property. Section 6079 creates expedited procedures for property seized for administrative forfeitures involving the possession of controlled substances in "personal use" quantities. Section 6080 (codified at 21 U.S.C. 881-1) provides for such expedited procedures in a judicial forfeiture where a conveyance has been seized for a drug-related offense.

These provisions of law and regulation provide for two types of written notice: (1) the notice to the possessor regarding the expedited procedures given at the time of seizure, and (2) the notice to the owner concerning the legal and factual basis of the seizure given at the earliest practicable opportunity after ownership is determined. Case law is limited and does not address the effect, if any, of failure to give notice to the possessor. This may well be because it is the owner or other interested party as defined in regulations, not the possessor at the time of seizure, who has the right to avail himself or herself of the expedited procedures established. The purpose for requiring written notice to the possessor appears to have been to

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quickly alert the owner of a seizure in those instances where the possessor was not the owner but was in communication with him or her.

Congress did not provide a penalty for failure to provide notice within a prescribed period of time. However, it is clearly in the interests of good government that notice, whether to the possessor or owner, be provided as soon as practicable.

It is the policy of the Department of Justice that written notice should be provided to the possessor(s) and owner(s) as soon as practicable but not later than within forty-five (45) days of the seizure. Where the appropriate notice has not been provided as required, the seized property should be returned and the forfeiture proceeding terminated. Exceptions in unusual circumstances may be granted by the Director of the Asset Forfeiture Office, Criminal Division, Department of Justice. This policy does not change the existing policy regarding the interpretation of the phrase "at the time of seizure" for purposes of adoptive seizures.

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

DIRECTIVE NO. 91-4

Washington, D.C. 20530

April 8, 1991

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service
Chief Postal Inspector, Postal Inspection Service
Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco and Firearms

FROM: Cary H. Copeland
Director CHC

SUBJECT: New Equitable Sharing Guide

Attached is a copy of our new publication, A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies. This Guide, which sets forth the procedures and policies for the Department's Equitable Sharing Program, is being distributed nationwide to federal, state and local law enforcement agencies. The revised Forms DAG 71 and 72 (the sharing request and decision forms) are being issued simultaneously.

The Equitable Sharing Program is truly a law enforcement success story. We have shared over $600 million dollars in cash and property with our state and local colleagues since the program began in FY 1986. In FY 1990 alone, equitable sharing was over $200 million.

This Program is a critical component of our law enforcement effort. Our ability to share the proceeds of federal forfeitures has brought about a dramatic increase among law enforcement at all levels.

We must, however, protect the integrity of the sharing process to ensure its future. To that end, this Office will be publishing a companion guide for federal equitable sharing decision makers.

We continually strive to improve the sharing program. Please feel free to contact me or Katherine Deoudes of this Office on FTS 368-1149 if you have any questions or ideas.

Attachment

A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies

December 1990

Prepared by the Executive Office for Asset Forfeiture
Office of the Deputy Attorney General

DIRECTIVE NO. 4
pg. 2/28-1991

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I. GOALS OF THE DEPARTMENT OF JUSTICE FORFEITURE PROGRAM

The Department's forfeiture program has three primary goals:

1. To punish and deter criminal activity by depriving criminals of property used or acquired through illegal activities;

2. To enhance cooperation among federal, state, and local law enforcement agencies through equitable sharing of assets recovered through this program; and

3. As a by-product of the above, to produce revenues to enhance forfeitures and strengthen law enforcement. The policies and procedures governing equitable sharing are contained in The Attorney General's Guidelines on Seized and Forfeited Property (July 1990). (See Appendix B.)

II. SHARING AUTHORITY

The Attorney General is authorized to share forfeited property with any state or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property.

This authority is found primarily at 21 U.S.C. § 881(e)(1)(A), 18 U.S.C. § 981(e) and 19 U.S.C. § 1616. (See Appendix A.)

III. AGENCIES ELIGIBLE TO RECEIVE EQUITABLE SHARING PAYMENTS

Any state or local law enforcement agency that directly participated in the investigation or prosecution of criminal activity or the execution of court orders arising from that activity may request an equitable share.

IV. THE TWO WAYS YOU CAN PARTICIPATE IN THE EQUITABLE SHARING PROGRAM

A. Joint Investigation

A state or local law enforcement agency may directly participate with one of the following federal agencies in the investigation or prosecution of violations of federal law which provide for the forfeiture of property.

V. HOW PROPERTY IS FEDERALLY FORFEITED

A. Administrative Forfeiture

Subject to the following dollar thresholds, federal agencies **may** administratively forfeit seized property where no claim and cost bond has been filed:

Monetary Instruments (e.g. cash, checks, stocks, bonds)	**Unlimited Value**
Hauling Conveyances (e.g. cars, boats, planes used to transport illegal drugs)	**Unlimited Value**
Other Property	**$500,000**

NOTE: Department of Justice policy requires that all real property be forfeited judicially.

B. Judicial Forfeiture

Any case in which: (1) the value of the property exceeds the above listed limits; (2) a claim and cost bond has been filed; or (3) real property is involved; must be forfeited through a judicial proceeding in federal district court.

VI. HOW TO APPLY FOR AN EQUITABLE SHARE

After the **seizure** in a joint case in which your agency directly participated or the federal **adoption** of your agency's seizure, you may request a share of the property.

An **Application for Transfer of Federally Forfeited Property - Form DAG-71** must be submitted to one of the appropriate federal agencies within **sixty (60) days** following the seizure. In adoptive seizures, the sixty (60) days begin to run on the date the federal agency adopts the case. (See Appendix C.)

Pursuant to the Guidelines, **no request can be considered unless it is submitted within the applicable sixty (60) day period.**

Federal Agencies Involved in the Justice Forfeiture Program

Drug Enforcement Administration
Federal Bureau of Investigation
Immigration and Naturalization Service
Internal Revenue Service
U.S. Postal Inspection Service
U.S. Bureau of Alcohol, Tobacco and Firearms

B. **Adoption of a State or Local Seizure**

A state or local law enforcement agency that has seized property may request that one of the above federal agencies adopt the seizure and proceed with federal forfeiture. The request for federal adoption of a state or local seizure should be made within fifteen (15) days of the date the property was seized.

The property seized must be forfeitable under a federal law enforced by the Department of Justice and the forfeitable interest (i.e., the net equity) must **generally** meet the following federal dollar thresholds:

Conveyances

Vehicles	$2,500
Aircraft	$5,000
Vessels	$5,000

Non-Conveyances

Real Property	$10,000
Cash	$ 1,000
All other property	$ 1,000

NOTE: The Immigration and Naturalization Service, in its border enforcement efforts, seizes large numbers of motor vehicles valued at less than $2,500. These seizures are made for purely law enforcement reasons and without regard to dollar thresholds. Also, thresholds may be higher in districts where extremely large caseloads require it.

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

DIRECTIVE NO. 91-7

Washington, D.C. 20530

May 20, 1991

MEMORANDUM

TO: ALL UNITED STATES ATTORNEYS

FROM: Cary H. Copeland CHC
Director

SUBJECT: Equitable Sharing Information

As of the end of April 1991, the Department of Justice has shared over $680 million in cash and tangible property with our State and local law enforcement colleagues. The equitable sharing program has become increasingly high profile because of its dramatic success. It is critical to the future of the equitable sharing program that it be administered with the utmost integrity.

The attached materials will provide you with additional information and guidance to assist in administering equitable sharing in your district:

1. Policy Memorandum "Equitable Sharing Issues" (May 20, 1991).

2. Department of Justice Assets Forfeiture Fund: Report on the Equitable Sharing Program (March 1991).

3. Memorandum of Understanding Between U.S Postal Inspection Service and the Department of Justice (March 22, 1991).

4. Talking Points on the Asset Forfeiture Program.

Attachments (4)

Forfeiture, like all legal proceedings, takes time. Equitable sharing can only occur after the federal forfeiture has been completed and the United States has taken clear title to the property. In addition, where a claimant has filed a petition for remission or mitigation of the forfeiture, sharings can be delayed. .Finally, if the forfeiture involves property which must be sold, sharing cannot occur until the sale is complete and the net proceeds of sale determined.

The most common cause of unnecessary delay can be overcome by ensuring that the DAG-71 is accurate, complete and timely. The federal investigative agency can assist you in filling out the DAG-71 and the Law Enforcement Committee Coordinator in the United States Attorney's office can assist you in determining the status of your request.

VII. USE OF EQUITABLY SHARED PROPERTY

Pursuant to Department of Justice policy, all equitably shared cash and tangible property, and any income generated by this property, **must be used for the law enforcement purposes stated in the DAG-71.** The DAG-71 should be treated as a contract between the requesting agency and the Department of Justice; and the terms are binding on the parties.

Cash or tangible property shall be shared with state or local agencies only where it will **increase and not supplant law enforcement resources of that specific state or local agency. Any interest generated by this property shall also go to law enforcement purposes. Use of equitable sharing monies to pay for basic operational expenses is discouraged.**

Permissible state and local law enforcement uses include, but are not limited to:

1. Purchase of vehicles and equipment necessary for law enforcement functions;

2. Purchase of weapons and protective equipment;

3. Purchase of investigative communications equipment;

4. Payment of salaries and overtime for law enforcement officers;

5. Purchase of ADP equipment and software to be used in support of law enforcement purposes;

6. Payment of expenses for training of law enforcement personnel;

7. Payment of expenses for travel and salaries for law enforcement personnel;

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

May 20, 1991

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service
Chief Postal Inspector, Postal Inspection Service
Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco and Firearms

FROM: Cary H. Copeland
Director

SUBJECT: Equitable Sharing Issues

The Department of Justice's equitable sharing program has experienced dramatic growth and is by all accounts a true law enforcement success story. Sharing has increased from $22.5 million in FY 1986 to over $200 million in FY 1990.

A sharing guide for federal decision makers is being developed. Pending the issuance of that guide, however, set out below are a series of sharing policies of which you should be aware. Some of these represent a change from prior policies. Your careful attention to these policies is solicited as it is essential that we maintain the integrity of this important law enforcement program.

1. DECISION MAKING AUTHORITIES. The levels of decision making authority are set forth at Section V(D)(1-4) of The Attorney General's Guidelines on Seized and Forfeited Property (July 1990). All decision makers are asked to ensure that every equitable share approved meets the Guidelines standards.

15. This Agreement shall be construed in accordance with federal law, and any conflict over the terms and conditions of this Agreement must be decided by the Court as part of the forfeiture action.

[If applicable add:

__. Occupant agrees to protect, feed and provide all reasonable and necessary veterinary care for any domestic animals permitted by the USMS to remain upon the seized property.]

_____ _____
Date Occupant

_____ _____
Date U.S. Marshal for the District of _____

[If applicable:

Entered as an Order of this Court, dated this _____ day of _____, 199_.

_____
UNITED STATES DISTRICT JUDGE]

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

Equitable sharing ceremonies are meant to foster good will. Holding back delivery of equitable sharing checks or transfer of property is discouraged unless the recipient agency agrees. 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.

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

For this reason, the use of federal sharing monies to fund basic administrative expenses should be discouraged. For example, any salaries paid out of sharing funds should be for additional personnel (e.g. additional officers for a task-force). Allegations of diversion or supplantation in connection with equitable sharing should be brought to the attention of the Asset Forfeiture Office (AFO), Criminal Division (FTS 368-1263).

Moreover, requests for the transfer of property for novel purposes should be scrutinized carefully. Additional information should be requested to support any unusual request. Any concerns about a proposed use of forfeited assets should be brought to the attention of AFO.

3. "PASS-THROUGHS" PROHIBITED. The pass-through of sharing funds to other non-law enforcement agencies is not permissible. The Attorney General is only authorized to share federal forfeiture proceeds with the State or local law enforcement agencies which participated directly in the investigation or operation resulting in the forfeiture. As we are not authorized to share money with non-law enforcement agencies (or even with State or local law enforcement agencies which did not participate in the effort resulting in the forfeiture), then we cannot accede to the pass-through of sharing monies by recipient law enforcement agencies to other agencies.

without express written consent of the USMS.

8. Occupant shall not use the property for any illegal purposes or permit the use of the property for such purposes; use the property so that it poses a danger to the health or safety of the public or a danger to law enforcement; or use the property so that it adversely affects the ability of the U.S. Marshal or his designee to manage the property.

9. Occupant agrees to provide the USMS with thirty (30) days' advance notice, in writing, in the event he/she chooses to vacate the property.

10. The USMS may require Occupant to vacate the property when the interests of the United States so requires. Except for the circumstances described in paragraph 11, or in exigent circumstances, the USMS agrees to provide Occupant with thirty (30) days' advance notice to vacate the property. However, at the discretion of the Court or if Occupant fails to vacate the property within that period, the USMS, upon notice to Occupant and all parties to the forfeiture action, may immediately petition the Court for directions to remove Occupant, and all other persons occupying the property, pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims, Rule E(4)(d).

11. If Occupant violates any term or condition of this Agreement, except Paragraph 10, the USMS shall notify Occupant that he/she has ten (10) days to correct the violation(s). If Occupant fails to correct the violation(s) cited by the USMS within that period, the USMS, upon notice to Occupant and all

parties to the forfeiture action, may immediately petition the Court for directions to remove Occupant, and all other persons occupying the property, pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims, Rule E(4)(d).

12. Occupant, on behalf of himself/herself, his/her heirs, statutory survivors, executors, administrators, representatives, successors and assignees ["potential claimants"], agrees that he/she does hereby release the United States, its agencies, agents, assigns and employees ["potential federal defendants"] in their official and individual capacities, from any and all pending or future injuries, claims, demands, damages, suits and causes of actions arising from Occupant's possession, maintenance, occupancy and/or use of the property.

13. Occupant, on behalf of himself/herself and other potential claimants, further agrees to indemnify the United States, and other potential federal defendants, as to any and all pending or future claims, demands, damages, suits and causes of actions regarding any damage or personal injuries incurred on, or as a result of, the property while Occupant resides there.

14. Occupant acknowledges that violation of the contents of this Agreement as it pertains to the removal or destruction of property under the care, custody, or control of the USMS constitutes a violation of federal criminal law, specifically, 18 U.S.C. §2233 entitled "Rescue of Seized Property". That section provides for a fine not exceeding $2,000, or imprisonment not exceeding two (2) years, or both.

property until such time as an order for interlocutory sale or a final disposition order is entered by the Court.

TERMS AND CONDITIONS

1. Occupant shall be permitted to occupy the residence located on the property subject to the terms and conditions of this Agreement as long as the Court permits. It is understood by the Occupant that this Agreement does not create any interest in the land or a tenancy of any kind, but rather this Agreement is a license by USMS of this property under custody of the Court subject to revocation by the Court at the discretion of the Court or for violations of the terms and conditions of this Agreement.

2. The USMS shall have the right to re-enter the property, with or without the consent of Occupant, at reasonable times to inspect and/or appraise the property, or for any other purpose consistent with this Agreement.

3. Occupant shall maintain the property at Occupant's expense in the same, or better, condition and repair as when seized. The term "maintain" shall include, but not be limited to keeping the property free of hazards and/or structural defects; keeping all heating, air conditioning, plumbing, electrical, gas, oil, or other power facilities in good working condition and repair; keeping the property clean and performing such necessary sanitation and waste removal; maintaining the property and grounds in good condition by providing snow removal, lawn mowing and all other ordinary and necessary routine maintenance.

4. Occupant shall maintain casualty and fire insurance equal to the full replacement cost of the property and all improvements thereon, and shall maintain liability insurance for injuries occurring on or resulting from use of the property, or activities or conditions thereon, in the minimum amount of __(appraised value). Additionally, Occupant shall arrange for a rider to all above-mentioned policies naming the United States as a loss payee and additional insured for the life of the Agreement. Occupant shall deliver proof of such insurance to the USMS no later than the seventh calendar day following the execution of this Agreement.

5. Occupant shall timely pay any and all mortgage, home equity loan, rent, utilities, sewer, trash, maintenance, cable television, tax and/or other obligations, otherwise necessary and due on the property, for the life of this Agreement. Moreover, Occupant shall abide by all laws, codes, regulations, ordinances, covenants, rules, bylaws, binding agreements and/or stipulations or conditions pertaining to the care, maintenance, control and use of the property.

6. Occupant shall not convey, transfer, sell, lease, or encumber in any way, title to the property. Nor shall he/she permit any other person, other than his/her immediate family, and temporary house guests, to occupy the property.

7. Occupant shall not remove, destroy, alienate, transfer, detract from, remodel or alter in any way, the property or any fixture, which is part of the property, ordinary wear excepted,

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

This reiterates and expands upon existing Departmental policy regarding retention of custody by State or local agencies. In order to minimize storage and management costs incurred by the Department of Justice, State and local agencies which present motor vehicles for federal adoptions should generally be asked to serve as substitute custodians of the property pending forfeiture. (See memorandum styled "Forfeiture Policies," February 14, 1990.)

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.

III. Use of Seized Real Property by Occupants

The Department's policy states that as a general rule, occupants of real property seized for forfeiture should be permitted to remain in the property pursuant to an occupancy agreement pending the forfeiture. (See memorandum styled "Departmental Policy Regarding Seizure of Occupied Real Property," October 9, 1990.)

Attached is a form occupancy agreement developed by the Department which includes various restrictions (e.g. maintenance and access to the property, potential for continued illegal activity, threat to health and safety, etc.) that address Departmental concerns. Other specific restrictions that protect the best interests of the government in a particular case should be included as appropriate.

Attachment (1)

OCCUPANCY AGREEMENT

(Caption of the case.)

ORDER AND OCCUPANCY AGREEMENT

This Occupancy Agreement ("Agreement") is made between _____ and the United States Marshals Service (USMS) for the District of _____.

On _____(date)_____, the United States of America, by and through the USMS, seized under authority of a warrant in rem bearing civil number _____, under the provisions of and authority of _____ U.S.C. § _____, a parcel of real property ("property") located at _____ _____, which includes all fixtures and appurtenances thereto, and which is described as follows:

(address/description)

[The United States, by and through the USMS, also seized the following personal property which may, at the option of the USMS, remain on the property for the duration of this Agreement:

(description/attached list)]

The undersigned ("Occupant"), _____, resided on the property when it was seized by the USMS, and desires to continue to reside there pending the disposition of the forfeiture proceeding with respect to the property.

Therefore, it is hereby agreed, upon execution of the Agreement, and in compliance with all the terms and conditions stated herein, that the Occupant may continue to occupy the

Tab No. 22

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

DIRECTIVE NO. 91-5

Washington, D.C. 20530

April 9, 1991

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service
Chief Postal Inspector, Postal Inspection Service
Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco and Firearms

FROM: Cary H. Copeland
Director

SUBJECT: Use of Property Under Seizure

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

I. Use of Seized Property by Department of Justice Personnel

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

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

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

DIRECTIVE NO. 91-1

Washington, D.C. 20530

February 11, 1991

MEMORANDUM

TO: Director, U.S. Marshals Service
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco and Firearms
Chief Postal Inspector
Assistant Attorney General, Criminal Division
All United States Attorneys

FROM: Cary H. Copeland
Director

SUBJECT: Disposition of ADP Equipment Purchased with Assets Forfeiture Fund Allocations

Recently, this Office received an inquiry from one of our participating agencies asking what policy existed regarding how long ADP equipment purchased with monies from the Assets Forfeiture Fund (AFF) retained its statutory limitation requiring its use within the asset forfeiture program. We have developed a policy that attempts to balance the objectives behind the legislative requirement with practical resource management considerations. The policy has been coordinated with personnel within the participating agencies. No objections were received.

Accordingly, the attached policy is applicable to all ADP equipment currently in inventory that was purchased with AFF monies, as well as ADP equipment purchased in the future. If you have any questions, please do not hesitate to call me on FTS 368-0473 or on (202) 514-0473.

Attachment

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ADP Equipment

Tab No. 28

DIRECTIVE NO. 91-10

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

June 14, 1991

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service

FROM: Cary H. Copeland
Director CHC

SUBJECT: Expedited Forfeiture Settlement Policy For Mortgage Holders

Attached is the captioned settlement policy with forms. It should be self-explanatory. The purpose of this policy is set out in the foreword.

This policy is applicable to cases where real property is seized, arrested, restrained or charged in a civil or criminal forfeiture action on or after July 1, 1991.

In promulgating this policy, I should acknowledge that it represents the skillful efforts of Karen Tandy and Laurence E. Fann of the Criminal Division's Asset Forfeiture Office. Specific questions regarding the policy or forms should be directed to AFO at (FTS) 368-1263 or (Commercial) (202) 514-1263.

Attachment

cc: Inar Morics, Assistant Commissioner
Internal Revenue Service

K. M. Hearst, Assistant Chief Inspector
Postal Inspection Service

Daniel M. Hartnett, Associate Director
Bureau of Alcohol, Tobacco and Firearms

EXPEDITED FORFEITURE SETTLEMENT POLICY FOR MORTGAGE HOLDERS

For Real Property Seized, Arrested, Restrained, or Charged in a Civil or Criminal Forfeiture Action on or After July 1, 1991

Issued By:

The Executive Office for Asset Forfeiture
Office of the Deputy Attorney General

Prepared By:

The Asset Forfeiture Office
Criminal Division

Revised: April 1992

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FOREWORD

This Expedited Forfeiture Settlement Policy for Mortgage Holders is intended to resolve legal issues between the United States and financial institutions holding a perfected lien or mortgage against real property subject to Federal forfeiture. The policy is intended to provide consistency, predictability, and fairness in handling the claims of such financial institutions. The statutory basis for this policy, 28 U.S.C. § 524(c)(1)(D) and 19 U.S.C. § 1617, is set forth in the Appendix. It applies to property that is restrained, arrested, seized, or charged with civil or criminal forfeiture by the United States.

The highlight of the policy is the guaranteed satisfaction, where settlement is reached, of unpaid principal and accrued interest to the financial institution upon entry of the final forfeiture order regardless of when the property is sold or otherwise disposed of.

This pamphlet consists of the Expedited Settlement policy and model forms.

POLICY

This policy governs the settlement and payment of perfected liens and mortgages. The lien or mortgage must be held by a financial institution as defined in the Definitions Section, below. It applies only to real property that is restrained, arrested, seized, or charged with civil or criminal forfeiture where the forfeiture statute has a statutory innocent owner provision.

This new policy, of course, is not binding upon any party who decides not to settle. If an Expedited Settlement is not reached, a lienholder or mortgagee is not precluded from filing a petition for remission or mitigation of forfeiture and/or otherwise pursuing its interests in the judicial forfeiture action.

I. PURPOSE

Pursuant to Department of Justice policy issued April 23, 1987, real property must be judicially forfeited. The following policy implements the interest of Congress to settle and pay valid liens and mortgages against forfeited property.

II. DEFINITIONS

A. "Expedited Forfeiture Settlement" (herein "Expedited Settlement") is an agreement to pay valid liens or mortgages against real property that is restrained, arrested, seized, or charged with civil or criminal forfeiture. This settlement is in lieu of:

(1) litigation of the financial institution's civil forfeiture claim;

(2) a petition for an ancillary hearing in a criminal forfeiture proceeding; and

(3) a petition for remission or mitigation of the forfeiture.

B. For the purposes of this policy, "Financial Institution" means:

(1) a State or federally insured or chartered lending institution;

(2) a mortgagee approved by the Secretary of Housing and Urban Development for participation in any mortgage insurance program under the National Housing Act;

(3) the Federal National Mortgage Association (Fannie Mae), Federal Home Loan Mortgage Corporation (Freddie Mac), and Government National Mortgage Association (Ginnie Mae);

D. This policy applies only to those forfeiture statutes that have statutory innocent owner provisions.

E. This policy applies only to forfeiture of real properties seized, arrested, restrained, or charged in a civil or criminal forfeiture action commenced before July 1, 1991. However, the procedures for Expedited Settlement, in the discretion of the United States Attorney and with the concurrence of the Asset Forfeiture Office, may be extended to seizures or forfeitures of real property commenced before that date.

F. This policy applies only to mortgagees satisfying the definition of "financial institution" contained herein. However, the procedures for Expedited Settlement, in the discretion of the United States Attorney and with the concurrence of the Asset Forfeiture Office, may be extended to any bona fide mortgagee.

(4) legally established insurance companies and pension funds; or

(5) in the discretion of the United States Attorney, any other entity satisfying the definition of "financial institution" set forth in 18 U.S.C. § 20 or 31 U.S.C. § 5312.

C. "Action Against the Property" refers to restraining, arresting, or seizing real property for forfeiture or charging it with civil or criminal forfeiture.

D. A "Perfected" lien/mortgage means a perfected security interest in real property as determined by real property recording laws of the State where the property is located.

E. "Final Judgment" or "Final Order of Forfeiture" means a judgment or order that vests all right, title, and interest in the forfeited property in the United States, and as to which all appeals are exhausted and conclusive upon the matter.

III. REPORTING REQUIREMENTS FOR THE UNITED STATES ATTORNEY

The United States Attorney shall within ten (10) working days report the denial of a request for an Expedited Settlement to the Asset Forfeiture Office, U.S. Department of Justice, Post Office Box 27322, Central Station, Washington, D.C. 20038, (202) 514-1263 (FTS 368-1263), FAX (202) 514-5522.

IV. SCOPE OF THIS POLICY

A. This policy does not create or confer any rights, privileges, or benefits on prospective or actual claimants, defendants, or petitioners. Likewise, this policy is not intended to have the force of law. *See, United States v. Caceres*, 440 U.S. 471 (1979).

B. This policy is not intended to create any right on the part of the financial institution to a judicial hearing or a judicial determination of its request for Expedited Settlement.

C. The Expedited Settlement does not constitute an offer in compromise subject to 28 C.F.R. Part O.

GENERAL PROCEDURES

Immediately following commencement of an action against the property, the United States Attorney shall notify any financial institution that has a perfected lien or mortgage of record against the seized/arrested property of its right to request an Expedited Settlement. This notice shall be in addition to any statutory notice required to be provided to entities that have or may have an interest in the seized property.

The notice shall consist of the following 14 paragraphs, which set forth the general procedures applicable to an Expedited Settlement.

RIGHT TO REQUEST

(1) A financial institution has the right to request Expedited Settlement of its perfected lien or mortgage following:

- notice of the forfeiture action and the timely filing of a Claim and Answer to a Civil Forfeiture Complaint; or
- the return of a criminal indictment charging forfeiture.

An Expedited Settlement will be in lieu of further forfeiture litigation between the parties and a petition for remission or mitigation of the forfeiture. In a criminal forfeiture action, an Expedited Settlement may be reached following the return of the criminal indictment. However, at the appropriate time, the financial institution must file a petition as a claimant in the ancillary hearing in the criminal case.

REQUEST FORMAT

(2) Following notification of the right to request an Expedited Settlement, the financial institution shall send its Request for Expedited Settlement to the United States Attorney who initiated the action against the property. The request must include copies of documents and evidence that will satisfy the United States Attorney of the financial institution's status as an innocent owner and its perfected lien or mortgage on the property. Financial institutions that elect to request an Expedited Settlement are not relieved of any applicable discovery obligations imposed under the Federal Rules of Civil Procedure. The United States Attorney shall notify the requesting financial institution of acceptance or rejection of the Expedited Settlement request as soon as practicable, but no later than sixty (60) days after receipt of all requested documents.

(3) A Request for Expedited Settlement shall be set forth in an affidavit and shall include the following information:

- unpaid casualty insurance premiums for the seized property from the date of termination or expiration of the existing coverage to the date of payment of the financial institution's interest, if the lien/mortgage instrument expressly requires the payment of this insurance.

(7) Attorneys' fees may be paid to the financial institution only in exceptional circumstances, subject to approval by the Asset Forfeiture Office, Criminal Division. Examples of such circumstances include the following:

- where the financial institution commenced a foreclosure action against the property prior to the forfeiture action; or

- where extensive discovery litigation is required before settlement can be reached. For example, if following the production of documents by the financial institution, the United States Attorney decides that it must take depositions of financial institution managers/employees in order to determine the financial institution's innocence and settlement ultimately is reached, attorneys' fees might be authorized.

The financial institution's compliance with this policy, including the copying and production of documents and answering interrogatories, does not constitute exceptional circumstances.

(8) The United States Attorney reserves the right to void the Expedited Settlement agreement and terminate the forfeiture action at any time for a legal reason or within ninety (90) days after execution of the Expedited Settlement agreement for economic reasons.

Examples of "legal reasons" include, but are not limited to the following: the loss of witnesses or tangible evidence, issues involving witness credibility, and legal opinions, precedent, or policy adverse to forfeiture.

"Economic reasons" means that the United States has determined that forfeiture is unfeasible, in that the aggregate of all liens and mortgages against the property and other allowable fees are likely to exceed the United States' equity in the property.

CONDITIONS OF SETTLEMENT

(9) Expedited Settlement is contingent upon a final order of forfeiture of the property to the United States. In the event the property is not forfeited or the forfeiture action is terminated pursuant to ¶ 8, the Expedited Settlement agreement is void.

- a complete description of the real property;
- details regarding the perfected interest in the property of the lienholder/mortgagee, supported by copies of all documents pertaining to the loan, including but not limited to: the loan file, loan committee minutes, promissory notes, Deeds of Trust, mortgage instruments, appraisal reports, and other satisfactory documentary evidence as requested by the United States Attorney; and
- satisfactory proof of facts and circumstances that justify payment of the lien or mortgage.

(4) The foregoing affidavit shall be signed by a responsible, managing official of the financial institution under the penalty of perjury, pursuant to 28 U.S.C. § 1746.

SETTLEMENT STANDARDS

(5) The United States Attorney shall enter into an Expedited Settlement if the financial institution satisfactorily establishes the following:

- it has a valid, good faith security interest in the property as lienholder or mortgagee;
- the lien or mortgage is perfected; and
- it is an innocent owner as defined by the applicable forfeiture statute and case law.

SETTLEMENT PAYMENTS

(6) If the financial institution satisfies the settlement standards set forth in ¶ 5 above, the government will agree to pay the following sums upon entry of a Final Civil Judgment of Forfeiture or Final Criminal Order of Forfeiture:

- unpaid principal due and owing under the promissory note;
- accrued interest at the contractual (not default) rate of interest to the date of payment; and

APPENDIX

(10) The financial institution must stipulate in the Expedited Settlement to relinquish to the United States any other rights that it may have under the lien/mortgage instruments, including the right to foreclose.

(11) The financial institution must agree to join any government motions for interlocutory or stipulated sale of the property and any motions to remove occupants who fail to abide by the terms of an occupancy agreement. The financial institution must agree to endorse such government motions within ten (10) days of receipt of the motion.

(12) The financial institution must agree to notify the United States Attorney and United States Marshals Service at the end of the first payment cycle in which a payment is not made by the debtor under the terms specified in the note.

(13) Upon payment of the settlement amount pursuant to ¶ 6, the financial institution must agree to provide the United States with a release of its perfected lien or mortgage unless otherwise agreed by the parties. It must convey its security interest to the United States via recordable documents. It also must agree to release and hold harmless the United States, and any agents, servants, and employees of the United States (or any State or local law enforcement agency) acting in their individual or official capacities, from any and all claims by the financial institution and its agents which currently exist or which may arise as a result of the government's action against the property.

FAILURE TO SETTLE

(14) If either of the following events occurs, the financial institution shall be advised in writing that an Expedited Settlement cannot be reached:

- the financial institution fails to produce copies of documents and other evidence to satisfy the United States Attorney of the institution's innocence or of the perfection of its mortgage interest in the property subject to forfeiture; or

- the United States Attorney determines that the interest of the financial institution cannot be settled because the financial institution has failed to satisfy any of the settlement standards set forth in ¶ 5 or for any other just cause.

MODEL NOTICE LETTER TO FINANCIAL INSTITUTION

[DATE]

[NAME & ADDRESS OF FINANCIAL INSTITUTION]

Re: Notice of Expedited Settlement in [CASE CAPTION]

Dear [FINANCIAL INSTITUTION]:

This is notice of a forfeiture action brought by the United States involving property in which you may have an interest, as well as the procedures to follow if you elect to pursue Expedited Settlement of your interest. This letter is not intended as a substitute for legal notice of a forfeiture action.

On [DATE], the following real property was [SELECT AS APPROPRIATE: SEIZED, RESTRAINED, ARRESTED, CHARGED IN A CIVIL FORFEITURE COMPLAINT, AND/OR CHARGED WITH FORFEITURE IN A CRIMINAL INDICTMENT] pursuant to [CITE THE APPLICABLE FORFEITURE STATUTE]:

[DESCRIBE REAL PROPERTY BY STREET ADDRESS AND/OR LEGAL DESCRIPTION]

The Asset Identifier Number [NUMBER] has been assigned to this property.

• • •

[INCLUDE THE NEXT TWO PARAGRAPHS IF
A CIVIL FORFEITURE ACTION HAS BEEN OR WILL BE COMMENCED]

Once a Complaint for Forfeiture is filed against this property, you may choose to assert your interest by filing a claim to the property and answering the Complaint. Rule C(6) of Supplemental Rules of Certain Admiralty and Maritime Claims sets forth your filing obligations as follows:

> The claimant of property that is the subject of an action *in rem* **shall file his claim within 10 days** after process has been executed, or within such additional time as may be allowed by the Court, **and shall serve an answer within 20 days** after the filing of the claim.

If you timely file your Claim and Answer to the Civil Forfeiture Complaint, you may request that the United States consider an Expedited Settlement of your interest in the property.

• • •

[INCLUDE THE NEXT THREE PARAGRAPHS IF
A CRIMINAL FORFEITURE ACTION HAS BEEN COMMENCED]

[CITE APPLICABLE THIRD PARTY RIGHTS STATUTE (e.g., 21 U.S.C. § 853(n))], provides procedures for a third party to assert its interest in property that has been criminally forfeited. The third party must assert its interest within thirty (30) days of receiving notice of the forfeiture.

Your statutory right to petition the court for relief from criminal forfeiture does not arise until a criminal conviction of the defendant and forfeiture of that defendant's interest in the property. However, in the interest of fairness, the government is giving you the opportunity to establish your legal interest in the property in advance of a criminal conviction and forfeiture. You do not have to wait for the criminal case involving the property to proceed any further in order to request an Expedited Settlement of your interest in the property. You may follow the Expedited Settlement procedures set forth below at this time.

Use of the Expedited Settlement procedures does not constitute a waiver of any statutory filing deadlines applicable to criminal forfeiture actions. Thus, if your interest in the property is settled through this expedited procedure and the property ultimately is criminally forfeited, you still need to file a timely petition with the court. However, it will not be necessary for you to participate in any ancillary hearing or other forfeiture litigation involving this property. Your interest in the property will be protected through a written settlement agreement that will be filed with the court.

• • •

If you decide to seek an Expedited Settlement of your security interest in this property, you must send a Request for Expedited Settlement to: [NAME AND ADDRESS OF THE UNITED STATES ATTORNEY WHO INITIATED THE ACTION AGAINST PROPERTY.]

The Department of Justice Policy and Procedures governing Expedited Settlement are set forth below:

[INSERT THE FOLLOWING SECTIONS OF THE EXPEDITED SETTLEMENT POLICY:
I. PURPOSE, II. DEFINITIONS, IV. SCOPE, and GENERAL PROCEDURES.]

For your convenience, I have enclosed sample forms for your use in filing your Claim (civil) and/or a Petition for Ancillary Hearing (criminal) and in drafting your Request for Expedited Settlement.

Sincerely yours,
United States Attorney

Enclosure

_____
Assistant United States Attorney

TIME LIMITS TABLE

The following time limits are found in this policy:

IMMEDIATELY	Once real property has been restrained, arrested, or seized for forfeiture, or charged in a civil or criminal forfeiture action, the United States Attorney shall immediately notify all financial institutions that have a perfected lien or mortgage in the seized/arrested property of record of their right to request Expedited Settlement.
10 DAYS	The United States Attorney shall within ten (10) working days report the denial of a request by a financial institution, as defined in Section II, Parts B (1) through (4), for an Expedited Settlement to the Director of the Asset Forfeiture Office, U.S. Department of Justice, Post Office Box 27322, Central Station, Washington, D.C. 20038, (202) 514-1263 (FTS 368-1263), FAX (202) 514-5522.
10 DAYS	The financial institution must endorse any government motions for interlocutory or stipulated sale of the property and any motions to remove occupants who fail to abide by the terms of an occupancy agreement within ten (10) days of receipt of the motion.
60 DAYS	The United States Attorney shall notify the requesting financial institution of acceptance or rejection of the Expedited Settlement request, no later than sixty (60) days after receipt of all requested documents.
90 DAYS	The United States Attorney reserves the right to void the Expedited Settlement agreement and terminate the forfeiture action within ninety (90) days after execution of the Expedited Settlement agreement for economic reasons.

MODEL FORMS

- Part G: Factors governing amount of equitable share:

  - Adoptive seizure forfeited administratively or in uncontested judicial proceeding = 85% state/local share.

  - Adoptive seizure forfeited in contested judicial proceeding = 80% state/local share.

Joint Operations

- In a joint operation, state/local share must reflect the degree of direct participation in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort, including any related criminal prosecution with respect to the violation of law on which the forfeiture is based (21 U.S.C. 881(e)(3)). Total state/local share cannot exceed 85%.

- Whether state/local agency provided unique or indispensable information.

- Whether state/local agency originated the information leading to the seizure and whether the information was obtained fortuitously or by use of its investigative resources.

- Whether state/local agency initially identified the asset(s) for seizure.

  Whether state/local agency seized other assets during the course of the same investigation and whether such seizures were made pursuant to state/local law.

- Whether state/local agency could have achieved forfeiture under state law, with favorable consideration given to an agency which could have forfeited the asset(s) on its own but joined forces with the United States to make a more effective investigation.

After completion of Part I, Indicate on DAG-71, Part I whether the case is adoptive or joint. In all cases valued at $100,000 or more forward completed DAG-71 and 72 to the appropriate U.S. Attorney's Office for his/her review. Within 10 days, if no recommendation from the U.S. Attorney is received, concurrence should be assumed and the completed paperwork forwarded to your Headquarter's office.

Section II - To be completed by Investigative Bureau Headquarters.

- Part A: Indicate whether this is a recommendation or decision by Headquarters.

- Part B: If concurring with field office recommendation, check "Yes", sign and date. If not concurring, check "No" and state recommendation in Part C.

- Part C: To be completed when stating recommendation or decision which differs from that of the field office.

- Part D: If an award has been paid from the forfeiture of the asset, indicate amount.

STATUTORY AUTHORITY

- Title 28 U.S.C. § 524(c)(1)(D) reads as follows:

  ...the compromise and payment of valid liens and mortgages against property that has been forfeited pursuant to any law enforced or administered by the Department of Justice, 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...

- Title 19 U.S.C. § 1617 reads as follows:

  Compromise of Government claims by Secretary of Treasury

  Upon a report by a customs officer, United States Attorney, or any special attorney, having charge of any claim arising under the customs laws, showing the facts upon which such claim is based, the probabilities of a recovery and the terms upon which the same may be compromised, the Secretary of the Treasury is authorized to compromise such claim, if such action shall be recommended by the General Counsel for the Department of the Treasury.

U.S. Department of Justice

Date: ☐☐/☐☐/☐☐

Decision Form for Transfer of Federally Forfeited Property

TO BE COMPLETED BY INVESTIGATIVE BUREAU FIELD OFFICE

A. Investigative Agency Field Office: _____
Requesting Agency Name: _____
Judicial District: _____
Name of AUSA: _____
Address: _____
Telephone Number: (COMM) _____
(FTS) _____

B.
Asset #:
Case #:
Seizure Date:
Judicial District:

C. Description of Property Subject to Sharing: *(A separate DAG-72 must be initiated for each asset requested)*

Property	Identification Number	Appraised Value	Liens	Inv. Agency Expenses	U.S. Atty Expenses

D. Were other assets seized? Yes ☐ No ☐ If yes, please attach list.
E. Were other investigative agencies involved in this case? Yes ☐ No ☐ If yes, please attach list.
F. Is an award, under 28 USC 524(c)(1)(C), anticipated in this case? Yes ☐ No ☐ If yes, see II(D) and III(E) below.

G. Recommendation of Field Office:
Estimate the percentage of the requester's participation in the investigation: _____ %
Recommend how the property identified in Part C above should be equitably distributed. Your signature below certifies that the information provided is complete and accurate.

Recommendation	Recommendation Type		Recipient Agency(s)
☐ Grant ☐ Deny	☐ Item ☐ Cash / Proceeds	_____ %	
		_____ %	
		_____ %	

_____ _____
Official / Title Date

TO BE COMPLETED BY INVESTIGATIVE BUREAU HEADQUARTERS

II.

A. Recommend ☐ Decide ☐ *(Check one)*
B. Concur with above recommendation: Yes ☐ No ☐
(If no, complete "C")
D. Award Paid $ _____ *(See I(F) above)*
E. Federal Share $ _____

C.

Recommendation	Recommendation Type		Recipient Agency(s)
☐ Grant ☐ Deny	☐ Item ☐ Cash / Proceeds	_____ %	
		_____ %	
		_____ %	

_____ _____
Designated Official / Title Date

TO BE COMPLETED BY UNITED STATES ATTORNEY

III.

A. Recommend ☐ Decide ☐ *(Check one)*
B. Forfeiture Contested Yes ☐ No ☐
C. Concur with above recommendation: Yes ☐ No ☐
(If no, complete "D")
E. Award Paid $ _____ *(See I(F) above)*
F. Federal Share $ _____

D.

Recommendation	Recommendation Type		Recipient Agency(s)
☐ Grant ☐ Deny	☐ Item ☐ Cash / Proceeds	_____ %	
		_____ %	
		_____ %	

_____ _____
Designated Official / Title Date

FORM DAG-72
DEC. 90

- **Part E:** In a single asset case in which the asset will be transferred, calculate the federal share by multiplying the wholesale value of the asset times 15%.

If appraised value of property is $1,000,000 or less, following administrative forfeiture notify requesting agency of decision and send completed DAG-72 and declaration of forfeiture to the appropriate U.S. Marshal's Office.

If appraised value of property is $1,000,000 or more and it has been administratively forfeited or if property is subject to judicial forfeiture, forward DAG-71 and DAG-72 to the Asset Forfeiture Office, Criminal Division, Washington, D.C.

If the requested property is not available for sharing (e.g. property placed into official use), notify requesting agency in writing and send copy to U.S. Marshal's Office with custody of the asset and to the appropriate U.S. Attorney's Office.

Section III - To be Completed by U.S. Attorney or Designee

- **Part A:** Indicate whether this is a recommendation or a decision by the U.S. Attorney.
- **Part B:** Indicate whether or not forfeiture was contested.
- **Part C:** Carefully review Sections I and II. If you concur with recommendation of Investigative Bureau Headquarters, check "Yes", sign and date. If you disagree with recommendation, check "No" and complete Part D.

Note: See Section I, Part G above for factors governing amount of equitable share.

- **Part D:** Complete only when stating recommendation or decision which differs from that made by Investigative Bureau Headquarters.
- **Part E:** If an award has been paid from the forfeiture of the asset, indicate amount.
- **Part F:** In a single asset case in which the asset will be transferred, calculate the federal share by multiplying the wholesale value of the asset times 15%.

If you are the final decision making official (judicially forfeited non-real property, appraised value less than $1,000,000), notify requesting agency of your decision and send DAG-71, DAG-72 and Order of Forfeiture to Asset Forfeiture Office, Criminal Division, Washington, D.C. The Asset Forfeiture Office will review and forward necessary information to the appropriate U.S. Marshal's Office for disposition of the property.

If you are making a recommendation on real property or an asset with an appraised value of $1,000,000 or more, send DAG-71, DAG-72 and Order of Forfeiture to the Asset Forfeiture Office, Criminal Division, Washington, D.C. The Asset Forfeiture Office will coordinate with the proper Department official for a final decision.

If the requested property is not available for sharing (e.g. property placed into ficial use), notify requesting agency in writing and send copy to U.S. Marshal's Office h custody of the asset.

VI. Additional space for detailed answers *(Indicate Part to which answer(s) apply)*

(If more space is required, use a separate sheet of paper and attach.) **Attachment:** ☐ Yes ☐ No

VII. Certifications:

A. The requester certifies that the above information is true and accurate, that the property transferred will be used for the law enforcement purpose stated, and that all monies received pursuant to this request will be deposited and accounted for consistent with applicable state laws, regulations and orders. The requester agrees to report on the actual use of equitably transferred property upon request. The requester agrees to pay fees and expenses necessary to effect transfer of title not later than the time of transfer. The requester understands that if it is unable to pay the necessary fees and expenses at the time of transfer, the asset will be sold and the maximum percent of net sale proceeds will be awarded in lieu of the asset.

_____ _____
Signature / Title Date

B. As legal counsel, I have reviewed this Application for Transfer of Federally Forfeited Property and I certify that the contact person identified in Part II has the authority to accept forfeited property and is the official to whom transfer documents and/or money should be delivered.

_____ _____
Signature / Title Date

Address: _____

_____

Telephone Number: (___) _____

. DEPARTMENT OF JUSTICE
ructions for Completing Form DAG-72
. ..sion Form for Transfer of Federally Forfeited Property

General Instructions

- Transfer of federally forfeited property is governed by The Attorney General's Guidelines on Seized and Forfeited Property, (Guidelines) (See Section V).

- Upon receipt, copies of all DAG-71s must be sent by the federal investigative agency to the U.S. Marshals Service District Office in custody of the requested asset and the appropriate U.S. Attorney's Office.

- A separate DAG-72 must be initiated for each asset requested.

- Agency Headquarters is authorized to decide equitable sharing requests if the property is forfeited administratively and the appraised value is less than $1,000,000.

- U.S. Attorneys are authorized to decide equitable sharing requests if the appraised value of the property to be forfeited in one judicial proceeding is less than $1,000,000.

- U.S. Attorneys shall have 10 days to review all proposed equitable sharing decisions in administrative cases involving property valued at $100,000 or more.

- Sharing requests for property appraised at $1,000,000 or more and any request for real property must be forwarded to the Department of Justice for decision.

ni-72

Section I - To be completed by Investigative Agency Field Office

- Part A: Provide information requested. Note: If name of Assistant U. S. Attorney is not known, provide name of U.S. Attorney.

- Part B: Provide information requested. Asset number is the case number or the uniform identifier. Note: Where available, computer generated information label can be used.

- Part C: Provide specific identifying numbers where appropriate. Provide a cumulative total of all recognized liens and supporting documentation. Provide a cumulative total of all expenses incurred for which your agency will be seeking reimbursement from the Assets Forfeiture Fund.

- Parts D and E: Provide any additional information on an attached sheet.

- Part F: Indicate if an award based on the value of the forfeiture (28 U.S.C. 524(c)(1)(C)) is anticipated.

U.S. DEPARTMENT OF JUSTICE
Instructions for Completing Form DAG-71
Application for Transfer of Federally Forfeited Property

General Instructions

- Transfer of federally forfeited property is governed by the Department of Justice Attorney General's Guidelines on Seized and Forfeited Property (Guidelines).
- Requesting **state or local** law enforcement agency (Agency) head or designee must complete the DAG-71. (**Note:** Incomplete or inaccurate information is the most common cause of delay in processing.)
- For international transfer of federally forfeited property, contact the Asset Forfeiture Office, Criminal Division, Department of Justice, Washington, D.C.
- A **separate** DAG-71 must be completed for **each** asset (or proceeds) requested.
- The **deadline** for submitting the DAG-71 to the federal investigative agency processing the forfeiture (federal agency) is **60 days from the date of the last seizure in the case.** No DAG-71 will be considered if submitted after the deadline.
- In a one-asset case where the Agency requests the tangible property in lieu of proceeds, the Agency must return costs and the appropriate federal equitable share to the United States. If the Agency is unable to return the costs and federal share, the property will be liquidated and the proceeds distributed proportionally. (Upon adequate justification, exceptions may be granted by the deciding official.)

DAG-71

Part I: For federal use only. (**Note:** Asset Number refers to federal investigative agency case number or uniform identifier.)

Part II: Provide information requested. If **NCIC code** is not known, contact the federal agency responsible for processing this forfeiture. **Contact person** is the person who has authority to accept property and transfer documents, and/or money.

Part III: Provide as complete a property description as possible. Include serial or vehicle identification number. You must check either **"Item"** (if requesting the asset) or **"Cash/Proceeds"** (if requesting a percentage of the asset). Attach list of any other assets in this case.

By law, **percentage requested** must be based on the "degree of direct law enforcement effort by the state or local agency resulting in the forfeiture, taking into account the total value of all property forfeited and total law enforcement effort, including any related criminal prosecution with respect to the violation of law on which the forfeiture is based." (21 U.S.C. 881(e)(3)).

Part IV : Indicate specific intended law enforcement purpose(s) for requested cash, proceeds or tangible property. Pursuant to the Guidelines, all property, including cash and proceeds, must be used for the specific law enforcement purpose(s) approved.

Part V: Answer all items A - F. If an answer to A thru E is yes, provide details in Block VI.

Part VI: Space for additional information.

Part VII: Agency head or his designee and appropriate legal office must **certify** that information provided in Blocks I - VI is true and accurate.

REQUEST FOR PRODUCTION NO. 1. All records and documents reflecting, stating or relating, in whole or in part, to the indebtedness of [NAME OF BORROWER(S)] to you as the claimant to the defendant property, including but not limited to the following:

a. promissory notes;

b. deeds of trust;

c. mortgage instruments;

d. the complete loan file;

e. proof of disbursement of the loan proceeds, including the front and back of the loan proceeds disbursement check(s) and/or proof of the wire transfer(s);

f. any and all loan applications submitted by the borrower(s);

g. any and all financial statements, Federal and State tax returns (including all schedules thereto), balance sheets, profit and loss statements, and collateral appraisals submitted by the borrower(s);

h. any and all credit reports and other documents considered by the financial institution;

i. any and all loan presentation summaries and loan status reports prepared by any agents, employees or officers of the financial institution;

j. any and all loan committee minutes or comparable memoranda of the deliberations of your financial institution and/or of your predecessor in interest, if any, with respect to the loan;

k. any and all internal and external audit reports of the loan;

l. any and all loan payment history cards and computer printouts;

m. any and all correspondence and memoranda of telephone calls with the borrower(s).

RESPONSE:

REQUEST FOR PRODUCTION NO. 2. All records and documents reflecting, stating or relating, in whole or in part, to your disposal by sale, or other means of transfer, of the defendant property or any part thereof.

RESPONSE:

REQUEST FOR PRODUCTION NO. 3. All records and documents reflecting, stating or relating, in whole or in part, to any change in your interest in the defendant property, whether by sale, exercise of option, gift, mortgage or other means of transfer.

RESPONSE:

REQUEST FOR PRODUCTION NO. 4. All records and documents reflecting, stating or relating, in whole or in part, to the satisfaction of your financial or other interest in the defendant property, or any part thereof.

RESPONSE:

DATED: [MONTH, DAY, AND YEAR]

Respectfully submitted,
UNITED STATES ATTORNEY

_____
Assistant United States Attorney

STATE OF)
) ss.
County of)

I, [AFFIANT'S NAME], declare under penalty of perjury that I am a claimant in the above-entitled action, that I have read the foregoing United States' Request for Production of Documents and Answers thereto, know the contents thereof and believe the same to be true.

_____
[NAME AND TITLE OF AFFIANT]

INTERROGATORY NO. 9. Are you willing to request the individual having custody of the above identified records to provide legible copies to the United States?

ANSWER:

Respectfully submitted,
UNITED STATES ATTORNEY

_____
Assistant United States Attorney

STATE OF)
) ss.
County of)

I, [AFFIANT'S NAME], declare under penalty of perjury that I am a claimant in the above-entitled action, that I have read the foregoing United States' First Set of Interrogatories and answers thereto, know the contents thereof and believe the same to be true.

_____
[NAME AND TITLE OF AFFIANT]

MODEL REQUEST FOR PRODUCTION OF DOCUMENTS

UNITED STATES DISTRICT COURT

_____ DISTRICT OF _____

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL NO. [NUMBER]
	)	
[DESCRIPTION OF REAL PROPERTY]	)	
	)	
Defendant	)	
	)	

PLAINTIFF UNITED STATES' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

TO: [NAME OF FINANCIAL INSTITUTION]

Plaintiff, United States of America, in accordance with Rule 34 of the Federal Rules of Civil Procedure, requests that within thirty (30) days, you produce to the undersigned attorney for the United States the following designated records and documents for inspection and copying.

As used in this request, the term "records" and "documents" includes any book, pamphlet, periodical, letter, report, memorandum, log, notation, message, telegram cable, record, study, working paper, chart, graph, photograph, videotape, computer disc, index, tape, re-recorded tape, minutes, contract, lease, invoice, record of purchase or sale, correspondence, electronic or other transcription or taping of telephone or personal conversations or conferences, and any and all other written, printed, typed, punched, taped, filmed, computerized or graphic material, however produced or reproduced.

INTERROGATORY NO. 4. State with particularity your current interest in the defendant property and the full circumstances under which it arose.

ANSWER:

INTERROGATORY NO. 5. State with particularity whether or not any or all of your financial interest in the defendant property has been satisfied.

ANSWER:

INTERROGATORY NO. 6. Identify the type of lien, mortgage or indebtedness which you hold on the defendant property, and as to the lien, mortgage or indebtedness, please provide the following:

a. The name and address of each person who incurred the lien, mortgage, or indebtedness.

b. The original amount of the lien, mortgage, or indebtedness.

c. The current outstanding amount of the lien, mortgage or indebtedness.

d. The date(s) the lien, mortgage or indebtedness was incurred.

e. The length of time and payment provisions of the lien, mortgage, or indebtedness.

f. The names and addresses of any person(s) who have paid any portion of the lien, mortgage or indebtedness.

g. How you came to hold the lien, mortgage, or indebtedness, and by whom you were contacted to accept the lien, mortgage, or indebtedness.

h. How and where the lien, mortgage, or indebtedness is recorded.

i. The date the lien, mortgage, or indebtedness was recorded.

ANSWER:

INTERROGATORY NO. 7. Do you have any records or documents which reflect or are relevant to your interest in the defendant property or your claim to the defendant property?

ANSWER:

INTERROGATORY NO. 8. If your answer to the preceding interrogatory is in the affirmative, please identify the records or documents you have which reflect or are relevant to your sale, disposal, and/or interest in the defendant property, and identify by name, address, and telephone number, the person having custody of the records and documents.

ANSWER:

OATH

State of _____

County of _____

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____

_____

[NAME]
[TITLE/POSITION AFFIANT HOLDS
WITH FINANCIAL INSTITUTION]

Attachments

MODEL REQUEST FORM

TO: [United States Attorney]

FROM: [FINANCIAL INSTITUTION]
[TAXPAYER IDENTIFICATION NUMBER]

[FINANCIAL INSTITUTION] requests an Expedited Settlement of its [LIEN OR MORTGAGE] interest in the real property described as [DESCRIPTION]. The Asset Identifier Number is [NUMBER]. On [DATE] this property was restrained, arrested, or seized for forfeiture or charged with civil or criminal forfeiture pursuant to [STATUTE] by the [AGENCY]. This request is based on: _____.

Attached to this request are copies of the following supporting documents:

[EXAMPLES: ALL DOCUMENTS PERTAINING TO THE LOAN, INCLUDING BUT NOT LIMITED TO: THE LOAN FILE, LOAN COMMITTEE MINUTES, PROMISSORY NOTES, DEEDS OF TRUST, OR MORTGAGE INSTRUMENTS.]

REQUEST FOR CASUALTY INSURANCE PREMIUMS

The terms of the [LIEN/MORTGAGE] require that casualty insurance in the amount of [AMOUNT] must be maintained on this property. The monthly premium for this insurance is [AMOUNT]. Casualty insurance premiums have been paid through [DATE].

COMPLIANCE WITH FILING DEADLINES

[THE FINANCIAL INSTITUTION] understands that this request for Expedited Settlement does not relieve it of compliance with any statutory filing deadlines as a claimant in the civil forfeiture action or as a petitioner in the criminal ancillary hearing.

MODEL CIVIL FORFEITURE CLAIM

UNITED STATES DISTRICT COURT

_____ DISTRICT OF _____

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL NO. [NUMBER]
	)	
[DESCRIPTION OF REAL PROPERTY]	)	
	)	
Defendant	)	

VERIFIED CLAIM OF [NAME OF FINANCIAL INSTITUTION]

TO: PLAINTIFF AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that [NAME OF FINANCIAL INSTITUTION] has an interest in the defendant property located at [LOCATION].

1. On or about [DATE], [BORROWER's NAME] executed and delivered to [NAME OF FINANCIAL INSTITUTION] a promissory note (the "Note") in the principal amount of [AMOUNT]. A copy of the Note is attached hereto as Exhibit A.

2. The Note was and is secured by a Deed of Trust dated [DATE], recorded on [DATE] as Instrument No. [RECORDING NUMBER], in the official records of [COUNTY OR STATE]. A copy of the Deed of Trust is attached hereto as Exhibit B.

VERIFICATION

I, [AFFIANT'S NAME], am the [TITLE OF PERSON MAKING THE VERIFICATION] of [NAME OF FINANCIAL INSTITUTION], and I am authorized to make this verification on its behalf.

I have read the foregoing Verified Claim of [NAME OF FINANCIAL INSTITUTION] to the Complaint for Forfeiture of Real Property and know the contents thereof.

I am informed and believe that the matters stated are true and on that basis I declare that the matters stated are true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on [MONTH, DAY, AND YEAR] at [CITY AND STATE IN WHICH SIGNATURE IS OBTAINED].

_____

[AFFIANT'S NAME AND TITLE]

3. As of [DATE], the principal due and owing under the Note is [AMOUNT] and the interest due and owing is [AMOUNT]. Interest will continue to accrue under the Note at a rate of [AMOUNT] per diem from [DATE].

By virtue of [NAME OF FINANCIAL INSTITUTION]'s interest in the defendant property, [NAME OF FINANCIAL INSTITUTION] demands restitution and the right to defend this action.

DATED: [MONTH, DAY, AND YEAR]

Respectfully submitted,

_____

Attorney

Attorney for [CLAIMANT'S NAME]

MODEL CRIMINAL FORFEITURE PETITION

UNITED STATES DISTRICT COURT

_____ DISTRICT OF _____

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v.	)	CRIMINAL NO. [NUMBER]
	)	
[NAME OF CRIMINAL DEFENDANT]	)	
	)	
Defendant	)	

PETITION OF [NAME OF FINANCIAL INSTITUTION] FOR ANCILLARY HEARING

[NAME OF FINANCIAL INSTITUTION] by and through its counsel, [ATTORNEY'S NAME], petitions this Court for an ancillary hearing pursuant to Title [NUMBER], United States Code, Section [NUMBER] [INSERT AS APPLICABLE: 21 U.S.C. § 853(n); 18 U.S.C. § 1963(l); 18 U.S.C. § 982(b)(1)(A), incorporating 21 U.S.C. § 853; 18 U.S.C. § 2253(m); or 18 U.S.C. § 1467] and asserts its interest as an innocent third party with respect to real property which has been forfeited to the United States, in the above-styled case, as follows:

1. [NAME OF FINANCIAL INSTITUTION] asserts its interest in the following real property ordered forfeited to the United States in this Court's [DATE] Order of Forfeiture: [STREET ADDRESS AND/OR FULL LEGAL DESCRIPTION OF THE PROPERTY].

2. [NAME OF FINANCIAL INSTITUTION] is the beneficiary of a Deed of Trust dated [DATE], and executed on [DATE] by [NAME]. The Deed of Trust was recorded in [NAME] County, [STATE], [CITE TO OFFICIAL COUNTY RECORDS WITH RECORDING NUMBER]. A true and correct copy of the Deed of Trust is attached to this Petition as Exhibit A.

DATED: [MONTH, DAY AND YEAR]

Respectfully submitted,

_____

[ATTORNEY'S NAME]

Petitioner
[NAME OF FINANCIAL INSTITUTION]

3. The Deed of Trust secures, among other things, funds issued pursuant to a promissory note (the "Note") dated [DATE], in the original amount of [AMOUNT], which was executed and delivered by [NAME OF BORROWER]. A true and correct copy of the Note is attached to this Petition as Exhibit B. The length of time and payment provisions of this loan are: [TIME AND PAYMENT INFORMATION].

4. There is presently due and owing on the Note a principal balance of [AMOUNT], together with interest in the amount of [AMOUNT] at the rate of [NUMBER] percent per diem from [DATE]. The note is presently in default as a consequence of [NAME OF BORROWER(S)] failure to pay installments as provided for therein. The Note continuously has been in such default since [DATE].

5. The secured interest of [NAME OF FINANCIAL INSTITUTION] was perfected on [DATE] in the following manner: [DESCRIBE].

6. The circumstances under which [NAME OF FINANCIAL INSTITUTION] acquired its interest is as follows:

[DESCRIBE HOW YOU CAME TO HOLD THE LIEN/MORTGAGE AND THE NAME AND ADDRESS OF THE INDIVIDUAL(S) WHO CONTACTED THE FINANCIAL INSTITUTION TO ACCEPT THE LIEN/MORTGAGE].

7. Pursuant to Title [NUMBER] U.S.C. SECTION [NUMBER] [INSERT AS APPLICABLE: 21 U.S.C. § 853(n)(6); 18 U.S.C. § 1963(l)(6); 18 U.S.C. § 982(b)(1)(A), incorporating 21 U.S.C. § 853(n)(6); 18 U.S.C. § 2253(m)(6); or 18 U.S.C. § 1467(l)(6)] the petitioner [NAME OF FINANCIAL INSTITUTION] is "a bona fide purchaser for value of the right, title, and interest in the above described property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture."

8. The petitioner seeks relief from this Court's Preliminary Order of Forfeiture and hereby requests that this Honorable Court hold a hearing ancillary to the criminal conviction of [NAME CRIMINAL DEFENDANT] at which the Petitioner may testify and present evidence and witnesses on its own behalf pursuant to Title [NUMBER] U.S.C. Section [NUMBER] [INSERT AS APPLICABLE: 21 U.S.C. § 853(n)(5); 18 U.S.C. § 1963(l)(5); 18 U.S.C. § 982(b)(1)(A), incorporating 21 U.S.C. § 853(n)(5); 18 U.S.C. § 2253(m)(5); or 18 U.S.C. § 1467(l)(5)] and further that this Court amend its Preliminary Order of Forfeiture dated [DATE] to fully recognize the interest of [NAME OF FINANCIAL INSTITUTION] as it is set forth herein.

MODEL EXPEDITED SETTLEMENT AGREEMENT FOR CIVIL FORFEITURE

UNITED STATES DISTRICT COURT

_____ DISTRICT OF _____

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL NO. [NUMBER]
	)	
[DESCRIPTION OF REAL PROPERTY]	)	
	)	
Defendant	)	

STIPULATED EXPEDITED SETTLEMENT AGREEMENT

IT IS HEREBY STIPULATED by and between plaintiff, United States of America, and Claimant [NAME OF FINANCIAL INSTITUTION] to compromise and settle its claim according to the following terms:

1. The parties hereby stipulate that any violations of [CITE STATUTORY VIOLATIONS GIVING RISE TO FORFEITURE] involving the defendant property occurred without the knowledge and consent of [NAME OF FINANCIAL INSTITUTION].

2. Plaintiff United States agrees that upon entry of a final Order of Forfeiture, it will pay Claimant [NAME OF FINANCIAL INSTITUTION] the following:

> a. all unpaid principal due to the Claimant under the [DATE] mortgage instrument attached hereto as Exhibit A, which was secured by a Deed of Trust (recorded in the official records of [COUNTY AND STATE], Recording No. [NUMBER]), and attached hereto as Exhibit B, that is, $ [PRINCIPAL AMOUNT];

OATH

State of _____

County of _____

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____

_____

[AFFIANT'S NAME]
[TITLE/POSITION AFFIANT HOLDS WITH FINANCIAL INSTITUTION]

7. Claimant understands and agrees that by entering into this Expedited Settlement of its interests in the defendant property, it waives any rights to further litigate against the United States its interest in the defendant property and to petition for remission or mitigation of the forfeiture. Unless specifically directed by order of this Court, [NAME OF FINANCIAL INSTITUTION] is hereby excused and relieved from further participation in this action.

8. Claimant understands and agrees that the United States reserves the right to void this Expedited Settlement agreement and terminate the forfeiture action at any time for legal reasons or within ninety (90) days after the date of this agreement for economic reasons.

9. The parties agree to execute further documents, to the extent necessary, to convey clear title to the property to the United States and to further implement the terms of this settlement. Each party agrees to bear its own costs and attorneys fees.

10. The terms of this settlement agreement are contingent upon forfeiture of the defendant property to the United States and the Court's entry of a final Judgment of Forfeiture. Further, the terms of this settlement agreement shall be subject to approval by the United States District Court and any violation of any terms or conditions shall be construed as a violation of an Order of the Court.

DATED: [MONTH, DAY, AND YEAR]

Respectfully submitted,

UNITED STATES ATTORNEY

_____

Assistant United States Attorney
Attorney for Plaintiff
United States of America

_____

Attorney for Claimant
[NAME OF FINANCIAL INSTITUTION]

b. all unpaid interest at the contractual (not default) rate under the above mortgage instrument that is $ [AMOUNT], assessed at [THE RATE] percent per diem until the date of payment; and

* * *

[INSERT THE FOLLOWING PARAGRAPH C ONLY IF CASUALTY INSURANCE IS REQUIRED UNDER THE MORTGAGE INSTRUMENT]:

c. all unpaid casualty insurance premiums for the defendant property from [DATE OF THE FIRST FORFEITURE RELATED ACTION] to the date of payment.

* * *

3. The payment to Claimant [NAME OF FINANCIAL INSTITUTION] shall be in full settlement and satisfaction of any and all claims by [NAME OF FINANCIAL INSTITUTION] to the defendant property [INSERT AS APPLICABLE: ARRESTED, RESTRAINED, OR SEIZED] by the United States on or about [DATE OF ARREST, RESTRAINT, OR SEIZURE], and all claims resulting from the incidents or circumstances giving rise to this lawsuit.

4. Upon payment, Claimant [NAME OF FINANCIAL INSTITUTION] agrees to assign and convey its security interest to the United States via recordable documents and to release and hold harmless the United States, and any agents, servants, and employees of the United States (or any State or local law enforcement agency) acting in their individual or official capacities, from any and all claims by the financial institution and its agents which currently exist or which may arise as a result of the government's action against the property.

5. As a part of settlement, Claimant [NAME OF FINANCIAL INSTITUTION] agrees not to pursue against the United States any other rights that it may have under the mortgage instrument including but not limited to the right to initiate a foreclosure action.

6. Claimant agrees to notify the United States Attorney and United States Marshals Service at the end of the first payment cycle in which a payment is not made under the terms specified in the note. Claimant further agrees to join any government motions for interlocutory or stipulated sale of the defendant property and any motions to remove occupants from the property who fail to abide by the terms of an occupancy agreement, within ten (10) days of claimant's receipt of the motion(s).

ORDER

This Stipulated Expedited Settlement is hereby APPROVED.

DATED: [MONTH, DAY, AND YEAR]

UNITED STATES DISTRICT JUDGE

Seen and Approved:

_____

Attorney for Claimant,
[NAME OTHER CLAIMANTS TO PROPERTY]

MODEL EXPEDITED SETTLEMENT AGREEMENT FOR CRIMINAL FORFEITURE

UNITED STATES DISTRICT COURT

_____ DISTRICT OF _____

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v.	)	CRIMINAL NO. [NUMBER]
	)	
[NAME OF CRIMINAL DEFENDANT]	)	
	)	
Defendant	)	
	)	

STIPULATED EXPEDITED SETTLEMENT AGREEMENT

IT IS HEREBY STIPULATED by and between the United States of America and Petitioner [NAME OF FINANCIAL INSTITUTION] to compromise and settle its interest in the following property:

[INSERT A FULL DESCRIPTION OF THE PROPERTY]

This stipulated settlement is entered into between the parties pursuant to the following terms:

1. The parties hereby stipulate that [NAME OF FINANCIAL INSTITUTION] was a bona fide purchaser for value of the right, title, or interest in the above property and that any violations of [CITE STATUTORY VIOLATIONS GIVING RISE TO FORFEITURE] involving the defendant property occurred without the knowledge and consent of [NAME OF FINANCIAL INSTITUTION].

2. The United States agrees that upon conviction of the above named defendant and entry of a Final Order of Forfeiture forfeiting the above-described property to the United States, it will pay Petitioner [NAME OF FINANCIAL INSTITUTION] the following:

terms specified in the note. Petitioner further agrees to join any government motions for interlocutory or stipulated sale of the defendant property and any motions to remove occupants from the property who fail to abide by the terms of an occupancy agreement, within ten (10) days of Petitioner's receipt of the motion(s).

7. Petitioner understands and agrees that by entering into this Expedited Settlement of its interests in the above described property, it waives any rights to further litigate its interest in the property and to petition for remission or mitigation of the forfeiture. However, Petitioner understands that it must timely file a petition pursuant to Title [NUMBER], United States Code, Section [NUMBER] [INSERT AS APPLICABLE: 21 U.S.C. § 853(n); 18 U.S.C. § 1963(l); 18 U.S.C. § 982(b)(1)(A), incorporating 21 U.S.C. § 853(n); 18 U.S.C. § 2253(m) or 18 U.S.C. § 1467(l)]. Thereafter, unless specifically directed by an order of the Court, [NAME OF FINANCIAL INSTITUTION] shall be excused and relieved from further participation in this action.

8. Petitioner understands and agrees that the United States reserves the right to void this Expedited Settlement agreement and terminate the forfeiture action at any time for legal reasons or within ninety (90) days after the date of this agreement for economic reasons.

9. The parties agree to execute further documents, to the extent necessary, to convey clear title to the property to the United States and to further implement the terms of this settlement. Each party agrees to bear its own costs and attorneys fees.

10. The terms of this settlement agreement are contingent upon forfeiture of the above described property to the United States and the Court's entry of a final Order of Forfeiture. Further, the terms of this settlement agreement shall be subject to approval by the United States District Court upon conviction of the named Defendant. Violation of any terms or conditions herein shall be construed as a violation of an Order of the Court.

DATED: [MONTH, DAY, AND YEAR]

Respectfully submitted,
UNITED STATES ATTORNEY

_____
Assistant United States Attorney
Attorney for Plaintiff
United States of America

_____
Attorney for Claimant
[NAME OF FINANCIAL INSTITUTION]

a. all unpaid principal due to the Petitioner under the [DATE] mortgage instrument attached hereto as Exhibit A, which was secured by a Deed of Trust (recorded in the official records of [COUNTY AND STATE], Recording No. [NUMBER]), and attached hereto as Exhibit B, that is, $ [UNPAID PRINCIPAL AMOUNT];

b. all unpaid interest at the contractual (not default) rate under the above mortgage instrument that is $ [AMOUNT], assessed at [THE RATE] percent per diem until the date of payment; and

• • •

[INSERT THE FOLLOWING PARAGRAPH C ONLY IF CASUALTY INSURANCE IS REQUIRED UNDER THE MORTGAGE INSTRUMENT]:

c. all unpaid casualty insurance premiums for the defendant property from [DATE OF THE FIRST FORFEITURE RELATED ACTION], the date of [DESCRIBE THE ACTION TAKEN: RESTRAINT, SEIZURE, OR ARREST OF THE ABOVE DESCRIBED PROPERTY], to the date of payment.

• • •

3. The payments to Petitioner [NAME OF FINANCIAL INSTITUTION] shall be in full settlement and satisfaction of all claims by [NAME OF FINANCIAL INSTITUTION] to the property [INSERT EARLIEST FORFEITURE RELATED ACTION: RESTRAINED OR SEIZED] by the United States on or about [DATE OF RESTRAINT OR SEIZURE], and of all claims resulting from the incidents or circumstances giving rise to this lawsuit.

4. Upon payment, Petitioner [NAME OF FINANCIAL INSTITUTION] agrees to assign and convey its security interest to the United States via recordable documents and to release and hold harmless the United States, and any agents, servants, and employees of the United States (or any State or local law enforcement agency) acting in their individual or official capacities, from any and all claims by the financial institution and its agents which currently exist or which may arise as a result of the government's action against the property.

5. Petitioner [NAME OF FINANCIAL INSTITUTION] agrees not to pursue against the United States any other rights that it may have under the mortgage instrument, including but not limited to the right to initiate a foreclosure action.

6. Petitioner agrees to notify the United States Attorney and United States Marshals Service at the end of the first payment cycle in which a payment is not made under the

MODEL SET OF INTERROGATORIES

UNITED STATES DISTRICT COURT

_____ DISTRICT OF _____

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL NO. [NUMBER]
	)	
[DESCRIPTION OF REAL PROPERTY]	)	
	)	
Defendant	)	
	)	

PLAINTIFF UNITED STATES' FIRST SET OF INTERROGATORIES

TO: [NAME OF FINANCIAL INSTITUTION]

Pursuant to the provisions of Rule 33 of the Federal Rules of Civil Procedure, the United States propounds the following interrogatories to be answered in writing, under oath, within thirty (30) days of service.

These interrogatories are intended to be a continuing obligation upon you to furnish all information requested herein until final disposition of this case. Corrections and/or additions to answers provided are required as noted in Civil Rule 26(e). Should such additional information not be furnished, the Government may move to strike or preclude such information at time of trial.

Spaces have been provided for answering the interrogatories. Should a space be inadequate for your answer, the answer may be continued on attached separate sheet or sheets of paper.

For those portions of any interrogatory to which you object or otherwise decline to answer, state the reason for such objection or declination and identify each person having knowledge of the factual basis, if any, on which the privilege or other ground for objection is asserted. Furthermore, please identify those facts supplied by information and belief, rather than actual knowledge and specifically describe or identify the sources of such information/belief.

INTERROGATORIES

INTERROGATORY NO. 1. Please provide the following information about yourself:

a. Full name;
b. Date of birth;
c. Place of birth;
d. Social Security Number;
e. Residence address;
f. Business address; and
g. Business/home telephone number.

ANSWER:

INTERROGATORY NO. 2. Provide the following information as to the borrower [Borrower's Name]:

a. Full name;
b. Nicknames;
c. Date of birth;
d. Place of birth;
e. Social Security Number;
f. Driver's license number and State;

The person signing these interrogatories shall sign under oath, attesting to the fact that he/she: (1) has read the interrogatories and the answers; (2) has read the contents thereof; and (3) believes the answers to be true and correct to the best of his/her knowledge.

INSTRUCTIONS FOR ANSWERING

In each of your answers to these interrogatories, you are requested to provide not only such information as is in your possession and control, but also all information as is reasonably available. In the event that you are able to provide only part of the information called for by any particular interrogatory, please provide all the information you are able to provide and state the reason for your inability to provide the remainder, as well as the effort expended to obtain the requested information. Information in the possession and control of claimants' businesses, associated organizations, related organizations, organizations under common control, predecessors in interest, spouses, relatives, friends, associates, employers, consultants, accountants, attorneys, investigators, agents, employees, or other representatives, whether past or present, is also to be provided.

In replying to any interrogatory do not merely state "see attached records" unless you have no additional memory to the matters referred to in the interrogatory. If you have any additional memory of the relevant events, describe it in detail.

For each interrogatory, separately identify:

(a) all sources of information and all documents and communication maintained by you, or by any other person, upon which you relied in making such response or which records or refers to any of the matters referred to in such response,

(b) the person or persons most familiar with the facts requested as well as those whom you consulted in preparing your response to such interrogatory.

If you object to, or otherwise decline to answer, any portion of any interrogatory, please provide all information called for by that portion of that interrogatory to which you do not object, or to which you do not decline to answer. If you do not answer an interrogatory or any portion thereof, please indicate each person or organization who you believe has information regarding the subject of such interrogatory. If you object to any interrogatory on the ground that it is too broad (i.e., that it calls for both information which is relevant to subject matter of the action and information which is not), please provide such information that is relevant. If you object to an interrogatory on the ground that providing an answer would constitute an undue burden, please provide: such requested information you believe can be supplied without undertaking an undue burden.

g. Name of spouse;
h. Number and names of children;
i. Name and address of relative;
j. Last known residence address;
k. Known infirmities or handicaps;
l. Veteran or military status;
m. Educational level and institution attended;
n. Languages spoken; and
o. Institutions admitted or committed to and purpose of admission.

ANSWER:

INTERROGATORY NO. 3. Fully describe your relationship with the borrower including how long you have known the borrower and whether you know the borrower socially, and describe those circumstances as well as the history and details regarding the borrower's business relationship with you.

ANSWER:

locations, and a corresponding strengthening of internal controls over those funds.

This Office has recently received a report from the Asset Forfeiture Office (AFO) of the Criminal Division regarding cash seized for forfeiture but not on deposit with the Treasury as of January 31, 1991. The report indicated that many of the individuals contacted were not aware of the Department policy in this area or were not aware the policy applied to them.

Please ensure that all personnel handling cash seized for judicial forfeiture are aware of the following points:

- The policy applies to all cash seized for purposes of forfeiture. Therefore, all seized cash must be turned over to the U.S. Marshal within the prescribed time frames.

- An exception to the deposit policy may be granted if retention of the currency serves a significant evidentiary purpose. This may be due to the presence of fingerprints, packaging in an incriminating fashion, or presence of notations or writing.

- If the amount of seized cash to be retained for evidentiary purposes is less than $5,000, permission to retain the cash must be granted at a supervisory level within the cognizant U.S. Attorney's Office.

- 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 this Office. The request should include a brief statement of the factors warranting its retention and the name, position and phone number of an individual to contact regarding the request.

- If only a portion of the seized cash has evidentiary value, only that portion with evidentiary value should be retained. The balance should be deposited in accordance with Department policy.

Thank you for your assistance and cooperation in conducting the periodic seized cash surveys. Any questions regarding this policy may be directed to me on 202-514-0473 (FTS 368-0473).

Tab No. 27

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

DIRECTIVE NO. 91-9

Washington, D.C. 20530

June 6, 1991

MEMORANDUM

TO: Commissioner, Internal Revenue Service
Chief Postal Inspector
Director, Bureau of Alcohol, Tobacco and Firearms

FROM: Cary H. Copeland CHC
Director
Executive Office for Asset Forfeiture

SUBJECT: Seized Cash Management Policy

This memorandum is to restate and clarify the existing policy on management of seized cash. In the past, agencies participating in the Department's asset forfeiture program have held tens of millions of dollars in office safes and other locations throughout the country. This raises both financial management and internal controls issues. The Department must report annually to Congress on the level of seized cash not on deposit.

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

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

Last year, the Executive Office for Asset Forfeiture initiated a program of periodic reviews of seized cash not on deposit with the Treasury. We have asked the Asset Forfeiture Office (AFO) of the Criminal Division to make telephonic contact with each Assistant U.S. Attorney (AUSA) and agent who is holding significant amounts of seized cash to determine if retaining the cash is warranted. This initiative has resulted in a sharp reduction in the amount of seized cash being held in field

Cash Management

Tab No. 26

DATA ANALYST I

Analyzes incoming forfeiture files to determine completeness of each Agency forfeiture/seized item file and the accuracy of information in the file according to Agency standards. Contacts Agency field personnel via telephone to obtain missing data. Performs on-line data updates and verification of existing records as well as on-line creation of new records according to Agency standards. Performs retrieval of files to answer inquiries regarding case related information as well as providing the status of cases being processed. Modifies records on-line to correct data to assure file, record integrity. Provides analysis of existing database records to verify the accuracy of these records which will be produces both as printed reports and through on-line review. Performs photocopying and hard copy records of case related materials and establishes the case jackets.

Requirements

Successful completion of training program. Ability to read rapidly and comprehend various types of written reports. Ability to identify, extract, paraphrase of transpose data concisely and accurately in conformity with established criteria. Ability to follow complex oral & written instructions. Ability to work well with others

Experience/Training

College level degree or equivalent.

DATA ANALYST TRAINEE

Receives on the job and/or formal training until qualified as a Data Analyst I.

Undergoes training using various source documents, manuals or other source material. Compares incoming documents with the existing Agency's database. Updates and verifies existing records, performs on-line creation of new records generated from letter correspondence. Is instructed in the performance of quality control to maintain data integrity. Learns how to perform the analysis of documentation prepared by Agency Field Offices or Headquarters personnel. Performs photocopying and filing of case related material

Maintains an error and production rate in accordance with training program progression criteria.

Reviews agency policies and procedures and current data processing procedures.

Has good reading comprehension and the ability to follow complex oral and written instructions.

Experience/Training

College level degree or equivalent experience and training.

Legal Technician

Perform complex research into factual aspects of portions of a case by reviewing and analyzing certain questions under issue, and law reviews, published studies, financial reports, etc. Gathers facts for routine reports as well as those specifically assigned. Extracts data from forfeiture files, computerized printouts noting errors such as tardiness in reporting and missing information. Prepares summaries and digests of pertinent data from records analyzed. Performs initial review of petitions for remission or mitigation of forfeiture, make recommendations to the DOJ project officer on the validity of petitions or of petition investigations. Verifies citations and legal references on prepared legal documents. Preforms other legal technician duties as assigned.

NOTE: Workers performing as a legal technician should be a certified paralegal, or should have demonstrated skills, based upon other education or experience backgrounds, in collection of data, evaluation of information; and research of legal issues.

PROJECT DIRECTOR

As the contractor's on-site supervisor, this person is responsible for the day-to-day supervision of the contractor's personnel engaged in the data entry, analysis and other related duties requested under task orders that provide the Agency with assistance in the continued support of the Asset Forfeiture Program. This includes supervision of the training of coder/trainees as well as analysts in analysis of source material to identify forfeiture data for existing files, the creation of new records on-line as well as the updating, verification, modification and quality control of records to insure the integrity of the data base. In addition, the Director shall oversee the xeroxing, and filing of pertinent materials and the telephone and written inquiries regarding case related information and status of cases being processed. Acts as liaison in the preparation of responses to inquiries from Agency personnel and other investigative agencies and the general public. Acts as supervisor to Project Supervisor , clerical and technical support staff.

Writes reports on contract progress at the required intervals as well as identifying problems in production and takes appropriate action to assure the Agency that all performance standards are met. Administers Time and Attendance records for his/her staff. Reviews case related correspondence to assure its' conformity with Agency guidelines . Makes sure contract personnel follow Agency and contract guidelines.

Allocates all assignments to contract staff, assists in coordinating the operation, monitoring and closing of all cases. Performs other duties as required.

In conjunction with the Agency COTR, priorities work assignments in order to accomplish the mission of the Agency

Requirements

Experience as a manager of a large, technical staff. Ability to communicate well in a sensitive environment.

Experience/Training

College level degree or equivalent, experience as a project coordinator with federal Agencies and database expertise.

- o Shall not drive official Government or seized vehicles. (Ebon employees may use common carriers or drive their own vehicles and seek reimbursement for mileage from Ebon.)

Point 4: Maintaining the distinction between Government employees and Ebon contract employees is the responsibility of both organizations.

Extreme care must be taken to ensure that Ebon contract employees are not given the trappings or authorities of a federal employee. Ensuring the separate and distinct identity of contract employees is necessary to ensure that your organization stays within the bounds of the contract and the law.

Federal employees are cautioned:

- o Not to refer to Ebon employees as "my employee or staff."
- o Not to provide IDs that appear to be official Government IDs. Ebon employees must have IDs that clearly indicate that they are contract employees.
- o Not to provide Ebon employees access to secure and sensitive information. Coded passcards which provide limited and restricted access are permissible.

Point 5: When in doubt, ask.

Any questions regarding the use of Ebon contract employees should be referred to the Department of Justice Contracting Officer, Mr. John Kraus on 202-219-1225.

In conclusion, our ability to use contract employees in support of the asset forfeiture program has been enormously beneficial. It is essential that we comply fully with pertinent federal laws and regulations and with the terms of the Ebon contract itself if we expect Congress to continue to permit us to use asset forfeiture proceeds to pay the costs of contract employees.

Attachment

cc: George J. Terwilliger III
Associate Deputy Attorney General

DESCRIPTION OF LABOR CATEGORIES

ATTACHMENT 2

PROJECT SUPERVISOR:

The Project Supervisor shall be responsible for the day-to-day supervision of the Contractor assignments, assist in coordinating the operating, monitoring and closing of all cases; and checking the accuracy of computer data. The Project Supervisor must be experienced in the management and supervision of legal, analytical and data processing operations. He/She shall define objectives, priorities and deadlines within broad policy guidance received from the DOJ Project Officer.

DATA ANALYST:

The Data Analyst shall analyze incoming forfeiture files to determine completeness of files and accuracy of information contained therein; telephonically contact field office forfeiture personnel to obtain missing data which may include but not be limited to locating and obtaining a detailed description of the forfeiture asset; maintain suspense system for obtaining outstanding information; prepare disposition documents for forfeited assets; maintain internal status information on the disposition of all forfeited assets; assure that the information is accurate; and perform analytical computations necessary to process the data.

Data Analyst III- College Degree, 3 years experience
Data Analyst II - College Degree, Up to three years experience.

Data Entry/Retrieval or Word Processor I:

Work at this level requires considerable classroom or on-the job training and may involve working directly with task originator rather than through supervisor. Work assignments and duties include one or more of the following:

a. Uses the more sophisticated features of the equipment to carry out complex assignments, such as sorting, merging, and organizing text, or maintaining files;

b. Applies knowledge of specialized terminology;

c. Tests new applications and procedures; or

d. Trains lower level processors.

DIRECTIVE NO. 8
pg. 5/9 - 1991

Point 1: Recruiting, hiring and termination of contract employees is the responsibility of Ebon.

Ebon must do all advertising for their contract employees. The Government cannot advertise or pay to advertise for Ebon positions. However, the Government should work with Ebon to develop the details of the advertisement to ensure that applicants are qualified. Standard Ebon advertisements should be used whenever possible. The Government may encourage qualified persons to submit applications to Ebon.

Ebon must do all screening of applicants for Ebon positions. Federal employees may be present during interviews conducted by Ebon. Questions for the applicant may be provided to the Ebon interviewer.

Selection of contract employees must be done by Ebon. Advice of the Government may be considered in the selection process. Likewise, all hiring is done by the contractor and Ebon must extend any offer of employment. The contract employee also may only be terminated by Ebon.

Point 2: Day-to-day supervision of Ebon employees is the responsibility of Ebon.

There is a legal prohibition against "personal services contracts." A contract employee may not work directly for or be supervised by a federal government employee. That is the responsibility of the Ebon Project Supervisor.

- Federal employees must refer work projects to the Ebon Project Supervisor to assign to Ebon employees.
- Problems with work products or contract employee performance should be discussed with the Ebon Project Supervisor.
- Federal employees must not sign work plans or performance appraisals for Ebon employees.
- Federal employees must not approve leave for Ebon employees, but should consult with the Ebon Project Supervisor to ensure that the supervisor is aware of proper staffing requirements. Federal employees should verify time and attendance for Ebon employees.
- While the Government should report to the Ebon Project Supervisor the circumstances and value of the efforts of an exemplary Ebon employee, federal employees may neither demand, recommend specific amounts for, nor pay cash awards to Ebon employees.

Point 3: Ebon employees may only perform tasks within the terms of the labor categories enumerated in the contract.

When the contract with Ebon was drafted, clerical and support functions attendant to administration of the asset forfeiture program were the only functions included. There are only eight labor categories included in the contract as it currently exists. (See Attachment)

With the exception of the Project Director and Project Supervisor positions, the majority of the work is related to maintaining and analyzing forfeiture information contained in automated systems or case files. Both federal employees and Ebon employees are cautioned not to request or encourage work assignments that fall outside of the purview of the contract labor descriptions.

Ebon employees:

- o Shall **not** be used for other than asset seizure and forfeiture work. Using Ebon employees to fill in for non-forfeiture support staff is **not** appropriate.
- o Shall **not** make decisions involving the discretionary exercise of Governmental authority.
- o Shall **not** do investigatory work. However, contract personnel may research public information sources (e.g. court house or county records) or obtain information from commercial data bases (e.g. TRW, Dunn & Bradstreet) or obtain documents from other agencies that are related to the forfeiture of assets that have been seized or are targeted for seizure.
- o Shall **not** conduct interviews on behalf of the Government.
- o Shall **not** have access to non-forfeiture computer data bases.
- o Shall **not** handle seized assets or evidence during the pendency of the forfeiture action.
- o Shall **not** sign Government forms on behalf of the Government.
- o Shall **not** represent the Government in negotiations, conferences or meetings. However, this does not preclude their attendance at negotiations, conferences, or meetings if their attendance is necessary to perform their functions under the contract.
- o Shall **not** attend Government training conferences except to the extent that the training is necessary to permit the performance of job descriptions set forth in the contract.

DIRECTIVE NO. 91-8

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

[illegible] 22 AM 9:57

RECEIVED
91 MAY 20 PM 5:17
CRIMINAL DIVISION

Washington, D.C. 20530

May 20, 1991

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service

FROM: Cary H. Copeland
Director

SUBJECT: Points to Remember Regarding Work with Ebon Contract Employees

Background

Pursuant to the Anti-Drug Abuse Act of 1986, the Department of Justice was authorized to use Assets Forfeiture Fund monies to contract for services related to the seizure and forfeiture of property.

In July of 1988, the Department entered into a contract with Ebon Research Services to support our asset forfeiture efforts. The following duties are authorized under the contract:

1. Document review;
2. Case and record analysis;
3. On-line data entry and update;
4. Maintenance of files;
5. Typing of related case materials;
6. Telephone and written contact with other Department bureaus, other federal government agencies, state and local law enforcement agencies and members of the public;
7. Photocopying; and
8. Other activities in support of the Department's computerized asset seizure, forfeiture and disposal systems.

In our review of the Ebon contract program, problems in four areas were identified. Please advise your staff of the following points to remember and ensure that any necessary corrective action is taken to ensure compliance.

and costs; and (2) the forfeited item will fill a demonstrable need of the requesting agency. Such exceptions shall be liberally granted where the two above showings are made.

4. Nothing in this section shall alter the ability of the U.S. Marshals Service to pay appropriate expenses from the Fund or to recover costs directly from participating agencies.

D. **Decision-Making Authority**

Sharing decisions should be made during the period when forfeiture proceedings are being conducted. Decision-making authority shall be as follows:

1. Administrative Forfeitures Valued at Less than $1,000,000

The head of the seizing investigative bureau shall determine the appropriate equitable transfer of assets forfeited in a single administrative proceeding where the appraised value of the asset(s) is less than $1,000,000.

2. Judicial Forfeitures Valued Less than $1,000,000

The United States Attorney shall determine the appropriate equitable distribution of asset(s) forfeited in a single judicial proceeding in his or her district where the appraised value of the asset(s) is less than $1,000,000.

3. Administrative and Judicial Forfeitures Valued at $1,000,000 or Greater and Multi-District Cases

In the case of a single administrative or judicial proceeding where the appraised value of the asset(s) forfeited is $1,000,000 or more in multi-district cases, the United States Attorney(s) shall, after consultation with the investigative bureau(s), forward his (their) evaluation(s) and recommendation(s) to the Deputy Attorney General or his designee for determination.

4. Real Property Forfeitures

The Deputy Attorney General or his designee shall approve any equitable transfer of real property. Where appropriate, any such transfer shall include a provision for reversion of title to the United States if the property is not used for the agreed upon purposes.

ASSETS FORFEITURE FUND
DISPOSITION OF ADP EQUIPMENT

ADP equipment purchased with Assets Forfeiture Fund monies shall retain any statutory conditions or limitations on its use until:

(1) The equipment fails or suffers serious performance degradation and it is economically impractical to invest in equipment repair; or

(2) The equipment is rendered functionally obsolete for forfeiture program purposes of the using office, and

No other agency participating in the AFF within a reasonable radius can use the equipment for forfeiture program purposes, and

The Executive Office for Asset Forfeiture is provided 30 days written notice of the intent to redirect the equipment out of the asset forfeiture program with a brief explanation of the attendant circumstances.

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

DIRECTIVE NO. 91-11

July 5, 1991

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service
Chief Postal Inspector
Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco and Firearms

FROM: Cary H. Copeland
Director

SUBJECT: Forfeiture Procedures Pursuant to Increased Administrative Forfeiture Authority

On February 26, 1991, Deputy Attorney General Barr notified you of the policies and procedures to follow in implementing the increased statutory authority for administrative forfeitures. This memorandum provides more detailed guidance on this policy.

1. Processing Equitable Sharing Requests

As stated in the Deputy Attorney General's memorandum, in all administrative cases involving property of any kind valued in excess of $100,000, the seizing field office shall notify the United States Attorney's office (USAO) of its recommendation on equitable sharing.

The following procedures will be followed:

A. The seizing agency field office will provide a copy of the Application for Transfer of Federally Forfeited Property (DAG-71) and the "preliminary" Decision for Transfer of Federally Forfeited Property (DAG-72) to the pertinent USAO for all (what ever the value) administrative and judicial forfeiture actions. The originals of these forms will be concurrently forwarded to the agency's headquarters decision-maker. A USAO may choose not to receive copies of the DAG-71 and/or the preliminary DAG-72 for

Administrative Auth

Date: ☐☐/☐☐/☐☐

Investigative Agency: ☐☐☐

Case Number: _____

U.S. Department of Justice — **Application** *(For Use B* — Transfer of Federally Forfeited Property *ited States Law Enforcement Agencies Only)*

For Federal Use Only — *(For Additio* — *nformation - See Instructions)*

I.

Asset #:

Seizure Date:

Judicial District:

Case Type: Adoption ☐ Joint ☐ *(Check One)*

- All asset stated in — sferred must be used for the law enforcement purpose request.
- Deadline the seizu — ubmission of this request is sixty *(60)* days following
- The req Federal C asset cas — g agency will be responsible for reimbursing the nment its costs and may be responsible, in a single- reimbursing the federal share.

II. Requesting Agency Name: _____

Address: _____

_____

NCIC Code: ☐☐☐☐☐☐☐☐☐

Contact Person: _____ — ephone Number: (___) _____

III. Asset Requested _____ — ☐ Other assets in this case. *(Attach list).*

Property Description

_____

Request Type

☐ Item ☐ Cash / Proceeds _____%

IV. Specific Intended Law Enforcement Use:

☐ Salaries ☐ Purchase of Equipment ☐ Other — *se Explain):* _____

☐ Purchase of Vehicles ☐ Place Into Official Use *(If other than Cash)*

V. Contribution *(If any answer to A thru E is yes, provide details in Part V*

	Yes	No
A. Did your agency originate the information leading to the seizure?	☐	☐
B. Were any other assets seized under state law?	☐	☐
C. Were extraordinary expenses incurred?	☐	☐
D. Did your agency supply any unique or indispensable assistance?	☐	☐
E. Are there any assets located in foreign countries associated with this	☐	☐

F. How many hours were expended? _____ hours

2. Aggregation of Seizures

In the Deputy Attorney General's February 26, 1991, memorandum the Department's longstanding policy for aggregating civilly forfeited property is reiterated.

The increase in administrative forfeiture monetary caps alters the application of this policy in two respects. The policy now exempts from aggregation, monetary instruments as defined by 31 U.S.C. § 5312(a)(3) and Part 103 of Title 31, C.F.R., and the previous requirement to judicially forfeit personalty simply because realty had also been seized for forfeiture. The aggregation forfeiture policy is amended to read as follows:

A. Administrative Forfeiture

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

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

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

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

3. Early Notification to the United States Attorney of All Seizures of Property for Forfeiture

In order to keep USAOs apprised of pending forfeiture activity in their judicial districts, seizing agencies are to forward a copy of the seizure form for all seizures to the pertinent USAO within twenty-five (25) days of the seizure.

A USAO may choose not to receive copies of all the seizure forms. Written notification of this decision to the seizing agency is required for the seizing agency records.

property appraised at $100,000 or less. Written notification of this decision to the seizing agency is required for their records.

B. In an administrative forfeiture action (for property valued in excess of $100,000) where the USAO does not agree with the seizing agency's sharing decision, the USAO must notify the appropriate headquarters unit of the seizing agency within ten (10) working days of receipt. If no agreement can be reached within five (5) working days, the headquarters unit will forward the DAG-71 and 72 to the Executive Office for Asset Forfeiture (EOAF) for resolution.

C. In a judicial forfeiture action where the USAO does not elect to follow the sharing recommendation of the seizing agency, the USAO will advise the headquarters unit of the seizing agency. If no agreement is reached, the USAO will advise EOAF in writing at the time the DAG-71 and 72 are sent to the Asset Forfeiture Office, Criminal Division.

D. EOAF will resolve disputes in subparagraph B. and C. above regarding sharing matters in administrative or judicial forfeiture actions. It will notify the parties and the U.S. Marshals Service (USMS) of the final decision.

E. The following FAX numbers should be used:

FBI :Forfeiture and Seized Property Unit
Attn: Paul V. King, Jr., Unit Chief
FAX No. (202) 347-1748

DEA :Forfeiture Unit
Attn: William J. Snider
FAX No. (202) 307-7641

INS :Office of Asset Forfeiture
Attn: Dan Stephan
FAX No. (202) 514-4186

USPS :Forfeiture Branch
Attn: P.M. Renzulli
FAX No. (202) 268-4563

IRS :Operations Assistance Branch 1
Attn: Kelly Daigle
FAX No. (202) 566-6743

ATF :Planning and Analysis Division
Attn: Yvonne White
FAX No. (202) 786-8518

EXCERPT FROM HOUSE APPROPRIATIONS COMMITTEE REPORT

Transfers from assets forfeiture fund

Federal Prison System: Activations	$47,866,000
U.S. Marshals Service:	
Holding Cells	407,000
Aircraft security	1,000,000
Prisoner vans	417,000
SOG equipment	574,000
Cellular telephones	200,000
Computer workstations	2,425,000
Micrographic equipment	185,000
Drug Enforcement Administration:	
Telephone intercepts	1,000,000
Portable computers	722,000
Fingerprint equipment	172,000
Word processors/DATS	533,000
Federal Bureau of Investigation:	
HQ computer upgrade	4,168,000
Drug intelligence system	1,600,000
U.S. Attorneys: Security equipment	2,678,000

Questions regarding the above may be referred to me or to Katherine Deoudes at FTS 368-1149.

cc: George J. Terwilliger, III
Principal Associate Deputy Attorney General

Tab No. 29

U.S. Department of Justice

Office of the Deputy Attorney General

DIRECTIVE NO. 91-12

Executive Office for Asset Forfeiture

Washington, D.C. 20530

July 8, 1991

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service

FROM: Cary H. Copeland
Director

SUBJECT: Need to Expedite Asset Forfeiture Deposits

Funding of initiatives important to your components will be in jeopardy if we fail to reach the projected level of forfeiture deposits. We had projected a $64 million surplus above and beyond the amount to be transferred to the Drug Czar's Special Forfeiture Fund and the Congress determined that this surplus can be used by the Attorney General to fund initiatives that are not funded through our regular appropriations. (See attached.)

Two things have occurred since the projection was made: (1) net deposits are dramatically down for March through May, and (2) the rate of equitable share is up dramatically from a level of 44% in FY 1990 to 58% through May.

Please advise your staff of specific actions that can be taken to maximize deposits to the Fund between now and the end of the fiscal year. These steps should be aimed toward both expediting the processing of cases (particularly cash cases) and ensuring that we are equitably sharing and not oversharing with State and local agencies.

We appreciate your commitment to the program. Please let me know if there is anything I can do to support your efforts.

Attachment (1)

cc: George J. Terwilliger
Principal Associate Deputy Attorney General

Tab No. 30

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

DIRECTIVE NO. 91-13

Washington, D.C. 20530

July 12, 1991

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, United States Marshals Service
Chief Postal Inspector, U.S. Postal Inspection Service
Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco and Firearms

FROM: Cary H. Copeland
Director

SUBJECT: Liability of the United States for State and Local Taxes on Seized and Forfeited Property

Attached for your information is a copy of an opinion from the Department of Justice, Office of Legal Counsel on the above-captioned topic.

The Office of Legal Counsel has concluded that the federal government's immunity from State and local taxes precludes payment of such taxes that arise after the date of an offense that gives rise to the forfeiture.

This opinion supersedes all previous issuances on this subject by the Department. Please ensure that your staff is aware of this restriction.

Attachment (1)

cc: George J. Terwilliger, III
Principal Associate Deputy Attorney General

U.S. Department of Justice
Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

July 9, 1991

MEMORANDUM TO GEORGE J. TERWILLIGER, III
Associate Deputy Attorney General

Re: Liability of the United States for State and Local Taxes on Seized and Forfeited Property

This memorandum responds to your request for our opinion whether property seized by, and ultimately forfeited to, the federal government is subject to taxation by state and local authorities.[1] We conclude that principles of intergovernmental tax immunity, combined with longstanding rules governing forfeiture and the express language of modern forfeiture statutes, establish that property ultimately forfeited to the federal government is not subject to state and local taxes arising after the date of an offense that leads to the order of forfeiture.[2]

Property actually forfeited to the United States is immune from taxation by state and local authorities in the absence of express congressional authorization. This doctrine finds its classic expression in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). As the Court has subsequently explained, under M'Culloch "a State cannot constitutionally levy a tax directly against the Government of the United States or its property without the consent of Congress." United States v. City of Detroit, 355 U.S. 466, 469 (1958). See also Cotton Petroleum

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[1] This memorandum confirms oral advice we provided earlier to Cary H. Copeland, Director, Executive Office of Asset Forfeiture.

[2] Currently, "[t]he [Justice] Department's position is that the doctrine of sovereign immunity precludes the payment of State and local taxes on property which has been seized for federal forfeiture." Memorandum Re: Forfeiture Policies to United States Attorneys Offices, et al., from Cary H. Copeland, Director, Executive Office for Asset Forfeiture, July 3, 1990, at 1. Under this policy, the "date of the seizure marks the imposition of sovereign immunity." Id. at 2. The Department, therefore, "will not pay State or local taxes incurred after the property is seized for forfeiture." Id.

Under this principle, which by 1890 was the "settled doctrine" of the Supreme Court with respect to forfeitures,

> whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offence is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.

United States v. Stowell, 133 U.S. 1, 16-17 (1890) (emphases added). See also United States v. Grundy & Thornburgh, 7 U.S. (3 Cranch) 337, 348-54 (1806); Florida Dealers and Growers Bank v. United States, 279 F.2d 673, 677 (5th Cir. 1960).

Under the relation back doctrine the United States' title to forfeited property, although not perfected until an order of forfeiture is entered, arises on the date of the offense giving rise to forfeiture. Florida Dealers and Growers Bank, 279 F.2d at 676 ("At th[e] moment [of the illegal act] the right to the property vests in the United States, and when forfeiture is sought, the condemnation when obtained relates back to that time . . ."); United States v. One Single Family Residence, 731 F. Supp. 1563, 1567 (S.D. Fla. 1990) ("A final judgment of forfeiture merely confirms the government's interest . . . "). Because the interest of the United States arises on the date of the offense, the federal government's tax immunity mandates that no state and local tax obligations may attach to the property after that date absent congressional authorization.

We have identified no congressional authorization sufficient to permit payment of state and local tax obligations arising after title to the property vests in the United States. Authority to pay state and local taxes on federally-owned property requires "express congressional authorization" to waive tax immunity. Cotton Petroleum Corp. v. New Mexico, 109 S. Ct. at 1707. See also Kern-Limerick, Inc. v. Scurlock, 347 U.S. at 122 (court will not "subject the Government or its official agencies to state taxation without a clear congressional

Corp. v. New Mexico, 109 S. Ct. 1698, 1707 (1989) ("absent express congressional authorization, a state cannot tax the United States directly"); United States v. Allegheny County, 322 U.S. 174, 177 (1944) (the "possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation").[3] Once property is forfeited to the United States, an attempt by a state or local government to tax that property in the absence of consent by the Congress is plainly invalid under the longstanding doctrine of intergovernmental tax immunity.[4]

The process of forfeiture presents the question whether that immunity might attach before the date on which the forfeiture is perfected by entry of an order of forfeiture. We conclude that it does, by operation of the relation back doctrine, which is codified in the major federal forfeiture statutes. For example, the provisions of federal law relating to civil forfeiture of certain drug-related property were amended by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2051 (1984), to provide that "[a]ll right, title, and interest in property [subject to forfeiture] shall vest in the United States upon commission of the act giving rise to forfeiture under this section." 21 U.S.C. § 881(h). See also 18 U.S.C. § 1963(c) (same); 21 U.S.C. § 853(c) (same).[5]

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[3] The federal government's tax immunity has been described as a function of the supremacy of federal law under Article VI of the Constitution, M'Culloch, 17 U.S. at 436 (describing tax immunity as "the unavoidable consequence of that supremacy which the constitution has declared"); United States v. New Mexico, 455 U.S. 720, 733 (1982), and as a function of sovereign immunity, Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 122 (1954).

[4] If seized property is not ultimately forfeited to the federal government, the owner of the property would remain liable for state and local taxes.

[5] Some courts have held that the relation back doctrine, if not expressly set forth in the statute, is simply a rule of statutory construction that applies only to those statutes making forfeiture automatic rather than permissive. See, e.g., United States v. Thirteen Thousand ($13,000) in United States Currency, 733 F.2d 581, 584 (8th Cir. 1984); United States v. Currency Totalling $48,318.08, 609 F.2d 210 (5th Cir. 1980). See generally Note, Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases, 76 Va. L. Rev. 165, 181-83 (1990). After the adoption of express relation back provisions in the major forfeiture statutes, these holdings would appear to be of limited practical significance.

We also find no authorization for the payment of state or local taxes in either the Attorney General's authority under 28 U.S.C. § 524(c)(1)(D) to pay "valid liens" against forfeited property or his authority under 28 U.S.C. § 524(c)(1)(E) to grant remission or mitigation of forfeiture. Neither of these provisions contains the express congressional authorization necessary to pay state and local taxes on federal property. Nor do they describe a category of permissible actions that might arguably include payment of state and local tax claims. Although the lien provision may permit the Attorney General to recognize property interests -- including tax liens -- in forfeited property that existed prior to the date of the offense, it does not make valid otherwise invalid attempts by state and local taxing authorities to attach liens to property after title has vested in the federal government. In like fashion, the Attorney General's authority to grant remission of forfeiture is insufficient to permit payment of tax liens attaching after the relevant offense, for such relief can be granted only if the petitioner "has a valid, good faith interest in the seized property as owner or otherwise." 28 C.F.R. § 9.5(b)(1).[8]

Our conclusion is consistent with that of courts that have considered related questions. Most directly relevant is the Tenth Circuit's decision in Eggleston v. Colorado, supra. There, the court held that the State's tax claims were invalid because the asserted state tax liens did not exist until after the event giving rise to federal forfeiture. Similarly, the court in United States v. $5,644,540.00 in U.S. Currency, 799 F.2d 1357, 1364 (9th Cir. 1986), upheld forfeiture of property against the claims of California tax authorities who were unaware of the property's existence until after the date of the offense leading to forfeiture.[9]

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[8] Although the criteria governing mitigation are somewhat more general (e.g., "to avoid extreme hardship"), 28 C.F.R. § 9.5(c), nothing in any relevant statute or in the regulations expressly refers to state and local tax claims.

[9] See also United States v. Trotter, 912 F.2d 964, 966 n.2 (8th Cir. 1990) ("Since title vests 'in the United States,' other creditors, including state agencies, may not claim any part of the funds if the government successfully obtains forfeiture"). It should also be noted that, because tax immunity runs to the benefit of the States as against the United States, some federal courts have invalidated federal tax liens arising after the date of an offense leading to forfeiture to a State following the relation back doctrine. Metropolitan Dade County v. United States, 635 F.2d 512 (5th Cir. Unit B. Jan. 1981). But see United States v. Wingfield, 822 F.2d 1466, 1475 (10th Cir. 1987)

(continued...)

mandate").[6] None of the relevant statutory provisions contains such authorization.

Although the statutory forfeiture provisions do contain some exceptions, none of those exceptions contemplates payment of state and local taxes. The exceptions to the criminal forfeiture statutes for a "bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture," 18 U.S.C. § 1963(c), 21 U.S.C. § 853(c), provide no authority for payment of state and local taxes. These exceptions not only fail to contain an express waiver of tax immunity, but also do not, in their general language, reach the asserted interest of taxing authorities in the property, for those authorities do not qualify as bona fide purchasers for value.

The civil forfeiture statute's somewhat broader exception for "innocent owners," 21 U.S.C. § 881(a)(6), as the Department has traditionally interpreted it, does not waive the government's tax immunity. It consistently has been the position of the United States that one cannot qualify as an innocent owner if the asserted ownership interest (broadly construed to include liens) arose after the date of the offense at issue.[7] Given this reading, which we have no occasion to question here, there is no statutory basis for permitting state and local tax liens arising after the date of the offense to qualify for payment under the exception.

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[6] An example of such an explicit authorization is 42 U.S.C. § 1490h ("All property . . . the title to which is acquired or held by the Secretary under this subchapter other than property used for administrative purposes shall be subject to taxation by a State, Commonwealth, territory, possession, district, and local political subdivisions in the same manner and to the same extent as other property is taxed").

[7] See, e.g., In Re One 1985 Nissan, 889 F.2d 1317, 1320 (4th Cir. 1989); United States v. One Single Family Residence, 731 F. Supp. at 1568 ("The Government contends . . . that the innocent owner provision only applies to claimants who owned the property at the time of the offense, and not to those who acquired the property afterward"). Most courts that have considered this position have agreed that "[t]he innocent owner exception applies only to owners whose interest vests prior to the date of the illegal act that forms the basis for forfeiture." Eggleston v. Colorado, 873 F.2d 242, 248 (10th Cir. 1989), cert. denied, 110 S. Ct. 1112 (1990). See, e.g., In Re One 1985 Nissan, 889 F.2d at 1320; United States v. One 1965 Cessna 320C Twin Engine Airplane, 715 F. Supp. 808, 811 (E.D. Ky. 1989); United States v. One Piece of Real Estate, 571 F. Supp. 723, 725 (W.D. Tex. 1983). Cf. One Single Family Residence, 731 F. Supp. at 1567-69.

We conclude that the federal government's immunity from state and local taxes precludes payment of such taxes that arise after the date of an offense that gives rise to forfeiture. We have identified no authority that permits the Department to pay tax claims arising after that date.

Please let us know if we can be of further assistance.

John Harrison

John C. Harrison
Deputy Assistant Attorney General
Office of Legal Counsel

cc: Cary H. Copeland
Director
Executive Office for Asset Forfeiture

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[9](...continued)
("the doctrine of relation back under state law cannot be held to subvert the constitutional power to lay and collect taxes").

Tab No. 2

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

DIRECTIVE NO. 91-14

Washington, D.C. 20530

October 1, 1991

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service
Chief Postal Inspector, Postal Inspection Service
Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco and Firearms

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Expediting Delivery of Equitable Sharing Transfers

Equitable sharing has been a dramatic success in fostering cooperation with our State and local law enforcement colleagues. Sharing in FY 1991 may reach $300 million, almost fifteen times the $22 million shared in FY 1986.

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.

Equitable sharing ceremonies are encouraged but should be scheduled as quickly as possible once the cash and/or tangible property is available for sharing. Accumulating sharing checks and property for purposes of presentation is discouraged where the recipient agency does not concur -- particularly where large amounts of money are involved. Not only are the funds critically important to some agencies; the interest that can be earned on these funds is also available to be used for law enforcement use.[1]

Your assistance in this matter will be appreciated.

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[1] The reference to "All property" at V, A, 3 of The Attorney General's Guidelines on Seized and Forfeited Property should read "All cash and property" . . ." A revision will be forthcoming.

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

DIRECTIVE NO. 91-15

Washington, D.C. 20530

October 31, 1991

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U. S. Marshals Service
Chief Postal Inspector, Postal Inspection Service
Commissioner, Internal Revenue Service
Commissioner, U.S. Customs Service
Director, Bureau of Alcohol, Tobacco and Firearms

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Policy Regarding Forfeiture by Settlement

I. General Policy

Settlements to forfeit property are encouraged as a way to conserve resources of both the United States and claimants where the ends of justice will be served. The following principles must be observed in negotiating and structuring settlements.

A. There must be a statutory basis for the forfeiture of the property and sufficient facts to satisfy the elements of the statute.

B. All settlements must be negotiated in consultation with the seizing agency. The agency's input is essential as a claimant may be merely seeking another opportunity to bargain while having no legitimate innocent ownership interest in the property.

C. A United States Attorney cannot settle a forfeiture action involving property that is subject to administrative forfeiture unless there has been a claim and cost bond filed and the seizing agency has forwarded the matter for judicial action. However, when property is seized for administrative forfeiture and no claim

Tab No. 31

II. Monetary Amounts

United States Attorneys can accept or reject offers in compromise in all civil or criminal cases in which the difference between the proposed settlement and the claim does not exceed $200,000. Also, after consultation with the Asset Forfeiture Office, Criminal Division, United States Attorneys can close a pending forfeiture case (other than by compromise or entry of judgment) where the gross amount of the original forfeiture sought is $200,000 or ten (10) percent of the original forfeiture or more.[1]

III. Administrative Forfeiture by Agreement

The following procedures apply to cases where a claim and cost bond has been filed and the case is referred to the United States Attorney, but a settlement is reached and the claim withdrawn. It is the Department's policy that these cases should proceed administratively.

A. The settlement should be reduced to writing and include specific reference to the withdrawal of the claim; and

B. The case should be promptly referred back to the seizing agency.

1. Where the Claim to All the Property is Withdrawn

Where the claimant agrees to withdraw the claim to all the property, the case can be referred back to the agency for administrative forfeiture. Re-publication of the notice of the administrative forfeiture action is not necessary, provided publication occurred prior to filing of the claim and cost bond.

2. Where the Claim to Only Part of the Property is Withdrawn

The seizing agency shall administratively forfeit that portion of the property not claimed and release the remainder to the claimant consistent with the

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[1] Effective March 1, 1991, the Attorney General increased the settlement and compromise authority delegated to the Assistant Attorneys General of the litigating divisions by amending Subpart Y, Part O, Title 28 of the Code of Federal Regulations, §§ 0.160, 0.164, 0.165, and 0.168. A revision to Directive No. 116 is being made to conform with the increased monetary amounts set forth in Subpart Y, Part O. You will be advised when this revision is effective.

and cost bond has been filed, the seizing agency may consent to judicial forfeiture of such property. The claimant must agree to the forfeiture of all assets in a single judicial settlement.

D. A United States Attorney has authority to settle those judicial forfeiture actions involving property located in his or her judicial district. To settle forfeiture actions involving property located in another judicial district, the United States Attorney handling the forfeiture must notify the United States Attorney in the district where the property is located.

E. The government may initiate a settlement of a criminal forfeiture action in conjunction with the criminal charges against the defendant which provide the cause of action against the property. The government may initiate such offers to settle criminal forfeiture cases with criminal charges. However, the government should not tie civil forfeiture of property to a reduction in charges or dismissal of charges just to gain the advantage of civil forfeiture. Settlement of a civil forfeiture case should <u>not</u> be used to leverage a criminal plea or vice versa.

The settlement of a civil forfeiture for property under a plea agreement disposing of criminal charges against the defendant should not be drafted to provide that if the plea agreement is violated by either party, both the civil forfeiture and the criminal charges are reinstated. If the claimant/defendant is giving up his right, title and interest to property in a civil forfeiture action, that should be filed to dispose of the civil forfeiture action separately and should be documented independently of the plea agreement.

F. Settlements should not provide for unsecured partial payments except upon the approval of the Asset Forfeiture Office, Criminal Division, in consultation with the U.S. Marshals Service. Partial payments will be authorized only in exceptional circumstances. In addition, settlements shall not provide for payment of criminal fines, taxes or other debts owed the United States (<u>e</u>.g. SBA or student loans) with forfeited assets.

G. The settlement should state that the defendant-claimant may not re-acquire the forfeited property directly or indirectly through family members or others acting in concert with him or her.

him or her. A settlement that purports to "forfeit" the property can only bind the parties to it and transfers only that interest which the defendant-claimant possesses.

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

1. The indictment or information or a bill of particulars must identify the property in a forfeiture count.

2. The settlement to forfeit property must be in writing.

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

4. The Court must issue a Final Order of Forfeiture that incorporates the settlement and addresses, if necessary, of any third party claims.

Note: Substitute assets can only be forfeited when the applicable statute permits it and when all statutory requirements have been met, (e.g., 18 U.S.C. §§ 982(b) (1) (A) and 1963(m) and 21 U.S.C. § 853(p). Approval of the Asset Forfeiture Office, Criminal Division is required.

V. Acceptance of a Monetary Amount in lieu of Forfeiture

A monetary amount instead of forfeiture of property in civil or criminal judicial forfeiture actions can be accepted pursuant to 19 U.S.C. §1613(c). The following procedures must be followed:

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

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

3. The United States Marshals Service will accept this Court approved settlement and deposit the money (and share it where appropriate) in the same manner as the proceeds of sale of a forfeited item.

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

5. In cases where the Postal Inspection Service or the

settlement. Re-publication of the notice of the administrative forfeiture action is not necessary.

3. Agency Contacts

William R. Schroeder
Unit Chief, Legal Forfeiture Unit
Legal Counsel Division
Federal Bureau of Investigation
Phone: (202) 393-4323
Fax: (202) 347-1748

William J. Snider
Forfeiture Counsel, Office of Chief Counsel
Drug Enforcement Administration
Phone: FTS 367-8555 (202) 307-8555
Fax: (202) 307-7641

IV. Judicial Forfeiture by Settlement

A. Civil Forfeiture

Any settlement that purports to "forfeit" the 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.

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

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

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

5. The Court must issue an Order of Forfeiture that incorporates the terms of the settlement and specifically identifies the assets to be forfeited.

B. Criminal Forfeiture

In any plea settlement, a defendant claimant can only consent to forfeit that interest in the property that belongs to

National Marine Fisheries Service is the primary federal investigative agency, the U.S. Marshals Service shall 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.

VI. Plea Agreements Affecting Forfeitability of Assets Located Abroad

In drafting plea agreements, prosecutors should ensure that defendants agree to cooperate fully in identifying, repatriating, and forfeiting their tainted assets, regardless of where they may have been transferred or hidden. To achieve this end, the plea agreement may provide for polygraph examinations of the defendant regarding his or her domestic and foreign holdings.

A defendant's ability to assist in the repatriation and forfeiture of assets located abroad may be limited by the laws of the foreign government where the assets are located. For example, the United States frequently requests foreign governments to restrain or freeze forfeitable assets such as bank accounts. Once in place, such a restraint cannot be lifted except by the foreign authority which issued it. Even in such cases, however, a plea agreement should still require the defendant to cooperate to the extent possible in any forfeiture [2] efforts.

VII. U.S. Customs Service Cases Generally

Although the Customs Service has its own Asset Forfeiture program and procedures, forfeiture by settlement in Customs cases will generally also follow the above policy. Please contact the Customs Regional or District Counsel in your area if there are any questions on the settlement of Customs cases.

cc: George J. Terwilliger, III
Principal Associate Deputy
Attorney General

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[2] Reference United States Attorney Manual 9-16.600

Tab No. 34

provisions that would not be served by denying the bona fide purchaser defense to holders of liens for state and local taxes. See Reckmeyer, 836 F.2d at 208 ("Congress's primary concern in adopting the relation-back provision was to make it possible for courts to void sham or fraudulent transfers that were aimed at avoiding the consequences of forfeiture"). Nonetheless, we have found no authority that has construed bona fide purchaser broadly enough to encompass such a tax lien-holder.

A state or locality does provide something of value, in the form of government services, in return for the interest it acquires in property (ultimately in the form of a lien) by virtue of its taxing authority. This exchange, however, does not fit the transactional, arms'-length exchange of values contemplated in the case law and suggested by the statutory phrase "bona fide purchaser for value."[12]

Therefore, we do not reverse the Harrison Memorandum's conclusion that the bona fide purchaser provisions cannot be relied upon to require payment of state and local tax liens.[13]

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[12] See, e.g., Lavin, 942 F.2d at 185-86 (Congress derived bona fide purchaser exception "from hornbook commercial law" principle of protecting the "innocent purchaser for valuable consideration" which had developed at common law "in order to promote finality in commercial transactions and thus to . . . foster commerce"); Reckmeyer, 836 F.2d at 208 (scope of bona fide purchaser provision "construed liberally" is to protect "all persons who give value to the defendant in an arms'-length transaction with the expectation that they would receive equivalent value in return").

[13] The Harrison Memorandum also found that payment of liens for state and local taxes, accruing after the offense, was not within the Attorney General's discretionary authority under 28 U.S.C. § 524(c)(1)(D) ("payment of valid liens . . . against property that has been forfeited") or 28 U.S.C. § 524(c)(1)(E) (payments "in connection with remission or mitigation procedures relating to property forfeited"). We reach the same conclusion through a different analysis. A tax lien-holder who establishes that he or she is an innocent owner under the civil forfeiture statute or a bona fide purchaser under the criminal statutes is protected from the operation of the relation back doctrine, and need not rely on the Attorney General's discretionary payment of a valid lien or remission or mitigation of a forfeiture that has not occurred with respect to the lien-holder's interest. See S. Rep. No. 225 at 207-08, 217, reprinted in 1984 U.S.C.C.A.N. at 3390-3391, 3400; Lavin, 942 F.2d at 185 (bona fide purchaser provisions designed to require protection previously left to discretion of Attorney General). If the tax lien-holder fails to establish that he or she is protected by one of these defenses to

III.

For the reasons set forth above, we reach the following conclusions: In civil forfeiture proceedings (under 21 U.S.C. § 881), the United States may -- and, indeed, must -- pay liens for state and local taxes accruing after the commission of the offense leading to forfeiture and before the entry of a judicial order of forfeiture, if the lien-holder establishes, before the court enters the order of forfeiture, that it is an innocent owner of the interest it asserts. In criminal forfeiture proceedings (under 18 U.S.C. § 1963 or 21 U.S.C. § 853), however, the United States may not pay such liens because state and local tax lien-holders are not bona fide purchasers for value of the interests they would assert, and therefore do not come within any applicable exception to a statute that, upon entry of a court's final order of forfeiture, vests full ownership retroactively in the United States as of the date of the offense.

Please let us know if we may be of further assistance.

Walter Dellinger
Assistant Attorney General

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forfeiture, there can be no "valid lien" for taxes to be paid and no forfeited interest (in the form of tax liabilities) for the Attorney General to "remi[t] or mitigat[e]." Because ownership of the property will have vested in the United States as of the commission of the offense, state and local authorities cannot (absent a congressional waiver of immunity from state and local taxation that we do not find in 28 U.S.C. § 524 or elsewhere) levy taxes on such property after the date of the offense any more than they could levy taxes on a federal courthouse or post office.

the United States.[11]

This conclusion also avoids an incongruity that the concurrence's interpretation would create: an innocent owner (under the civil statute) would owe state and local taxes from the moment he or she acquired the property, but a bona fide purchaser for value (under the criminal statutes) would not owe taxes from the time he or she acquired the property until the time the court amended the order of forfeiture.

Finally, the conclusion we reach also is consistent with the statutory distinction between "owner" and "transferee." A person claiming to be a bona fide purchaser is nothing more than a transferee until he or she establishes to the court that he or she is a bona fide purchaser (whether the transferee does so after an initial forfeiture order, as the statute contemplates, or at some earlier stage). Only after the transferee has made this showing is he or she recognized as an owner (indeed, an innocent owner) of a particular type. Similarly, a person claiming to be an innocent owner is recognized as an innocent owner only after he or she proves to the court that he or she meets the standards of innocent ownership. Before that, such a person is, in the eyes of the court, merely a transferee. The civil forfeiture laws simply do not address or refer explicitly to those who assert, but have not yet established, that they are innocent owners.

For these reasons, we do not believe that the concurrence's discussion of the legal significance of the differences between the civil and criminal forfeiture statutes (which, in any case, is unnecessary to its conclusions) is correct.

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[11] Although the statutory language does not fit perfectly with the interpretation adopted here, somewhat imprecise drafting concerning the sequence of events leading to a retroactive vesting of title is, as the Buena Vista concurrence points out, perhaps to be expected in a legal culture familiar with retroactive vesting. See Buena Vista, 113 S. Ct. at 1140 (Scalia, J., concurring).

Moreover, the legislative history of the criminal forfeiture provisions also seems to support the interpretation set forth in this Memorandum. It refers to bona fide purchaser claims, raised after the initial forfeiture order, as "in essence, . . . challenges to the validity of the order of forfeiture," and, when successful, as "render[ing] that portion of the order of forfeiture reaching [the bona fide purchaser's] interest invalid." S. Rep. No. 225 at 208, reprinted in 1984 U.S.C.C.A.N. at 3391 (emphasis added).

B.

The Harrison Memorandum also states that state and local tax authorities cannot "qualify as bona fide purchasers for value" under the criminal forfeiture statutes. Harrison Memorandum, 15 Op. O.L.C. at 88 (preliminary print). The Memorandum does not set forth the basis for this conclusion. The Buena Vista plurality and concurrence have nothing to say about this issue and, thus, do not require a reversal of the Harrison Memorandum. Although the matter is not free from doubt, we believe that the stronger argument is that state and local tax lien-holders are not "bona fide purchasers."

The courts have not adopted a clear and uniform view of how to interpret "bona fide purchaser" under the criminal forfeiture statutes. See, e.g., United States v. Lavin, 942 F.2d 177, 182-89 (3d Cir. 1991) (bona fide purchaser acquires interest through volitional, advertent and, generally, commercial transaction; victim of embezzlement acquired interest through unwitting and inadvertent tortious action of another and therefore was not a bona fide purchaser); United States v. Reckmeyer, 836 F.2d 200, 206-08 (4th Cir. 1987) (bona fide purchaser includes a general, unsecured creditor of defendant who gave value to defendant in arms'-length transaction with expectation that he would receive equivalent value in the future, and whose interest must have been in some part of the forfeited property because debtor's entire estate had been forfeited); cf. United States v. Campos, 859 F.2d 1233, 1237-38 (6th Cir. 1988) (general, unsecured creditor is not a bona fide purchaser, because he does not have a legal interest in the forfeited property); Torres v. $36,256.80 U.S. Currency, 1993 U.S. Dist. Lexis 9107 at *19-23 (S.D.N.Y. July 7, 1993) (similar to Campos; also pointing out significance, for general, unsecured creditor, of unusual circumstance in Reckmeyer that entire estate had been seized); United States v. Mageean, 649 F. Supp. 820, 824, 829 (D. Nev. 1986) (definition of bona fide purchaser cannot be "stretch[ed]" to include tort claimants, but "there is no reason that a good-faith provider of goods and services," although an unsecured creditor, "cannot be a bona fide purchaser"), aff'd without opinion, 822 F.2d 62 (9th Cir. 1987); see also United States v. 3181 S.W. 138th Place, 778 F. Supp. 1570, 1574-75 (S.D. Fla. 1991) (civil forfeiture case stating that locality is not bona fide purchaser by virtue of tax lien), vacated on other grounds, 996 F.2d 1141 (11th Cir. 1993); S. Rep. No. 225 at 201, 209, reprinted in 1984 U.S.C.C.A.N. at 3384, 3391.

We are aware of no case that has decided the precise question at issue here. We acknowledge that some of the claims that courts have rejected are weaker than those presented by tax liens, and that at least one court has pointed to a primary purpose of the criminal forfeiture statutes' relation back

that the plurality's holding is based on a reading of the civil forfeiture statute (and its innocent owner provisions) and does not address the criminal forfeiture statutes (and their bona fide purchaser provisions). That holding also does not require the plurality to adopt the interpretation of the common law relation back doctrine that the opinion sets forth. Nonetheless, the plurality's discussion of the common law doctrine makes clear that it agrees with the concurrence that the relation back doctrine vests ownership retroactively in the United States only upon entry of a final judgment of forfeiture. Under that reading, if a state or locality establishes that it is a "bona fide purchaser" of an interest in the property by virtue of a tax lien, and does so before a court orders forfeiture, the order of forfeiture will not extend to the lien-holder's interest and, therefore, will not vest title to that interest in the United States.[10]

We also recognize that the concurrence in Buena Vista suggests that the relation back doctrine precludes a bona fide purchaser defense under the criminal statutes where it allows an innocent owner defense under the civil statute. As the concurrence points out, the criminal forfeiture statutes establish a procedure by which a person asserting a bona fide purchaser defense raises that defense after the court has entered an order of forfeiture. See 21 U.S.C. § 853(n); 18 U.S.C. § 1963(l). In contrast, the civil forfeiture process (on both the plurality's and the concurrence's reading) contemplates that a person asserting an innocent owner defense will do so before the court enters an order of forfeiture. As the concurrence sees it, in the former case, the court order already has vested title retroactively in the United States (effective as of the date of the offense) before the "transferee" asserts a claim to be a bona fide purchaser. In the latter case, however, the court will not yet have issued the order vesting title retroactively when the "owner" asserts an innocent owner claim. (The concurrence argues that the civil statute's use of the term "owner" and the criminal statutes' use of "transferee" reflects this distinction and suggests its significance.) On this view, if a transferee's claim to be a bona fide purchaser succeeds and the court amends

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issue under the criminal forfeiture statute).

[10] This conclusion would follow rather simply from the Court's analysis in Buena Vista when the state or locality asserts its bona fide purchaser defense at or before the proceedings in which the court issues an order of forfeiture. The conclusion is less certain under the procedure set forth in the criminal forfeiture statutes, which provides for assertion of bona fide purchaser claims at a hearing held after the court issues an initial order of forfeiture. The remainder of this subsection addresses this issue.

the order of forfeiture, the amendment does not void, retroactively, the initial retroactive vesting of title in the United States. The amendment to the initial order of forfeiture simply effects a new transfer of title to the bona fide purchaser, leaving undisturbed the United States' ownership from the time of the offense to the time of the amendment to the forfeiture order. See Buena Vista, 113 S. Ct. at 1141 (Scalia, J., concurring).

The Buena Vista concurrence fails to establish, however, that the criminal forfeiture statutes' bona fide purchaser defense does not protect liens for state and local tax liabilities incurred after the offense giving rise to the forfeiture. Only the concurrence advances the argument. The plurality does not join in it, and nothing in the dissenting opinion suggests that the dissenters would adopt the concurrence's views.

Further, the concurrence's argument reads too much into the actual, multi-step procedures by which a court adjudicates a criminal forfeiture claim. It thereby overlooks -- or confuses those procedures with -- the more fundamental legal (and fictional) process through which a retroactive transfer of ownership occurs. The better interpretation of the criminal forfeiture statutes is that the procedures of entering an order of forfeiture, holding a hearing at which transferees assert claims to be bona fide purchasers, and amending the order of forfeiture upon successful presentation of such a claim are but phases in a single (if protracted) process for determining what property interest vests, retroactively, in the United States when the court enters its final, amended order of forfeiture. The entire process is the equivalent of the single order of forfeiture in the civil context.

This interpretation fits more easily with the statutory language, especially when that language is read in light of the discussion in Buena Vista of common law relation back doctrine. The criminal forfeiture statutes provide that title in property subject to forfeiture "shall be ordered forfeited to the United States unless the transferee establishes" that he is a bona fide purchaser for value, and that "the United States shall have clear title to [the] property" only "following the court's disposition of all petitions" filed by transferees asserting claims to be bona fide purchasers. 21 U.S.C. § 853(c), (n)(7); 18 U.S.C. § 1963(c), (l)(7) (emphasis added). Such language would seem to suggest that the United States never obtains title from a bona fide purchaser, not that the United States first obtains title and then must give it back. Only after the entry of the final, amended order of forfeiture would ownership vest retroactively in

II.

The two federal criminal forfeiture statutes addressed in the Harrison Memorandum do not contain an innocent owner defense. Those statutes, however, do provide protection for a "transferee [who] establishes in a hearing [to 'amend' an order of forfeiture] that he is a bona fide purchaser for value of [the] property [subject to criminal forfeiture] who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture . . . ." 21 U.S.C. § 853(c); 18 U.S.C. § 1963(c) (same). The Harrison Memorandum concluded that this statutory "bona fide purchaser" defense is not available to a state or locality asserting a lien for tax liability incurred after the offense that made the property subject to forfeiture.

We conclude, consistent with the apparent assumption of the Harrison Memorandum, that such tax liens are "property" or an "interest" in property under the two criminal forfeiture statutes. Both statutes define property broadly, as including all "real property" and all "tangible and intangible personal property, including rights, privileges, interests, claims and securities." 21 U.S.C. § 853(b); 18 U.S.C. § 1963(b) (same);

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forfeiture and the entry of a judgment of forfeiture. The appellate court remanded the cases for further consideration in light of the Supreme Court's decision in Buena Vista.

In United States v. 7501 S.W. Virginia St., No. 92-921-BE (D. Ore. Aug. 3, 1993), the district court held that a county asserting a lien, for taxes accruing after the offense, in a forfeiture proceeding was an innocent owner under section 881(a)(6), but that the relation back doctrine had vested the title in the United States as of the date of the offense and therefore precluded payment of the tax lien. To support this conclusion, the court quoted the plurality's statement in Buena Vista that "[o]ur decision denies the Government no benefits of the relation back doctrine." Slip op. at 6 (quoting Buena Vista, 113 S. Ct. at 1137). The court has taken this quotation out of context, interpreting it as meaning, in effect, "our decision denies the Government no benefits of the relation back doctrine as is it had been understood, erroneously, in the case law that Buena Vista rejects." The district court simply misunderstands or ignores the Supreme Court's holding. This misinterpretation does not appear to be widely shared by courts applying the Buena Vista analysis of the relation back doctrine in analogous contexts. See, e.g., United States v. Daccarett, 1993 U.S. App. Lexis 23418 at *42-43 (2d Cir. Sept. 10, 1993); United States v. 41741 Nat. Trails Way, 989 F.2d 1089, 1091 (9th Cir. 1993); 2350 N.W. 187 St., 996 F.2d 1141; United States v. One 1990 Lincoln Town Car, 817 F. Supp. 1575, 1579-80 (N.D. Ga. 1993).

see also 21 U.S.C. § 853(c), (n)(6); 18 U.S.C. § 1963(c), (l)(6) (forfeiture and bona fide purchaser defense provisions referring to "interest" in such property). The legislative history and the courts' application of this statutory language also suggest a definition of property interests broad enough to include state and local tax liens on real property.[8]

The Harrison Memorandum suggests two arguments -- one based on the relation back doctrine and another based on the definition of bona fide purchaser -- to support its conclusion that the bona fide purchaser defense does not extend to holders of property interests that consist of liens for state and local taxes for the period after the offense and before a judgment of forfeiture.

A.

The Harrison Memorandum's central argument concerning the relation back doctrine addresses the bona fide purchaser defense no less than the innocent owner defense. See Harrison Memorandum, 15 Op. O.L.C. at 88 (preliminary print). On the interpretation set forth in the Harrison Memorandum, the United States has owned the property since the commission of the offense giving rise to the criminal forfeiture, and no one, including a bona fide purchaser, can later acquire any interest from the former owner.

Although the question is a closer one than in the civil forfeiture context, we conclude that the Supreme Court's decision in Buena Vista rejects this argument as well.[9] We recognize

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[8] See S. Rep. No. 225 at 193, reprinted in 1984 U.S.C.C.A.N. at 3376 (section enacting current 18 U.S.C. § 1963(c) and 21 U.S.C. § 853(c) "allows the use of criminal forfeiture as an alternative to civil forfeiture in all drug felony cases"); id. at 211, reprinted in 1984 U.S.C.C.A.N. at 3394 (property defined as subject to criminal forfeiture under 18 U.S.C. § 1963(a) and 21 U.S.C. § 853(a) is equivalent to property subject to civil forfeiture under 21 U.S.C. § 881(a)); United States v. Reckmeyer, 836 F.2d 200, 205 (4th Cir. 1987) (unsecured creditor who has reduced his claim to judgment and acquired a lien could seek an amendment to a forfeiture order under 21 U.S.C. § 853(n)); United States v. Robinson, 721 F. Supp. 1541, 1545 (D.R.I. 1989) (a leasehold interest ordinarily is a real property interest within the definition in 21 U.S.C. § 853(b)); see also United States v. Monsanto, 491 U.S. 600, 606-09 (1989) (noting breadth of forfeitable property under 21 U.S.C. § 853(a)).

[9] Cf. United States v. Harry, 1993 U.S. Dist. Lexis 11999 at *21-27 (E.D. Iowa May 6, 1993) (drawing on Buena Vista discussion of innocent owners to resolve bona fide purchaser

an innocent owner defense would seem to be easy to satisfy in most cases. Like an innocent donee or purchaser, a state or locality holding a tax lien generally has obtained its interest without knowledge of the offense giving rise to the forfeiture.

The Harrison Memorandum's further conclusion with regard to the innocent owner defense, however, cannot survive the ruling in Buena Vista. The plurality and concurring opinions reject the interpretation of the relation back doctrine set forth in the Harrison Memorandum, and agree that the innocent owner defense is available to persons who acquire interests in forfeitable property after the commission of the offense that rendered the property subject to forfeiture. The opinions differ only as to the reading of the statute that leads to this result.

The plurality and the concurrence both analyze the common law doctrine of relation back as transferring ownership of forfeited property retroactively to the date of the offense, but only upon the entry of a judgment of forfeiture. Until a court issues such a judgment, this retroactive vesting of ownership in the United States does not occur, and all defenses to forfeiture that an owner of the property otherwise may invoke will remain available. Thus, a person who has acquired an interest in the property may raise any such defense in a forfeiture proceeding. If that person prevails, a judgment of forfeiture will not vest (retroactively) ownership of that property interest in the United States. Buena Vista, 113 S. Ct. at 1135-36, 1137 (plurality opinion), 1138-39 (Scalia, J., concurring).

The plurality and the concurrence both conclude that the federal civil forfeiture statute is fully compatible with the common law, and that the statutory innocent owner clause provides a defense for a third party who innocently acquires ownership of the property after the offense and before a judgment of forfeiture. The plurality notes that section 881(h), which sets forth the relation back doctrine for the civil forfeiture statute, applies that doctrine only to "property described in subsection (a) of this section." Subsection (a)(6) excepts, from its description of forfeitable property, the property of an innocent owner. Therefore, in the plurality's analysis, subsection (a) places the property of an innocent owner beyond the reach of the forfeiture and relation back provisions in subsection (h). See Buena Vista, 113 S. Ct. at 1136-37. Accordingly, an ownership interest in forfeitable property that is transferred to an innocent person (after the offense giving rise to forfeiture) does not vest in the United States as of the time of the offense. Indeed, it does not vest in the United States at all.

Interpreting the civil forfeiture statute as a more

straightforward codification of common law doctrine,[5] the concurrence reads the phrase, in subsection (h), "'shall vest in the United States upon commission of the act giving rise to forfeiture'" as meaning "'shall vest in the United States upon forfeiture, effective as of commission of the act giving rise to forfeiture.'" Buena Vista, 113 S. Ct. at 1140 (Scalia, J., concurring).[6] The result, of course, is the same as under the plurality's analysis: a property interest innocently acquired after the offense is not forfeited to the United States if an owner asserts the interest in a proper and timely way, before the entry of a forfeiture judgment.

In sum, we reverse the Harrison Memorandum's conclusion that the innocent owner defense, set forth in 21 U.S.C. § 881(a), does not protect state and local claims for tax liabilities arising between the time of an offense rendering property subject to forfeiture and the issuance of a court order of forfeiture.[7]

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[5] The concurrence specifically rejects the plurality's reading of the phrase, in subsection (h), "property described in subsection (a)" as meaning, in effect, "property forfeitable under subsection (a)." The concurrence stresses that subsection (h) refers to "property described in subsection (a)," not property deemed forfeitable under subsection (a). Since subsection (a) describes property generally and does not declare that property that cannot be forfeited is not "property," the "property described in subsection (a)" refers to all relevant property interests, including those of innocent owners. Buena Vista, 113 S. Ct. at 1139 (Scalia, J., concurring).

[6] The concurrence "acknowledge[s] that there is some textual difficulty with th[is] interpretation," but argues, first, that the imprecision imputed to the quoted language in subsection (h) is to be expected "in a legal culture familiar with retroactive forfeiture" and, second, that the civil forfeiture statute as a whole, including subsection (d) and its adoption of forfeiture procedures applicable under 19 U.S.C. § 1602 et seq., does not make sense if one rejects the concurrence's reading of subsection (h) (and the plurality's reading of subsections (a) and (h)). Buena Vista, 113 S. Ct. at 1140 (Scalia, J., concurring).

[7] The local tax lien cases decided by lower courts since the Supreme Court's decision in Buena Vista do not alter our conclusion. In 2350 N.W. 187 St., 996 F.2d 1141, the court vacated the judgments in two cases in which the district courts had relied on the interpretation of the relation back doctrine described in the Harrison Memorandum, and had granted summary judgment against a county invoking the innocent owner defense in 21 U.S.C. § 881(a)(6), (7) to assert liens for property taxes owed for some of the period between an offense giving rise to

time of the offense. This view is based on an interpretation of the "relation back" doctrine, which provides that a judicial order of forfeiture retroactively vests title to the forfeited property in the United States as of the time of the offense that leads to forfeiture, not as of the time of the judicial order itself. See 21 U.S.C. § 881(h) ("[a]ll right, title, and interest in property [subject to forfeiture] shall vest in the United States upon commission of the act giving rise to forfeiture . . . ."); 18 U.S.C. § 1963(c), 21 U.S.C. § 853(c) (substantially identical to quoted language from 21 U.S.C. § 881(h)). Under the Department's traditional interpretation, title in forfeited property vests in the federal government at the time of the offense. The date of the judicial order of forfeiture is not significant. From the date of the offense, states and other parties are barred from acquiring interests in the property from the owner whose interests are forfeited to the United States. See In re One 1985 Nissan, 889 F.2d 1317, 1319-20 (4th Cir. 1989); Eggleston v. Colorado, 873 F.2d 242, 245-48 (10th Cir. 1989), cert. denied, 493 U.S. 1070 (1990) (cases decided before Buena Vista and consistent with the Harrison Memorandum).

The Harrison Memorandum considers and rejects several possible grounds for limiting the operation of the relation back doctrine and requiring payment of state and local tax liens for the period between the offense and the forfeiture order. The two grounds of principal concern here are the "innocent owner" defense in the civil drug forfeiture statute, see 21 U.S.C. § 881(a)(6)[2], and the "bona fide purchaser" defense in the criminal drug forfeiture statute, see 21 U.S.C. § 853(c), and in the forfeiture provision of the RICO statute, see 18 U.S.C. § 1963(c). The Harrison Memorandum concludes that these defenses do not protect a state or locality (or anyone else) who innocently acquires a property interest after the time of the offense. The Supreme Court's decision in Buena Vista forces us to reconsider this conclusion. We conclude that the Harrison Memorandum's conclusion concerning the innocent owner defense must be reversed, but that the Harrison Memorandum's conclusion regarding the bona fide purchasers defense is correct (although this latter conclusion is less certain than the Harrison Memorandum indicates and we reach it through an analysis different from that set forth in the Harrison Memorandum).

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[2] The conclusions with regard to section 881(a)(6), the innocent owner provision immediately at issue in Buena Vista and applicable to all "things of value" traceable to an exchange for a controlled substance, also apply to section 881(a)(7), which contains a nearly identical innocent owner provision applicable to real property used in a drug offense. See notes 3, 7, infra.

I.

The civil drug forfeiture statute provides that "no property shall be forfeited . . . , to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. § 881(a)(6). The Harrison Memorandum accepted that "owner" could include a state or locality holding a tax lien on the property. See Harrison Memorandum, 15 Op. O.L.C. at 88 (preliminary print). The Memorandum concluded, however, that this "innocent owner" provision does not apply to asserted property interests that arise after the time of the offense because, as of the moment of the offense, the property belongs (by operation of the relation back doctrine) to the United States, and not to the person from whom a third party innocently acquires an interest.

We conclude, consistent with the Harrison Memorandum, that a state or locality holding a tax lien can be an "owner" as that term is defined in the civil forfeiture statute's innocent owner provisions. The broad language of the statute -- "[a]ll . . . things of value" and "[a]ll real property, including any right, title and interest" -- provides no reason to exclude a tax lien-holder from the definition of "owner." 21 U.S.C. § 881(a)(6), (7). The legislative history urges a broad reading.[3] And the courts have followed, sometimes explicitly, the path suggested by Congress.[4] The "innocence" requirement of

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[3] See Joint Explanatory Statement of Titles II and III, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S.C.C.A.N. 9522 (in section 881(a)(6), "[t]he term 'owner' should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized"); see also S. Rep. No. 225, 98th Cong., 2d Sess. 195, 215 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3378, 3398 (describing section 881(a)(7) as, in effect, extending section 881(a)(6) to cover real property used in a drug offense but not acquired with proceeds of prohibited drug transactions).

[4] See, e.g., United States v. 717 S. Woodward St., 1993 U.S. App. Lexis 21051 at *15 (3d Cir. Aug. 20, 1993) (citing legislative history); United States v. 6960 Miraflores Ave., 995 F.2d 1558, 1561 (11th Cir. 1993) ("Lien holders have the right to assert their claims of innocent ownership" under section 881(a), as interpreted in Buena Vista); United States v. 6109 Grubb Rd., 886 F.2d 618, 625 n.4 (3d Cir. 1989) (cited in Buena Vista and citing legislative history); see also United States v. 2350 N.W. 187 St., 996 F.2d 1141 (11th Cir. 1993) (Buena Vista analysis of section 881(a) innocent owner provisions assumed to apply where purported innocent owner is local tax lien holder).

DIRECTIVE NO. 93-6

Effective Date and Limitations: This directive is effective immediately and permits the payment of taxes upon civilly forfeited properties: (1) which have not yet been sold, or (2) which are the subject of pending litigation regarding payment of taxes, provided, however, that a tax claim was filed with the federal district court prior to entry of the order of forfeiture, or that a valid lien had been recorded among the pertinent land records giving the federal district court notice of the tax claim prior to entry of the order of forfeiture.

Attachment

cc: Treasury Executive Office for Asset Forfeiture

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

October 18, 1993

MEMORANDUM FOR CARY H. COPELAND
Director and Chief Counsel
Executive Office for Asset Forfeiture

Re: Liability of the United States for State and Local Taxes on Seized and Forfeited Property

You have asked us to reconsider our opinion that property seized by and forfeited to the United States is not subject to state or local taxation for the period between the commission of the offense that leads to the order of forfeiture and the entry of the order of forfeiture. See Liability of the United States for State and Local Taxes on Seized and Forfeited Property, 15 Op. O.L.C. 85 (1991) (preliminary print) ("Harrison Memorandum"). In light of the Supreme Court's decision in United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993), we partially reverse our opinion.

Because states and localities may not tax federal property (absent express congressional authorization),[1] the time at which ownership of forfeited property passes to the United States and the extent of the ownership interest that passes to the United States determine whether state and local taxes are owed. In many property transactions, the time and the extent of transfer of ownership are unambiguous and independent issues. In cases of transfers of ownership under the federal forfeiture statutes, however, the answer to the question of when ownership is transferred has been a matter of dispute, and of great consequence for the extent of the interest transferred.

The Harrison Memorandum expresses the Justice Department's traditional view that title vests in the United States at the

---

[1] See, e.g., United States v. City of Detroit, 355 U.S. 466, 469 (1958) ("a State cannot constitutionally levy a tax directly against the Government of the United States or its property without the consent of Congress."); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

DIRECTIVE NO. 93-6

November 4, 1993

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, United States Marshals Service
Chief Inspector, Postal Inspection Service
Chief, U.S. Park Police

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Liability of the United States for State and Local Taxes on Seized and Forfeited Property

In light of the Supreme Court's decision in United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993), we asked the Office of Legal Counsel (OLC) to reconsider its July 9, 1991, opinion on the captioned subject. The attached opinion represents the Department's official position on the issue.

The opinion concludes that we must pay state and local taxes on properties civilly forfeited where the taxing authority established its innocent owner status prior to the entry of a final order of forfeiture. Given the unique nature of the interest of taxing authorities, the Department will in the future indulge a presumption of innocence in the absence of exceptional circumstances. Accordingly, in civil forfeiture cases, the United States will henceforth pay standard ad valorem property taxes up to the date of entry of an order of forfeiture. In criminal forfeiture cases, we may not pay such taxes and are bound by the OLC opinion of July 9, 1991.

Place Behind Tab

No. 47

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

DIRECTIVE NO. 93-5

September 15, 1993

93 SEP 22 AM 10:19

MEMORANDUM

TO: Paul King, FBI
Jack Mahoney, DEA
Dan Stephan, INS
Joey Lucero, USMS
Larry Maxwell, Postal Inspection Service
Charles Hume, U.S. Park Police

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: 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 this Office "at the time property valued at $50,000 or greater is placed into official use." Although this requirement may be satisfied by post-transfer notification, the FBI and USMS have gone further and provided this Office with advance notice of and an opportunity to review such decisions. I have informally notified the Justice Management Division's Budget Staff and Facilities and Administrative Services Staff of such proposed transfers and given them an opportunity to review and comment.

The Attorney General is considering a revision to the Guidelines to require Attorney General or Deputy Attorney General approval of such decisions. Pending that action, please ensure that this Office is given advance notice of and an opportunity to review official use actions involving federal forfeited property valued at $50,000 or more. We will endeavor to act on all such notifications within two weeks of receipt.

cc: Adrian Curtis
Ben Burrell
Bob Diegelman

Place Behind Tab

No. 46

Memorandum

To: The Asset Forfeiture Community

From: The Asset Forfeiture Office
Department of Justice

Re: Updates to Volume III of the
Asset Forfeiture Manual

Date: March 1994

Enclosed are policies 93-5 through 94-2 to be included in Volume III of your *Asset Forfeiture Manual*. The Table of Contents and Index will be updated on a periodic basis, at which time they will be forwarded to you.

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all administrative forfeitures, the "written notice" under 19 U.S.C. § 1607 to possessors, owners, and other interested parties, including lienholders, known at the time of seizure, shall occur not later than sixty (60) days from the date of seizure.[1] For interested parties determined after seizure, the "written notice" shall occur within 60 days after reasonably determining ownership or interest. Waivers of this notice may be obtained in writing in exceptional circumstances from a designated official within the seizing agency. If a waiver is granted, the waiver must set forth the exceptional circumstances and be included in the administrative forfeiture case file. Where a reasonable effort of notice has not been made within the 60-day period and no waiver has been obtained, the seized property must be returned and the forfeiture proceeding terminated.[2]

Effective Date: March 1, 1993.

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[1] The 45-day rule under 19 U.S.C. § 1607 "written notice" for administrative forfeiture of conveyances and for possession of personal use drug quantities (see 21 CFR § 1316.99(b) and 21 U.S.C. § 881) set forth in the memorandum captioned "Effect of Delay in Notice Required by the Anti-Drug Abuse Act of 1988" from Cary H. Copeland, Director, Executive Office for Asset Forfeiture dated March 20, 1991 is superseded by this uniform 60-day "written notice" requirement for all administrative forfeiture cases.

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

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U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

DIRECTIVE NO. 93-4

JAN 15 1993

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, United States Marshals Service
Chief Inspector, Postal Inspection Service
Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco and Firearms
Director, U.S. Secret Service
Chief, U.S. Park Police

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Sixty-Day Notice Period in All Administrative Forfeiture Cases

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

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

It is the policy of the Department of Justice that the "written notice" from the seizing agency of seizure and intent to forfeit required by 19 U.S.C. § 1607 shall be provided at the earliest practicable opportunity after determining ownership. In

Tab No. 45

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

DIRECTIVE NO. 93-3

JAN 15 1993

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service
Chief Postal Inspector, Postal Inspection Service
Assistant Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco and Firearms
Director, U.S. Secret Service
Chief, U.S. Park Police

FROM: Cary H. Copeland
Director and Chief Counsel

SUBJECT: Expedited Payment of Lienholders in Forfeiture Cases

1. Effective February 1, 1993, the "Expedited Forfeiture Settlement Policy for Mortgage Holders" (July 1991) is expanded: (a) to cover mortgages held by private individuals and organizations that do not qualify as a "financial institution"; and (b) to cover liens on tangible property. A revised guide will be issued in the near future.

2. I hereby interpret 28 U.S.C. 524(c) to authorize pre-forfeiture payment of liens and mortgages. Use of this authority must be approved in writing by this Office prior to entering into any agreement to pay a lienholder. It is intended that this authority be used sparingly and only in those situations where pre-forfeiture payment of liens and mortgages is necessary to avoid extreme hardship to natural persons. All other viable options, including interlocutory sales, must be pursued prior to seeking this authority. As experience is gained under this policy, this Office will issue more specific criteria for approval of such payments.

Tab No. 44

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

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

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

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

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

6. In cases where a false IFP petition has been submitted to the agency resulting in the United States Attorney proceeding with judicial forfeiture in reliance upon the false information, prosecutions under 18 U.S.C. §§ 1001 and 1621 should be considered

EFFECTIVE DATE: March 1, 1993.

Form 4. Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis

United States District Court for the _____
District of _____

United States of America
v.
A. B. } No. _____

Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis

I, _____ being first duly sworn, depose and say that I am the _____ in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.
   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.
2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?
   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.
3. Do you own any cash or checking or savings account?
   a. If the answer is yes, state the total value of the items owned.
4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
   a. If the answer is yes, describe the property and state its approximate value.
5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

_____

SUBSCRIBED AND SWORN TO before me this _____ day of _____, 19__.

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

_____
District Judge

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

DIRECTIVE NO. 93-2

JAN 15 1993

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, United States Marshals Service
Chief Postal Inspector, Postal Inspection Service
Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco, and Firearms
Director, U.S. Secret Service
Chief, U.S. Park Police

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Policy on In Forma Pauperis Petitions

Judicial review of an administrative seizure is available if, within 20 days of the first publication of notice of seizure by the seizing agency, the claimant either files a claim and cost bond in the sum of $5,000 or 10 percent of the appraised value of the property (whichever is lower but not less than $250) or the bond is waived through an In Forma Pauperis (IFP) petition filed with the seizing agency. Failure by the claimant to submit a claim and cost bond or to obtain a waiver of bond through a valid IFP petition allows the agency to forfeit the property through administrative procedures. Although a seizing agency has jurisdiction to rule on the IFP petition, it must keep in mind that IFP petitions are constitutionally mandated for the indigent and that forfeiture laws must not be enforced so as to deny the Fifth Amendment rights of the poor.

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

Request for Adoption of State or Local Seizure

Federal Use Only

Asset Identifier: _____

Agency Case Number: _____

Agency Seizure Number: _____

Seizure Date: _____

Judicial District: _____

Date Request Received: _____

-Request must be submitted to the federal investigative agency within 30 calendar days of State and local seizure date unless circumstances merit a waiver.

-Federal investigative agency shall review all requests for adoptions.

-USMS must be consulted for purposes of pre-seizure planning prior to adoption.

Name of Requesting State or local Agency:

Contact Person:

Date of Seizure:

Telephone Number:

Date of Request:

Delay Requested in Processing: Yes ( ) Reason:_____ **No ( )**

Criminal Case: State ( ) Case # _____District Attorney Assigned:_____
Federal ( ) Case # _____ Assistant United States Attorney:_____

Was Property Seized Pursuant to State Warrant Yes ( ) Attach Copy No ( )

State Forfeiture Action Initiated: Yes ( ) No ( )

If yes, explain circumstances: _____

Has a State or local prosecutor declined to proceed with forfeiture under State law? Yes ( ) No ( )
Has another Federal Agency been contacted, and declined to proceed with this forfeiture under Federal law? Yes ( ) No ( )
Have you attached copies of pertinent investigative or arrest reports and copies of any affidavits filed in support of a seizure warrant? Yes ( ) No ( )

To be Completed by Federal Investigative Agency

Recommend Adoption: [ ] Adoption is in accord with general and local policy.

Decline Adoption: [ ] Reason for declination:_____

Investigative Agency Reviewing Official

_____ _____
Signature Date

Immediate Probable Cause Review needed if following factors are not present:

-seizure was based on judicial warrant
-arrest made in connection with seizure
-drugs or other contraband were seized from the person from whom the property was seized

Investigative Agency Headquarters Approval:

_____ _____
Name/Title Date

Tab No. 43

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

- 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

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

Judicial Review Favored

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

Thirty-Day Rule for Presentation for Federal Adoption

State and local agencies have thirty (30) calendar days from the date of seizure to request a federal adoption.[3] 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.

United States Attorney Recommendation

A United States Attorney may recommend in writing that a federal seizing agency adopt a particular State or local seizure.

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[3] Note that this is a change from the prior requirement that State and local seizures be presented to federal seizing agencies within fifteen business days of seizure. Experience has shown that the fifteen-day requirement was too short in light of the time necessary for investigative steps such as obtaining laboratory test results on seized controlled substances.

If the federal agency declines to adopt the seizure despite the recommendation of the United States Attorney, the agency must promptly document its reasons for declination in a memorandum and forward copies of the memorandum to the United States Attorney and the Executive Office for Asset Forfeiture (EOAF). EOAF will resolve any disagreements and may authorize direct adoption of State or local seizures by United States Attorneys for judicial forfeiture in appropriate circumstances.

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.

Effective date: March 1, 1993

Attachment

on a new form entitled "Request for Adoption of State or Local Seizure" (copy attached). Until the new form is printed, photocopies of the attached may be used. Copies of the attached form shall be supplied to any State or local law enforcement agency seeking federal adoption of a seizure. 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 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.[2]

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:

- the seizure was based on a judicial seizure warrant; or
- an arrest was made in connection with the seizure; or
- 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

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

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 Assistant United States Attorney to conduct this review. Any further review processes established in the future for federal seizures will also apply to adoptive seizures.

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

Minimum Monetary Thresholds

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

Conveyances	
Vehicles	$ 3,500
Vessels	$10,000
Aircraft	$10,000
Real Property	$20,000 or 20% of the
Land and any improvements	appraised value, whichever is greater
All Other Property	
Currency, bank accounts, monetary instruments, jewelry, etc.	$ 2,000

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:

- 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;

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

DIRECTIVE NO. 93-1

93 JAN 26 A11:52
DEPARTMENT OF JUSTICE
CRIMINAL DIVISION

JAN 15 1993

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service
Chief Postal Inspector, Postal Inspection Service
Assistant Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco and Firearms
Director, U.S. Secret Service
Chief, U.S. Park Police

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: General Adoption Policy and Procedure

Background

Effective use of federal forfeiture laws requires a willingness on the part of federal law enforcement agencies to adopt State and local seizures for federal forfeiture whenever appropriate. This memorandum establishes new policies and procedures intended to ensure consistent review and handling of State and local seizures presented for federal adoption.[1]

Federal Adoption Form

All State and local requests for adoption must be reported

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

Consequently, in order to ensure that application of the relation back doctrine in civil forfeiture cases is consistent with its application in criminal forfeiture cases, **it is the Department's policy in civil forfeiture cases not to apply the relation back doctrine to the property interests of innocent bona fide purchasers for value filing claims in civil forfeiture proceedings if those claims would have been honored in criminal forfeiture proceedings.** Government prosecutors are not to contest valid claims filed by innocent bona fide purchasers for value, including creditors with a secured ownership interest in the seized property acquired after the commission of the offense giving rise to the forfeiture. If for some reason such a claim is not filed or not honored during a forfeiture proceeding, the Department will continue to grant timely filed petitions for remission or mitigation. The Department will also continue to make available the procedures for expedited settlement in real property cases, which are set forth in the Expedited Forfeiture Settlement Policy for Mortgage Holders (revised April 1992), to financial institutions on a routine basis and to other secured creditors on a case-by-case basis.

The Department has proposed legislation to resolve the inconsistency between civil and criminal forfeiture statutes concerning application of the relation back doctrine to innocent bona fide purchases in accordance with the policy set forth in this memorandum. Recent legislative proposals in the Department's proposed Comprehensive Asset Forfeiture Amendments include a proposal to amend 18 U.S.C. §§ 981(f) and 2254(g), and 21 U.S.C. § 881(h) to conform civil forfeitures under these statutes to criminal forfeitures by excepting the property interests of innocent bona fide purchasers from the reach of the "relation back" doctrine. Pending enactment of this legislation, we are reiterating our policy to treat innocent bona fide purchasers for value alike in criminal and civil forfeiture proceedings.

If you have any questions regarding this policy, please contact the Asset Forfeiture Office in the Criminal Division at (202) 514-1263.

cc: Jeffrey R. Howard
Principal Associate Deputy Attorney General

United States v. One Single Family Residence Located at 6960 Miraflores Ave., Coral Gables, Florida, 731 F. Supp. 1563, 1568 (S.D. Fla. 1990), appeal dismissed, 932 F.2d 1433 (11th Cir. 1991), cert. granted on other issues sub nom. Republic National Bank v. United States, 112 S. Ct. 1159 (1992); United States v. One Single Family Residence Located at 2901 S.W. 118th Court, Miami, Florida, 683 F. Supp. 783, 787-88 (S.D. Fla. 1988).

Tab No. 42

The criminal forfeiture statutes expressly exempt from forfeiture property transferred after the act giving rise to forfeiture when the transfer was to a bona fide purchaser for value who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture. The interests of such "innocent bone fide purchasers for value" in otherwise forfeitable property are thus protected from the reach of the "relation back doctrine" in criminal forfeitures.[1]

In contrast, the relation back provisions and the "innocent owner" exceptions in the parallel civil forfeiture statutes do not exempt from forfeiture property transferred to an innocent bona fide purchaser for value after the time of the offense giving rise to the forfeiture.[2] Under the relation back doctrine in the civil forfeiture statutes, all right, title, and interest in the property vest in the United States at the time of the offense, except as to someone who is an "innocent owner" at that point in time. Once the offense has been committed, a valid interest in the property can only be acquired from the United States since the statutes make no exception for bona fide purchasers for value. Consequently, any subsequent transferee or purchaser from someone other than the United States has not acquired a valid interest and is not "an

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[1] See 18 U.S.C. §§ 2253(b) and (m)(6)(B) (sexual exploitation of minors); 21 U.S.C. §§ 853(c) and (n)(6)(B) (controlled substances); and by incorporation of 21 U.S.C. §§ 853(c) and (n) by reference, 18 U.S.C. § 982(b)(1) (money laundering). Also see the criminal forfeiture statutes that have no civil forfeiture parallel: 18 U.S.C. §§ 793(h)(3) and 794(d)(3) (espionage); 18 U.S.C. §§ 1467(b) and (1)(6)(B) (obscene material); 18 U.S.C. §§ 1963(c) and (1)(6)(B) (RICO).

[2] See the relation back provisions in 18 U.S.C. § 981(f), 18 U.S.C. § 2254(g), and 21 U.S.C. § 881(h), and the innocent owner exceptions in 18 U.S.C. § 981(a)(2), 18 U.S.C. §§ 2254(a)(2) and (a)(3), 21 U.S.C. §§ 881(a)(4)(C), (a)(6), and (a)(7). For example, 21 U.S.C. § 881(h) provides only that:

> All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

and 21 U.S.C. § 881(a)(4)(C) provides that:

> no conveyance shall be forfeited . . . to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

owner" entitled to raise the "innocent owner" defense regardless of how this alleged interest was acquired.

The Government made this point in a brief recently filed before the Supreme Court in United States v. A Parcel of Land, Buildings, Appurtenances and Improvements known as 92 Buena Vista Avenue, Rumson, New Jersey, 937 F.2d 98 (3d Cir. 1991), cert. granted, 112 S. Ct. 1260 (1992). The issue in this case is whether a person who receives a gift of money derived from drug trafficking, and uses that money to purchase real property, may assert an "innocent owner" defense to the forfeiture of the real property under 21 U.S.C. § 881(a)(6). The Government argues that the innocent owner defense is available only to one who acquired his interest in the forfeited property prior to the illegal acts giving rise to the forfeiture. Otherwise, a drug dealer could circumvent forfeiture by later conveying property to a friend or relative who was not aware of the illegal activity at the time of the transfer. Since the civil forfeiture statutes draw no distinction between those acquiring their interest by purchase or loan, on the one hand, or gift on the other, such an analysis is essential to being able to prevent criminals from frustrating civil forfeiture. The brief notes that some courts have drawn a distinction based on how an interest was acquired (see cases cited in footnote 3, infra) but indicates this issue is not presently before the Court.

The brief goes on to state that the Department may grant remission petitions on a broader basis than the innocent owner defense and that the Department has statutory authorization to pay off liens and mortgages from the proceeds of seized assets. As the brief states: " . . . federal law enforcement authorities do not, as a matter of practice, pursue forfeiture of property in the hands of bona fide purchasers for value who would ordinarily be expected to lack notice of the government's prior claim." Brief for the United States at 40, 92 Buena Vista Avenue (No. 91-781). Oral arguments in this case will probably take place this fall.

It is obviously undesirable that innocent bona fide purchasers for value, who are expressly protected from losing their interests in criminal forfeiture cases, not be protected in civil forfeiture cases, especially when the same property is subject to civil and/or criminal forfeiture for the same underlying offense.[3]

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[3] Some courts have suggested that the innocent owner defense should be available to innocent bona fide purchasers of property that is subject to civil forfeiture for previous drug violations. See In the Case of One 1985 Nissan 300 ZX, 889 F.2d 1317, 1322 (4th Cir. 1989) (Murnaghan, J., concurring); Eggleston v. State of Colorado, 873 F.2d 242, 247-248 (10th Cir. 1989); United States v. Four Parcels of Real Property on Lake Forrest Circle in Riverchase, Shelby County, Alabama, 870 F.2d 586, 590 n.11 (11th Cir. 1989);

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

DIRECTIVE NO. 92-8

RECEIVED

AUG - 5 1992

July 31, 1992

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Administrator, Drug Enforcement Administration
Director, Federal Bureau of Investigation
Commissioner, Immigration and Naturalization Service
Director, United States Marshals Service
Chief Postal Inspector, Postal Inspection Service
Assistant Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco and Firearms
Director, U.S. Secret Service

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Policy on Bona Fide Purchasers for Value and the Relation Back Doctrine in Civil Forfeitures

Summary:

The innocent owner defense to civil forfeiture is not available, as a matter of law, to one who has acquired an interest in the forfeited property after the illegal acts which resulted in the forfeiture. This memorandum reiterates the Department's policy that despite the statutory wording, we will treat bona fide secured creditors and purchasers for value the same in civil as in criminal forfeiture proceedings. Valid claims filed by bona fide secured creditors or other purchasers for value will be honored pending the enactment of corrective legislation.

Specifics:

The "relation back doctrine" provides that all right, title, and interest in property subject to forfeiture vest in the United States at the time of the commission of the act giving rise to the forfeiture. This doctrine is codified in both the criminal and the civil forfeiture statutes for the offense of sexual exploitation of minors, 18 U.S.C. §§ 2253(b) and 2254(g), for money laundering/FIRREA violations, 18 U.S.C. §§ 982(b)(1) and 981(f), and for controlled substance violations, 21 U.S.C. §§ 853(c) and 881(h).

Tab No.

other cases, including those involving amounts greater than as set forth in paragraph (a) above, and up to the maximum limit of his authority, where the circumstances warrant such delegation.

(c) All other authority delegated to me by §§ 0.160, 0.162, 0.164 and 0.171 of title 28 of the Code of Federal Regulations not falling within the limitations of paragraph (a) of this Order is hereby redelegated to Section Chiefs in the Criminal Division, except that--

(1) The authority delegated to me by §§ 0.160, 0.162, 0.164 and 0.171 of that title relating to conducting, handling, or supervising civil and criminal forfeiture litigation (other than bail bond forfeiture), including acceptance or denial of petitions for remission or mitigation of forfeiture, is hereby redelegated to the Director of the Asset Forfeiture Office; and

(2) When a Section Chief or the Director of the Asset Forfeiture Office is of the opinion that because of a question of law or policy presented, or for any other reason, a matter described in paragraph (c) should receive the personal attention of a Deputy Assistant Attorney General or Assistant Attorney General, he shall refer the matter to the appropriate Deputy Assistant Attorney General or to the Assistant Attorney General.

(d) Notwithstanding any of the above redelegations, when the agency or agencies involved have objected in writing to the

proposed closing or dismissal of a case, or to the acceptance or rejection of an offer in compromise, any such unresolved objection shall be referred to the Assistant Attorney General for resolution.

MAY 19 1992

Date

Robert S. Mueller, III
Assistant Attorney General
Criminal Division

Approved:

6/5/92

Date

Wayne A. Budd
Associate Attorney General

(i) Claims in behalf of the United States in all cases (other than forfeiture cases) in which the original claim did not exceed $500,000, and in all cases in which the original claim was between $500,000 and $5,000,000, so long as the difference between the gross amount of the original claim and the proposed settlement does not exceed 15 percent of the original claim; and in all civil or criminal forfeiture cases, except that the U.S. Attorney shall consult with the Asset Forfeiture Office of the Criminal Division before accepting offers in compromise or plea offers in forfeiture cases in which the original claim was $5,000,000 or more, and in forfeiture cases in which the original claim was between $500,000 and $5,000,000, when the difference between the gross amount of the original forfeiture sought and the proposed settlement exceeds 15 percent of the original claim; and

(ii) Claims against the United States in all cases, or in administrative actions to settle, in which the amount of the proposed settlement does not exceed $500,000; and

(B) To close (other than by compromise or entry of judgment) claims asserted by the United States in all cases (other than forfeiture cases) in which the gross amount of the original claim does not exceed $500,000, and in all civil or criminal forfeiture cases, except that the U.S. Attorney shall consult with the Asset Forfeiture Office of the Criminal Division before closing a forfeiture case in which the gross amount of the original forfeiture sought is $500,000 or more.

(2) This subsection does not apply--

(A) When, for any reason, the compromise or closing of a particular claim (other than a forfeiture case) will, as a practical matter, control or adversely influence the disposition of other claims which, when added to the claim in question, total more than the respective amounts designated above;

(B) When the U.S. Attorney is of the opinion that because of a question of law or policy presented, or for any other reason, the matter should receive the personal attention of the Assistant Attorney General;

(C) When a settlement converts into a mandatory duty the otherwise discretionary authority of an agency or department to revise, amend, or promulgate regulations;

(D) When a settlement commits a department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek a particular appropriation or budget authorization; or

(E) When a settlement limits the discretion of a Secretary or agency administrator to make policy or managerial decisions committed to the Secretary or agency administrator by Congress or by the Constitution.

(b) Notwithstanding the provisions of this Order, the Assistant Attorney General of the Criminal Division may delegate to U.S. Attorneys authority to compromise or close

of the Assistant Attorney General's authority to compromise civil penalties and forfeitures and close civil claims to subpart Y, part 0, title 28 of the Code of Federal Regulations (CFR), §§ 0.160, 0.164, 0.165, and 0.168 as amended by the Attorney General (Order No. 1478-91, 56 FR 8923-24, March 4, 1991). Subject to limitations set forth in §§ 0.160(c) and 0.168(a), § 0.168(d) provides that redelegations of this authority by Assistant Attorneys General to United States Attorneys will include the authority: (1) to accept offers in compromise in cases involving original claims by the United States of not more than $500,000; (2) to accept offers in compromise in cases involving original claims by the United States between $500,000 and $5,000,000, so long as the difference between the original claim and the proposed settlement does not exceed 15 percent of the original claim; and (3) to accept offers in compromise of claims against the United States in cases where the principal amount of the proposed settlement does not exceed $500,000.

This Order supersedes Criminal Division Directive No. 116 (48 FR 50712-13, November 3, 1983), which contains the current redelegation of the authority of the Assistant Attorney General, Criminal Division, to compromise civil penalties and forfeitures and close civil claims.

This Order is exempt from the requirements of Executive Order 12291 as a regulation related to agency organization and management. Furthermore, this Order will not have a significant economic impact on a substantial number of small entities because

its effect is internal to the Department of Justice. 5 U.S.C. 605(b).

List of Subjects in 28 CFR Part 0

Authority delegations (Government agencies), Organization and functions (Government agencies), Penalties, Seizures and forfeitures.

Accordingly, 28 CFR Part 0 is amended as follows:

PART 0 - ORGANIZATION OF THE DEPARTMENT OF JUSTICE

1. The authority citation for Part 0 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515-19.

2. The Appendix to Subpart Y of Part 0 is amended by removing Criminal Division Directive No. 116.

3. The Appendix to Subpart Y of Part 0 is further amended by adding Order No. [___] to read as follows:

[Order No. ___]

REDELEGATIONS OF AUTHORITY TO UNITED STATES ATTORNEYS, DEPUTY ASSISTANT ATTORNEYS GENERAL, SECTION CHIEFS, AND DIRECTOR, ASSET FORFEITURE OFFICE, IN THE CRIMINAL DIVISION

By virtue of the authority vested in me by part 0 of title 28 of the Code of Federal Regulations, as amended, particularly §§ 0.160, 0.162, 0.164, 0.168 and 0.171, it is hereby ordered as follows:

(a) (1) Each U.S. Attorney is authorized in cases delegated to the Assistant Attorney General of the Criminal Division--

(A) To accept or reject offers in compromise of--

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

General Policy

Under the authorities contained in the MFCMA, the Department of Justice will transfer to the NOAA funds forfeited by the Attorney General for violations under the MFCMA. Assets seized for forfeiture under the MFCMA should be deposited in the Seized Asset Deposit Fund with the United States Marshals Services (USMS). Following the forfeiture action, the funds will then be transferred by the USMS to NOAA. Where expenses have been incurred by the USMS, these expenses must first be deducted before the net proceeds of forfeiture are transferred to NOAA If no expenses are incurred, the entire amount will be transferred to NOAA. The transfer of the net proceeds of forfeiture minus expenses, with respect to previously identified cases in which there is a final order of forfeiture as of June 1, 1992 should occur immediately, without the need for further processing.

BILLING CODE: 4410-10

DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 0

[A.G. Order No. 1598-92

Redelegations of Authority to
United States Attorneys, Deputy Assistant Attorneys General,
Section Chiefs, and Director, Asset Forfeiture Office,
in the Criminal Division

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This Order is the Criminal Division's implementation of the first increase in the settlement and compromise authority delegated to the Assistant Attorneys General since 1981. It provides a corresponding increase in the settlement and compromise authority redelegated to United States Attorneys, Deputy Assistant Attorneys General, Section Chiefs, and the Director, Asset Forfeiture Office, in the Criminal Division, to further the efficient operation of the Department of Justice.

EFFECTIVE DATE: [Insert date of publication in the FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Lee J. Radek, Director, Asset Forfeiture Office, Criminal Division, Department of Justice, Washington, D.C. 20530, 202-514-1263.

SUPPLEMENTARY INFORMATION: This Order conforms the redelegations

made pursuant to the MFCMA. As with other judicial forfeiture involving sharing, the United States Attorney's Office shall forward the DAG-72 recommendation or decision to the Criminal Division, Asset Forfeiture Office, for processing and tracking purposes. The Criminal Division, Asset Forfeiture Office, will retain authority for dispute resolution in sharing decisions valued under $1,000,000.

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

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

The check should also contain the following information:

case name and number	_____
account number	AD1000 BL2D02

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/FTS 933-2292.

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

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

RECEIVED
ASSET FORFEITURE OFFICE
92 JUN 16 PM 5:10
DEPARTMENT OF JUSTICE
CRIMINAL DIVISION

DIRECTIVE NO. 92-6

MEMORANDUM

TO: United States Attorney, District of Alaska
United States Attorney, District of Guam
United States Attorney, District of New Jersey
United States Attorney, Southern District of New York
United States Attorney, Southern District of Texas
United States Attorney, Eastern District of Virginia
United States Attorney, Western District of Washington
Assistant Attorney General, Criminal Division
Director, United States Marshals Service
Under Secretary for Oceans and Atmosphere, NOAA

FROM: Cary H. Copeland
Director and Chief Counsel

SUBJECT: Policy regarding the transfer of property which is judicially forfeited under the Magnuson Fisheries Conservation and Management Act from the Department of Justice to the National Oceanic and Atmospheric Administration

Background

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

Any future FCMA forfeitures and request for transfers 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 Department of Justice (DOJ) Assets Forfeiture Fund will retain ten percent (10%) of the total net proceeds of the forfeiture. This amount represents the Department of Justice share based upon its effort in forfeiting the property.

Transfer Request Procedures

To avoid the necessity of creating new forms and procedures, the transfer by NOAA request should follow established sharing request procedures as enumerated in The Attorney General's Guidelines on Seized and Forfeited Property, July 1990. Since MFCMA forfeitures are judicial, the local NOAA must request the transfer of funds by submitting a form DAG-71 to the U.S. Attorney's Office in the District where the forfeiture action is pending. In preparing the DAG-71, NOAA Headquarters legal counsel will not be required to complete Section VII, Block B. Upon receipt of the DAG-71, the U.S. Attorney's Office shall make a decision using form DAG-72 on forfeitures valued less than $1,000,000 and a recommendation on forfeitures valued over $1,000,000. The U.S. Attorney's Office does not have to consult with any other DOJ investigative agencies concerning requests

Tab No. 40

Tab No.

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

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

Transfer of forfeited real property under the Weed and Seed Initiative may, alternatively, be accomplished through the U.S. Department of Housing and Urban Development (HUD). In this regard, the Department of Justice has statutory authority to transfer forfeited property to another federal agency. Under this option, after a property is identified as a suitable Weed and Seed transfer and is forfeited, title to the property will be transferred to HUD. After the initial transfer, HUD will then retransfer the property to the pre-selected recipient, consistent with understandings reached in consultation with Federal, State and local agencies and the pertinent United States Attorney's Office.

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

1. Mortgages

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

2. Qualified Third Party Interests

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

E. Asset Seizure, Management and Case-Related Expenses

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

F. Law Enforcement Concurrence

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

G. Contact Point

Questions regarding this policy and procedure may be directed to the Executive Office for Asset Forfeiture, (202) 616-8000.

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 or local law enforcement agency which is entitled to an equitable share of the net proceeds from the sale of the property to be transferred.

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

This Memorandum establishes guidelines and authorizes the transfer of seized and forfeited real property, in appropriate cases, to States, political subdivisions and private non-profit organizations in support of the Weed and Seed Initiative.

A. General Authorization

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

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

B. **Identification and Use of Forfeited Real Property**

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

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

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

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

1. **Sharing Requests**

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

2. **Transfers to State and Local Agencies**

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

III. Administrative Forfeiture by Agreement After Cost Bond Filed

This Office's memorandum styled "Policy Regarding Forfeiture by Settlement," October 31, 1991, sets out (at page 3) the Department's policy for settlements in which the claim is withdrawn. In accord with that policy, the forfeiture should proceed administratively pursuant to a written settlement agreement that includes specific reference to withdrawal of the claim.

When a claim and a cost bond have been filed and the claim is withdrawn pursuant to a settlement agreement, the Department's policy regarding the disposition of the cost bond is as follows:

A. If allowable costs have not been incurred,

1. the settlement agreement should provide for return of the cost bond, or the entire amount deposited as the cost bond; and

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

B. If allowable costs have been incurred,

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

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

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

IV. U.S. Customs Service Cases Generally

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

Questions regarding disposition of costs bonds in forfeiture cases other than Customs cases should be referred to the Asset Forfeiture Office, Criminal Division, FTS 368-1263 or (202) 514-1263.

Office of the Deputy Attorney General

Washington, D.C. 20530

DIRECTIVE NO. 92-5

May 26, 1992

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service
Chief Postal Inspector, Postal Inspection Service
Assistant Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco and Firearms
Director, U.S. Secret Service

FROM: Jeffrey R. Howard
Principal Associate Deputy
Attorney General

SUBJECT: Weed and Seed Initiative; Transfers of Real Property

Executive Summary: This memorandum describes the Weed and Seed Initiative and explains how federally forfeited real properties may be transferred to State and local public agencies and private non-profit organizations for use in support of the Weed and Seed Initiative. Importantly, this memorandum sets forth additional guidance to permit the expanded use of federally forfeited real property to support Weed and Seed programs.

The memorandum reviews the legal authority for this change in the sharing program. It then describes the procedure by which Weed and Seed transfers are to be accomplished. In summary, the process parallels the current sharing procedure including use of Form DAG-71, consultation among Federal, State, and local law enforcement authorities, and final approval of real property transfers by the Office of the Deputy Attorney General. Where there is a legal impediment to a Weed and Seed transfer through the participating State or local law enforcement agency, the transfer can still be accomplished through the U.S. Department of Housing and Urban Development (HUD). HUD will also play a consultant role in transfers made through State and local law enforcement agencies.

The costs which may be charged against the cost bond are set forth in 28 U.S.C. §§ 1920 and 1921.[2] These costs are:

A. the fees of the clerk;

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

   1. the Marshal's fees for service of the complaint, the warrant of arrest in rem, or any other writ, order, or process in the case;

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

   3. the Marshals fees for the preparation of public notices; and

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

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

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

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

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

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

Pursuant to § 1920, "[a] bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."[3]

II. General Policy

A. Upon receipt of the cost bond from the seizing agency, the U.S. Attorney shall forward the bond to the U.S. Marshal.[4] The U.S. Marshal shall hold the bond in the Seized Asset Deposit Fund pending resolution of the claim for which the cost bond was filed.

B. If any of the property for which the cost bond was filed is judicially forfeited,

1. judgment for allowed costs should be included in the judgment of forfeiture or sought by separate motion and order;

2. the costs allowed should be recovered from the amount of the cost bond; and

3. the amount remaining, if any, after the deduction of allowed costs should be returned.

C. In the settlement of judicial forfeiture cases, the U.S. Attorney shall retain the authority to waive the costs incurred in the case and return the bond.

D. If none of the property for which the cost bond was filed is forfeited, the cost bond, or the entire amount deposited as the cost bond, should be returned to the claimant when the property is returned.

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

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

U.S. Department of Justice

Office of the Deputy Attorney General

DIRECTIVE NO. 92-4

Executive Office for Asset Forfeiture

Washington, D.C. 20530

April 7, 1992

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service
Chief Postal Inspector, Postal Inspection Service
Assistant Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco and Firearms
Director, U.S. Secret Service

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Disposition of Cost Bonds

I. Applicable Law

Pursuant to statute, the seizing agency receiving a claim and a cost bond transmits them to the U.S. Attorney for the institution of a judicial forfeiture. 19 U.S.C. § 1608, 26 U.S.C. § 7325(3). The cost bond secures the claimant's obligation to pay costs in the event that forfeiture results.[1]

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

highly liquid assets.[1] The relevant regulatory definition of "monetary instruments", 31 C.F.R. § 103.11(m), cannot be construed as encompassing bank accounts. Consequently, section 1607(a)(4) may not be used as a basis for the administrative forfeiture of seized bank accounts.

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

In sum, administrative proceedings are not to be used to forfeit bank accounts exceeding $500,000 in value. The Criminal Division's Asset Forfeiture Office (FTS 368-1263) is available to provide guidance regarding these issues and should be notified of any challenges to the validity of previously concluded administrative forfeitures of bank accounts.

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

Tab No. 37

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

DIRECTIVE NO. 92-3

February 28, 1992

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, United States Marshals Service
Chief Postal Inspector
Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco, and Firearms
Director, United States Secret Service
Chief, United States Park Police

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Opinion on Administrative Forfeiture of Bank Accounts

Executive Summary: The question has arisen whether it is permissible to administratively forfeit seized bank accounts under the provisions of either section 1607(a)(1) or section 1607(a)(4) of Title 19, United States Code.

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

Rationale: Section 1607(a)(4) of Title 19 does not apply to bank accounts. Rather, it states that "monetary instruments" may be administratively forfeited without regard to dollar value and incorporates by reference 31 U.S.C. § 5312(a)(3) which defines the term "monetary instrument" to mean currency, travellers' checks, various forms of bearer paper, and "similar material". The legislative history of 31 U.S.C. § 5312(a)(3) indicates that Congress intended the term "monetary instrument" to apply only to

charged in a civil or criminal forfeiture action before July 1, 1991; and (2) application of the policy to claims held by bona fide, secured creditors other than a "financial institution" as defined in the Policy. You are also authorized to determine when exceptional circumstances exist that warrant the payment of attorneys' fees.

Factors to be considered in connection with the Mortgage Holder Policy include but are not limited to (1) any hardship to the creditor resulting from a delay in settlement; (2) excessive costs to the Government due to interest payments pending sale; and (3) whether the property in question is likely to be sold in the near future at a price sufficient to cover the amount of the lien. Exceptions should be granted in writing pursuant to a written request from the United States Attorney after he or she has consulted with the pertinent U.S. Marshals Office. Determinations as to exceptional circumstances warranting the payment of attorneys' fees shall take into account applicable case law in the District or Circuit where the forfeiture action is pending.

cc: Jeffrey R. Howard
Associate Deputy Attorney General

Tab No. 36

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

DIRECTIVE NO. 92-2

February 20, 1992

MEMORANDUM

TO: George W. Proctor
Director
Asset Forfeiture Office

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Clarification of AFO Authorities

Confirming our conversations, this is to clarify your authority with respect to waiving the sixty-day rule for filing of DAG-71s and granting exceptions to the Expedited Forfeiture Settlement Policy for Mortgage Holders.

1. Part V.A.5. of The Attorney General's Guidelines on Seized and Forfeited Property (July 31, 1990) provides that "No request [for equitable sharing] shall be considered if it is submitted after sixty (60) days following the seizure." Our intention in drafting this rule was that exceptions could be granted for good cause shown and I have done so on several occasions. More specifically, I have granted exceptions in circumstances where the requesting State or local agency had no notice of the seizure, the assistance was provided after the seizure occurred, the agency was inadvertently misled by a federal official as to whether it qualified for sharing, and State and local agencies without prior experience with sharing were simply unaware of the sixty-day rule. You or your designee are hereby authorized to grant exceptions to the sixty-day rule on the above or other grounds where you conclude that the granting of an exception is necessary to avoid a harsh or inequitable result.

2. The Expedited Forfeiture Settlement Policy for Mortgage Holders (July 1991) incorporates a number of limitations upon its application. You or your designee are hereby authorized to grant exceptions to the following limitations: (1) application of the policy to real properties seized, arrested, restrained, or

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Tab No. 35

or clouds involving the propriety of the forfeiture of the property.

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

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

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

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

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

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

III. CIRCUMSTANCES FOR THE USE OF A GENERAL WARRANTY DEED

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

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

which will accrue over time as a result of each successive use of a general warranty deed.

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

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

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

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

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

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

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

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

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

IV. DISPUTE RESOLUTION

The Executive Office for Asset Forfeiture will resolve any disputes that may arise in the event the United States Attorney and the U.S. Marshal cannot agree on the appropriate form of deed to be used.

to convey whatever right, title and interest that the Government had as of the execution date. A special warranty deed[1] may be used instead when the Marshal, in consultation with the United States Attorney, concludes that such a deed is necessary and appropriate under the facts of a particular case, as described in Section II below. Finally, property may be transferred by a general warranty deed,[2] but it is Department policy to use general warranty deeds only in exceptional circumstances as outlined in Section III below.[3]

II. CIRCUMSTANCES FOR THE USE OF A SPECIAL WARRANTY DEED AND INDEMNIFICATION AGREEMENT

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

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

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

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

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

[2] 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.

[3] 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.

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

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

f. The forfeiture is subject to a pending appeal.

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

If such special circumstances exist, the Marshal in consultation with the United States Attorney may execute a special warranty deed to the buyer specifically warranting against claims arising from the applicable circumstances as enumerated in a. through g. above. Such special warranty deeds are permitted by the authority delegated to the Marshal in 28 C.F.R. § 0.156.

It is suggested that the language of the special warranty deed be as follows, with the insertion of the specifically applicable circumstances as enumerated in a. through g. above:

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

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

Tab No. 33

U.S. Department of Justice

Office of the Deputy Attorney General

DIRECTIVE NO. 92-1

Executive Office for Asset Forfeiture

Washington, D.C. 20530

February 12, 1992

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service
Chief Postal Inspector, Postal Inspection Service
Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco and Firearms
Director, U.S. Secret Service
Chief, U.S. Park Police

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Departmental Policy on Attorney General's Authority to Warrant Title

I. GENERAL POLICY

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)(10) reads as follows:

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

The authority of the Attorney General to dispose of forfeited real property and to execute deeds and warrant title has been delegated to the Director of the U.S. Marshals Service, by 28 C.F.R. § 0.111(i), and redelegated to chief deputies or deputy U.S. Marshals by 28 C.F.R. § 0.156.

The preferred deed to transfer forfeited property is a U.S. Marshal's quitclaim deed (USM-159A) executed by the Marshal. The quitclaim deed makes no warranty representations. It serves only

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

DIRECTIVE NO. 91-16

91 DEC 13 PM 4:24

December 13, 1991

MEMORANDUM

TO: George Proctor
Director
Asset Forfeiture Office
Criminal Division

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Delegation of Authority
to Approve Exceptions to Cash Mangement Policy

The authority to approve exceptions to the Department of Justice cash management policy that requires all seized cash, except where it is to be used as evidence, to be deposited promptly into the Seized Asset Deposit Fund, as set forth in Section VII (I) of The Attorney General's Guidelines on Seized and Forfeited Property (July 1990), is hereby delegated to the Director, Asset Forfeiture Office (AFO), Criminal Division. To the extent any serious disagreements arise in AFO's exercise of this authority, this Office will be available to resolve them.

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No. 48

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

DIRECTIVE NO. 93-7

December 10, 1993

MEMORANDUM

TO: All United States Attorneys
Director, Executive Office for U.S. Attorneys
Assistant Attorney General, Criminal Division
Director, U.S. Marshals Service
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Chief Postal Inspector, Postal Inspection Service

FROM: Cary H. Copeland C H C
Director and Chief Counsel

SUBJECT: Payment of Costs and Attorney's Fees From the Assets Forfeiture Fund (the Fund) - Limited Authority

Generally, the Fund is not available to pay judgments arising from asset forfeiture cases, including costs and attorneys fees. This Office has reviewed the narrow legal question whether the Fund is available to pay judgments of expenses and attorney's fees under 28 U.S.C. § 2412(d). This provision is commonly referred to as the Equal Access to Justice Act (EAJA). Pursuant to a delegation of authority from the Attorney General, I conclude that the Department of Justice (the Department) has the legal authority pursuant to 28 U.S.C. § 524(c)(1)(A) to permit the use of Fund monies to pay EAJA awards arising from actions related to the forfeiture, attempted forfeiture or seizure for forfeiture of property.[1]

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

"(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified

DIRECTIVE NO. 93-7

Assets Forfeiture Fund

The legislative history of the Comprehensive Crime Control Act of 1984 lists several reasons for the various forfeiture provisions included in the Act. That history cites as a significant problem the financial burden an aggressive pursuit of forfeiture cases places on our law enforcement agencies. Where the sale of property does not realize more than the total expenses incurred in storing, maintaining, and selling the property, the net loss was carried by the law enforcement agency's budget. The solution proposed was the creation of the Assets Forfeiture Fund from which moneys could be appropriated to defray the mounting costs associated with forfeiture actions. While the legislative history does not mention EAJA awards, it is clear that (1) Congress wanted a more aggressive use of forfeiture, (2) the Fund was created to defray the costs associated with forfeiture actions that formerly were borne by law enforcement agency budgets, and (3) the occasional EAJA award was a known potential cost of forfeiture actions that would be borne by agency budgets.

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

Policy

Notwithstanding the legal availability of the Assets Forfeiture Fund, the Department is limiting by policy the cases in which Fund monies may be used for EAJA awards. The Congress enacted the EAJA for specific public policy reasons. It would be inappropriate for the Fund to be used in a manner that completely ignored or negated the public policy basis for EAJA. In an attempt to balance the competing interests involved, the following three tier policy is established:

1. Actions Consistent With Existing Law and Policy: The Assets Forfeiture Fund will fund the EAJA award in any case in which the actions of the federal participants were clearly consistent with current law and Department

DIRECTIVE NO. 93-7

Discussion

EAJA

The history of EAJA indicates it was enacted to encourage private parties to pursue their legitimate claims against the government, and to deter inadvisable or inappropriate official action, including legal action, by the government, with its high cost ramifications for the non-government party. Prior to enactment of the EAJA, it was believed that many small businesses and individuals with legitimate claims or defenses failed to defend themselves against the government due to the high cost involved. Since the permanent judgment appropriation of the Treasury was available if the government ever suffered an adverse judgment, there did not appear to be any deterrent to overreaching by Executive Branch agencies. This imbalance in power was largely unavoidable. However, Congress concluded that certain changes could be made to mitigate this imbalance.

In EAJA, Congress provided that the non-government party could seek reimbursement of costs and legal fees if the government's position was not substantially justified. In addition, Congress decided that if the presiding court determined that the government position was not substantially justified, then requiring the agency that took the official action to pay the costs and legal fees from its own operating funds would serve as an effective deterrent to government overreaching. Thus, 28 U.S.C. § 2412(d)(4) states that the award will be paid "from any funds made available to the agency by appropriation or otherwise." (Emphasis added). The Assets Forfeiture Fund allocations represent funds that are "otherwise" available to an agency.

When the EAJA was enacted, the primary source of funds to pay judgments against the United States was the permanent judgment appropriation. Agency appropriations, and other funds available to each agency, were generally not available to pay these costs. As noted above, the EAJA expressly shifted responsibility for these costs from the permanent judgment appropriation to operating funds available to the individual agencies. In other words, payment of EAJA awards arising from agency program operations was a part of the operating costs with which each agency had to cope. This practice was well established by October 1984.

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(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise..."

has contested the case and incurred an adverse judgment, a copy of the court order should be provided to all involved agencies immediately to permit their participation in preparation of the request package. The request should be forwarded by the U.S. Attorney's Office to this Office by express mail within five (5) business days of the court order. The request should include, as appropriate:

1. a copy of the court order indicating that the award is being made under 28 U.S.C. § 2412(d) or that the government's position was not substantially justified;

2. a copy of the seizure warrant and associated affidavit or a copy of the probable cause statement supporting the seizure, if the seizure was cited as a basis for the award;

3. a copy of any pleadings or answers or a description of any litigative position that was cited as a basis for the award;

4. a description of any governmental action not referenced above that was cited as a basis for the award;

5. a description of any extenuating factors affecting the seizing agency and the U.S. Attorney's Office that should be considered;

6. a list of the agencies involved in the case; and

7. a joint proposal for allocation of responsibility for the EAJA award among the involved agencies.

If the U.S. Attorney's Office is proposing to settle an EAJA claim, the materials cited in items (2) through (7) above should be provided to this Office in advance of agreeing to any settlement. This Office will consult with the Asset Forfeiture Office, Criminal Division, on proposed settlements. This policy is in addition to any other policies governing settlements.

Proposed court orders drafted by the government should be silent as to the source of funds for paying any award. The identification of appropriate sources of funding to pay court judgments is an Executive Branch function and may vary from case to case depending on the facts of the particular case.

Allocation of Responsibility

In general, responsibility for an EAJA award in a forfeiture

policy. This includes those cases in which (1) this Office is involved in planning a specific case or program initiative and the participating agency was executing the planned initiative in good faith, (2) the federal participants were executing their responsibilities in consonance with current law and Department policy but the court creates a novel reason or basis for overturning a case that could not be anticipated, and (3) similar "no fault" cases. Once approved, EAJA awards in these cases will be paid by the Fund against the case related expenses category.

2. Consistency With Existing Law and Policy Unclear: The Assets Forfeiture Fund allocations of the federal participant will be available to fund awards where the agency personnel were acting in good faith but it is not clear that their actions were consistent with existing law and Department policy. Once approved, the funds are to be taken from the case related expenses category. If there are insufficient funds available to cover the award, then the shortfall may be made up by funds available for other categories of expense. A request for reallocation will be approved for this purpose. Total allocations will not be increased to make up for the payment of the award.

3. Actions Inconsistent With Existing Law or Policy: In any case in which the court finds bad faith or an intentional disregard for existing law or Department policy by the federal participants, the Assets Forfeiture Fund will not be available, either directly or indirectly, to fund the EAJA award.

Procedure

No EAJA award may be charged against the Assets Forfeiture Fund or the federal participant's Fund allocations without the express written approval of this Office. Requests for approval to charge an EAJA award against the Fund or against Fund allocations must be submitted to this Office in writing.[2] If the government

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[2] In non-forfeiture cases, the U.S. Attorney's Office should follow any procedures established by the Executive Office for U.S. Attorneys regarding notification of pending settlements or adverse judgments. The AFF and AFF allocations are not available to fund EAJA awards in non-forfeiture cases. Therefore, the Executive Office for Asset Forfeiture should not be notified of actions in non-forfeiture cases.

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case will be allocated equally among the participants, including the U.S. Attorney's Office. However, this allocation may be modified by this Office depending on the specific findings made by the court and extenuating circumstances described by the participants. Availability of the Assets Forfeiture Fund to certain participants in a case must not be used to relieve other involved agencies of responsibility for a portion of the award.

Execution of Payment

Upon approval of the request for authority to pay an EAJA award directly from the Assets Forfeiture Fund, this Office will notify the appropriate U.S. Marshal's Office that the award may be paid. The U.S. Marshal will charge the award directly against the Assets Forfeiture Fund. If the request is to permit use of Fund allocations to pay an EAJA award, the participants will be notified directly by this Office of the action on the request.[3] EAJA charges will be billed against the case related expenses category under subobject class code 4204. Questions concerning this policy may be referred to me or to Michael Perez, Assistant Director for Financial Management, at 202-616-8000.

Effective date

This policy is effective with respect to judgments entered on or after October 1, 1993.

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[3] In the case of awards to be paid by the U.S. Attorneys, the Financial Management Service in the Executive Office for U.S. Attorneys will also be notified and will be responsible for processing the payment.

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

DIRECTIVE NO. 94-1

January 10, 1994

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service
Chief Inspector, Postal Inspection Service
Chief, U.S. Park Police

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Policy Regarding Work with DynCorp Contract Employees

Effective July 21, 1993, the Department of Justice (DOJ) entered into a contract with DynCorp to provide the administrative support to our asset forfeiture efforts. Under this contract, DynCorp will provide administrative support services to the DOJ asset forfeiture program and other agency missions approved by this Office to be supported by this contract. Data processing and linguistic services are excluded from the scope of this contract.

In reviews of the previous support services contract, four problem areas were consistently identified. A discussion of each is attached. Your assistance in ensuring that all necessary implementation actions are taken to avoid recurrence in the contract with DynCorp is appreciated. Our ability to use contract employees in support of the asset forfeiture program has been enormously beneficial, therefore it is essential that we comply fully with pertinent federal laws and regulations and with the terms of the contract itself if we expect to be permitted to continue to use asset forfeiture proceeds to pay for the costs of contract employees.

Points to Remember
When Working with DynCorp Contract Employees

I. RECRUITING, HIRING AND TERMINATION OF CONTRACT EMPLOYEES IS THE RESPONSIBILITY OF DYNCORP.

DynCorp must do **all** recruiting, including advertising, for their employees. The Government cannot advertise or pay to advertise for DynCorp positions. The Government may encourage qualified persons to submit applications to DynCorp.

DynCorp must do **all** screening of applicants for DynCorp positions. Federal employees may be present during interviews conducted by DynCorp. Questions for the applicant may be provided to the DynCorp interviewer.

Selection of contract employees must be made by DynCorp. Advice of the Government may be considered in the selection process. Likewise, all hiring is done by the contractor and DynCorp must extend any offer of employment. The contract employee also may only be terminated by DynCorp.

II. DAY-TO-DAY SUPERVISION OF DYNCORP EMPLOYEES IS THE RESPONSIBILITY OF DYNCORP.

A contract employee may not work directly for or be supervised by a federal government employee without express statutory authority. The Assets Forfeiture Fund statute does not provide such authority. The day to day supervision of each of the contract employees is the responsibility of the designated DynCorp supervisor.

- Federal employees must refer work projects to the DynCorp supervisor to assign to DynCorp employees.
- Problems with work products or contract employee performance should be discussed with the DynCorp supervisor.
- Federal employees must not sign work plans or performance appraisals for DynCorp employees.
- Federal employees must not approve leave for DynCorp employees, but should consult with the DynCorp

As stated in the contract, the contract employees are not government employees and should not hold themselves out to be such. In this regard, DynCorp employees may not have access to grand jury materials unless so ordered by the court pursuant to Rule 6(e)(3)(C)(i). Each component using the administrative support contract is required to establish affirmative controls over classified, tax, grand jury, or other sensitive information by contractors to assure compliance with all relevant laws and regulations.

Any questions regarding the use of DynCorp contract employees should be referred to the Contracting Officer, Mr. Garland Sharp on 202-307-1961 or Rob Weeks, the Contracting Officer's Technical Representative on 202-616-8005.

Effective Date: This directive is effective immediately and supersedes directive 91-8, Points to Remember Regarding Work with Ebon Contract Employees, dated May 20, 1991.

Attachment

cc: Charles Bartoldus
Acting Director
Executive Office for Asset Forfeiture
Department of the Treasury

- Shall not do investigative work without the specific approval of the Executive Office for Asset Forfeiture. However, contract personnel may research public information sources or obtain information from commercial data bases or obtain documents or other information from other agencies that are related to the forfeiture of assets that have been seized or are targeted for seizure.

- Shall not conduct interviews on behalf of the Government.

- Shall not have access to non-forfeiture computer data bases without the specific approval of the Executive Office for Asset Forfeiture.

- Shall not handle seized assets or evidence during the pendency of the forfeiture action, unless the employee is in one of the driver/messenger or property custodian labor categories.

- Shall not sign Government forms on behalf of the Government. This prohibition does not apply to the signing of document receipts or Certificates of Service.

- Shall not represent the Government in negotiations, conferences, or meetings. However, this does not preclude their attendance at negotiations, conferences, or meetings if their attendance is necessary to perform their functions under the contract.

- Shall not attend Government training conferences except to the extent that the training is necessary to permit the performance of labor category descriptions set forth in the contract.

- Shall not drive official Government or seized vehicles, unless they are in one of the driver/messenger labor categories. Other DynCorp employees may use common carriers or drive their own vehicles and seek reimbursement for mileage from DynCorp.

- Shall not develop, modify, or maintain computer software or equipment. This does not preclude the use of computer resources to perform activities authorized under the contract.

supervisor to ensure that the supervisor is aware of proper staffing requirements.

- Federal employees must verify time and attendance for DynCorp employees. Under the terms of the contract, the Government only pays DynCorp for the actual hours that the contract employee is on duty. For example, DynCorp is not paid for days when the federal office is closed in observance of holidays. Similarly, if the DynCorp employee works from 9:00 AM to 5:00 PM and takes an hour for lunch, DynCorp is paid for seven hours. Certification that a contractor was on duty during periods they were absent may constitute fraud.

- While the Government should report to the DynCorp supervisor the circumstances and value of the efforts of an exemplary DynCorp employee, federal employees may neither demand, recommend specific amounts for, nor pay cash awards to DynCorp employees.

III. DYNCORP EMPLOYEES MAY ONLY PERFORM TASKS WITHIN THE TERMS OF THE LABOR CATEGORIES ENUMERATED IN THE CONTRACT.

When the contract with DynCorp was drafted, clerical and support functions attendant to administration of the asset forfeiture program were the only functions included. There are 18 labor categories included in the contract as it currently exists.

With the exception of the Project Director, Office Manager, Regional, and Program Manager labor categories, the majority of the work is related to maintaining and analyzing forfeiture information contained in automated systems or case files. Federal employees are cautioned not to request or encourage work assignments that fall outside of the purview of the contract labor descriptions.

DynCorp employees:

- Shall not be used for other than asset seizure and forfeiture work without specific approval by the Executive Office for Asset Forfeiture. Using DynCorp employees to fill in for non-forfeiture support staff is not appropriate.

- Shall not make decisions involving the discretionary exercise of government authority.

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IV. MAINTAINING THE DISTINCTION BETWEEN GOVERNMENT EMPLOYEES AND DYNCORP CONTRACT EMPLOYEES IS THE RESPONSIBILITY OF BOTH ORGANIZATIONS.

Extreme care must be taken to ensure that DynCorp contract employees are not given the trappings or appearances of a federal employee. Ensuring the separate and distinct identity of contract employees is necessary to ensure that your organization stays within the bounds of the contract and the law.

Federal employees are cautioned:

- Not to refer to DynCorp employees as "my employee" or "my staff."
- Not to provide identification cards or credentials that appear to be official Government employee identification. DynCorp employees must have identification that clearly indicates that they are contract employees.

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

DIRECTIVE NO. 94 - 2

February 16, 1994

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, United States Marshals Service
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Chief Inspector, Postal Inspection Service
Chief, U.S. Park Police

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Guidelines for Pre-seizure Planning

I. INTRODUCTION

This memorandum updates and supersedes the Department of Justice policy on pre-seizure planning set forth in the June 25, 1986, memorandum of former Deputy Attorney General D. Lowell Jensen, entitled Anticipating and Avoiding Problems Relating to the Management and Disposition of Seized and Forfeited Assets. Like that memorandum, this memorandum also is intended to encourage practices that will minimize or avoid the possibility that the Government will assume unnecessarily difficult or insurmountable problems in the management and disposition of seized assets.

This memorandum directs the United States Attorneys, or in administrative matters, 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 seizure of

III. GENERAL POLICY GUIDELINES

What follows are broad pre-seizure planning policy guidelines for all agencies participating in the Asset Forfeiture Program. Minor variations and exceptions to the mandatory aspects of these guidelines are permitted only with the explicit approval of the Executive Office for Asset Forfeiture.

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

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

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

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, are the building in which it operates, and the accounts receivable, accounts payable, etc., also being seized? All

real property, commercial enterprises, or other types of property which may pose potential problems of maintenance and/or disposition (e.g., animals and aircraft). These guidelines are intended to be flexible enough to enable each United States Attorney, or in administrative matters, the agent in charge of a field office, to establish and utilize procedures which clearly define pre-seizure planning responsibilities in his or her district or office.

II. SCOPE OF ASSETS COVERED BY GUIDELINES

Except in the most unusual of circumstances, pre-seizure planning as outlined herein shall occur prior to the seizure of all assets specified below for federal forfeiture. The degree and nature of pre-seizure planning will depend directly upon the circumstances and complexity of each case.[1]

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

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

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

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

1. Real Property - minimum net equity must be at least 20% of the appraised value, or $20,000, whichever is greater.[2]

2. Vehicles - minimum net equity must be at least $5,000, unless the person from whom the vehicle was taken was criminally prosecuted or is being criminally prosecuted by state or federal authorities for criminal activities related to the property, in which case, the minimum net equity must be at least $1,000;[3]

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;

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

6. All Other Personal Property - minimum net equity must be at least $5,000 in the aggregate.

A United States Attorney may institute higher district-wide thresholds for judicial forfeiture cases. Written notice of such higher thresholds shall be provided to the Executive Office for Asset Forfeiture.

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.

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[2] As a general rule, the Department of Justice does not seize or adopt contaminated real properties. See Directive No. 90-3, Department Policy Regarding the Seizure and Forfeiture of Real Property that is Potentially Contaminated, or is Contaminated, with Hazardous Substances, June 29, 1990.

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

ownership interests to be seized should be identified to the extent possible.

2. How and when is the asset going to be seized? The type and content of the seizing instrument and authority to enter or cross private property shall be communicated or provided, in advance, to both the investigative agency and the United States Marshals Service to ensure that each has the necessary information and legal authority to carry out its respective seizure and post-seizure responsibilities. Determine also if seizure is necessary now or can be safely postponed. (See discussion in part VI.B. below.)

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

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

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

IV. PLANNING CHECKLISTS AND FINANCIAL ANALYSIS WORKSHEET

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

A. Net Equity Values. In general, the following minimum net equity requirements exist.

search prior to seizure unless otherwise agreed in individual cases.

2. Financial Analysis; Avoiding Liability Seizures. When real property and businesses are targeted for asset forfeiture, the potential net equity must be calculated. (See financial worksheets attached at Appendix B.)

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

      (1) determine not to go forward with the seizure (see Alternatives to Seizure, Part VI below), or

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

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

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

In individual cases, these thresholds may be waived where forfeiture will serve a compelling law enforcement interest, e.g., forfeiture of a "crack house," or of a conveyance with hidden compartments. Any downward departure from the above thresholds must be approved in writing by a supervisory-level official and an explanation of the reason for the departure noted in the case file.

B. Planning Checklists. Either the personal property pre-seizure checklist or the real property/business pre-seizure checklist found in Appendix A is to be used for pre-seizure planning.

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

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

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

C. Financial Analysis Worksheet. A written financial analysis is required to facilitate and to document pre-seizure planning decisions. In cases where information relating to titles and liens cannot be acquired without compromising the investigation, the financial analysis may be completed post-seizure. (See Part IV.C.2.b below.) Sample financial analysis worksheets are attached at Appendix B. A United States Attorney may adopt these forms or develop his or her own.

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

potential loss to the United States Government (e.g., an immediate motion for interlocutory sale or stipulated sale of the property thereby minimizing asset management costs). A copy of this plan, along with the financial analysis worksheet, is to be sent to the Executive Office for Asset Forfeiture.

V. PRE-INDICTMENT AND OTHER FORFEITURE COORDINATION

A. Criminal Forfeitures.

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

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

B. Use of Seizure Warrants on Real Property.

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

Unless exigent circumstances are present, the Due Process Clause of the Fifth Amendment requires the Government to afford notice and a meaningful opportunity to be heard before seizing actual control of real property pending forfeiture. United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993). To establish exigent circumstances justifying an ex parte warrant for actual seizure and control of real property pending forfeiture, the Government must show that less restrictive measures (e.g., a lis pendens, restraining order, or bond) would not suffice to protect the Government's interests in preventing the sale, destruction, or continued unlawful use of the real property. Id. Additionally, the Good decision

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

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

D. Business Seizures. Due to the complexities of seizing an ongoing business and the potential for substantial losses from such a seizure, a United States Attorney's Office shall obtain the concurrence of the Asset Forfeiture Office prior to initiating a forfeiture action against, or seeking a temporary restraining order affecting, an ongoing business.

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

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

If the financial analysis worksheet shows that the property targeted for forfeiture has marginal or negative anticipated net sale proceeds, the United States Attorney's Office (or agency field office conducting an administrative forfeiture) must document a plan to protect innocent lienholders and to dispose of the property in a manner that will minimize

federal taxing authorities to have the property seized for back taxes.

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

5. In instances where the property is being marketed for sale, allow the sale to continue and seize the net proceeds.[5]

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

1. In certain circumstances, it may be advisable not to seize and take actual possession of the property, but only to "arrest" it for forfeiture by execution of a Warrant of Arrest under Rule C(3) of the Supplemental Rules for Certain Admiralty and Maritime Claims.[6]

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

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

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

[6] See Directive No. 90-10, Departmental Policy Regarding Seizure of Occupied Real Property, October 9, 1990.

makes clear that the Government can avoid the hearing requirement if it refrains from seizing actual control of the property but instead merely posts the property with the warrant of arrest *in rem* and leaves a copy of the process with the occupant in order to provide the court with the constructive control of the *res* required for the initiation of an *in rem* forfeiture.

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

VI. ALTERNATIVES TO SEIZURE

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

1. In negative or minimal net proceeds cases, allow the mortgage holder to foreclose on the mortgage, targeting the defendant's equity, if any, for seizure from the escrow account.[4]

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

3. In instances where a violator may be behind on local or federal taxes, work with the local or

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

disposition in accordance with law." It is also unnecessary to have the court confirm the manner and conditions of sale of forfeited property except in certain civil settlements. In the usual case, the United States Marshals Service is to determine the best method and conditions of sale of forfeited property in its custody.

VIII. DISPUTE RESOLUTION

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

EFFECTIVE DATE: March 1, 1994

Attachments:

Appendix A
- Personal Property Pre-seizure Checklist
- Real Property/Business Pre-seizure Checklist

Appendix B
- Real Property/Personal Property Net Equity Worksheet
- Business Net Equity Worksheet

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

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

VII. MANAGEMENT AND DISPOSAL OF SEIZED ASSETS

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

Prior to taking any action (e.g., in a settlement or plea agreement) concerning the management or disposition of property, the United States Attorney or agent in charge of the field office responsible for an administrative forfeiture case should consult with the United States Marshals Service or other custodial agency. Such discussions shall address the impact that such proposed action may have on the United States Marshals Service or other custodial agency in undertaking, continuing, or terminating custody of the property. If the interests of claimants are to be satisfied in whole or in part by payments from the proceeds of a sale of the property by the Marshals Service or other custodial agency, the proposed forfeiture order should provide specific guidance for the Marshals Service or other custodial agency concerning such payments.[7]

The disposition of property forfeited to the United States is an executive branch decision and not a matter for the court. Consequently, orders of forfeiture should be drafted broadly to direct forfeiture of the property to the United States "for

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[7] See Directive No. 91-15, Policy Regarding Forfeiture by Settlement, October 31, 1991.

ATTACHMENT TO PERSONAL PROPERTY CHECKLIST
EXAMPLES

☐ **AIRCRAFT**
tail #:
make:
EFMV:
condition: ☐ good ☐ fair ☐ poor ☐ salvage/scrap
location of log books and keys:
other information:
serial #:
model:
liens:

☐ **ANIMALS**
type:
location of registration documentation:
any other description and specific needs of the animals:
quantity:
EFMV:

☐ **CHEMICALS, HAZARDOUS MATERIALS and CONTROLLED SUBSTANCE GROWTH EQUIPMENT:**
type of operations:
type of containers:
EFMV:
type of chemicals:
number of containers:
other concerns:

☐ **ELECTRONIC EQUIPMENT/APPLIANCES:**
type:
condition: ☐ good ☐ fair ☐ poor ☐ salvage/scrap
other information:
quantity:
EFMV:

☐ **EXPLOSIVES/FIREARMS:**
make:
condition: ☐ good ☐ fair ☐ poor ☐ salvage/scrap
antique or collectible:
other information:
type:
model:
EFMV:

☐ **FURNITURE/HOUSEHOLD ITEMS:**
type:
condition: ☐ good ☐ fair ☐ poor ☐ salvage/scrap
other information:
quantity:
EFMV:

☐ **GAMBLING DEVICES:**
quantity:
condition: ☐ good ☐ fair ☐ poor ☐ salvage/scrap
EFMV:
other information:
type:
type of storage facility:
date of inventory:

☐ **HEAVY MACHINERY:**
type:
condition: ☐ good ☐ fair ☐ poor ☐ salvage/scrap
lien:
quantity:
EFMV:
other information:

☐ **JEWELRY/PRECIOUS ITEMS (Antiques, Fine Art, Precious Metal, and Collectibles):**
type:
EFMV:
other information:
quantity:
denomination, if collector coins:

☐ **VEHICLES:**
year:
model:
condition: ☐ good ☐ fair ☐ poor ☐ salvage/scrap
other information:
make:
NADA loan value:
NADA wholesale value:

☐ **VESSELS:**
name:
model:
length:
condition: ☐ good ☐ fair ☐ poor ☐ salvage/scrap
other information (include construction, e.g., wood, steel, etc.):
make:
type:
EFMV:

☐ **OTHER:**
type:
condition: ☐ good ☐ fair ☐ poor ☐ salvage/scrap
other information:
quantity:
EFMV:

Appendix A

PERSONAL PROPERTY PRE-SEIZURE CHECKLIST
(For seizures of personal property.)

PROPERTY INFORMATION

1. Description of property, i.e., location, type, quantity, condition, and estimated fair market value (EFMV): (See attachment for examples of information to include in the description.)

_____

_____

2. Name, address, and phone no. of owner of property: _____

_____

GENERAL INFORMATION

3. AUSA assigned: _____ 4. Telephone: _____
5. Address: _____
6. Case no. (when available): _____
7. Agency(ies) Involved: _____
8. Agent(s) name: _____
9. Phone no.: _____ 10. Agency case no.: _____
11. Is there a related criminal case or investigation? ☐ Yes ☐ No
12. If yes, name of criminal case: _____
13. Criminal AUSA assigned: _____
14. Is sharing anticipated? ☐ Yes ☐ No
15. If sharing is anticipated, is storage by participating state and local law enforcement agency also anticipated? ☐ Yes ☐ No

SEIZURE INFORMATION

16. Date USMS office was contacted: _____
17. Name and phone no. of USMS contact: _____
18. Pre-seizure meeting date: _____
19. Scheduled seizure date: _____
20. Relevant statute(s) authorizing seizure: _____

_____

21. Specific facts that demonstrate the existence of probable cause that the property violated statutes authorizing civil forfeiture: _____

_____

_____

22. Has information which will assist agents regarding their safety and welfare been transmitted to USMS? ☐ Yes ☐ No
23. Estimated post-seizure management expenses (including maintenance and disposition):

_____

24. Are there any public relations concerns anticipated? ☐ Yes ☐ No
25. If yes, has the appropriate public affairs personnel been advised or consulted? ☐ Yes ☐ No
26. Is the property potentially contaminated? ☐ Yes ☐ No
27. If yes, has any agency been contacted to provide contamination assessment on the property? ☐ Yes ☐ No

PREPARE NET EQUITY SHEET
(NET EQUITY WORK SHEET MUST BE ATTACHED)

28. Does the asset meet the minimum net equity threshold value? ☐ Yes ☐ No
29. If no, what law enforcement benefits are to be derived from the seizure?

_____

30. Can the losses be mitigated? ☐ Yes ☐ No
31. Explain: _____

_____

_____

Prepared by: Name/Title: Date

21. Factors relevant to the decision to continue operating the business:

_____

_____

22. Are business assets being seized? ☐ Yes ☐ No
23. If yes, describe assets to be seized: _____

_____

_____

24. Are accounts payable being seized? ☐ Yes ☐ No
25. Are accounts receivable being seized? ☐ Yes ☐ No
26. Is the business located in leased real property? ☐ Yes ☐ No
27. Is it located in real property owned by the business? ☐ Yes ☐ No
28. Type of ownership: ☐ Corporation ☐ Partnership ☐ Sole Proprietorship
☐ Other, explain: _____
29. Name(s), address(es), and phone no(s). of owner(s): _____

_____

30. Name, address, phone no., and grounds for claims of all potential claimants:

_____

_____

31. Name and location of contact person for access to business records:

_____

32. State the financial condition of the business: _____

_____

33. Business Liabilities: $ _____
34. Net worth: $ _____
35. Indicate source, i.e.: ☐ Estimate ☐ Balance Sheet (date: _____)

PREPARE NET EQUITY SHEET
(NET EQUITY WORKSHEET MUST BE ATTACHED)

36. Does the asset meet the minimum net equity threshold value? ☐ Yes ☐ No
37. If no, what law enforcement benefits are to be derived from the seizure?

_____

_____

38. Can the losses be mitigated? ☐ Yes ☐ No
39. Explain: _____

_____

GENERAL INFORMATION

40. AUSA Assigned: _____ 41. Phone No.: _____
42. Address: _____
43. Case No. (when available): _____
44. Agency(ies) Involved: _____
45. Agent(s) Name: _____
46. Phone no.: _____ 47. Agency Case No.: _____
48. Is there a related criminal case or investigation? ☐ Yes ☐ No
49. If yes, name of criminal case: _____
50. Criminal AUSA assigned: _____
51. Is sharing anticipated? ☐ Yes ☐ No

SEIZURE INFORMATION

52. Date USMS Office was contacted? _____
53. Name, phone no. of USMS contact: _____

REAL PROPERTY/BUSINESS PRE-SEIZURE CHECKLIST
(To be used in residential, business, and commercial seizures.)

PROPERTY INFORMATION (Complete all sections that apply)

A. REAL PROPERTY

1. Description of property, i.e., address/location (attach legal description of the property, title report, if available, and evidence of ownership): _____
2. Name, address, and phone no. of titled owner: _____
3. Is titled owner a fugitive? ☐ Yes ☐ No
4. Name, address, phone no., and grounds for claims of all potential claimants:
5. Type of Real Estate (check all that apply):
   - ☐ Single Family Detached Residence
   - ☐ Apartment/Condominium Unit
   - ☐ Apartment/Condominium Building
   - ☐ Commercial
   - ☐ Undeveloped Land
   - ☐ Other
6. Specific concerns regarding the property (include apparent major structural defects, unfinished or incomplete construction areas, etc): _____
7. Is the property potentially contaminated? ☐ Yes ☐ No
8. If yes, has any agency been contacted to provide contamination assessment on the property? ☐ Yes ☐ No
9. Is the property occupied? ☐ Yes ☐ No
10. If yes, attach name, phone no., and status of all known occupants (owner, renter, elderly, children, handicapped, pets, other) _____
11. Are contents of the house being seized? ☐ Yes ☐ No
12. If no, have arrangements been made to handle unseized personal property? ☐ Yes ☐ No
13. Is the property a historical site or proposed historical site under federal/local law? ☐ Yes ☐ No

PREPARE NET EQUITY SHEET
(NET EQUITY WORKSHEET MUST BE ATTACHED)

14. Does the asset meet the minimum net equity threshold value? ☐ Yes ☐ No
15. If no, what law enforcement benefits are to be derived from the seizure?
16. Can the losses be mitigated? ☐ Yes ☐ No
17. Explain: _____

B. BUSINESS

18. Name of business: _____
19. Type of business: _____
20. Is business ☐ operating ☐ idle

Appendix B

BUSINESS
NET EQUITY WORKSHEET

Case Name: _____

State and District: _____

Court Case of Docket No.: _____

Name of Business: _____

1. a. Net worth[1] $_____ (date of net worth appraisal _____)
   minus
   b. Expenses[2] - _____
   plus
   c. Income[3] + _____
   equal
   d. Net Value = _____

2. a. Net Value $ _____
   minus
   b. Liens[4] - _____
   equal
   c. U.S. equity[5] = _____

3. a. U.S. equity $ _____
   divided by
   b. Appraised value _____
   equal
   c. Percentage of U.S. equity[6] = _____ %

_____

Prepared by: (Name/Title) Date

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[1] Business Net Worth = Assets minus Liabilities. Assets include real property (lands and structures) owned, or leasehold interests held, by the business.

[2] Includes maintenance and disposal expenses, e.g., advertising, sales commission, sellers expenses, property manager salary, amounts not paid from business revenues, etc.

[3] Business revenues less operating expenses.

[4] Includes total of all liens, principal and interest from the date of seizure to the date this worksheet is completed.

[5] Districts are <u>not</u> authorized, without additional approval, to pay a lien or liens totalling more than $50,000.

[6] U.S. equity must be at least 20% or more of appraised value in order to pay a lien prior to sale.

54. Pre-seizure Meeting Date: _____
55. Scheduled Seizure Date: _____
56. Relevant statute(s) authorizing seizure: _____

_____

57. Specific facts which demonstrate the existence of probable cause that the property violated statutes authorizing civil forfeiture: _____

_____

58. Has information which will assist agents regarding their safety and welfare been transmitted to USMS?
☐ Yes ☐ No
59. Estimated post-seizure expenses (including maintenance and disposition):

_____

_____

60. Are there any public relations concerns anticipated? ☐ Yes ☐ No
61. If yes, has the appropriate public affairs personnel been advised or consulted? ☐ Yes ☐ No

_____

Prepared by: Name/Title Date

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

DIRECTIVE 94-9

November 23, 1994

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U. S. Marshals Service
Chief Inspector, Postal Inspection Service
Chief, U. S. Park Police
Commissioner, Food and Drug Administration

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Interest and Penalties on Taxes on Forfeited Realty

Policy Directives 93-6 and 94-4 established Department of Justice policy concerning the circumstances where and the extent to which taxes on forfeited real property may be paid. The Congress has recently enacted 18 U.S.C. 524(c)(1)(H) which statutorily authorizes the payment of State and local taxes on real property seized for purposes of forfeiture.

The question has arisen as to whether the Department of Justice will pay interest and penalties on State and local real property taxes. In order to ensure consistent national treatment of interest and penalties on State and local taxes, the following policy is set forth:

(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

Appendix B

REAL PROPERTY
PERSONAL PROPERTY
NET EQUITY WORKSHEET

Case Name: _____

State and District: _____

Court Case of Docket No.: _____

Identification of Real/Personal Property: _____

1. a. Appraised value $_____ (date of appraisal _____)
   minus
   b. Expenses[1] - _____
   plus
   c. Income[2] + _____
   equal
   d. Net Value = _____

2. a. Net Value $ _____
   minus
   b. Liens[3] - _____
   equal
   c. U.S. equity[4] = _____

3. a. U.S. equity $ _____
   divided by
   b. Appraised value _____
   equal
   c. Percentage of U.S. equity[5] = _____ %

_____

Prepared by: (Name/Title) Date

---

[1] Includes maintenance and disposal expenses, e.g., advertising, sales commission, sellers expenses to close, property manager salary, etc.

[2] Only applies to real property. Include any rental income.

[3] Includes total of all liens, principal and interest from the date of seizure to the date this worksheet is completed.

[4] Districts are <u>not</u> authorized, without additional approval, to pay a lien or liens totalling more than $50,000.

[5] U.S. equity must be <u>at least</u> 20% or more of the appraised value in order to pay a lien prior to sale.

excess of the rate specified by 28 U.S.C. 1961(a), e.g., where tax certificates have been sold to private investors;

(4) United States Attorneys, with the concurrence of the Asset Forfeiture Office, Criminal Division, may agree to a higher rate of interest provided that such higher rate is not punitive; and

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

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

DIRECTIVE 94-3

April 1, 1994

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, United States Marshals Service

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Disposition of Cost Bonds

Please remember that all final orders of forfeiture in judicial cases following an administrative seizure and referral must contain a provision for the disposition of the cost bond in accordance with Part II (General Policy) of Directive 92-4, a copy of which is attached.

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

EFFECTIVE DATE: May 1, 1994

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

DIRECTIVE NO. 92-4

April 7, 1992

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service
Chief Postal Inspector, Postal Inspection Service
Assistant Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco and Firearms
Director, U.S. Secret Service

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Disposition of Cost Bonds

I. Applicable Law

Pursuant to statute, the seizing agency receiving a claim and a cost bond transmits them to the U.S. Attorney for the institution of a judicial forfeiture. 19 U.S.C. § 1608, 26 U.S.C. § 7325(3). The cost bond secures the claimant's obligation to pay costs in the event that forfeiture results.[1]

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

The costs which may be charged against the cost bond are set forth in 28 U.S.C. §§ 1920 and 1921.[2] These costs are:

A. the fees of the clerk;

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

1. the Marshal's fees for service of the complaint, the warrant of arrest in rem, or any other writ, order, or process in the case;

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

3. the Marshals fees for the preparation of public notices; and

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

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

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

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

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

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

Pursuant to § 1920, "[a] bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."[3]

II. General Policy

A. Upon receipt of the cost bond from the seizing agency, the U.S. Attorney shall forward the bond to the U.S. Marshal.[4] The U.S. Marshal shall hold the bond in the Seized Asset Deposit Fund pending resolution of the claim for which the cost bond was filed.

B. If any of the property for which the cost bond was filed is judicially forfeited,

1. judgment for allowed costs should be included in the judgment of forfeiture or sought by separate motion and order;

2. the costs allowed should be recovered from the amount of the cost bond; and

3. the amount remaining, if any, after the deduction of allowed costs should be returned.

C. In the settlement of judicial forfeiture cases, the U.S. Attorney shall retain the authority to waive the costs incurred in the case and return the bond.

D. If none of the property for which the cost bond was filed is forfeited, the cost bond, or the entire amount deposited as the cost bond, should be returned to the claimant when the property is returned.

---

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

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

III. Administrative Forfeiture by Agreement After Cost Bond Filed

This Office's memorandum styled "Policy Regarding Forfeiture by Settlement," October 31, 1991, sets out (at page 3) the Department's policy for settlements in which the claim is withdrawn. In accord with that policy, the forfeiture should proceed administratively pursuant to a written settlement agreement that includes specific reference to withdrawal of the claim.

When a claim and a cost bond have been filed and the claim is withdrawn pursuant to a settlement agreement, the Department's policy regarding the disposition of the cost bond is as follows:

A. If allowable costs have not been incurred,

1. the settlement agreement should provide for return of the cost bond, or the entire amount deposited as the cost bond; and

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

B. If allowable costs have been incurred,

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

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

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

IV. U.S. Customs Service Cases Generally

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

Questions regarding disposition of costs bonds in forfeiture cases other than Customs cases should be referred to the Asset Forfeiture Office, Criminal Division, FTS 368-1263 or (202) 514-1263.

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

DIRECTIVE 94-4

Washington, D.C. 20530

April 29, 1994

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Director, United States Marshals Service
Commissioner, Immigration and Naturalization Service
Chief Inspector, Postal Inspection Service
Chief, U.S. Park Police

FROM: Cary H. Copeland CHC
Director and Chief Counsel

and
Robert D. Sharp
Acting Director
Asset Forfeiture Office
Criminal Division

SUBJECT: State and Local Real Property Taxes
in Criminal Forfeiture Cases

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

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

§ 853(i) by reference, 18 U.S.C. § 982(b)(1) (money laundering) and 18 U.S.C. §§ 793(h)(3) and 794(d)(3) (espionage).

Pursuant to this delegated authority, the Acting Director, Asset Forfeiture Office, Criminal Division, hereby authorizes the payment of State and local taxes on criminally forfeited real property in the same manner and to the same extent as is authorized for the payment of such taxes on civilly forfeited real property pursuant to Directive No. 93-6.

Questions concerning this policy directive may be directed to Mike Payne in the Asset Forfeiture Office at (202) 514-1263.

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

DIRECTIVE 94-5

Washington, D.C. 20530

June 1, 1994

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service
Chief Postal Inspector
Chief, U.S. Park Police

FROM: Cary H. Copeland C H C
Director and Chief Counsel

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

I. General Policy

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

II. Legal Analysis

The starting point for understanding the difference between a forfeiture sale and a judicial sale is the definition of the term "forfeiture." "Forfeiture has been historically defined as 'the divestiture without compensation of property used in a manner contrary to the laws of the sovereign.'"[1] Forfeiture, therefore, divests the owner of title and vests the title in the government. The forfeiture process is the extinguishment of the interest of the former owner, because of the criminal activity, and the vesting of all the right, title and interest in the property in the United States.[2] In United States v. A Parcel of Land, Buildings, Appurtenances and Improvements, Known as 92 Buena Vista Avenue, Rumson, New Jersey, the Supreme Court clarified the time when the forfeiture action vests title in the Government:

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

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

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

> relation back until it has obtained a judgment of forfeiture.[3]

In the forfeiture process, the Government does not own the property until a final order of forfeiture. However, once there is a final forfeiture judgment, the Government is vested with title by operation of law:

> ...If the Government wins a judgment of forfeiture under the common-law rule -- which applied to common-law forfeitures and to forfeitures under statutes without specific relation back provisions -- the vesting of its title in the property relates back to the moment when the property became forfeitable. Until the Government does win such a judgment, however, someone else owns the property.[4]

Thus, under the forfeiture process, the court's only involvement is to confirm the Government's ownership interest in the property and to hear claims by innocent owners to the property in the case.[5]

A. Forfeiture Sale Defined

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

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

[4] Buena Vista, 113 S.Ct. 1126, 1136.

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

The Attorney General's authority to dispose of forfeited property, is determined by examining the relevant forfeiture statutes. The forfeiture statutes at issue, 21 U.S.C. § 881(e), 21 U.S.C. § 853(h) and 18 U.S.C. § 1963(f) and (g)[6], give the Attorney General the authority to dispose of forfeited property "by sale or other commercially feasible means." It is clear from the language of the forfeiture statutes, from their legislative history, and from the cases and other authorities which have addressed this issue, that the Attorney General has complete authority to dispose of forfeited property.

1. Statutory Construction - Clear and Unambiguous

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

> We begin with the familiar canon of statutory construction that the starting point for

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[6] 21 U.S.C. § 881 provides:

(e)(1) Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may --
(B)...sell by public sale or any other commercially feasible means, any forfeited property...

21 U.S.C. § 853 provides:

(h) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or other commercially feasible means...

18 U.S.C. § 1963 provides:

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means...

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to --

...(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means ...

> interpreting a statute is the language itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

447 U.S. at 108.

Unless the literal or ordinary meaning of the words used by the legislature would lead to absurd results, or thwart the obvious purpose of the statute, those interpreting statutes do not look beyond the words used by that body. Commissioner v. Brown, 380 U.S. 563, 571 (1965); National Small Shipment v. CAB, 618 F.2d 819, 827 (D.C. Cir. 1980). The Supreme Court has repeatedly noted that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Burns v. Alcala, 420 U.S. 575, 580-81 (1975); Perrin v. United States, 440 U.S. 37, 42 (1979); cf. Bowsher v. Merck & Co., 460 U.S. 824, 830 (1983). The Court has also cautioned that "[o]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure from [the plain and unambiguous] language" of a statute. United States v. Albertini, 472 U.S. 675, 689 (1985) (citing Garcia v. United States, 469 U.S. 70, 75 (1984)) (emphasis added); See also, United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Avenue, Elgin, Illinois, 903 F.2d 490, 492 (7th Cir. 1990). Finally, forfeiture statutes are to be fairly and reasonably construed, so as to carry out the intention of the legislature. United States v. Stowell, 133 U.S. 1, 12 (1890).

Applying these principles, Congress has clearly stated that the Attorney General has the authority to dispose of property "by sale or other commercially feasible means."[7] The Attorney General's authority to sell forfeited property has been delegated to the United States Marshal.[8] Once the property is finally forfeited, title to the property is in the United States, and the forfeiture statutes provide the Attorney General with complete authority to dispose of the property by selling it, or by disposing of it by other possible commercially feasible means, such as transferring it to a state or local government. Any other interpretation thwarts Congressional intent.

The forfeiture process was thoroughly reviewed by Congress when it enacted the Comprehensive Crime Control Act of 1984. As

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[7] 21 U.S.C. § 881(e)(1)(B); 21 U.S.C. § 853(h); and 18 U.S.C. § 1963(f).

[8] 28 C.F.R. § 0.111(i) (the U.S. Marshal can dispose of property); 28 C.F.R. § 0.156 (the Deputy Marshal can sign deeds transferring the property).

part of that review process, Congress obviously looked at various ways forfeited property could be disposed and by whom. It appears that Congress selected the Attorney General as the focal point for judicial forfeiture actions, for maintaining the seized and forfeited property, for handling the disposition of that property and for maintaining the Assets Forfeiture Fund.[9] Significantly, Congress never used the term "judicial sale." Moreover, Congress obviously wanted the Attorney General to act independently since it used virtually identical language in each of the forfeiture statutes. Each of the statutes plainly states that the Attorney General can sell forfeited property or dispose of it using any other commercially feasible way. Conversely, Congress made no mention of 28 U.S.C. § 2001 or the need for confirmation of the sale by the court. Moreover, our construction of the statutes is fully supported by the existing legislative history of the relevant forfeiture statutes.

2. Legislative History Supports this Analysis

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

The existing legislative history reflects that Title III of the bill was meant to "enhance the use of forfeiture," particularly "the sanction of criminal forfeiture" to combat racketeering and drug-trafficking, two of the largest crime problems facing the nation. Id. at 3374. Congress sought by this new legislation to dismantle the economic power of criminal enterprises and forfeiture was intended as the mechanism "designed to strip these offender organizations of their economic power." Id. at 3375. The bill's primary focus was on "improving

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

the procedures applicable to forfeiture cases." One of the primary problems addressed by Congress was how to provide a "funding mechanism to allow use of forfeiture proceeds to defray the escalating costs to the government in pursuing forfeitures..." Id. at 3376.

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

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

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

Id. at 3388 (emphasis added).

Section 303 of the bill contains language with the same provisions for the disposition of property under Subsection 303(i) of the bill, to be incorporated in Title 21, Section 853(h), as part of the criminal forfeiture statute. Id. at 3396. Part C indicates that 21 U.S.C. § 881(e), contains the same provisions. Id. at 3399. Therefore, the existing legislative history clearly supports the position that the civil forfeiture statute contains the same authority of the Attorney General to sell or otherwise dispose of forfeited property. In fact, the Committee Report for section 881(e) provides some guidance of possible ways "other commercially feasible means" might be interpreted. The Committee Report states:

> Section 309 amends U.S.C. § 881(e) to achieve two purposes. First, it provides that the Attorney General may transfer drug related property forfeited under Title 21, United States Code, to another Federal agency, or to an assisting State of local agency, pursuant to Section 1616 of the Tariff act (19 U.S.C.

§ 1616), as amended in section 318 of the bill. Often, state and local law enforcement agencies give significant assistance in drug investigations that result in forfeitures to the United States. However, there is presently no mechanism whereby the forfeited property may be directly transferred to these agencies for their official use. This amendment, in conjunction with the Tariff Act amendment cited above, will permit such transfers and thereby enhance important cooperation between Federal, State, and local enforcement agencies in drug investigations.

3. Caselaw Supports this Position

Although the matter has not been the subject of substantial review, the available caselaw recognizes the Attorney General's authority to dispose of forfeited property. In United States v. Mageean,[10] the court states:

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

B. Judicial Sale Defined

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

> A judicial sale is generally defined as a sale made under a judgment or order of a court of competent jurisdiction by an officer legally appointed and commissioned to sell, who acts as a mere ministerial agent of the court which appoints him, such sale being

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[10] 649 F. Supp. 820, 824-25 (D. Nev. 1986), aff'd without opinion, 822 F.2d 69 (9th Cir. 1987).

> subject to confirmation by the court, and becoming absolute only when so confirmed.[11]

In a judicial sale conducted in accordance with 28 U.S.C. § 2001, it is the court which conducts and supervises the sale and sets its terms:

> According to 28 U.S.C. § 2001(a), when any realty sold under any order or decree of any court of the United States shall be sold at public sale, such sale "shall be sold upon such terms and conditions as the court directs". It was therefore within the Court's discretion to order confirmation as a term and condition of this public judicial sale.[12]

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

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

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[11] 47 Am. Jur. 2d Judicial Sales § 1 (1984); cf. Yazoo & Mississippi Valley Railroad Company, et al. v. City of Clarksdale, 257 U.S. 10, 19 (1921); Pewabic Mining Company v. Mason, 145 U.S. 349, 362 (1891); United States v. Branch Coal Corporation, 390 F.2d 7, 9 (3d Cir. 1968); Prudential Insurance Company of America v. Land Estates, Inc. 90 F.2d 457, 458 (2d Cir. 1937); Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co., 165 F. 162, 164 (8th Cir. 1908), appeal dismissed, 218 U.S. 685; United States v. Smith, 479 F. Supp. 804, 806 (N.D. Ga. 1979).

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

validity on the marshal's compliance with requirements of law.[13]

C. Distinction of Interlocutory Sales

It has long been the position of the Department of Justice that sales in accordance with 28 U.S.C. § 2001 are only necessary for interlocutory sales conducted in forfeiture cases.[14] Very often, interlocutory sales are necessary because the property to be forfeited is deteriorating in value. However, it must be remembered that an interlocutory sale is not the end of the forfeiture case. It is a precautionary step in which the property to be forfeited is turned into cash to prevent deterioration in value. The forfeiture case continues, and the United States, if successful, will receive a final forfeiture order against the cash fund or proceeds of the sale. Using this procedure, the proceeds of the sale are then treated as substitute res for the original property to maintain jurisdiction as well as to satisfy the final judgment.[15]

Questions regarding this policy may be directed to the Executive Office for Asset Forfeiture at (202) 616-8000.

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

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

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

U.S. Department of Justice

Office of the Deputy Attorney General

DIRECTIVE NO. 94-6

Executive Office for Asset Forfeiture

Washington, D.C. 20530

June 7, 1994

MEMORANDUM

TO: All United States Attorneys
Director, Executive Office for U.S. Attorneys
Assistant Attorney General, Criminal Division
Director, U.S. Marshals Service
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Chief Postal Inspector, Postal Inspection Service

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: 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, the Department of Justice adopts the following policy.

It is the policy of the Department of Justice to waive the payment of certain costs and expenses incident to the seizure and forfeiture of property that is being restored through remission to an owner victim of the underlying offense when the owner victim is

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

EFFECTIVE DATE: July 1, 1994

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

DIRECTIVE 94-7

November 9, 1994

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, United States Marshals Service
Chief Postal Inspector, Postal Inspection Service
Chief, U.S. Park Police
Commissioner, Food and Drug Administration

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Revised Policy Regarding Forfeiture by Settlement and Plea Bargaining in Civil and Criminal Actions

I. General Policy

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] The critical principle that must be applied to

[1] Settlements are contractual agreements to end legal disputes. U.S. v. ITT Continental Banking Co., 420 U.S. 223, 228 (1975); Village of Kaktovik et al. v. Watt, 689 F.2d 222, 230 (D.C. Cir. 1982). Such agreements cannot dispose of the claims of non-participants. Firefighters v. Cleveland, 478 U.S. 501, 529 (1986). Similarly, plea agreements, which are also contractual in nature, cannot subject property to forfeiture unless permitted by substantive statute. U.S. v. Reckmeyer, 786 F.2d 1216 (4th Cir.), cert. denied, 479 U.S. 850 (1986); U.S. v. Roberts, 749 F.2d 404 (7th Cir. 1984), cert. denied, 470 U.S. 1058 (1985). Moreover, a plea agreement may significantly limit existing statutory forfeiture provisions. See U.S. v. Paccione,
(continued...)

all settlements is that civil forfeiture, either judicial or administrative, should not be used to gain an advantage in a criminal case. Furthermore, all settlements must be in compliance with Attorney General Order No. 92-1598, as described in Part II of this directive.[2] Other general requirements applicable to all settlements include the following:

A. 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.

B. All settlements must be negotiated in consultation with the seizing agency[3] and the U.S. Marshals Service.[4] The

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[1](...continued)
948 F.2d 851 (2d Cir. 1991). It is important to note that while unambiguous, good faith settlements and plea agreements will be read and interpreted according to their terms, any ambiguities or imprecise terms will be construed against the government. See United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986); United States v. Field, 766 F.2d 1161, 1168 (7th Cir. 1985). Because the courts are inclined to read such terms against the government even when defense counsel has contributed to the ambiguity or imprecision of the agreement, Harvey, 791 F.2d at 301, it is essential that federal prosecutors and forfeiture attorneys strive for clarity, precision, and detail in defining the obligations of each party to the agreement. Fields, 766 F.2d at 1168.

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

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

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

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

(continued...)

agency's input is essential to reaching a settlement: (1) that is based on a common understanding of the facts and circumstances surrounding the seizure; and (2) that requires administrative action to be taken by the agency to implement, e.g., those settlements that include a referral back to the agency for administrative forfeiture of all or a part of the seized property.[5] Input from the U.S. Marshals

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[3](...continued)

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

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

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

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

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

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

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

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

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

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

(continued...)

Service should be sought to determine current and prospective expenses to ensure that the settlement is fiscally sound from the government's perspective.

C. It is the obligation of both the Assistant United States Attorney (AUSA) and the investigating agent before any type of settlement is discussed to determine what property, if any, is presently being processed for administrative forfeiture. Moreover, AUSAs may not reach agreements with defendants or their counsel about the return of property that is the subject of an administrative forfeiture proceeding without first consulting the seizing agency. Furthermore, a judicial forfeiture action may not be commenced against any property that has administrative forfeiture potential pursuant to 19 U.S.C. §§ 1607, 1609, unless it falls within one of the three exceptions identified in Directive No. 91-11, Forfeiture Procedures Pursuant to Increased Administrative Forfeiture Authority (July 5, 1991).[6] If an AUSA intends to pursue an exception

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[5](...continued)
(b) INS: Regional Director or designee.

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

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

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

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

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

[6] The three exceptions listed in Directive No. 91-11 are:

(1) Where several items of personalty are subject to civil forfeiture (a) under the same statutory authority, (b) on the same factual basis, (c) have a common owner, and (d) have a combined appraised value in excess of $500,000, they shall all be forfeited judicially. Monetary instruments as defined by 31 U.S.C. § 5312(a)(3) and Part 103 of Title 31, C.F.R., hauling conveyances or

(continued...)

under Directive No. 91-11, before doing so the seizing agency must be consulted to ensure that the agency has not already commenced an administrative forfeiture proceeding against the property.[7] More specifically, the AUSA handling the forfeiture must notify the seizing agency's contact of his/her intent to file a judicial forfeiture against the property so the seizing agency can stop the administrative process if in fact it is in progress. If the administrative forfeiture is completed, then it is not subject to judicial forfeiture. A completed administrative forfeiture is not waivable. The exceptions in Directive No. 91-11 should be explored prior to the commencement of the administrative forfeiture process.

D. Where the seizing agency disagrees with the United States Attorney's recommended settlement proposal, it must follow the procedures that are set forth in the regulations cited herein in footnote 2.

E. A United States Attorney has the authority to settle those judicial forfeiture actions involving property located

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[6](...continued)
seizures of personalty that occur over a period of weeks are not subject to this aggregation policy;

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

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

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

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

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

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

2. 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.

3. 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: (a) the claimant/defendant's interest in the property, (b) an admission of the facts supporting forfeiture, (c) the claimant/defendant gives up all rights to the property, (d) he/she gives up any right to contest the forfeiture, and (e) settlement should be supported by written agreement. Furthermore, the defendant, in the plea agreement, must admit to facts sufficient to support the forfeiture. The government, however, should not waive its right to reopen a civil forfeiture action where it is later determined that the settlement was based on false information or where the defendant violates his plea agreement.

G. Settlements shall not provide for partial payments, except upon the advice and approval of the Asset Forfeiture Office, Criminal Division, in consultation with the U.S. Marshals Service, Headquarters Seized Assets Division.[8]

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

I. 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.[9] The civil settlement documents should state this clearly.

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[8] In Department of the Treasury cases, the advice and approval of the Asset Forfeiture Office, Criminal Division should also be sought.

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

II. Monetary Amounts

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

(a) cases not in excess of $500,000; and

(b) cases between $500,000 and $5,000,000, provided that the settlement releases not more than 15% of the amount involved.

The United States Attorney must consult with the Asset Forfeiture Office, Criminal Division before settling forfeiture cases involving $5,000,000 or more, and before a settlement releasing more than 15% of the amount involved in any case between $500,000 and $5,000,000.[10]

The authority of the Assistant Attorney General pursuant to 28 C.F.R. § 0.160 for settlement of forfeiture cases is delegated to the Director, Asset Forfeiture Office, Criminal Division by paragraph (c) of Attorney General Order No. 1598-92. This authority is limited to settlements releasing not more than $2,000,000 or 15% of the amount involved, whichever is greater. When the proposed settlement would release more than $2,000,000 or 15% of the amount involved, whichever is greater, the Director, Asset Forfeiture Office, Criminal Division must refer the matter to the Deputy Attorney General for approval pursuant to 28 C.F.R. § 0.161.

III. Effecting Settlement Agreements Through Administrative Forfeiture

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

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[10] See supra note 2.

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

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

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

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;

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 the disposition of the cost bond;[11] and

f) A "hold harmless" provision and a general waiver of Federal Tort Claims Act rights and Bivens actions, as well as other actions based on the Constitution (e.g., the Excessive Fines Clause). Finally, a Halper waiver should be included so that future civil or criminal cases are not hampered by the settlement agreement.

2. The case should be promptly referred back to the seizing agency to reinstitute the administrative process. The seizing agency shall reinstitute the administrative forfeiture process to effectuate the

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[11] See Directive No. 92-4, Disposition of Cost Bonds (April 7, 1992).

agreement upon receipt of a referral in compliance with this policy, consistent with its lawful authority.

a) Where the Claim to All the Property is Withdrawn. Where the agreement provides for the claimant to withdraw the claim to all property covered by claim and cost bonds filed, the entire case will be referred back to the agency for administrative forfeiture. Re-publication of the notice of the administrative forfeiture action is not necessary, provided publication occurred prior to filing of the claim and cost bond.

b) Where the Claim to Only Part of the Property is Withdrawn. 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. Re-publication 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 and cost bond.

B. Civil Judicial Forfeiture Without Prior Administrative Action. In those other cases where the judicial action was commenced without a prior administrative forfeiture action having begun and a settlement agreement has been reached involving a proposed administrative forfeiture of seized property, (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. Criminal Forfeiture Action. In those cases where property has been seized or restrained for forfeiture under criminal statutes and an agreement reached between the United States Attorney and the claimant/defendant prior to an order of forfeiture relating to a proposed administrative forfeiture of the property, (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 provisions of A.1 and A.2, above, must be met before referral may be made to a seizing agency under this policy. The seizing agency shall initiate the administrative forfeiture process to effectuate such an agreement upon receipt of a referral in compliance with this policy, consistent with its lawful authority.

IV. Judicial Forfeiture by Settlement

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

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

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

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 short-cut the process will not be recognized as a valid forfeiture.

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

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

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

5. Proposed orders of forfeiture must be filed with the settlement agreement and include the terms of the settlement agreement.[12]

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

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

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

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

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[12] See also Directive No. 92-4, Disposition of Cost Bonds (April 7, 1992).

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

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

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

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

6. 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.[13]

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

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[13] See also Section I.G.

V. Acceptance of a Monetary Amount in Lieu of Forfeiture

A. A monetary amount may be accepted in lieu of forfeiture of the property in civil or criminal judicial forfeiture actions pursuant to 19 U.S.C. § 1613(c).[14] 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 § 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 U.S. Marshals Service will accept this court approved settlement and deposit the money (and share it where appropriate) in the same manner as the proceeds of sale of a forfeited item.

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

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

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[14] 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).

VI. Agreements to Exempt Attorneys' Fees from Forfeiture

Any agreement to exempt an asset from forfeiture so that it can be transferred to an attorney as fees must be approved by the Assistant Attorney General for the Criminal Division.[15]

VII. Settlement with Fugitives in Civil Forfeiture Cases

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

This policy supersedes Directive No. 91-15, Policy Regarding Forfeiture by Settlement, previously issued by the Executive Office for Asset Forfeiture on October 31, 1991. This does not affect Directive No. 93-3, Expedited Payment of Lienholders in Forfeiture Cases, issued on January 15, 1993.

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