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**ASSETS SEIZURE
& FORFEITURE:**

**DEVELOPING & MAINTAINING
A STATE CAPABILITY**

**REVISED
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Prepared in cooperation with the
Florence V. Burden Foundation

**National Institute of Justice and
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PREFACE

I am pleased to present the revised edition of the National Criminal Justice Association's (NCJA) instructional guide to forfeiture, *Assets Seizure & Forfeiture: Developing and Maintaining a State Capability*.

Assets Seizure was first published in 1988 with funding from the U. S. Department of Justice, National Institute of Justice and the Florence V. Burden Foundation. It was the culmination of some four years of study by the NCJA of forfeiture laws and their application and was published at a time when forfeiture was just coming into prominent use in conjunction with drug trafficking cases. The state of the art of forfeiture at that time was at its most rudimentary level. States were beginning to explore revising decades-old forfeiture laws to provide for their broader application; forfeiture experience in the states was limited and confined largely to urban areas; and few decisions had been handed down in forfeiture cases to provide insights into how courts might view issues evolving from the use of civil forfeiture or concerning the rights of innocent owners.

What was clear as the NCJA developed the 1988 guide was that forfeiture was a complex legal procedure that would require the close cooperation of police and prosecutors in developing policies and procedures for financing and organizing forfeiture capacities and applying forfeiture provisions. A central theme of the 1988 manual was that police and prosecutors should work together to produce a successful forfeiture from the beginning of an investigation to disposition of the case. This process necessarily would have to begin with a thorough knowledge of forfeiture laws and end with written procedures for maintaining seized assets and disposing of and distributing forfeiture proceeds.

In the eight years that have passed, nearly every state has amended its forfeiture provisions at least once. Police agencies — from the largest urban departments to the smallest rural agency — have engaged independently or in cooperation with federal, state, or other local agencies, in pursuing forfeiture in criminal investigations. Law enforcement agencies have become more adept at financial investigations, and many prosecutors' offices have developed special units to handle cases involving forfeiture. Billions of dollars in contraband have been seized and disposed of by state, local, and federal agencies. Billions of dollars in forfeited cash and property have been directed to beefing up law enforcement capacities and, more recently, expanding drug prevention and treatment programs.

The importance of viewing forfeiture as a process, however, has not been diminished as forfeiture experience has evolved in these intervening years. The need for interdisciplinary, interagency cooperation is no less, perhaps even

more, important today as more sophisticated criminals present police and prosecutors with greater challenges; as the courts begin to impose limits and safeguards on forfeiture applications; and as the revenue-raising potential of forfeiture piques the interest and concerns of policymakers and lawmakers at all levels of government and an increasing number of non-law enforcement constituencies.

The revised guide was funded by the Justice Department's Bureau of Justice Assistance (BJA). It underscores the NCJA's earlier call for treatment of forfeiture as a process. The guide has been updated to reflect the current state of the art and to capture insights and guidance from lessons learned through experience.

Chapter I provides a general overview of forfeiture provisions. Chapter II describes the main steps of the general forfeiture process. Chapter III includes a discussion of public policy interests affecting forfeiture programs. Chapter IV provides information on planning for the use of forfeiture. Chapter V discusses the role of police and prosecutorial discretion in forfeiture cases. Chapter VI provides a discussion of the use of financial investigations in forfeiture cases. Chapter VII discusses the management and disposition of seized or forfeited assets. Chapter VIII provides an explanation of various interagency approaches to developing a forfeiture capability. Chapter IX includes a model curriculum and practical exercise.

Forfeiture has proven itself to be an invaluable enforcement tool in the nation's struggle to manage its crime problem. It is my hope that this guide will help enhance the viability of the forfeiture process.

Gwen A. Holden
Executive Vice President
National Criminal Justice Association

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CHAPTER I

FORFEITURE LAWS AND PROCEDURES

Introduction

In technical terms, forfeiture is a legal mechanism by which property derived from or used in the furtherance of criminal activity can be seized and forfeited to the government, with the owner losing all rights to the property without compensation. In practice, however, it is most helpful to think of forfeiture in a broader sense, as a process that encompasses a spectrum of activities, from the seizure of an asset through the prosecution of the forfeiture case, the management of the asset pending the conclusion of the forfeiture proceeding, to the final disposition of the asset. Because forfeiture involves a series of interconnected steps, it is a process that is most effective as an enforcement tool when investigators anticipate and take into account the possibility of forfeiture at the outset of any criminal investigation.

Scope of Forfeiture Provisions

Governmental agencies' authority to proceed with the forfeiture of property is governed by statute. In most instances, forfeiture provisions are codified in states' controlled substances acts (CSA's). Approximately half the states also have adopted anti-racketeering or Racketeer Influenced and Corrupt Organizations (RICO) acts that contain forfeiture provisions. In addition, a number of states have general forfeiture provisions that authorize the seizure of property connected with the commission of any felony offense. (See Appendix A, Statutory Citations to State Forfeiture Provisions.) Although forfeiture provisions may be applicable in a variety of types of cases, this manual focuses on cases involving drug laws violations.

Forfeiture provisions serve several important purposes. First, the seizure and subsequent forfeiture of an individual's assets often affect that individual's ability to carry on his business. Whether the business itself is illegal, or whether proceeds from illegal activity have been used to finance a legitimate business, this interference with business operations caused by the use of forfeiture provisions clearly furthers the traditional law enforcement objective of preventing or stopping criminal activity. Second, forfeiture provisions allow

the government to strip an individual of assets that he has accumulated as a result of illegal operations. That individual who has engaged in illegal activity thus is deprived of the economic benefits of such activity and, perhaps, the economic incentive for continuing that illegal activity. Finally, the forfeiture of an individual's "ill-gotten gains" provides state and local governments with additional revenues and other resources to direct toward increased drug laws enforcement, drug education, drug treatment, or some combination of these strategies to fight the drug problem.

Forfeiture provisions originally were designed to cover the seizure of contraband materials or modes of transporting or facilitating the distribution of contraband materials. However, state and federal definitions of forfeitable property since have been expanded; in most jurisdictions, assets or proceeds traceable either directly or indirectly to the facilitation of, or participation in, violations of certain laws also are forfeitable. Forfeiture provisions may permit the seizure of controlled substances; raw materials, equipment, and products; books, data, and research materials; conveyances; money, securities, and other financial materials; drug paraphernalia; and containers. Two-thirds of the states now permit the forfeiture of real property.

Types of Forfeiture

Forfeiture provisions may authorize one or more types of forfeiture, including summary forfeiture, civil administrative forfeiture, and civil and criminal judicial forfeiture. The provisions generally also set out the types of notice requirements and other procedures necessary to carry out seizure and forfeiture in various situations, as well as procedures for disposition of forfeited assets or their proceeds.

Summary forfeiture proceedings involve the confiscation and destruction of contraband. Under most statutes, this type of forfeiture is restricted to property that is contraband *per se*, i.e., substances that have little or no medically-approved use and that therefore are subject to the strictest levels of control under CSA's, as well as plants cultivated for the production of controlled substances. For this type of forfeiture, no notice to the property owner is necessary.

A few states have provisions for administrative forfeiture in which disposition of the forfeiture case is handled without a court proceeding. Administrative forfeiture is intended to be a cost-effective alternative to court proceedings in instances in which the property has limited value and no one contests its forfeiture. In the several states that specifically authorize administrative forfeiture, such procedures may be available in cases in which the property involved has a value up to a certain amount or is a conveyance used to transport

or store controlled substances. Under federal law, property valued at \$500,000 or less — other than real estate; property, the importation of which is illegal (regardless of value); conveyances that have been used to import, export, transport, or store controlled substances (regardless of value); and certain monetary instruments (regardless of value) — may be forfeited administratively.

Depending upon a state's forfeiture provisions, judicial forfeiture proceedings may involve either civil suits brought against the property itself or criminal forfeiture proceedings brought in conjunction with criminal charges against defendants; some state statutes authorize both types of actions. Because most civil forfeitures involve *in rem* proceedings against property, the outcome of a civil proceeding is not dependent upon a criminal conviction of an owner or user of the property; the property itself is subject to a possible finding of "guilt." Criminal forfeiture proceedings, unlike civil proceedings, are *in personam* actions against individuals, and the outcome of such actions therefore depends entirely upon a property owner or user's being found guilty of, or pleading guilty to, the substantive criminal activity that has created forfeiture liability; officials generally may not seize property potentially subject to criminal forfeiture pending the outcome of the action against the defendant.

The differences between civil and criminal proceedings frequently are factors that influence a prosecutor's decision whether to proceed with forfeiture at all, and whether to proceed civilly or criminally. In the 1980s, when prosecutors first began to apply forfeiture in drug cases, civil forfeiture often was favored because it requires a lesser burden of proof. However, in recent years, the courts have moved to place limitations on the use of civil forfeiture because of concerns that the greater ease and appeal of civil forfeiture may be having the unintended consequences of inappropriate and excessive applications.

Disposition of the Property

At the conclusion of a successful administrative, civil, or criminal forfeiture, the title of the forfeited property vests in the government for disposition in accordance with applicable statutory requirements, guidelines, or other administrative directives. Generally, forfeiture disposition laws and policies provide that property that is not dangerous to health or safety or illegal to possess may be sold or put into official use by the seizing agency. If the property is sold, the proceeds from such sale are used to pay the costs incurred as a result of the seizure, maintenance, and forfeiture of the property and to satisfy any liens on the property. Depending on the specific requirements of a state's statute, remaining proceeds may be deposited into a special drug laws enforcement,

education, prevention, or treatment fund; the general account of the seizing or prosecuting agency; the state general revenue fund; a general education fund; a crime victims fund; or be divided by formula or other method among several accounts.

Federal Forfeiture Provisions

Forfeiture procedures under the federal CSA are similar to those of the majority of states. The federal statute authorizes summary, administrative, and civil judicial forfeiture proceedings. The types of property that may be forfeitable are similar as well. In addition to the forfeiture provisions of the CSA, the major sources of authority for federal forfeiture in drug cases are the Continuing Criminal Enterprise (CCE) Act, the RICO Act, and anti-money laundering and currency transaction reporting statutes.

CHAPTER II

THE FORFEITURE PROCESS

Although statutory provisions establish the broad outlines for carrying out forfeiture actions, in any jurisdiction the forfeiture process is likely to be shaped in part by additional provisions specific to each jurisdiction, such as agency guidelines, established administrative or regulatory procedures, other pertinent statutory requirements, or court rules. This chapter describes the main steps of the general forfeiture process in some detail. Users of this guide are encouraged to review the outlined process with a view toward identifying which aspects of the process might be addressed by state or local procedures that are not part of the statutory forfeiture provisions.

Identifying the Property

The first step in any forfeiture action is to identify the potentially forfeitable property. In many instances, law enforcement officials at the scene of the criminal activity will be able to identify property involved in an offense quite readily. For example, officers may spot drugs in a car during a routine traffic stop, or they may observe firsthand the use of cash during a controlled drug buy; in these situations, the drugs, the car, and the cash all are subject to seizure as potentially forfeitable property. In other cases, however, more prolonged and sophisticated investigation may be necessary for officials to identify assets associated with criminal activity. Financial investigations, in particular, are a productive method of locating forfeitable assets of persons believed to be involved in criminal activity, especially if they are part of criminal networks or racketeering or drug trafficking organizations. State anti-racketeering laws, which generally are broader in scope than other forfeiture provisions, may provide the most effective means of seeking forfeiture of property used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity. The use of financial investigations to develop forfeiture cases is discussed in more detail in Chapter VI of this manual.

Seizing Property

In general, law enforcement authorities may seize potentially forfeitable property:

- upon direction of a court having jurisdiction over the property;
- incident to arrest;
- incident to a search under a search warrant;
- incident to an administrative inspection under warrant;
- when the property has been the subject of a prior judgment in favor of the state;
- when there is probable cause to believe the property is dangerous to health or safety; or
- when there is probable cause to believe the property has been used or intended for use in violation of the state's controlled substance statute or other applicable provisions of law.

However, rules for initiating property seizures vary according to whether the forfeiture is to be pursued criminally or civilly. In criminal forfeitures, property generally cannot be seized unless and until the property owner is found guilty of the underlying criminal offenses. However, restraining orders may be obtained in some instances upon a proper showing of need by the government. By contrast, with the exception of real property, property subject to civil forfeiture is seized as soon as it is identified. After the seizure, individuals with claims to the property receive notice of the seizure and of the government's intent to forfeit the property. Individuals are entitled to a hearing prior to the actual forfeiture.

In cases in which the government seeks to institute forfeiture proceedings against real property, the claimant's opportunity for an adversarial hearing must occur prior to the actual seizure of the property. The U. S. Supreme Court ruled in 1993 in U. S. v. James Daniel Good Property that the government may not seize real property without providing notice and a hearing to all possible claimants.

The seizure does not have to be initiated at the earliest point authorized by law. Courts have held that reasonable delays between the time of the alleged illegal activity and the seizure of the property normally will not preclude officials from seizing and successfully forfeiting the property at a later time, particularly if the reason for the delay is the preservation of an ongoing investigation.

Reporting the Seizure

Steps for seizing property potentially subject to civil or administrative forfeiture generally are statutorily prescribed. The seizing officer will be required to submit documentation within a certain number of days of the seizure in support of the seizure and forfeiture to an official designated to review forfeitures.

The officer should submit documentation in support of the seizure and forfeiture that contains all the information necessary for the reviewing official to determine whether the seizure is warranted and whether sufficient evidence has been obtained to make forfeiture likely. Once the reviewing official has determined that forfeiture of the property probably is warranted, he must institute forfeiture proceedings within a specified number of days of receiving notice of the seizure.

In Good, the U. S. Supreme Court ruled that as long as a forfeiture action is filed within the statute of limitations, failure to comply with other statutory timing requirements is not grounds for dismissal of a forfeiture action.

Administrative Forfeiture Actions

A few states, as well as the federal government, provide for administrative proceedings for forfeiture of property seized. An administrative proceeding is more efficient and more streamlined than a judicial forfeiture proceeding. However, administrative forfeiture usually is limited to property valued at less than a statutorily defined amount.

Administrative forfeitures are commenced by providing notice to "interested parties" of the government's intent to seek forfeiture of the seized property. Interested parties would include, for example, mortgages, lienholders, etc.

A civil *in rem* action aims to determine the rights of the government to the property against the claims of any other interests. Therefore, it generally is necessary both to mail or deliver notices to parties individually and to publish a notice in area newspapers. All known interested parties and all other persons whose identities are reasonably subject to discovery and who may have an interest in the property should be served. Notice of the forfeiture also should be published in the newspaper in the district of the forfeiture proceeding to inform unknown interested parties of the action pending against the property.

Personal and published notices concerning the seizure and pending forfeiture proceeding should contain all relevant information necessary to describe the property seized and the forfeiture proceeding adequately for

interested parties. The notice should include a complete and accurate description of the seized property; the appraised value of the property; the date and place of the seizure; the person from whom the property was seized; the registered owner of the property; the violation of law subjecting the property to forfeiture; the instructions for filing a claim and a petition for remission or mitigation, or both; and a statement that the seized property will be forfeited if no answer is filed in a timely manner. Statutory requirements regarding content and timeliness of notices should be known and closely followed by enforcement officials. In some jurisdictions, these requirements have been construed very strictly, and otherwise forfeitable property has been returned to owners because of the government's failure to satisfy all notice provisions. Similarly, failure to include all relevant information in the forfeiture notice may result in a successful appeal of a final forfeiture order.

A claimant who has received notice of the government's intent to forfeit property has several options. Under state forfeiture statutes, the claimant may do nothing; file a petition for remission or mitigation; or file a claim to contest the forfeiture. In the federal system, a claimant may file both a petition for remission or mitigation and a claim and a cost bond. If only a petition for remission or mitigation is filed, the forfeiture action remains an administrative proceeding; if a claim and a cost bond are filed, the case is referred for judicial forfeiture.

A petition for remission or mitigation is a request for a "pardon" of the property following its forfeiture; remission is a complete pardon of the property, while mitigation is a partial pardon of the property. The purpose of the pardon is to provide relief to a secured property owner or an interested party from the harshness of forfeiture provisions. The petition for remission or mitigation should include a description of the property, evidence of the claimant's interest, and facts and circumstances upon which the requested pardon is based. In order to receive a pardon of the forfeited property, the claimant must demonstrate a valid good faith interest in the property and a lack of knowledge that the property was used or intended to be used in an illegal manner. For example, a pardon might be granted in a case involving forfeiture of a car driven by a youth who was in possession of drugs while driving the car, if the parents neither knew, nor should have known, of the illegal activity.

When a party seeks to contest the validity of a forfeiture action in court by filing a claim and a cost bond, the claim must state the claimant's ownership interest in the property. The accompanying bond usually must be in the sum of either 10 percent of the value of the property or some set amount, whichever is greater. The filing of a valid claim and a cost bond ends the administrative forfeiture proceeding.

If a claim and a cost bond are not filed, the administrative proceeding continues. If the reviewing official determines that the government has shown by a preponderance of the evidence that the property was used or intended to be used in an illegal fashion, the property usually is forfeited and disposed of in accordance with statutory provisions. If a petition for remission or mitigation is filed, the reviewing official is responsible for inquiring into the facts and circumstances of the petition. If the petition is granted, the petitioner may be reimbursed in several ways, including through the sale of the property and payment to the petitioner from the proceeds. If for some reason the agency chooses to retain the property for official use, the agency may pay the petitioner from other agency funds.

In 1990, Wayne County, Mich., obtained funding from the U. S. Department of Justice, Bureau of Justice Assistance, to implement a program that served as an alternative to administrative forfeiture. The purpose of the program, titled campaign PUSH-OFF (Purchaser's Use of Streets & Highways — Opt for Forfeitures), is to deter drug buying by focusing community policing efforts on reducing street drug retail activity. Under the program, law enforcement officers and prosecutors are encouraged to use existing forfeiture laws to seize automobiles allegedly used in drug sales. If a vehicle allegedly involved in a drug transaction is seized, law enforcement officers serve the owner a notice of the government's intent to institute forfeiture proceedings, but no arrest is made. The officer instructs the driver to contact the prosecutor's office and the automobile is towed to an impound lot.

The prosecutor's office contacts the car owner to explain the legal options for recovering the vehicle. If the driver is the owner and there is no lien against the vehicle, he has the following options: 1) pay a \$900 redemption fee, \$150 of which goes to the prosecutor's office and \$750 of which goes to the seizing agency; 2) pay a \$250 bond and contest the case in court; or 3) allow the car to be forfeited administratively.

If there is a lien on the car, the lienholder will be contacted before the vehicle is released from police custody. The lienholder may repossess the vehicle or pay towing, storage, and court fees to obtain possession of the vehicle following an administrative judgment.

If the driver is not the registered owner of the car, the owner must sign a "warning letter" stating that the owner knows that the vehicle was used in an illegal manner and if it or another vehicle owned by the individual is used for illegal purposes in the future the owner will no longer be considered an innocent third party.

Civil Forfeiture Actions

If the statute does not provide for administrative forfeiture, if the property has a value greater than the statutorily established limit for administrative forfeitures, or if an interested party contests the forfeiture by filing a claim and a cost bond, the forfeiture proceeding is a judicial matter. The local prosecutor must file a petition for forfeiture in a court having jurisdiction over the property.

The forfeiture petition filed with the court should include an accurate description of the property, the names of the registered owners of the property, the names of any secured parties, the name of the person from whom the property was seized, and a statement of facts and circumstances surrounding the seizure of the property and the basis for the forfeiture of the property.

Once the forfeiture petition is filed, interested parties are served notice and given an opportunity to be heard. As noted earlier, in cases involving real property, possible claimants are entitled to notice and hearing prior to the seizure of the property. In all other civil forfeiture cases, notice is provided after the property is seized.

Parties wishing to contest the forfeiture or to ask for a pardon are required to file an answer with the court. If an interested party does file an answer to the notice, the government must hold a forfeiture hearing.

Under the federal forfeiture statute, the government must establish at the hearing that there was probable cause to seize the property because the property was used or intended to be used in violation of law. Because civil forfeiture action is against the property, the government need not prove the property owner's guilt, although such evidence may bolster the government's case against the property.

Traditionally, if the court finds that probable cause has been established, the burden shifts to the claimant to prove by a preponderance of the evidence that the property was not used for illegal purposes or that the claimant has a legitimate defense against the government's claim. If the court determines that the claimant has not met his burden of proof, the court must order the property forfeited and disposed of according to law. If the claimant proves by a preponderance of the evidence that the property was not used for illegal purposes or that he has a legitimate defense, the government must release the property to the successful claimant.

More recently, however, a number of state legislatures have shifted the initial burden of proof to the government and, in some cases, require that the government prove by a higher standard than preponderance of evidence that the property is subject to forfeiture. The Justice Department intends to

recommend that the Congress amend the federal forfeiture statutes to shift the initial burden of proof to the government and, in some cases, require that the government prove by a higher standard than preponderance of evidence that the property is subject to forfeiture.

Responding to several appeals of decisions in civil forfeiture cases, the courts and federal and state lawmakers also are taking a look at issues related to whether the fine imposed in a civil forfeiture case is "proportionate" to the alleged violation. The U. S. Supreme Court decided in June 1993 in Austin v. U. S. that the Eighth Amendment of the U. S. Constitution's prohibition against excessive fines applies to civil forfeiture proceedings.

In its ruling, the court did not, however, establish a test for determining if a forfeiture is excessive, and this issue now is being litigated in the lower federal courts and state courts. Several possible tests mentioned in a concurring opinion include a comparison of the value of the property forfeited to the value of the drugs and an examination of how closely the property forfeited was related to the illegal activity.

Criminal Forfeiture Actions

In the states that provide for criminal forfeiture, the forfeiture process begins not with the seizure of property, but with the indictment of an individual. Included in the indictment is a list of specific property that the government has identified as forfeitable because the identified property was used in, obtained with proceeds derived from, or controlled by the defendant or the defendant's criminal organization. The indictment must describe the connection between the property and the criminal activity.

Unlike civil forfeiture proceedings, which usually involve assets seized at the time of the illegal conduct, criminal forfeiture proceedings generally involve assets seized only after the property owner's conviction of the underlying offense. However, in some circumstances, a court may permit the early seizure of property, may issue an order to have the defendant's assets frozen, or may require the defendant to post a performance bond prior to the completion of the trial, particularly if there is a danger that the property will deteriorate or that the defendant will dispose of the property to avoid its forfeiture.

If the property owner or user is tried before a jury, the court delivers a separate jury instruction regarding the forfeiture issue, and the jury makes a specific finding on that issue. Because the forfeiture is tied to the criminal action, guilt must be established beyond a reasonable doubt; if this burden of proof is not met and the defendant is found not guilty, the forfeiture proceeding is dismissed.

Once a defendant is convicted of the underlying criminal charge and an order of forfeiture is entered against his property, the property may be seized. The U. S. Supreme Court ruled in June 1993 in Alexander v. U. S. that, as in civil forfeiture proceedings, a proportionality review is required in criminal forfeitures to determine whether a forfeiture violates the Eighth Amendment. As mentioned previously, the issue of how to determine whether a forfeiture is proportional to the offense currently is being litigated in the lower federal courts and state courts.

A forfeiture order entitles the government to the same interest in the property that the defendant had. Therefore, in order for the government to "perfect," or secure its interest in the property against all other interests, it must give notice to interested parties that the property has been forfeited.

If a third party files a claim to a given piece of property, there is an ancillary hearing to determine whether, at the time of the illegal activity, the petitioner either had a right to the property that takes precedence over that of the other owner or was a bona fide purchaser without knowledge that the property was subject to forfeiture. In either case, if the petitioner can establish his superior right to the property by a preponderance of the evidence, the court may amend the forfeiture order to reflect the findings made at the ancillary hearing and dispose of the property accordingly.

CHAPTER III

PUBLIC POLICY INTERESTS AFFECTING FORFEITURE PROGRAMS

Development and prosecution of cases involving forfeiture may require substantial and costly long-term commitments of manpower and other resources. However, initial investment in personnel and other costs associated with a particular forfeiture may not produce results for a year or more — or ever. The more important the target, the more likely the investigation will be complex and expensive. Policymakers may expect or even demand more immediate results from large-scale public expenditures for law enforcement operations than enforcement officials generally are able to produce with forfeiture actions. They also may question an enforcement strategy that appears to assign a higher priority to seizing property than to apprehending criminals.

Press coverage of seizures of property that affect property owners or dependents of property owners who are innocent of the crimes in which the property allegedly was used have evoked the interest and sympathies of the public and forced seizing agencies to justify their legal but unpopular actions. The effect of these sentiments is reflected in recent court decisions, including decisions by the U. S. Supreme Court, that indicate that the judiciary particularly is concerned that the constitutional rights of individuals who have property forfeited are protected adequately.

Assets Distribution

The distribution of assets or the proceeds from sales of forfeited property also has become a major and oftentimes contentious issue in many jurisdictions. State legislators and state budget officials may object to direct distribution, outside the budget process, of forfeiture proceeds to state agencies. Prosecutors may object to any plan for distribution of forfeiture proceeds that benefits police agencies exclusively.

Absent contractual or statutory provisions to the contrary, law enforcement agencies generally were the sole beneficiaries of forfeiture proceeds in the initial years of forfeiture's application to drug cases. In

forfeiture, law enforcement administrators saw a ready source of funds to supplement declining government appropriations and augment drug laws enforcement and related capacities. In their enthusiasm for the revenue-raising potential of forfeiture, these officials may have overlooked the possibility that other interests might wish to access a portion of forfeiture revenues or that legislatures, municipal executives, and other policymakers might object to law enforcement's claim on forfeiture proceeds or view police officials' access to forfeiture revenues as providing further justification for cutting law enforcement budgets in tough fiscal times.

Consequently, as the amount of money realized from forfeiture activity has increased, policymakers have moved to balance the fiscal interests of a variety of non-law enforcement programs that would like a share of money generated by forfeiture activity with those of the agencies that are most directly involved in the forfeiture process. Lawmakers have asserted a role for themselves in making decisions about the distribution of forfeiture proceeds. Many states allocate some portion of proceeds to non-law enforcement purposes, such as substance abuse treatment and education and crime victims services.

Assets Management

One-third of the states' forfeiture statutes contain provisions regarding the management of seized property pending the outcome of forfeiture actions, including handling seized property and proceeds, completing reports to ensure that property is not lost or misused, prohibiting employees of the seizing agency from gaining personally from the seizure, and selling off perishables or property that will decrease in value.

The absence of specific provisions concerning assets management in the statutes of the remaining states, however, does not imply that there is no duty of the seizing agency to manage the property. Indeed, the seizing agency is responsible for maintaining the asset throughout the forfeiture process in substantially the same condition as it was when seized. Failure to manage the asset in a reasonable fashion could result in the seizing agency's being liable for the amount of the depreciation of the asset. Management of seized property includes storage of assets and reasonable repair and maintenance required to keep assets in suitable condition. Assets management and maintenance issues are discussed in more detail in Chapter VII of this manual.

The Courts and Forfeiture

The courts have played a key role in defining the use of forfeiture in drug cases. A variety of issues, including proportionality, third-party rights, double

jeopardy, and self-incrimination, currently are being litigated in lower federal courts and state courts.

Since the U. S. Supreme Court's decisions in Austin and Alexander in June 1993 that proportionality reviews are required in both civil and criminal forfeitures, lower federal and state courts have been grappling with the issue of how to determine if forfeitures are disproportionate or excessive to the illegal activity.

Third Party Rights

The rights of third parties have long been a source of litigation. At issue are the rights of third parties with an interest in the property to be forfeited, who claim to have no knowledge of the illegal activity. Today almost one-half of the states provide relief for third parties or lienholders. The majority of states' forfeiture provisions also now allow an exception to the forfeiture of conveyances that facilitate drug violations, as well as things of value and proceeds traceable to drug transactions in cases in which a party establishes that he has an interest in the property and that he did not know, nor should he have known, of the illegal activity resulting in the seizure of the property. The U. S. Supreme Court recently ruled in U. S. v. A Parcel of Land that individuals who receive property as a gift also are entitled to raise an "innocent owner" defense if a prosecutor alleges that the donor acquired the property by illegal means.

Double Jeopardy

Another area of litigation in the state and federal courts is the issue of whether the Double Jeopardy Clause of the U. S. Constitution bars a civil forfeiture proceeding if the property owner already has been prosecuted criminally for the conduct giving rise to the forfeiture proceedings.

Self Incrimination

Finally, the courts are addressing the issue of what protections property owners are entitled to in civil forfeiture proceedings to ensure that their constitutional right not to incriminate themselves is guarded adequately.

Such issues are likely to pique the interest of policymakers, legislators, and the general public, who may not understand forfeiture or who may disagree with enforcement officials' forfeiture objectives. The lack of public understanding and support for forfeiture and conflicts among policymakers and enforcement officials on the application of forfeiture clearly can affect the usefulness and effectiveness of forfeiture as an enforcement tool. A jurisdiction that

intends to develop or expand its forfeiture capability therefore should work through the stages of the process carefully and thoughtfully prior to taking any further steps in order to take into account the full range of potential policy and practical issues that may arise during the application of forfeiture laws and procedures.

CHAPTER IV

PLANNING FOR THE USE OF FORFEITURE

Treatment of forfeiture as a process rests on the premise that forfeiture provisions will work most effectively in a jurisdiction that makes a commitment to incorporating assets forfeiture into its overall enforcement strategy and that supports its commitment over the long term with the resources necessary to develop and prosecute cases involving forfeiture. In order to obtain and act upon that commitment, however, enforcement and prosecutorial personnel must recognize and plan to deal with a wide range of policy, political, and managerial issues that bear directly on a jurisdiction's ability to make forfeiture an effective enforcement tool.

A process approach to forfeiture provides an organizational framework for routine consideration of the use of forfeiture, establishes a basis for development of policies and procedures to regulate government officials' roles and responsibilities in forfeiture actions, and promotes consistent and equitable interpretation of forfeiture laws and procedures as applied in specific cases. A process approach thereby also provides a means of anticipating and addressing public policy issues related to forfeiture.

The process approach to forfeiture consists of six major elements: instruction in applicable forfeiture laws and procedures; investigation of potentially forfeitable assets; seizure of assets; management of seized assets; prosecution of cases involving seized assets; and disposition of forfeited assets.

Each stage of the process raises a number of concerns that should be considered in a jurisdiction's preliminary planning to develop and maintain an assets seizure and forfeiture capability. A jurisdiction's preliminary planning for use of forfeiture therefore should involve:

- establishing enforcement objectives;
- becoming familiar with existing laws and procedures and evaluating the suitability of such laws and procedures for achieving stated enforcement objectives;
- developing administrative policies and procedures for making decisions about when to seek forfeiture and to govern the interaction of

police and prosecutorial personnel in the development of forfeiture cases, the management of seized assets, and the disposition of forfeiture proceeds; and

- identifying and acquiring necessary manpower and other resources to carry out investigations and prosecutions involving forfeiture.

Participants in the planning process should include not only managers, investigators, and attorneys from all affected law enforcement agencies and prosecutors' offices, but also individuals who have responsibility for, or can influence, agency policies, management practices, and manpower or other resource allocations.

Forfeiture Objectives: Crime Control or Revenue Raising

A jurisdiction's forfeiture objectives have both policy and practical implications. In many jurisdictions, enforcement officials' enthusiasm for forfeiture may be as much a consequence of perceptions of forfeiture's revenue-generating potential as of its prospective usefulness in divesting criminals of their gains and undermining their ability to continue to pursue their illegal activities. However, the overall effectiveness of forfeiture as an enforcement tool may be undermined if, as a practical matter, forfeiture is considered primarily a revenue-raising measure. In such a jurisdiction, decisions concerning when to make seizures, when to pursue forfeiture, and whether to begin civil or criminal proceedings might be based only upon the type and projected value of property held by the individual or criminal enterprise rather than upon the seizure's overall effect on an illegal operation. Under pressure to increase revenues, police officials not only could lose sight entirely of the importance of forfeiture as an enforcement tool, but also might find themselves in conflict with public policymakers and officials of other government agencies over the use of forfeiture proceeds. Of course, it is possible for a jurisdiction to achieve its law enforcement goals through the successful application of forfeiture and, at the same time, realize other benefits from the disposition of seized assets.

Whether crime reduction, revenue generation, or a combination of goals is the primary objective of a jurisdiction's forfeiture program, efficient use of resources always will be an important factor in the decision to pursue forfeiture in any given case. Another forfeiture program objective therefore should be to find the appropriate means of balancing considerations of the money, time, manpower, and likelihood of success involved in carrying out forfeiture actions with the benefits that forfeiture might produce in terms of either revenue or actual disruption of criminal activity. Such an approach would encourage consistency in decisions about whether or when to

proceed with forfeiture while allowing agencies some latitude in making decisions based upon the circumstances of each case.

For example, a jurisdiction might choose to pursue forfeiture of property in one instance because of the great potential financial rewards that forfeiture would produce, the strength of the case that the prosecutor has against the defendant or the property, and the lack of intervening third parties who might complicate the proceedings. In another instance, the government might decide to seek forfeiture of property even if the case would be more difficult to develop and the returns would be less certain; destroying the property owner's particularly corrupting or violent drug trafficking operation may be such a high priority for the jurisdiction that it is willing to pay the costs of putting the owner out of business. On the other hand, a jurisdiction may decide not to seek forfeiture in a case involving property of an individual who is neither a particularly influential nor prosperous criminal offender.

Forfeiture Laws and Procedures

Because agencies' authority to pursue forfeiture is statutory, development of a successful forfeiture capability requires that all law enforcement personnel, prosecutors, and others involved in the forfeiture process be familiar with all laws, procedures, and court decisions affecting forfeiture activity in the jurisdiction. To achieve this goal, personnel involved in forfeiture actions should receive formal training in the potential use of forfeiture as an enforcement tool, as well as in all applicable forfeiture laws and procedures. Specifically, those involved in forfeiture cases should be aware of general forfeiture laws pertaining to property used in any criminal offenses, as well as specific provisions governing forfeiture of narcotics, gambling paraphernalia, and other contraband or of any other property associated specifically with drug laws violations. At all stages of the forfeiture process, persons with detailed knowledge of the forfeiture statutes should be present for consultation to ensure that all individuals involved are applying the procedures correctly and effectively.

Administrative Policies and Procedures

In developing and maintaining an effective assets seizure and forfeiture capability, a jurisdiction should implement a system for conducting forfeiture cases that recognizes forfeiture as a process which begins prior to seizure of the property and continues through the disposal of the asset. By considering the potential use of forfeiture early on, law enforcement officials can take preliminary steps that may expedite and simplify the proceedings. A jurisdiction therefore should develop guidelines on the types of prop-

erty to be seized and forfeited; procedures for gathering relevant records necessary to establish ownership of the property; sources for expertise and guidance in conducting complex financial investigations; sources for appraisals of the different types of property; and policies for storing, maintaining, and disposing of property.

For example, in deciding whether to seize a vehicle in which he has discovered cocaine, an officer may need to consider whether the amount of cocaine found in the car is substantial; whether the person in the car was selling the cocaine or was only in possession of the cocaine; whether the person using the car has a criminal record; and whether the person using the car has been involved in previous violations involving controlled substances. Departmental policies also might reflect other considerations regarding the forfeitability of a particular type of property and the use of forfeiture proceeds, such as the value of the property; the potential for use of property for official business; the costs of maintaining, forfeiting, and disposing of the property; the property owner's involvement in illegal activity or knowledge that the property would be used in carrying out illegal activity; and the existence of a lien on the property.

Law enforcement agencies and prosecutors' officers also should develop administrative regulations, guidelines, interagency agreements, and statements of policy that will help them determine when and how forfeiture cases will be pursued.

Prosecutors' offices and law enforcement agencies should be encouraged to establish cooperative agreements for developing cases involving forfeiture. Establishing a good working relationship between police and prosecutors and clearly delineating the roles that each office will play in the development of forfeiture cases can avoid confusion and streamline the process. Over time, an established working relationship would produce the additional benefit of increasing officers' and prosecutors' understanding of not only the constraints that they face in carrying out their respective responsibilities, but also the resources, information, or evidence that they need to carry out forfeiture investigations and prosecutions successfully.

Deciding To Pursue

Standard administrative policies and procedures also help guide prosecutors and police officials when deciding if forfeiture is a worthwhile course of action. Taking the jurisdiction's forfeiture objectives into account, administrative guidelines therefore should set threshold amounts of costs and benefits that would justify forfeiture generally or describe enforcement priorities that would

clarify the instances in which the forfeiture of property is most likely to be considered essential.

Guidelines addressing the types of property to be seized and procedures for appraising seized property also would serve important goals. Forgoing forfeiture against property with minimal value to a jurisdiction saves police, prosecutors, and the courts the time and expense of investigating, preparing, and hearing such cases. Not prosecuting all cases also gives agencies additional time and resources to develop the most significant cases and reduces property maintenance and storage costs. Guidelines most likely would take into account the value of the property, the condition of the property, any liens and encumbrances against the property, and the benefits to be gained from the sale or use of the asset.

Maintaining Assets Pending Forfeiture

Similarly, the development of guidelines or regulations regarding methods of storage and maintenance would facilitate management of the property. For example, conveyances such as automobiles, aircraft, and vessels might be stored at designated lots administered by the appropriate agency under the guard of custodians whose duties to protect the property are set out clearly in department regulations.

Proper storage and maintenance of assets also is required to keep property from deteriorating and losing its value while it is in the jurisdiction's custody and to keep track of the location of assets. If property is damaged, the jurisdiction may be held liable for the loss of value of the property in the event that it must be returned to its owner or to another party claiming an interest in it. Firearms and other deadly weapons must be stored in high security facilities to avoid injury to persons. Proper storage and maintenance also is necessary to protect the integrity of property to be used as evidence at trial.

One way to help ensure that property does not deteriorate is to handle cases promptly. An agency should have a system for determining lienholders, registered owners, and other parties with an interest in the action and must commit sufficient support personnel to the tasks of filing reports, checking records, and sending notices to interested parties and local newspapers in a timely and accurate manner. The agency also must be able to arrange for the prompt appraisal of property, the analysis of any drugs found with the property, and the proper filing of resulting reports.

Identifying and Acquiring Resources for Forfeiture

To establish an effective forfeiture capability, state and local law enforcement agencies must have long-term commitments of funding and resources from the appropriate officials. Obtaining that commitment may mean persuading state legislators, executive branch officials, or local government officials of the potential of forfeiture as an effective weapon against criminal enterprises, as a symbolic statement of the state's vigorous commitment to fighting crime, and as a source of revenue for the state.

After a large initial commitment of resources, it may even be possible for a forfeiture program to sustain itself from its own proceeds, a point that legislators may find especially appealing if state funding is scarce.

Training

It should be pointed out, however, that forfeiture is most successful in jurisdictions in which enough enforcement personnel and prosecutors are trained in forfeiture procedures to be able to make forfeiture a major focus of case development and to make a significant time commitment to detailed investigation of all forfeiture possibilities in a case. Specialized training encourages planning for forfeiture from the earliest stages of investigations. An increasingly important area of training, for example, is investigation of an individual's financial records to determine whether money and other assets are traceable to illicit sources, a complex and specialized process that law enforcement agencies often are not equipped to pursue. Such investigations could broaden the range of potentially forfeitable property.

In order to increase line officers' awareness of the forfeiture possibilities in a given situation, and thereby increase their ability to exercise discretion to seize property and initiate forfeiture actions in appropriate cases, the officer initially must receive training in state and federal forfeiture statutes and applicable case law, as well as the application of those statutory provisions and court decisions to other situations. The objective of the training is to enable the officer to judge, from the evidence before him, whether seizure of property is appropriate. This initial assessment leads to the collection of necessary evidence against the property and is a key step in developing forfeiture cases. Training also encourages officers to think beyond arrest during encounters in which forfeiture is a possibility and to consider forfeiture as part of their departments' strategy to combat drug trafficking. In recent years, several sources have developed such training for the Justice Department-sponsored assets forfeiture programs administered by the Institute for Intergovernmental

Research (IIR); the Police Executive Research Forum (PERF); and the National Association of Attorneys General (NAAG).

Special Prosecutorial Capacities

Prosecutors' offices, as well as law enforcement agencies, will need to devote more resources to forfeiture case development. Rather than assigning cases randomly, an office may decide to designate a sufficient number of prosecutors to forfeiture cases to enable the office to handle all cases efficiently and competently. For more complex cases, such as those resulting from electronic surveillance and financial investigations, prosecuting attorneys may need more specialized training and knowledge concerning forfeiture procedures.

Specifically designating prosecuting attorneys to handle forfeitures benefits both the law enforcement agencies and the courts. Police officers, for example, can present these prosecutors with the facts and circumstances of a particular investigation for a pre-seizure determination of whether property involved might be forfeited successfully. Trained prosecutors also would be available for writing affidavits in support of seizure warrants and for filing petitions for forfeiture. They can assist in developing guidelines for officers concerning information necessary for a successful prosecution, conduct interviews of defendants who might be sources or leads to forfeitable assets, or train officers in asking appropriate questions to elicit that information. They also can aid the courts by providing informed presentations on forfeiture provisions as they relate to each case.

Interagency Arrangements for Forfeiture

Developing and maintaining a forfeiture capability may not be financially or logistically feasible for smaller states or local jurisdictions. Such jurisdictions might consider cooperative regional or statewide arrangements, or interagency task forces with the federal government, as ways to pool their resources.

An interagency approach to forfeiture could provide the means for agencies to establish personnel training programs, storage facilities, forfeiture information bureaus, and other important aids to forfeiture capability that otherwise would be unavailable to those jurisdictions.

Statutory provisions provide legal authority for forfeiture actions, set the scope of authority in such actions, and reflect a public policy to proceed with this form of enforcement capability. However, statutory provisions alone will

not accomplish the objective of using forfeiture to deprive individuals of the incentive of financial support for criminal activity. To reach their full potential, forfeiture programs require long-term commitment, resources, and training, with emphasis on the development of cases through specialized techniques, such as financial investigation, that will meet the legal burdens of proof required under chosen forfeiture mechanisms.

CHAPTER V

THE ROLE OF POLICE AND PROSECUTORIAL DISCRETION IN FORFEITURE CASE DEVELOPMENT

The seizure and forfeiture of assets used in or derived from illegal activity is a law enforcement tool that may complement, but does not necessarily go hand-in-hand with, criminal prosecutions. In fact, in some jurisdictions where police and prosecutorial resources are inadequate to support forfeiture in conjunction with criminal prosecutions, authorities use civil assets forfeiture in lieu of criminal prosecution because civil forfeiture generally is easier to prosecute, is often uncontested, and therefore is less resource-intensive. Such cases emphasize the value of assets forfeiture as a primary method of disrupting ongoing criminal activities. Some authorities believe that assets forfeiture is a more effective deterrent even than prosecution of a suspect in cases involving activity that appears to be centered upon specifically profit-motivated crime.

The forfeiture process encompasses a series of decisions concerning the seizure and forfeiture of property that everyone involved in the process, from the police officer who initiates the seizure to the attorney who prosecutes the case, must take into account in making his own decision whether to proceed with seizure or forfeiture in a given instance.

In the majority of cases, a forfeiture action begins when a police officer comes into contact with or otherwise identifies potentially forfeitable property. In jurisdictions in which assets seizure and forfeiture are used aggressively to deter and disrupt drug trafficking and other ongoing criminal activity, an officer or team of officers may be assigned specifically to the task of detecting and seizing potentially forfeitable property. Even in jurisdictions without such designated teams, a single officer may be assigned to develop expertise to review the preparation for, and carry out, seizure actions. Thus, from the outset, line officers as well as police managers must be aware of both the content and the import of forfeiture provisions applicable in their jurisdictions. Awareness of the forfeiture concept means more than knowing the statutory language; it also includes understanding what evidence to look for, what information to seek, and what questions to ask to develop the necessary information for a successful prosecution.

Many investigations that result in the seizure of property develop over a period of time, which allows agencies to prepare forfeiture cases even before property seizure occurs. For example, during the course of an investigation, an officer might maintain surveillance logs that show that one vehicle with a certain license plate number or a particular residence was used to meet undercover officers for the purchase of controlled substances. Information reflecting drug buys, drug meetings, and other activity could prove valuable for locating forfeitable items and establishing the evidence necessary for the state to succeed with such forfeiture, while descriptions of the car, residence, and suspects' conduct could form the basis for the forfeiture of the vehicle and residence.

Generally, the fact that officers do not seize property at the moment they observe its illegal use will not defeat a forfeiture action against the property, particularly if the reason for the delay in seizing the property was the protection of an ongoing investigation. In such a situation, the immediate seizure of the vehicle or residence might jeopardize further development of the case. A delay in seizing property also provides an opportunity for officers to check registration, ownership records, or other information relevant to a decision whether to seek forfeiture of a vehicle or other property. However, if an agency intends to seize a piece of property some time after its illegal use, officers may want to bolster the action by obtaining judicial approval for the seizure in the form of a seizure warrant, based upon the officers' affidavit that the property was used in violation of the statute. One other obvious drawback to not seizing the property at the first opportunity is that the owner may remove the illegally used property from the local jurisdiction or destroy the property before officers move to seize it.

In most jurisdictions, if an officer reasonably believes that he has identified property used in, or intended to be used in, violation of applicable laws, he has the authority to seize the property without a warrant. In some jurisdictions, the officer then may have to submit a report of the facts and circumstances of the seizure to a higher-ranking officer designated to review seizures and related activity. In jurisdictions adopting this approach, the designated officer is responsible for reviewing the facts and circumstances of the seizure and deciding whether to recommend that prosecutors pursue forfeiture of the property.

Agencies using this approach generally find it beneficial, perhaps necessary, to develop departmental guidelines setting out the factors that officers should consider and the policies that they should follow in seizing property for possible forfeiture. (See Chapter II of this manual for a discussion of administrative guidelines and procedures.)

In some jurisdictions, this review of asset seizures and the decision whether to recommend forfeiture is the responsibility of an attorney in the prosecutor's office assigned as a liaison to the police agency. The attorney also may assist in helping police agencies make seizure decisions and preparations by advising police on the forfeitability of targeted property and the legality of specific seizure methods.

In a majority of cases potentially involving forfeiture, the value of the property, whether in terms of resale price or usefulness to the seizing agency, is likely to be one of the most persuasive factors in an agency's determination of whether seizure and forfeiture of property would be beneficial. Although one goal of forfeiture is to deprive drug laws violators of property used in their criminal activity, an agency generally might not want to spend more to have property forfeited than it potentially could recoup from the sale or use of the property; for example, an agency might decide against seizing a car worth \$1,000 if prosecuting the case would cost \$2,000, and the sale of the forfeited car would produce only \$500.

The forfeiture value of property also is affected by any liens against it; if a car worth \$12,000 is subject to a secured interest of an innocent lienholder for \$11,000, the \$1,000 value of the car likely would not cover the costs of storing, maintaining, and bringing the forfeiture action against the property.

A third factor in evaluating property is its condition and appropriateness for use in agency activity. In order to determine whether to retain a vehicle for official use, for example, the agency should consider the capacity in which the agency is likely to use the vehicle and the extent of the repairs necessary to ready the property for such use.

If, after considering a range of factors, the police supervisor or liaison attorney decides to recommend that the local prosecutor pursue forfeiture of property, the prosecutor should conduct a similar analysis of facts and policies to determine whether pursuit of the forfeiture is in the jurisdiction's best interests. Although many of the factors pertinent to a prosecutor's decision are likely to be similar to those considered by the police supervisor, the prosecutor also must take into account additional factors related to caseload management, including resources available to prosecute forfeiture actions, pending criminal actions that may be affected by a forfeiture proceeding, the strength of the evidence against the property, and the likelihood of challenges to methods used to seize the property or obtain the evidence.

In determining whether to pursue a forfeiture action, officials also must consider whether any innocent third parties may assert credibly an interest in the property. Approximately one-half of the states now have specific statutory provisions protecting lienholders' interests in assets

seized by police. The majority of states' forfeiture provisions have been amended in recent years to provide an exception in cases in which a third party can establish that he has an interest in the property and that he did not know, nor should he have known, of the illegal activity. The courts have been particularly concerned about protecting the constitutional rights of innocent third parties. Nevertheless, the fact that a third party has an interest in the property should not be the determining factor in whether a forfeiture action should proceed; even when there is an innocent third party, a prosecutor may not wish to abandon forfeiture. For example, if a lienholder's interest in the property is small compared with the value of the property, it may be advantageous economically for officials to proceed with the forfeiture action, with the understanding that the government, if successful, must satisfy the lienholder's rights in the property before distributing the assets.

Before making a final determination of whether forfeiture is in the jurisdiction's best interest, the prosecutor, like the police reviewing officer, should consider whether the benefits from a successful completion of the forfeiture will outweigh the costs of conducting the investigation and the prosecution. The term, "benefits" is used broadly to include not only economic benefits, but also less tangible benefits — such as undermining a criminal element's ability to continue illegal activity — that promote law enforcement objectives or otherwise help the jurisdiction. As in the police officer's analysis, economic factors to be considered include the length of the investigation, the resources to be expended, the number and types of personnel required, the effects on other ongoing work in the agencies involved, the likelihood of success, the amount of money to be spent, and the amount of money to be recouped as a result of the successful forfeiture. An additional economic factor is the percentage of proceeds from the forfeited assets that agencies involved in the forfeiture case will receive.

In addition to these economic factors, however, law enforcement concerns, such as the punitive effect that the forfeiture might have on the defendant and the deterrent effect that forfeiture actions may have on other individuals involved in similar types of criminal activity, are important considerations. Despite the fact that a forfeiture action may cost more money than it will return, a jurisdiction may wish to proceed with the forfeiture if the forfeiture is likely to produce important non-monetary benefits.

Even if a prosecutor decides that, on balance, seeking forfeiture would be in the jurisdiction's best interest, prosecutorial discretion remains an important part of the next stages of the process. First, the prosecutor must decide whether to proceed under civil or criminal forfeiture provisions. If a jurisdiction's

forfeiture statute permits civil administrative forfeiture, and the property qualifies for administrative forfeiture under those provisions, administrative forfeiture may be the most appropriate choice.

In those states that authorize only civil and/or criminal judicial forfeiture, a prosecutor must keep several points in mind. First, there is the issue of timing. In a criminal forfeiture the offender or owner of the property is the defendant, so a successful criminal forfeiture depends upon the defendant's being found guilty. In fact, in the typical criminal forfeiture, the property sought in forfeiture cannot be seized until the criminal case is completed. In a civil proceeding, by contrast, the property itself is the defendant, and the state must seize the property prior to initiating proceedings and hold the property pending disposition of the forfeiture case; the guilt or innocence of the defendant is rarely an issue. Another consideration affecting a decision whether to pursue civil or criminal forfeiture is the standard of proof required. In a civil forfeiture action, the standard of proof usually is lower than that required for a criminal forfeiture case: proof that is "beyond a reasonable doubt."

On the other hand, an advantage of seeking forfeiture in a criminal case may be efficiency. In most jurisdictions, it is likely that a criminal trial will take place long before a civil trial; therefore, in a case in which forfeiture is based upon the outcome of the criminal trial, the government is saved the expense of conducting two trials, and the forfeiture issue is resolved more quickly than it would be in a separate civil action. In addition, the higher burden of proof in a criminal proceeding can be seen as an advantage; a successful criminal forfeiture may stand on more solid legal ground and be less open to appellate court challenges.

If a jurisdiction does proceed with both a civil forfeiture action against the property and a criminal action against the defendant owner, however, it is likely that the prosecutor handling the forfeiture action may not be the one handling any underlying criminal case. In such a situation, close cooperation between the two prosecutors is essential to developing information at one hearing that may be of benefit in the other proceeding. For example, in a number of jurisdictions, courts have ordered stays of forfeiture proceedings pending completion of any criminal action against the property owner in order to avoid placing a defendant in the position of having to make statements to save his property at a forfeiture proceeding that could be used to incriminate him at his criminal trial. Information presented at the criminal trial nevertheless still may be of use to the prosecution in the civil forfeiture case.

Another option for the prosecutor is to offer a plea arrangement whereby the defendant agrees to voluntary forfeiture of assets in exchange for the court's

acceptance of a guilty plea to a lesser offense. If the defendant agrees to such a plea bargain, of course, the defendant is transferring to the government only whatever is his actual interest in the property. Therefore, the government still must inform third parties with an interest in the property that it intends to seek forfeiture of the property.

One final option for a prosecutor is to turn a case over to the federal government for prosecution. There are two means by which the federal government may assume responsibility for a case: either local officials can give federal officials whatever information they have in a case so that federal agencies can continue with an investigation of their own, or local officials can complete the investigation and subsequently ask federal prosecutors to "adopt" the case, prosecuting it under federal law in federal courts. (See Chapter VIII of this manual for a more detailed discussion of these options.)

CHAPTER VI

FINANCIAL INVESTIGATIONS: A SPECIAL TOOL FOR FORFEITURE CASE DEVELOPMENT

Individuals engage in drug trafficking or other criminal enterprises primarily to make money, and they often make vast amounts of it, usually in cash. Drug traffickers and racketeers use this money to satisfy the expenses of operating or expanding their enterprises and supporting personal, often lavish, lifestyles. In addition, because excess purchases or assets that cannot be attributed to legitimate income sources serve to alert authorities to illegal activities, drug traffickers and racketeers must convert illegally obtained cash into other types of assets that provide secrecy and security. Thus, illicit proceeds may be deposited into bank accounts or used to purchase such legitimate income-producing assets as stocks, real estate, or businesses. Clearly, potentially forfeitable proceeds of drug transactions and other criminal activities often go far beyond the conveyances and cash found at the scene of searches or arrests.

Generally, a law enforcement agency will be unable to identify those other valuable assets, and subsequently to have them forfeited, by traditional means. Agencies therefore need to develop methods specifically for tracing the proceeds of criminal activities from their origin to their current use. Conversely, the tracing of proceeds from their current use back to their illegal origin can be useful in helping to prove criminal activities and, in turn, the forfeitability of assets uncovered by traditional search methods. A financial investigation, in which an individual's financial records are uncovered, examined, and analyzed for information relating to the extent and location of previously undiscovered assets, is one of the most effective tracing methods.

Enhancing the Effectiveness of Forfeitures

A financial investigation can substantiate charges that an individual's income has been obtained illegally and therefore is forfeitable. Such substantiation can be particularly helpful during jury presentations in court, especially if the property owner is a "manager" or "kingpin" who arranges and supervises illegal activities but never physically participates in those activities. Through

detailed examination and analysis of expense records, financial investigations may produce documentation of the means by which a trafficker has acquired assets. Because jury members understand the value of money and the difficulty most people have in acquiring large amounts of it legally, a presentation of evidence showing a defendant's extensive accumulation of cash or the purchase of expensive cars, homes, boats, and large investments when there is no apparent source of legitimate income, or when the sources of legitimate income simply could not support such purchases, is likely to have an enormous impact.

Unlike investigations focusing on the forfeiture of vehicles and cash, financial investigations can increase opportunities for implementing more strategic forfeiture actions that have a significant and lasting impact upon the criminal organization's ability to do business. That is, financial investigations can provide valuable information about, and lay the groundwork for, the seizure of an individual's long-term investments in real property, securities, and other assets specially chosen because of their beneficial tax consequences and ability to appreciate in value. Such forfeitures are legal remedies that reflect one of the statutory intentions behind forfeiture — to create deep, long-lasting discomfort for individuals involved in criminal activity and thereby create a stronger deterrent to sophisticated crime.

Benefits to Criminal Investigations and Prosecutions

Financial investigations undertaken in support of forfeiture actions often provide information that is extremely useful to other law enforcement efforts. Financial investigations augment, rather than take the place of, criminal investigations related to forfeiture efforts. A financial investigation can produce information that can buttress prosecutions of criminal enterprises, particularly major drug trafficking enterprises, in several ways. First, financial investigations can provide valuable information in cases brought under state conspiracy or anti-racketeering laws by producing evidence that, over a period of time, the violators obtained substantial income or resources from illegal activities, demonstrating career or "professional" commitment to those activities.

Second, financial investigations can generate intelligence that describes the organizational structure and scope of activities of criminal enterprises. That information not only enhances the status and political impact of a case, but also aids similar or related investigations by other law enforcement agencies, including state and local agencies and such federal agencies as the U. S. Department of the Treasury's Internal Revenue Service (IRS) and the U. S. Department of Justice's Federal Bureau of Investigation (FBI) and Drug Enforcement Administration (DEA). Financial information often makes it

possible for investigators to identify the leaders of organizations, their partners, and other accomplices.

Information also may be uncovered that reveals the extent of the influence of criminal organizations in legitimate activities and identifies individuals not previously suspected of being involved in illegal activities, such as lawyers, accountants, bankers, brokers, and other white-collar professionals who have assisted criminals in concealing illicit proceeds. Such detection may spur legitimate businesses to take enhanced measures to avoid unintentional connections to illegal activities and may deter unscrupulous white-collar professionals from offering their services to criminal efforts.

Approaches to Financial Investigations

Unless a drug trafficker secretly is keeping his money in cash, the conversion of cash proceeds into property and investments will leave a "paper trail" of records and other information about financial and other business transactions. For example, if money is spent on houses, boats, or other tangible assets, sales contracts, loan applications, or other documents must have been used to complete the transaction. Similarly, investments of cash made through brokers and the movement of cash through financial institutions require detailed record keeping. A financial investigation can uncover this paper trail, reconstruct it, and analyze it.

However, discovery and analysis of a paper trail is a time-consuming, resource-intensive activity. For these reasons, preparation for financial investigations should begin early in an investigation in order to allow sufficient time to search for assets and develop additional information about the target. As a first step, for example, investigators and prosecutors should consider the potential value of financial records when drawing up affidavits for any search warrants associated with a criminal investigation; essential financial information may surface at residences, businesses, or other locations during searches for drugs or during the execution of arrest warrants.

Officers making arrests and executing search warrants should be alert to the possibility that they may uncover evidence that will identify other assets that may be subject to seizure and forfeiture. Evidence of the existence of valuable assets often is located on an individual's person or in the immediate vicinity of his business records. Officers may discover such things as keys to safe deposit boxes, carbon copies of bank deposit slips, canceled checks, check registers or check stubs, copies of wire transfers of funds, monthly bank statements, copies of travelers' checks purchase receipts, copies of loan applications or agreements, money order stubs, receipts for items purchased, leases of rental property, paycheck stubs, credit card statements, and

computerized financial records. This information can become the basis for questioning during interviews of individuals suspected or charged in a case. Information discovered also may serve as an initial lead into other investigations of narcotics trafficking and the building of valuable intelligence. Some of the material may be introduced as evidence during a trial.

Valuable information concerning a suspect's assets can be found in many other locations as well. Banks and other financial institutions, for example, keep records on checking and savings accounts, loans, safe deposit boxes, funds transferred by wire to and from accounts, and investments made through the bank. Information might be obtained from stockbrokers and credit card companies and through state and local public records, such as recorded deeds of real estate ownership, motor vehicle registrations, business licenses, and revenue records. Financial information that may be useful in a financial investigation also may turn up in the course of routine criminal investigations, undercover operations, or general intelligence gathering. Other potentially valuable sources of financial investigation information and evidence include rival businesses, former employees, business associates, and friends who may have reasons for wanting to share such information with enforcement agencies.

To augment the paper trail left by the conversion of illegally derived proceeds, the federal and some state governments have enacted currency transaction reporting (CTR) laws. CTR requirements are imposed to detect and monitor the movement of large sums of money, which may indicate attempts to use or launder illicit profits. For example, under the Bank Secrecy Act of 1970 (see 31 U.S.C. 5311 et. seq.) and subsequent amendments, the Congress has required financial institutions and certain businesses to report to the Treasury Department any transactions that equal or exceed a value specified by the department. That amount currently is set at \$10,000. Criminals wishing to avoid leaving a CTR paper trail may attempt to "structure" transactions by dividing amounts greater than \$10,000 into smaller transactions of less than \$10,000 each. In order to detect and deter this structuring, the federal law requires reporting of combinations of simultaneous or related transactions conducted by the same party that, when aggregated, are worth at least \$10,000. In addition, the law absolves financial institutions and businesses from liability for reporting any "suspicious" transactions that do not meet the specific reporting requirements but may indicate illegal activity. At least 15 states have enacted their own CTR requirements that parallel or duplicate the federal requirements.

Reports issued under the federal requirements are gathered by the IRS and the Treasury Department's Financial Crimes Enforcement Network (FinCEN) for compilation, analysis, and dissemination primarily to federal investigators. However, the information also may be requested by state and local law enforce-

ment agencies that are investigating financial crimes. Thus, investigators and prosecutors planning seizures or forfeiture actions may use federal CTR information to locate previously undiscovered seizable assets or to help prove the forfeitability of seized assets. To facilitate this sharing of information with state and local investigators, the FinCEN has negotiated agreements with, and established contact persons in, every state and the District of Columbia.

In order to meet their own state statutory CTR requirements or investigative needs without burdening financial institutions and businesses with additional paperwork, some state authorities have made arrangements with the Treasury Department to gain direct access to federal CTR information. For example, authorities in at least three states (Arizona, California, and Maryland) have entered into agreements with the department to obtain computer tapes of federal CTR information regarding transactions occurring within their states. Moreover, in response to the increasing volume of state requests for CTR information, the Treasury Department is testing methods for providing states with direct, on-line access to the FinCEN's CTR data base.

Failure to report transactions as required under the Bank Secrecy Act is itself a criminal violation. In addition, under the Money Laundering Control Act of 1986 (Pub. L. 99-570, Title I, Subtitle H), the Money Laundering Prosecution Improvements Act of 1988 (Pub. L. 100-690, Title VI, Subtitle E), and the Annunzio-Wylie Anti-Money Laundering Act (Pub. L. 102-550, Title XV), the Congress also criminalized the act of laundering illicit proceeds and established penalties for financial institutions, certain businesses, and individuals that participate in money laundering or structuring transactions to evade CTR requirements. However, the U. S. Supreme Court recently ruled in Ratzlaf v. U. S. that in order to convict an individual of structuring, the prosecution must prove that the defendant knew that his actions were illegal, not merely that he was aware of a financial institution's CTR requirement, and took actions to avoid the result.

At least 21 states currently have their own statutes prohibiting money laundering and related activities. These statutes generally parallel the federal provisions.

Net Worth and Expenditures Analyses

Financial investigative methods that rely on such materials as books, records, journals, and ledgers routinely kept as part of operating a business are the most direct means of developing evidence that may be useful in forfeiture proceedings. However, investigators often are unable

to obtain permission to review such records, or do not obtain access until near the conclusion of a case. If investigators cannot locate or obtain access to business records, they can turn to indirect methods of establishing income information, which require putting together circumstantial rather than direct or specific evidence of the income.

“Net worth analysis” and “expenditures analysis” are two closely related techniques recognized in the enforcement community as effective methods for gathering, organizing, and presenting evidence related to financial investigations. These approaches are used to establish that, over a specific period of time, the person under investigation received and spent more money than was available to him from legitimate or documented sources of income. Such a showing can serve as corroborating evidence of the individual’s possible involvement in drug trafficking or other crimes that involve financial transactions or produce financial gain. In addition, these analyses may make investigators aware of previously undiscovered forfeitable assets.

The methods are very similar in that they employ many of the same types of information sources and the results are presented to the court in the familiar balance sheet format used in typical business accounting. These approaches do not involve complex financial analysis, but may require a substantial investment of staff time to obtain information concerning the assets, liabilities, and income of the individual under investigation.

Net worth is the difference between a person’s assets and liabilities at a given moment. Net worth analysis is based on the theory that, over a given time period, changes in a person’s net worth combined with the person’s known living expenses must be approximately equal to the person’s total income during that period. Any apparent income beyond the amount attributable to known, legitimate sources (such as wages, interest, and dividends) is inferred to be derived from unknown and possibly illegal sources.

First applied in criminal tax evasion investigations decades ago, net worth analysis is most useful in cases in which the suspect’s assets or liabilities have changed over a given period but detailed records of the subject’s expenditures are not available directly from the suspect. Net worth analysis capitalizes on information available from such outside sources as government agency, public, and private business records. Government records, particularly state and local ones, are the most accessible. Public records of assets or other information may be found at city and county offices responsible for recording deeds or liens; licensing offices, such as state or local health departments; tax offices; other law enforcement agencies; regulatory agencies; labor departments; and revenue departments. Federal

agency records and records of banks, credit card companies, and other businesses that have engaged in transactions with the suspect also may be helpful if they can be obtained through subpoenas or search warrants.

Interviews with individuals in businesses affiliated with enterprises run by the individual under investigation also may prove to be valuable sources of information in net worth investigations. Some of these sources, such as vendors, trash collectors, security alarm services, or other suppliers, provide services essential to the daily operation of a business, while others, such as accountants and real estate agents, provide professional services.

A suspect himself may be a source of information in a financial investigation. A suspect's own detailed expenditure records, such as purchase receipts or checkbook registers, may be uncovered in the course of a search. In a civil proceeding, the government also may gain information through depositions and record-collecting as part of the discovery process. Failure of the property owner to participate in discovery could result in a finding for the government.

When detailed records of a suspect's expenditures are available, an "expenditures analysis," also known as "source and application of funds analysis," may be used. Like the net worth method, an expenditures analysis attempts to determine whether the suspect attained more in income than was available to him from known, legitimate sources. However, expenditures analysis is a more direct method of showing the possibility of excess income. This method compares all known income (source) with all known expenditures (how the income was applied) during a given time period. Any expenditures in excess of the amount of known, legitimate income during the period are inferred to represent income from unknown and possibly illegal sources.

When the necessary information is available, expenditures analysis may be preferable to net worth analysis. Unlike net worth analyses, expenditures analyses do not require the complex process of computing the value of all of a suspect's assets at the beginning and end of a given time period, and therefore generally are less difficult to compile. In addition, because expenditures analyses provide simpler, more direct comparison of income and spending, they generally are easier for juries to understand.

Developing Financial Investigation Capabilities

Because financial investigations entail reconstructing and analyzing transactions, financial investigations require personnel who are trained or experienced in specialized investigative skills and techniques. Agencies that have developed white collar crime enforcement capabilities are most likely to be knowledgeable in financial investigative techniques, and agency officials

therefore would be able to apply their knowledge quite readily to investigations of assets tied to drug-related activity.

For agency investigators with no experience in these types of financial investigations, however, training is a necessary first step in establishing a capability to develop financial evidence. Some sources of such training in recent years have been the Justice Department-sponsored assets forfeiture training and technical assistance programs administered by the IIR, the PERF, and the NAAG. In addition, information about the money laundering methods being used by criminals is available from such sources as the PERF's Justice Department-sponsored research products and the FinCEN periodical, *Trends in Money Laundering*.

In addition to using trained investigators, it also may be appropriate, depending on the scale of projected financial investigations, for an agency to employ the assistance of investigative accountants, whose specialized knowledge can contribute to the successful development of a financially oriented drug trafficking case, a conspiracy or RICO prosecution, or a complex forfeiture case involving tracing of assets not readily identifiable. A current BJA project managed by the NAAG is exploring the feasibility of local police departments contracting certified public accountants to assist with assets forfeiture case development.

Prosecutors' Role in Financial Investigations

Because prosecutors take on an expanded role in cases involving financial investigations, the prosecutor responsible for a particular case must become involved in its planning and remain informed of its progress. Some prosecutors may need to redirect their thinking in these types of cases, particularly concerning the value and appropriateness of civil remedies such as forfeiture in connection with criminal cases.

Expert witnesses in the area of organized crime or financial investigations also may be helpful in the successful prosecution of a forfeiture case that relies in whole or in part on evidence developed through financial investigations. Such witnesses would be able to testify about the meaning and effect of the financial evidence gathered during the investigation.

Prosecutors also must be knowledgeable about financial investigative methods and trained in the preparation and presentation of cases developed from financial records. Some offices may choose to designate specific prosecutors to handle all cases requiring this type of investigation. Such persons should be familiar not only with the conduct of financial investigations, but also with the most appropriate ways of

presenting evidence produced by such investigations to its maximum effect in court.

One source of prosecutor training in financial investigation techniques has been the Justice Department-sponsored training programs of the National District Attorneys' Association.

Because many types of information necessary to make a financial investigation worthwhile can be obtained only through an appropriate legal process, sufficient information must be developed initially to justify a judge's issuance of court orders. For this aspect of case development, advice of legal counsel is important to investigators. In fact, legal guidance and involvement should begin at the first stages of the investigation to help shape the strategy for the search and seizure of valuable financial information.



CHAPTER VII

MANAGEMENT AND DISPOSITION OF SEIZED OR FORFEITED ASSETS

One element critical to the success of any forfeiture program is the manner in which a jurisdiction stores and maintains seized property pending forfeiture proceedings. Forfeiture programs should provide for the proper storage and maintenance of such assets in order to preserve their value. Approximately one-third of the states' forfeiture statutes now specifically include provisions that make seizing agencies responsible for managing seized property, including selling property that will decrease in value.

Preservation of the asset's value is important whether the jurisdiction is to retain the seized property for its own use or sell the property and distribute the proceeds. In the event that the forfeiture is denied and the jurisdiction is required to return the assets to their owner, those assets must be returned in the same condition as when they were seized. If the assets are allowed to deteriorate, the jurisdiction could be faced with liability for the amount of the depreciation. Therefore, a goal of any forfeiture program is to control the risks and costs of the forfeiture by establishing a comprehensive storage and maintenance program for seized assets.

Evaluation of Assets

Seized property poses unique maintenance problems that a jurisdiction should address prior to initiating a forfeiture program. As discussed in an earlier chapter of this manual, a threshold step in the forfeiture planning process is the development of guidelines for determining when an asset is worth seizing. In addition to considerations involving each specific asset, such as current value and condition and existence of any outstanding liens against the property, the guidelines might take into account the cost of seizures and forfeitures to all agencies that would be involved in any stage of the forfeiture process.

If possible, the value of an asset should be determined before it is seized in order to establish whether it is financially worthwhile to seek forfeiture of the asset. When an agency is contemplating seizure of an asset based upon prior

events, the agency has time to complete a preliminary check on the value of the asset, determine whether the asset has any encumbrances, assess the ability of the agency to manage the asset, weigh these factors against the benefit to the agency should the forfeiture be successful, and determine whether the forfeiture may have any deterrence effects. In instances, such as traffic stops, in which drugs are discovered, however, a pre-seizure appraisal clearly is not possible.

Following its seizure, property should be searched and inventoried. Usually, inventory searches can be accomplished without a warrant. However, if the asset to be searched carries with it some expectation of privacy, as would a home or business, the seizing agency generally must have a search warrant.

If it has not done so previously, the seizing agency should establish the value of the seized item as soon as possible after the seizure. For an automobile, a quotation from one of the standard value books should suffice. Professional appraisal will be required if the asset is a plane, a boat, a piece of real estate, or if the asset is unusual — livestock or a stamp collection, for example. The appraisal serves a number of important purposes. First, it tells the seizing agency the value of the property at the time of the seizure and helps the agency determine whether the forfeiture is worthwhile. Second, the appraisal acts as a reference for any person who wants to challenge a forfeiture and needs to file a cost bond of a set amount of the appraised value as part of that process. Third, the appraisal determines the amount of bond that a party who will be using the asset must file with the court to protect all other parties should the asset be destroyed or moved beyond the court's jurisdiction. Such bonds are required in states that permit assets to be used after the seizure but before the order of forfeiture.

Storage and Maintenance Costs

Costs of storing and maintaining assets can become a major factor, particularly in forfeiture proceedings that may take months or years to resolve. Conducting forfeitures in a prompt and efficient manner is the most effective way to cut the costs and risks of maintaining assets, but in states in which all forfeitures are judicial, the court calendar controls the speed with which cases are decided. The process can be expedited, however, by ensuring that the forfeiture is reported to the prosecutor promptly and that all reports and addresses of interested parties are contained in the reports.

Aside from costs, however, different types of property raise different maintenance concerns. For example, in some states, seized cash is to be deposited into an interest-bearing account following seizure; other jurisdictions

provide that seized money be maintained as evidence and stored pending any criminal trial. The federal government's policy is that, because cash can be substituted, it should be deposited into a special account pending an order of forfeiture. In general, actual seized cash is preserved and used as evidence only in instances in which it has been packaged in an incriminating fashion by the owner or when fingerprints or drug residue have been found on it; in other instances, the original cash may be recorded on videotape and other money substituted for it at trial.

Conveyances, such as planes, boats, and automobiles, present other concerns. Because the storage of such property generally requires enclosed spaces in order to preserve the property's condition, the responsible agency must either own or rent suitable storage space. In addition, mechanical maintenance must be provided, often by hired contractors. Because cars are comparatively simple to maintain, a jurisdiction may consider using its own employees, perhaps those assigned to city or county maintenance yards, for vehicle maintenance tasks. However, seized planes and boats may require maintenance service that employees cannot provide.

When contemplating the seizure of an ongoing legitimate business, an agency must decide whether it wants to continue that concern's operation after seizure. Even if continuing the operation is desirable, the agency still may need to hire a business manager to oversee the concern. Similarly, when contemplating the seizure of a residence, an agency must determine whether to allow residents to continue to occupy the dwelling. If residents are permitted to stay, an occupancy agreement should be executed in which the terms of the occupancy are stated and provision is made for inspection and appraisal of the premises.

Disposition of Assets

In addition to maintenance procedures, statutory or other provisions governing the disposition of forfeited assets also are key factors in determining the ultimate and long-term success of a forfeiture program. All states require that proceeds from forfeited property first be used to pay the costs of activities associated with forfeiture proceedings, such as the seizure, the storage and maintenance of the property, and the advertising and sale of the property.

When forfeiture first began to be used as a law enforcement tool in drug cases in the 1980s, the seizing agency often was permitted to keep the remaining seized assets or their proceeds. This policy was based upon an assumption that there would be a greater incentive for an agency to commit its own resources to a forfeiture program if the agency could reap some benefits from such an activity through receipt of assets or their proceeds.

Over the past several years a number of states have amended their forfeiture statutory provisions in order to distribute the proceeds of seized assets among a wider variety of state and local agencies. (See Chapter III for a discussion of these provisions.)

State forfeiture provisions now often provide for seized assets and their proceeds to be distributed, in varying percentages, among the seizing agency, the prosecutor's office that was involved in the forfeiture proceeding, and a particular non-law enforcement purpose, for example, drug education, drug and substance abuse prevention, or a crime victims' fund.

A number of states, like the federal government, deposit forfeited funds and the proceeds from the sale of forfeited property in a special assets forfeiture fund, which may be used to pay the costs of seizures and forfeitures or assets maintenance; equip forfeited vehicles for law enforcement purposes; buy equipment, such as automatic data processing equipment, that will be used primarily for assets forfeiture-related work; pay informers for information that leads to arrests and forfeitures; and supply cash for undercover agents' use as "buy money." Most forfeiture funds prohibit the use of fund monies to pay salaries or to cover regular agency budget costs.

Whether a jurisdiction chooses to cover assets storage and maintenance costs through routine budget allocations, a special fund, or cooperative agreements with other jurisdictions (as discussed in Chapter VIII of this manual), a jurisdiction clearly should have an assets maintenance plan developed prior to initiating or expanding upon forfeiture activity. Lack of a systematic approach to handling assets can result in the loss of some of the financial benefits of forfeiture and the long-term credibility and viability of the forfeiture program itself.

CHAPTER VIII

INTERAGENCY APPROACHES TO DEVELOPING A FORFEITURE CAPABILITY

Effective use of forfeiture provisions hinges upon the relative importance of forfeiture in a jurisdiction's enforcement program and officials' commitment to providing adequate funding to support a forfeiture capability. If a jurisdiction concludes that implementing its own forfeiture program is either unnecessary or infeasible, it might consider alternative, interagency approaches that would permit its law enforcement agencies to conduct or participate in forfeiture activity on a less comprehensive basis.

Cooperation with Federal Agencies

In some cases, resource constraints may prevent a jurisdiction's development of a forfeiture program. Such a jurisdiction might be able to initiate forfeitures through cooperation with the federal government. There are two avenues for cooperation with the federal government in forfeiture proceedings.

Joint Investigation

A jurisdiction may refer cases involving potentially forfeitable property to federal law enforcement officials for joint investigation. Under federal law, a jurisdiction that provides intelligence and other case-related information to federal agencies may receive a proportionate or "equitable," share of any assets or proceeds forfeited in the case. The legislation leaves it to the U. S. attorney general's discretion to decide whether any proceeds from forfeitures will be shared with participating state and local jurisdictions. The Justice Department's Executive Office for Asset Forfeiture (EOAF) and the Asset Forfeiture Office of the Criminal Division are responsible for establishing policies regarding equitable sharing. State and local jurisdictions should periodically check with these agencies to determine whether changes have been made to their policies.

Under the policies established by the Justice Department, the jurisdiction's proportionate share will be based upon its degree of direct participation in the law enforcement efforts that resulted in the forfeiture. The proportionate share usually is determined by comparing the number of hours expended by state agents to the total number of hours spent by all law enforcement officials involved in the forfeiture.

Decisions on a jurisdiction's equitable share are made by various federal officials, depending upon the value of the forfeited property. In administrative forfeitures in which the value of the property is less than \$1 million, the federal investigative agency determines the amount of the equitable share. In civil or criminal forfeitures in which the value of the property is less than \$1 million, the U. S. attorney determines the amount of the equitable share. In any forfeiture in which the value of the property is more than \$1 million, in multi-district cases, and in cases involving the transfer of real property to a state or local agency, the office of the U. S. deputy attorney general determines the amount of the equitable share. In no case involving a joint investigation will the federal share be less than 20 percent of the net proceeds.

State and local jurisdictions that receive equitably shared cash and tangible property must implement standard accounting procedures and internal controls to track the shared property. State and local law enforcement agencies that receive more than \$100,000 in a single year or that maintain a federal forfeiture account balance of more than \$100,000 must have an independent financial audit performed annually.

Under federal guidelines, shared funds and property must be used to increase or supplement the resources of the receiving state or local law enforcement agency and may not be used to replace the resources of the recipient. The U. S. Department of Justice may terminate sharing with law enforcement agencies that are not permitted by their governing authorities to benefit directly from equitable sharing.

Pre-approved permissible uses of equitably shared property include activities calculated to enhance future investigations; law enforcement training; law enforcement equipment, operations, and facilities; construction and operation of detention facilities; drug education and awareness programs; costs associated with supporting a law enforcement agency's pro rata share of multiagency items or facilities; and accounting and auditing of equitably shared property.

Impermissible uses include payment of salaries for existing positions; uses of forfeited property by non-law enforcement personnel; uses contrary to state or local laws; any use that creates the appearance that the shared funds

are being spent on political or personal activities; and extravagant expenditures.

State and local law enforcement agencies may transfer up to 15 percent of their shared funds to other government agencies to support drug abuse treatment, drug and crime prevention and education, housing, and job skills programs or other community-based programs. The receiving government agencies then may transfer any shared funds received to private, nonprofit organizations to be spent for the same purposes.

Any state or local agency that receives shared funds must certify once each fiscal year that it will comply with all statutes and guidelines regulating shared assets. Participating agencies also must report the balance in their equitable fund account, the amount of shared funds received, the interest accrued, and the total spent by the law enforcement agency.

Noncompliance may result in the agency being: barred from further participation in the equitable sharing program; barred from future sharing in an amount equal to impermissible uses; subjected to civil enforcement actions for breach of contract; or subjected to criminal prosecution.

Appendix B of this manual contains "A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies," which was issued in March 1994. Manual users also might want to consult the guidelines of the U. S. Department of the Treasury's U. S. Customs Service if they expect to work on cases falling within the service's jurisdiction.

Adoptions

A federal agency may adopt a state or local jurisdiction's seizure of property and institute a civil forfeiture proceeding in federal court. Federal agencies may adopt such seized property when the conduct giving rise to the seizure is in violation of federal law and federal law provides for forfeiture. The federal government's share in adoptive cases in which 100 percent of the pre-seizure activity was performed by a state or local agency is 20 percent of the net proceeds.

The EOAF announced a policy and procedure in January 1993 that limits the circumstances under which the federal government will adopt a state or local jurisdiction's forfeiture proceeding. States and localities requesting federal adoption must submit a request to the federal investigative agency within 30 days from the date of the seizure. Under the equitable sharing guidelines released by the EOAF in March 1994, the federal government

usually will not adopt a forfeiture case unless the equity of the seized property exceeds the following thresholds: vehicles — \$5,000; vessels and aircraft — \$10,000; real property — \$20,000 or 20 percent of the appraised value, whichever is greater; all other property, such as currency, bank accounts, monetary instruments, jewelry, etc. — \$5,000. Individual U. S. attorneys may institute higher thresholds for their districts by giving written notice to the EOAF.

Under the EOAF's policy, a forfeiture action should proceed in state court if the property was seized by a local or state agency as a result of an ongoing state criminal investigation and the criminal defendants are being prosecuted in state court. The EOAF has indicated, however, that there are certain circumstances in which federal forfeiture proceedings would be appropriate. These include instances in which: state forfeiture laws or procedures are inadequate; the management or disposition of the seized asset requires the involvement of the Justice Department's U. S. Marshals' Service; state laws or procedures would result in a delay that would lead to a significant reduction in the seized asset's value; or state or local officials have declined to initiate forfeiture proceedings.

Several Justice Department memorandums outlining the EOAF's general adoption policies and procedures are included in Appendix C.

Cooperative Arrangements with Other Jurisdictions

If a jurisdiction determines that it would have few occasions to use forfeiture provisions on its own and that a large-scale commitment of resources to develop a forfeiture capability therefore would be politically and economically infeasible, it might pursue the possibility of developing a joint forfeiture capability with a neighboring jurisdiction. The cooperative agreement might involve interagency sharing or loan of technical personnel, vehicles, or specialized equipment; development of multijurisdictional law enforcement task forces; or the enhancement of prosecutorial units or special technical support capabilities.

Some aspects of a forfeiture program particularly lend themselves to interagency and intergovernmental cooperative arrangements. Management of assets pending forfeiture and final disposition, for example, is problematic for many jurisdictions; many agencies either cannot afford or do not have the facilities to store and maintain certain assets pending the outcome of the forfeiture proceedings. Jurisdictions could alleviate part of the problem by purchasing and/or operating a common facility for the storage of boats, cars, and other assets, with payment of expenses of the facility allocated according to use. Such an arrangement would free participating jurisdictions from

having to make special accommodations for storage, security, and maintenance of relatively few large assets.

In fact, for some jurisdictions, the initial seizure of assets might be accomplished more effectively at less expense under cooperative arrangements. This approach uses a team made up of investigators, prosecutors, and support staff specially trained in financial investigations and other forfeiture techniques. Its main task would be to act as a specialized investigatory unit at the disposal of local agencies. It could help draft search warrants, execute the warrants, identify important evidence, conduct financial investigations, and prosecute cases. The group also could serve as a referral service for questions from local agencies. Such a team would provide a local enforcement agency with the means to dismantle the economic support of a criminal organization that the agency has targeted while freeing the agency's own officers to pursue other criminal aspects of the case.

In many jurisdictions, the essential elements for developing a cooperative forfeiture program already exist. For example, information sharing among agencies and jurisdictions already is a common practice. Other areas of cooperation, however, would require formal agreements or changes in state statutes or local ordinances. For example, arrangements for leasing common storage facilities and sharing staff should be set out in formal agreements, while legislative action may be necessary to create a drug forfeiture account, into which assets would be deposited for later distribution to agencies involved in each forfeiture case.

At minimum, however, the terms of any forfeiture-related interagency or intergovernmental cooperative arrangement, even an agreement that involves only the sharing of information, should be set out in writing. The agreement should address specifically the legal status of the cooperative arrangement, the roles and responsibilities of each agency participating in the arrangement, and the procedures for distributing forfeiture proceeds. Agreements that describe arrangements for sharing manpower and equipment also should address authority and the extent of liability of all involved agencies.

Whatever arrangements appear to be most suitable in a given jurisdiction, the key to making a cooperative program work is identifying each participating agency's strengths and capabilities at the outset and developing a plan that takes those capabilities into account and encourages all participating agencies to contribute their resources and experience to the fullest extent possible. With commitment and innovation, resource or other constraints placed upon jurisdictional development of forfeiture capabilities can be overcome.



CHAPTER IX

DEVELOPING AN ASSETS SEIZURE AND FORFEITURE CAPABILITY

Part I: Model Curriculum

The curriculum that follows is intended to instruct participants in a specialized enforcement approach to combatting drug trafficking and other drug laws violations. The program emphasizes development of financial investigation capabilities within local and state law enforcement agencies and prosecutorial offices and the use of financial investigations of alleged drug laws offenders with the objective of depriving them of the economic incentives and further financial support for their criminal activity. The curriculum is designed for an audience of both civil and criminal litigators as well as a cross section of police department personnel, including chiefs, managers, unit supervisors, budget and planning officers, investigators, and specialists in areas relevant to drug laws enforcement. The curriculum is designed to be presented over a period of a day and a half.



A Model Curriculum for Instruction on the Use of Assets Seizure and Forfeiture in Drug-Related Cases

- I. Introductory remarks
- II. Program overview
 - A. Description of program objectives and coverage
 - Financial investigation tools and techniques
 - Short- and long-term planning and resource management
 - Process approach to law enforcement; reorientation of approach from criminal to civil law
 - B. Description of definitions of forfeiture
 - C. Discussion of benefits of using seizure and forfeiture
 - Deterrence of additional criminal activity
 - Elimination of economic incentives for drug-related criminal activity
 - Reduction in other kinds of crimes
 - Creation of foundation for other cooperative efforts
 - Generation of additional revenues, use of tangible assets, for agencies
 - D. Discussion of levels of commitment required for use of assets seizure and forfeiture
 - Time and resource commitments to train personnel, carry out investigations, develop cases
 - Possible reorganization of management and resources to accommodate an integrated approach to enforcement
 - E. Description of elements of curriculum
 - Explanation of what each of the following program segments covers, why each is part of the curriculum, and how each part fits into the process as a whole:
 - ◆ Anatomy of a case
 - ◆ Applicable laws and procedures
 - ◆ Decision to initiate seizure and forfeiture actions

- ♦ Asset identification and forfeiture processes
- ♦ Practical applications: an exercise
- Discussion of roles of participants in instructional program

III. Instruction in curriculum elements

A. Anatomy of a case

- Presentation of a history of an actual seizure/forfeiture case that occurred in a local or state jurisdiction — in the participants' jurisdiction, if possible — to illustrate the objectives and benefits of the effective use of forfeiture and to introduce the concepts to be covered in the training curriculum. A single individual, such as a prosecutor, or a panel of individuals representing prosecutorial and law enforcement functions, may conduct the session.
- Description of the case as it actually was developed and successfully concluded
- Analysis of strengths and weaknesses of the operation and exploration of what officials might do differently if they were to repeat the process in a similar situation
- Relation of various stages and aspects of the case to curriculum elements, both through responses to program participants' questions and through a summary of discussion

B. Seizure and forfeiture laws and procedures applicable in drug-related cases

- Description and discussion of the elements and applications of all relevant laws, policies, and procedures in carrying out assets seizure and forfeiture actions in drug-related cases
- Description and discussion of the elements and applications of all relevant laws, policies, and procedures in carrying out assets seizure and forfeiture actions in drug-related cases in the participants' jurisdiction(s). The instructor should be an individual well-versed in the laws and procedures as they are applied and interpreted in the participants' jurisdiction(s). If more than one state is represented among the participants, a qualified instructor should be provided for each represented jurisdiction, and the participants should be divided into groups by jurisdiction for this portion of the program. The instructor(s) should be present throughout the training program to answer participants' questions

concerning legal issues that might arise in the course of discussion in subsequent portions of the program.

- Generic description of an effective forfeiture law to introduce specific elements of such laws, to point out the uses or benefits of certain kinds of provisions, and to provide a background for discussion of provisions in the law(s) of the participants' jurisdiction(s)
- Description and discussion of the most significant elements of state forfeiture, bank secrecy, privacy, and financial reporting laws, as well as any other state laws or state or local policies or procedures applicable to assets seizure and forfeiture actions in participants' jurisdiction(s)
- Description and discussion of significant elements of federal forfeiture, bank secrecy, privacy, and financial reporting laws, to the extent that they are applicable in lieu of or in addition to state law(s) in the jurisdiction(s)
- Description and discussion of significant elements of federal guidelines concerning sharing of assets, if relevant and potentially useful to program participants
- Discussion of need to consider ways in which implementation of applicable laws and procedures is affected by other factors, such as policy and resource considerations
- Guidance through curriculum materials provided for reference: copies of laws, policies, guidelines discussed in this session, as well as another state's forfeiture law that has been used effectively

C. Decision to initiate a forfeiture action

- Discussion of ways in which department policies and priorities shape decisions concerning whether to proceed with forfeiture in a given case involving drug laws violations. The instructor should be familiar with the process from both management and operational perspectives and should draw upon that experience to point out effects of decisions on both management and operations.
- Examination of the need for, and benefits of, department policies as guides for developing strategies and establishing criteria for decisions
- Discussion of the kinds of criteria that could or should be reflected in policies and decisions, such as resource requirements;

the need to involve other agencies; the need to manage assets seized pending forfeiture; and the potential for losing the forfeiture case

- Exploration of the possible effects of a given decision, such as whether to proceed against a supplier versus a seller, on overall drug laws enforcement strategy
- Discussion of the need to consider the effects of department-wide priorities in law enforcement, as well as government-wide priorities generally, on drug laws enforcement priorities and policies
- Discussion of the different but complementary roles of police and prosecutors in assets seizure and forfeiture cases, as well as drug laws enforcement generally, and the need for each agency to communicate with the other(s) from the outset concerning needs, priorities, and strategies

D. Assets identification and forfeiture processes

- Instruction concerning various investigative tools and procedures available for determining the extent of an individual's assets, as well as the preparation necessary for using those tools; effective means of bringing such assets into forfeiture proceedings; and other factors that affect case management or disposition. For this portion of the program, participants may be grouped together for an introductory discussion but subsequently divided into two groups, one for line officers and one for management, to permit more focused instruction in some aspects of assets forfeiture that would be more relevant to one group than the other. Prosecutors should be included in the management group. There should be at least two instructors, more if resources permit, in order to have the most experienced individuals available providing information on specific investigative techniques and management problems.
- Overview for the participant group as a whole concerning the kinds of skills, experience, and approaches necessary to develop an assets forfeiture case against a drug laws offender
 - ♦ Review of each of the elements discussed in the case study presented earlier in the program

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- ♦ Description of each element in greater detail, showing how each fits into the total forfeiture process
 - ♦ Discussion of the need for close cooperation among all agencies and individuals involved in carrying out forfeiture actions, with consideration of the fact that, at the same time, each is handling a different aspect of the job that requires more specialized instruction
 - Instruction of two separate groups, one for line officers and one for prosecutors and police supervisors and managers, for more specialized discussion of aspects of forfeiture most relevant to their work
 - ♦ Instruction of line officers in the following:
 - Identification and tracing of assets using financial investigation techniques
 - Bank records available in investigations
 - Vehicles for asset conversion, such as banks and securities dealers
 - Evidentiary needs in forfeiture cases
 - Legal or policy considerations affecting identification or investigation of assets and associated records
 - Task force roles in any interagency or intergovernmental enforcement effort
 - Other topics of concern or relevance in participants' jurisdiction(s)
 - ♦ Instruction of prosecutors and police supervisors and managers in the following:
 - Overview of techniques being discussed in line officers' group
 - Personnel needs and skills — for example, an individual trained in reading financial records — necessary for developing assets forfeiture cases and possible means of satisfying those needs
 - Formation and use of task forces
 - Integration of police, prosecutorial roles in forfeiture actions

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- Legal considerations in forfeiture actions
 - Assets management
 - Development of public support for drug laws enforcement strategies, including forfeiture and complementary emphasis on drug use prevention and education
 - Legislative needs and strategies relevant to participants' jurisdiction(s)
 - Other topics of concern or relevance to participants' jurisdiction(s)

E. Practical applications: An exercise (see Part II of this chapter)

- Presentation to the participant group as a whole of a fact pattern concerning drug trafficking and, with instructors' guidance, application by participants of what they have learned in the program to decide how they would proceed with the case, and why, to accomplish the objective of completing a forfeiture action successfully

IV. Summary discussion

- A. Review of the issues covered throughout the program, highlighting points of discussion and participant questions
- B. Discussion of specific first steps participants may take, using knowledge gained from this program, to increase the use of forfeiture in drug trafficking cases in their jurisdiction(s)
- C. Request for participants' cooperation in completing evaluation form covering program and in responding to any follow-up questions from sponsors concerning subsequent forfeiture-related activity in participants' jurisdiction(s)

Part II: A Practical Exercise

This manual is designed to provide users with a basic understanding of the concept of forfeiture and the benefits to be gained from an aggressive assets seizure and forfeiture program. The manual presents the general framework of the forfeiture process, from identifying the potentially forfeitable property to the disposition of the property. Additionally, common problems in the investigation and prosecution of forfeiture cases, and approaches to solving those problems, are addressed. The practical exercise that follows provides a vehicle for testing the comprehension of concepts presented in the manual and for analyzing the efficacy and adequacy of existing forfeiture laws and

procedures in the user's jurisdiction. The exercise involves decisions concerning what property is to be seized, the rationale for each seizure, and the type of investigation necessary for successful completion of each forfeiture action. It also contains examples of circumstances and issues that arise commonly during the course of a drug investigation involving potentially forfeitable property.

Fact Pattern

Officers of the narcotics section are contacted by a confidential informant who says that he has knowledge of an individual who actively is seeking a source for large amounts of cocaine. At the direction of the officers, the informant sets up a meeting with that individual, a mid-level manager for a local franchise of a national video rental concern.

Under police surveillance, the informant meets with the video rental store manager (store manager) who arrives at the location in a 1994 Honda EX. The store manager states that he is acting as an intermediary for several other individuals who are interested in purchasing a bulk shipment of cocaine. A price and quantity are discussed and the informant agrees to meet with the store manager and the principal for the potential buyers. The store manager tells the informant that he will contact the informant by telephone to advise him of the time and location for the meeting with the buyers' representative.

The store manager is placed under surveillance by police and followed to a small strip mall that houses the video rental store and a restaurant. The store manager enters the restaurant and proceeds to a table where the video store franchise owner (store owner) soon joins him. The store manager and the store owner are joined briefly by a third individual, the owner of both the restaurant and the strip mall property (mall owner). After the mall owner's departure, the store manager reports his conversation with the informant to the store owner. The store owner tells the store manager that his consortium of purchasers is prepared to negotiate to buy as much cocaine as the store manager's contact can supply. The store manager and the store owner discuss arrangements for the meeting with the informant and leave the restaurant for the video rental store.

At the video rental store, the store manager and the store owner meet briefly with a partner in the store's accounting firm concerning the store's federal quarterly estimated tax payments. At the end of that meeting, the store manager and the store owner return to their respective vehicles — the store owner to a 1994 Acura Legend — and leave the area. Police follow the store owner to his home in an elegant and exclusive neighborhood of the suburban community where homes cost on the average more than \$500,000.

Undercover police officials maintain surveillance of the store owner through the night. The store manager likewise is kept under surveillance by police officials. Late in the evening, the store manager contacts the informant by telephone to notify him of the date, time, and location for the meeting to negotiate the drug sale. In that conversation, the store manager advises the informant that his buyers would like to purchase 10 kilos of cocaine and will pay up to \$160,000 for that quantity of drugs.

The informant contacts police to report the logistical information for the meeting with the potential buyers of the drugs. Police officers obtain 10 kilos of cocaine from the police property room and arrange for the informant to take the contraband to his meeting with the store owner and the store manager. The informant and an undercover officer, posing as the informant's associate and driver, travel by car with the cocaine to the strip mall, where the informant leaves the car and joins the store manager and the store owner in the restaurant; the undercover officer remains in the car in the parking lot. The mall owner joins the store owner and the store manager and their guest for dinner. After dinner, the store manager, the store owner, and the informant leave the restaurant and move their meeting to the video store where they negotiate the drug purchase.

The informant, accompanied by the store manager, returns to the vehicle where the undercover officer is waiting and secures a small sample of cocaine. The informant returns to the meeting and presents the cocaine to the store owner for sampling and testing. The store owner says that the contraband is acceptable. The informant restates the terms for the purchase of the cocaine: 10 kilos for \$160,000. The store owner affirms the terms of the agreement but says that one of his buyers is unable to come up with his portion of the purchase price, leaving the other buyers with only \$100,000 to purchase the contraband. The informant says that he will have to contact his supplier to report the store owner's cash problem and to solicit instructions concerning any renegotiation of the deal. The informant returns to his vehicle where the undercover officer is waiting and reports on his meeting with the store owner. The undercover officer tells the informant to use a nearby pay telephone to contact a supervisor, the lead case agent, for further instructions. The case agent tells the informant to advise the store owner that the supplier would be willing to accept some form of collateral until the store owner's consortium is able to come up with the cash. The informant is instructed by the case agent to express a particular interest in some other type of controlled substance, preferably heroin, sinsemilla, or prescription drugs, as the collateral. The informant is further directed to demand \$100,000, rather than \$60,000, worth of the contraband for use as collateral because the store owner is unable to come up with the agreed upon amount of cash.

The informant returns to the video store and relays his instructions to the store owner. The store owner says that he has access to 100 pounds of sinsemilla, with a value of \$100,000, that he is willing to put up as collateral. The informant accepts the proposed arrangement. The informant and the store owner agree to exchange the money and contraband at the video rental store at 11:00 p.m. the following day. The informant, the store manager, and the store owner conclude their meeting. The informant and the store manager leave the store; the store owner remains for a meeting with the partner in the store's accounting firm who, in addition to handling the store's financial matters, manages the store owner's personal finances.

Police maintain surveillance of the store manager and the store owner through the night. The lead case agent contacts the district attorney's office and informs an assistant district attorney of the investigation. The case agent advises the assistant district attorney of the impending arrests and the police department's interest in pursuing forfeiture in conjunction with the case.

The following night, the informant, the store manager, and the store owner meet in the video rental store at the appointed hour to exchange the cash and contraband. As the informant, the store manager, and the store owner load the sinsemilla into the informant's vehicle, police announce their presence and place the store owner and store manager under arrest.

After obtaining search warrants, the police search the video store, the restaurant, and the homes and vehicles of the store owner and the store manager. Traces of the sinsemilla are found in the store owner's vehicle; cash and cocaine are found in the store owner's office in the video store. Police seize the cash, contraband, and the store manager's and the store owner's vehicles.

Questions

- Are there legal or procedural errors, deficiencies, or oversights in the police investigation that may affect the outcome of any forfeiture actions instituted in conjunction with all or any part of this case?
- What charges could be filed against the store manager and the store owner at arraignment? Does probable cause exist to arrest the mall owner? If so, what charges could be filed against him?
- Should the police pursue forfeiture of the cash and vehicles found at the site of the arrest?
 - What evidence developed by police in the course of the investigation and at the scene of the arrests would support seizure of the cash and vehicles?

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- Should forfeiture of the cash and vehicles be pursued under criminal or civil forfeiture provisions?
 - In checking the vehicle registration, officers learn that the store manager's vehicle, the Honda, is owned jointly with his wife, from whom he is separated, and the store owner's vehicle is leased by the video rental store. In light of this information, should the prosecutor institute forfeiture proceedings against either of these vehicles?
 - Under the facts presented in this case, would police have sufficient evidence to support seizure of the video rental store? The store owner's home? The restaurant? The entire strip mall?
 - If so, what evidence would support the seizure in each case? Should forfeiture of these properties be pursued under criminal or civil forfeiture?
 - If not, what additional evidence could police have attempted to secure that potentially could have produced probable cause in each case?
 - In reviewing the store owner's personal financial records, police discover that a local bank recently has approved a \$150,000 home equity line of credit on the store owner's home. Police discover further that the store owner in turn has used the line of credit to finance the down payment on a piece of lakefront property.
 - Would the police officials' discovery of the line of credit affect any planned forfeiture proceedings against the store owner's home?
 - Could or should the police initiate forfeiture proceedings against the lakefront property?
 - Informal police inventories of the store owner's property and police analyses of the store owner's personal financial records show inconsistencies that may indicate that the store owner is involved in illegal activity. Moreover, examination of financial and other records covering the video rental store's operations indicate suspiciously large and frequent cash transactions that appear disproportionate with the store's activity. Both the store owner's personal and business-related financial transactions were managed by the accounting firm partner. In addition, in a search of the accounting firm partner's vehicle, which was conducted pursuant to a warrant, officers find an unlocked briefcase containing what appeared to be records pertaining to the video business; a date book containing notations and several telephone numbers; and a number of receipts from automatic teller machines.

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- Does probable cause exist to arrest the accounting firm partner?
 - Could police initiate forfeiture proceedings against the accounting firm partner's personal property? The accounting firm itself?



APPENDICES

APPENDIX A:

STATUTORY CITATIONS TO STATE FORFEITURE PROVISIONS

STATUTORY CITATIONS TO STATE FORFEITURE PROVISIONS

| JURIS. | CSA FORFEITURE PROVISIONS | RICO FORFEITURE PROVISIONS | OTHER PROVISIONS |
|---------------|----------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| AL | Ala. Code § 20-2-93 (1990 & Supp. 1993) | | |
| AK | ALASKA STAT. §§ 17.30.110-17.30.126 (1983 & Supp. 1993) | | § 11.46.487 (1989) (forfeiture of property upon conviction); § 11.73.060 (1989) (imitation controlled substances); § 12.35.025 (1990 & Supp. 1993) (seizure of property) |
| AZ | ARIZ. REV. STAT. ANN. § 13-3413 (1989); 13-3415 (1989) | § 13-2314 (1989 & Supp. 1993); § 13-4315 (1989 & Supp. 1993) | |
| AR | ARK. CODE ANN. §§ 5-64-505, 5-64-509, 5-64-806 (Michie 1993) | | §§ 20-64-307, 20-64-308 (Michie 1991) |
| CA | CAL. HEALTH & SAFETY CODE §§ 11470 to 11493 (Deering 1984 & Supp. 1994) | CAL. PENAL CODE § 186 et. seq. (Deering 1985 & Supp. 1994) | |
| CO | COLO. REV. STAT. §§ 16-13-501 to 16-13-508 (1986 & Supp. 1993); §§ 16-13-509 to 16-13-511 (Supp. 1993); §§ 16-13-701, 16-13-702 (Supp. 1993) | § 18-17-106 (1986 & Supp. 1992) | |
| CT | CONN. GEN. STAT. ANN. § 21a-246(a) (West 1985 & Supp. 1993); § 54-36(g) and (h) (West 1985 & Supp. 1993) | §§ 53-396, 53-397, 53-402 (West 1985 & Supp. 1993) | |
| DE | DEL. CODE ANN. tit. 16 § 4784 (1983 & Supp. 1992) | tit. 11 §§ 1504, 1506, 1511 (1987) | DEL. CT. C.P.R. 71.3 (1991) |
| DC | D.C. Code Ann. § 33-552 (1981 & Supp. 1993) | | |
| FL | FLA. STAT. ANN. § 893.12 (West 1976 & Supp. 1993) | §§ 893.145, 895.05, 895.09 (Supp. 1993) | |
| GA | GA. CODE ANN. § 16-13-49 (1992 & Supp. 1993) | § 16-14-6 (1992 & Supp. 1993); § 16-14-7 (1992) | § 16-13-32.1 (1992); § 16-13-72.1 (1992) |

STATUTORY CITATIONS TO STATE FORFEITURE PROVISIONS

| JURIS. | CSA FORFEITURE PROVISIONS | RICO FORFEITURE PROVISIONS | OTHER PROVISIONS |
|--------|------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------|--------------------------------------------------------------------|
| HI | HAW. REV. STAT. §§ 712A-1 to 712A-16 (1988 & Supp. 1993) | §§ 842-1, 842-3 (1988 & Supp. 1993) | |
| ID | IDAHO CODE § 37-2744 (1977 & Supp. 1993) | § 18-7804 (1977 & Supp. 1993) | |
| IL | ILL. ANN. STAT. ch. 720, para. 570/505 (1993 & Supp. 1993); ch. 720, para. 5/36 (1993 & Supp. 1993) | ch. 725, para. 175 (1992 & Supp. 1993) | |
| IN | IND. CODE § 16-6-8.5-5.1 (1988) | §§ 34-4-30.5-3, 34-4-30.5-4 (1988 & Supp. 1992) | |
| IA | IOWA CODE ANN. § 204.506 (West 1987 & Supp. 1993) | | §§ 809.1, 809.6 to 809.14 (West 1994) |
| KS | KAN. STAT. ANN. §§ 65-4135 (1992 & Supp. 1993; 65-4136, 65-4156, 65-4171; 65-4173 (1992) | | § 65-173 (1992) |
| KY | KY. REV. STAT. ANN. § 218A.230 (Michie 1991); §§ 218A.410, 218A.415 (Michie 1991 & Supp. 1992); §§ 218A.420, 218A.440 Michie 1991) | | |
| LA | LA. REV. STAT. ANN. § 32:1550 (West 1989 & Supp. 1993) | § 15:1356 (West 1992 & Supp. 1993) | § 40:975 (West 1992); § 40:2601 (West 1992) |
| ME | ME. REV. STAT. ANN. tit. 15 § 5821, <u>et. seq.</u> (West Supp. 1993) | | tit. 14 § 7151 (West 1980) |
| MD | MD. ANN. CODE §§ 27-297, 27-297A, 27-297B (1992 & Supp. 1993) | | § 27-281A (use of weapon); § 27-36 (1992) (seizure and forfeiture) |
| MA | MASS. GEN. LAWS ANN. ch. 94C § 47 (West 1985 & Supp. 1993) | | ch. 257 § 1 (West 1992) |
| MI | MICH. COMP. LAWS ANN. § 333.7521 <u>et. seq.</u> (West 1992 & Supp. 1993) | § 750.415 (West 1991 & Supp. 1993) | § 600.4701 (West Supp. 1993); § 750.308 West 1991 & Supp. 1993) |

STATUTORY CITATIONS TO STATE FORFEITURE PROVISIONS

| JURIS. | CSA FORFEITURE PROVISIONS | RICO FORFEITURE PROVISIONS | OTHER PROVISIONS |
|---------------|----------------------------------------------------------------------|--------------------------------------------------------------------------------|-----------------------------------------------------------------------------------|
| MN | MINN. STAT. ANN. § 609.531 <i>et seq.</i> (West 1987 & Supp. 1994) | § 609.904 <i>et seq.</i> (West Supp. 1994) | |
| MS | MISS. CODE ANN. §§ 41-29-153, 41-29-154, 41-29-177, 41-29-181 (1993) | §§ 97-43-9, 97-43-11 (Supp. 1993) | |
| MO | MO. ANN. STAT. § 195.140, 195.145 (Vernon 1983 & Supp. 1993) | | §§ 513.600, 513.607, 513.620, 513.623 (Vernon Supp. 1993) |
| MT | MONT. CODE ANN. §§ 44-12-101 to 44-13-103 (1992) | | |
| NE | NEB. REV. STAT. § 28-431 (1989) | | |
| NV | NEV. REV. STAT. § 453.301-453.311 (1991) | § 207.420-207.510 (1991) | § 179.1164-179.121 (1991) |
| NH | N.H. REV. STAT. ANN. § 318-B:17 (1984 & Supp. 1993) | | § 617 (1986 & Supp. 1993) |
| NJ | N.J. STAT. ANN. § 24:21-52 (West Supp. 1993) | § 2C:41-4 (West 1982 & Supp. 1993) | § 2C:64-1 <i>et seq.</i> (West 1982 & Supp. 1993) (general forfeiture provisions) |
| NM | N.M. STAT. ANN. § 30-31-34 to 30-31-36 (Michie 1989) | §§ 30-42-4, 30-42-6 (Michie Supp. 1992) | §§ 30-31A-9 to 30-31A-11, 30-31B-17 (Michie 1989) |
| NY | N.Y. PUB. HEALTH LAW §§ 3387, 3388 (McKinney 1993) | N.Y. PENAL LAW § 460 (McKinney 1989 & Supp. 1994); § 480 (McKinney Supp. 1994) | N.Y. CIV. PRAC. L. & R. § 1311 (McKinney Supp. 1994) |
| NC | N.C. GEN. STAT. §§ 90-112 to 90-112.1 (1993 & Supp. 1994) | § 75D-5(a)-(I) (1990 & Supp. 1994); § 75D-8 (1990) | |
| ND | N.D. CENT. CODE § 19-03.1-36 (1991 & Supp. 1993) | | § 54-12-14 (1989 & Supp. 1993) |
| OH | OHIO REV. CODE ANN. § 3719.11 (Baldwin 1993) | §§ 2933.32, 2933.41 (Anderson 1993) | §§ 2925.13, 2925.41 to 2925.45 (Anderson 1993) |

STATUTORY CITATIONS TO STATE FORFEITURE PROVISIONS

| JURIS. | CSA FORFEITURE PROVISIONS | RICO FORFEITURE PROVISIONS | OTHER PROVISIONS |
|--------|-------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------|
| OK | OKLA. STAT. ANN. tit. 63 §§ 2-503 to 2-508 (West 1984 & Supp. 1994) | tit. 21 § 68 (West 1983); tit. 21 § 141 (West 1983); tit. 22 § 1405, 1410, 1411 (West Supp. 1994) | |
| OR | OR. REV. STAT. ANN. § 167.247 (1991) | §§ 166.725(2) to 166.725(4) (1991 & Supp. 1993); § 180.640(3) (1991) | §§ 161.045(3), 167.247 (1991) |
| PA | 42 PA. CONS. STAT. §§ 6801, 6802 (Supp. 1992) | 18 PA. CONS. STAT. § 911 (1983 & Supp. 1993) | |
| RI | R.I. GEN. LAWS §§ 21-28-5.04 to 21-28-5.07 (1989 & Supp. 1993) | § 7-15-4.1 (1992) | |
| SC | S.C. CODE ANN. §§ 44-53-520, 44-53-530, 44-53-586 (1985 & Supp. 1993); § 44-53-583 (Supp. 1993) | | |
| SD | S.D. CODIFIED LAWS ANN. §§ 34-20B-70, 34-20B-70.1, 34-20B-85 (1986 & Supp. 1993) | | |
| TN | TENN. CODE ANN. §§ 53-11-201, 53-11-2-4, 53-11-451 (1991 & Supp. 1993); § 53-11-452 (1991) | § 39-17-420 (1991 & Supp. 1993) | |
| TX | TEX. REV. CIV. STAT. ANN. art. 59.02-.05 (Vernon Supp. 1994) | TEX. CRIM PROC. CODE ANN. art. 59.02-.05 (Vernon Supp. 1994) | TEX. HEALTH & SAFETY CODE ANN. § 481.154-159 (Vernon 1992) |
| UT | UTAH CODE ANN. § 58-37-13 (1990 & Supp. 1993) | § 76-10-1603.5 (1990 & Supp. 1993) | § 58-37-20 (Supp. 1993); § 58-37d-7 (Supp. 1993) |
| VT | VT. STAT. ANN. tit. 18 §§ 4241, 4248, 4477 (Supp. 1993) | | |
| VA | VA. CODE ANN. § 18.2-249 (Michie 1988 & Supp. 1993) | | §§ 19.2-386.1 to 19.2-386.14 (Michie 1990 & Supp. 1992); §§ 19.2-369 to 19.2-386 Michie 1990) |

STATUTORY CITATIONS TO STATE FORFEITURE PROVISIONS

| JURIS. | CSA FORFEITURE PROVISIONS | RICO FORFEITURE PROVISIONS | OTHER PROVISIONS |
|---------------|-------------------------------------------------------------|-----------------------------------------------------------------------------------------|----------------------------------------------------------------|
| WA | WASH. REV. CODE ANN. § 69.50.505 (West 1985 & Supp. 1993) | § 9A.82.100 (West 1988 & Supp. 1993); § 9A.83.030 (Supp. 1993); § 9A.82.110 (West 1988) | § 69.52.040 (West 1985 & Supp. 1993); § 69.52.045 (Supp. 1993) |
| WV | W. VA. CODE § 60A-4-403a (1992) | | §§ 60A-7-701 to 60A-7-707 (1992) |
| WI | WIS. STAT. ANN. §§ 161.55, 161.555 (West 1989 & Supp. 1993) | §§ 946.86, 946.87 (West Supp. 1993) | §§ 973.075, 973.076 (West 1985 & Supp. 1993) |
| WY | WYO. STAT. § 35-7-1049 (1988 & Supp. 1992) | | |

APPENDIX B:

**A GUIDE TO EQUITABLE SHARING OF
FEDERAL FORFEITED PROPERTY FOR
STATE AND LOCAL LAW ENFORCEMENT AGENCIES**

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

A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies

March 1994



**A Guide to Equitable Sharing of
Federally Forfeited Property for
State and Local Law
Enforcement Agencies**

March 1994

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



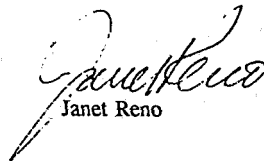
Office of the Attorney General
Washington, D.C. 20530

FOREWORD

In the nine years since the Comprehensive Crime Control Act of 1984 gave federal investigators and prosecutors the tools they needed to mount an effective national asset forfeiture program, forfeiture has become an important component of the federal criminal justice process.

One of the most important provisions of the 1984 law authorized the sharing of federal forfeiture proceeds with cooperating state and local law enforcement agencies. As this is written, the Department of Justice has shared over \$1.4 billion in forfeited assets with more than 3,000 state and local law enforcement agencies.

It is the purpose of this Guide to enhance the integrity of the sharing program so that it will continue to merit public confidence and support. For this reason, we have appended to this Guide the National Code of Professional Conduct for Asset Forfeiture (Appendix G). All seizing and prosecutorial agencies should take steps to ensure that they are in compliance with this Code.


Janet Reno

March 1994
Washington, D.C.

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I. SHARING AUTHORITY

The Attorney General's authority to share federally forfeited property with participating state and local law enforcement agencies is established in federal law.¹ The exercise of this authority is discretionary. The Attorney General is not required to share property in any case.

The Controlled Substances Act most fully states the intent of Congress in the sharing of forfeited property. It provides that:

The Attorney General shall assure that any property transferred to a State or local law enforcement agency . . .

- (A) *has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and*
- (B) *will serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies.*

21 U.S.C. § 881(e)(3).

II. PURPOSES OF THE DEPARTMENT OF JUSTICE FORFEITURE PROGRAM

The primary purpose of the Department's Forfeiture Program is law enforcement: to deter crime by depriving criminals of the profits and proceeds of their illegal activities and to weaken criminal enterprises by removing the instrumentalities of crime. An ancillary purpose of the program is to enhance cooperation among federal, state, and local law enforcement agencies through the equitable sharing of federal forfeiture proceeds.

¹ 21 U.S.C. § 881(e)(1)(A) and (e)(3), 18 U.S.C. § 981(e)(2), and 19 U.S.C. § 1616a.

III. FEDERAL AGENCIES IN THE JUSTICE FORFEITURE PROGRAM

As of October 1, 1993, the following federal entities are in the Department of Justice Forfeiture Program:

Federal Bureau of Investigation
Drug Enforcement Administration
Immigration and Naturalization Service
United States Park Police²
United States Marshals Service²
United States Attorneys' Offices²
Criminal Division²
United States Postal Inspection Service³

NOTE: Sharing by agencies of the U.S. Department of the Treasury is subject to the Treasury Department's Guide to Equitable Sharing for Foreign Countries and Federal, State, Local Law Enforcement Agencies (October 1, 1993).

IV. AGENCIES ELIGIBLE TO RECEIVE EQUITABLE SHARING PAYMENTS

Any state or local law enforcement agency that directly participates in an investigation or prosecution that results in a federal forfeiture may request an equitable share of the net proceeds of the forfeiture.⁴ (See Section IX on How to Calculate the Sharing Percentage.)

² These entities do not directly adopt state and local seizures.

³ Although required only in judicial forfeitures involving proceeds, the U.S. Postal Inspection Service has adopted the DAG-71 and DAG-72 forms for use in sharing with state and local law enforcement agencies. The Memorandum of Understanding between the U.S. Postal Inspection Service and the Department of Justice should be referred to in connection with the distribution of federal forfeiture proceeds among federal agencies. (See Executive Office for Asset Forfeiture Directive No. 91-7, "Equitable Sharing Information," May 20, 1991.)

⁴ Sharing with foreign countries and other federal agencies is not covered in A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies (March 1994), hereinafter referred to as the Guide.

NOTE: No sharing request or recommendation, including shares negotiated in task force or other agreements, is final until approved by the federal decision-maker. (See pages 5-9.)

V. TWO WAYS AN AGENCY CAN PARTICIPATE IN THE EQUITABLE SHARING PROGRAM

A. Joint Investigation

Most sharing is the result of joint investigations. Joint investigations are those in which federal agencies work with state or local law enforcement agencies to enforce federal criminal laws.

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 federal agencies listed in Section III adopt the seizure and proceed with federal forfeiture. Federal agencies may adopt such seized property for federal forfeiture where the conduct giving rise to the seizure is in violation of federal law and federal law provides for forfeiture. State and local agencies have **thirty (30) calendar days** from the date the property was originally seized to request a federal adoption. Waivers of the 30-day rule may be approved by the adopting federal agency where the state or local law enforcement agency requesting adoption demonstrates the existence of exceptional circumstances justifying the delay.

VI. WHAT THE MINIMUM MONETARY THRESHOLDS ARE

Seizures are not generally adopted for federal forfeiture unless the equity in the seized property exceeds the following thresholds:

| | | |
|--------------------|---------------------------------------------------------------------------|----------------------------------------------------------------------------------|
| Conveyances | Vehicles Vessels Aircraft | \$5,000 \$10,000 \$10,000 |
| Real Estate | Land and any improvements | \$20,000 or 20 percent of the appraised value, whichever is greater ⁵ |
| All Other Property | Currency, bank accounts, monetary instruments, jewelry, etc. ⁶ | \$5,000 |

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 the criteria. In individual cases, these thresholds may be waived where forfeiture will serve a compelling law enforcement interest, e.g., forfeiture of a "crack house," of a conveyance with hidden compartments, or of a vehicle seized at an international border for alien smuggling. Any downward departure from the monetary 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. The fact that the owner or person in possession of the property has been arrested or will be criminally prosecuted is an appropriate basis for a downward departure.

⁵ As a general rule, the Department of Justice does not adopt contaminated real properties. See Executive Office for Asset Forfeiture Directive No. 90-3, "Departmental Policy Regarding the Seizure and Forfeiture of Real Property that is Potentially Contaminated, or is Contaminated, with Hazardous Substances," June 29, 1990.

⁶ Firearms are forfeited without regard to value.

VII. HOW PROPERTY IS FEDERALLY FORFEITED

A. Administrative Forfeiture

Federal law authorizes the seizing or adopting agency to administratively forfeit the following types of property (unless a timely claim is filed):

| | |
|------------------------------------------------------------------------------------------------------|----------------------|
| Monetary Instruments (e.g., cash, checks, stocks, bonds) | Unlimited Value |
| Hauling Conveyances (e.g., vehicles, vessels, and aircraft used to transport illegal drugs) | Unlimited Value |
| Other Property (e.g., bank accounts, jewelry, etc.) | \$500,000 or less |

B. Judicial Forfeiture

Judicial forfeiture is required for any property other than monetary instruments and hauling conveyances if:

1. the value of the "other property" exceeds \$500,000;
2. a claim and cost bond has been filed; or
3. the property is real estate.

VIII. HOW TO APPLY FOR AN EQUITABLE SHARE

After the seizure in a joint case or adoption in an adoptive case, a state or local agency may request a share of the property by submitting a **Form DAG-71, Application for Transfer of Federally Forfeited Property**, to the pertinent federal investigative agency. A separate DAG-71 must be completed for each asset to be shared. (See Appendix A for a copy of the DAG-71 Form and other supplemental instructions.)

B. Sharing in Joint Operations Reflects the Degree of Direct Participation of the Requesting Agencies

Federal law mandates that sharing in joint cases reflects the "degree of direct participation of the state or local agency in the law enforcement effort resulting in the forfeiture." Normally this is determined by comparing the number of hours expended by the agents involved.

Example: Federal agents devote 1,000 hours, and state officers devote 500 hours, to a joint investigation and prosecution that result in a federal forfeiture. The net proceeds of the forfeited property are \$150,000. As the state law enforcement agency provided one third of the total 1,500 hours of effort, the equitable share for the state law enforcement agency would be \$50,000.

The following factors may be considered by the federal decision-maker where the hours devoted do not adequately reflect the degree of participation of the state or local agencies:

1. Did an agency originate the information leading to the seizure?

Example: As part of its normal intelligence gathering activities, a local law enforcement agency has been monitoring the activities of Drug Organization X. One day the agency learns specific information regarding the location of a forfeitable asset belonging to X. It shares this information with a federal agency and they both assign two agents to do a short-term joint investigation of one of X's drug dealers before making the seizure. The local agency merits a larger share of the proceeds of the sale of the asset than the 50 percent it would get based only on the time devoted to the joint investigation. The fact that this seizure was the indirect result of long-term intelligence gathering activities should be made known in the request for equitable sharing.

Similarly, a federal undercover investigation produces intelligence about drug shipments. In order to avoid compromise of the investigation, the federal government asks the state or local agency to execute the stop and seizure. The federal agency merits a larger share than it would get based strictly on agent time involved in the seizure.

2. Did an agency provide unique and indispensable assistance?

Example: An agency is asked to provide assistance only it can provide; for example: (1) seizing property in its jurisdiction (which may be hundreds of miles away from the area where the investigation is being

conducted); (2) providing an informant who has access to critical information that is essential to securing a conviction; or (3) recovering relevant information from a target that only it can obtain without making the target suspicious that he is under investigation. Such an agency would merit a relatively large share of the forfeiture proceeds even though its contribution to the overall investigation on a time and effort basis was relatively small. Therefore, the significance of any contribution should be made known in the request. By contrast, the provision of services many agencies typically can provide, such as use of a drug detection dog, a laboratory analysis, an aerial surveillance, or an undercover operative, would not necessarily be considered unique.

3. Could the state agency have achieved forfeiture under state law, but joined forces with the United States to conduct a more effective investigation?

Example: A local agency has conducted an investigation on its own that has led to the identification of certain assets for seizure. Rather than effecting an immediate seizure, the agency joins forces with a federal agency to conduct a broader investigation, which, while it results in more arrests, does not lead to the identification of significant additional assets. The local agency is entitled to receive most of the proceeds of the forfeited assets, regardless of the relative time and effort contribution of the federal agency to the overall investigation.

C. Adoptive Seizures⁷

The federal share in adoptive cases, where 100 percent of pre-seizure activity was performed by a state or local agency, is based on a "flat rate" of the net proceeds. This rate is twenty percent (20%) of the net proceeds.

***NOTE:** In no case (joint or adoptive) will the federal share be less than twenty percent.*

D. Sharing with State and Local Prosecutorial Agencies

The following are examples of ways prosecutors may qualify for an equitable share:

1. Providing assistance in the preparation of search and seizure warrants and

⁷ For details on adoption, see Executive Office for Asset Forfeiture Directive No. 93-1, "General Adoption Policy and Procedure," January 15, 1993.

other documents relating to the forfeiture. (Sharing percentage will normally be based on hours expended.)

2. Providing a key informant, or substantially assisting throughout the investigation that leads to a federal forfeiture. (Sharing percentages will normally be based on hours expended.)
3. Cross-designating state or local attorneys to handle the federal forfeiture or related criminal cases in federal court. (The Department will authorize sharing up to 5 percent of the federal government's share of the net forfeiture proceeds with cooperating local prosecutors who cross-designate attorneys in adoptive cases.)
4. Prosecuting criminal cases under state law directly related to a federal forfeiture. (The sharing percentage will be determined on a case-by-case basis.)

E. The Decision-Makers

In administrative forfeiture cases where the value of the forfeited property is less than \$1,000,000, the federal investigative agency determines the amount of the equitable share.

In judicial forfeiture cases — either civil or criminal — where the value of the forfeited property is less than \$1,000,000, the United States Attorney determines the amount of the equitable share.

In administrative and judicial forfeiture cases where the property is valued at \$1,000,000 or more, in multi-district cases, and in cases involving the transfer of real property to a state or local agency, the Office of the Deputy Attorney General determines the amount of the equitable share.

Questions regarding sharing should be directed to the federal investigative agency that processed the request or the coordinator for the Law Enforcement Coordinating Committee in the United States Attorney's Office.

NOTE: As stated above, no requested or recommended share, including shares negotiated in task force or other agreements, is guaranteed until approved by the decision-maker.

X. USES OF EQUITABLY SHARED PROPERTY

A. Law Enforcement Uses

1. **Permissible Uses.** Subject to laws, rules, regulations, and orders of the state or local jurisdiction governing the use of public funds available for law enforcement purposes (see paragraph 2.c. of this section), the expenses noted below are pre-approved as permissible uses of shared funds and property.⁵ Among the following uses, priority should be given to supporting community policing activities, training, and law enforcement operations calculated to result in further seizures and forfeitures:
 - a. **Activities Calculated to Enhance Future Investigations** — The support of investigations and operations that may result in further seizures and forfeitures, e.g., payment of overtime for officers and investigators; payment of the first year's salaries for new law enforcement positions that supplement the workforce; payments for temporary or not-to-exceed-one-year appointments; payments to informants; "buy," "flash," or reward money; and the purchase of evidence.
 - b. **Law Enforcement Training** — The training of investigators, prosecutors, and law enforcement support personnel in any area that is necessary to perform official law enforcement duties. Priority consideration should be given to training in (1) asset forfeiture in general (statutory requirements, policies, procedures, caselaw); (2) the Fourth Amendment (search and seizure, probable cause, drafting affidavits, confidential informant reliability); (3) ethics and the National Code of Professional Conduct for Asset Forfeiture; (4) due process rights; (5) protecting the rights of innocent third-parties (individuals and lienholders); and (6) this Guide.
 - c. **Law Enforcement Equipment and Operations** — The purchase of body armor, firearms, radios, cellular telephones, computer equipment, software to be used in support of law enforcement purposes, vehicles (e.g., patrol vehicles, surveillance vehicles), electronic surveillance equipment, uniforms, travel, transportation, supplies, leasing of office and other space for task force and

⁵ See Appendix B for further examples of permissible and impermissible uses. Also note that expenditures for these uses are permissible only to the extent that they increase resources available to the receiving agency. See Section X.B. of this Guide.

undercover operations, and leasing of other types of equipment that support law enforcement activities.

- d. **Detention Facilities** — The costs associated with construction, expansion, improvement, or operation of detention facilities managed by the recipient agency.
- e. **Law Enforcement Facilities and Equipment** — The costs associated with basic and necessary facilities, government furniture, safes, file cabinets, telecommunications equipment, etc., that are necessary to perform official law enforcement duties.
- f. **Drug Education and Awareness Programs** — The costs associated with conducting drug education and awareness programs by law enforcement agencies.
- g. **Pro Rata Funding** — The costs associated with supporting multi-agency items or facilities. Example: a town purchases a new computerized payroll system; the police department payroll represents twenty percent of the total use of the payroll system. The police department may use shared money to fund its pro rata share (twenty percent) of the operating and maintenance expenses of the system.

Property, facilities, equipment, and other items and services acquired with shared monies must be used only for law enforcement purposes unless written approval is obtained from the Executive Office for Asset Forfeiture. Such property must continue to be used predominantly for law enforcement purposes.

- h. **Asset Accounting and Tracking** — The costs associated with the accounting, auditing, and tracking of expenditures for shared cash, proceeds, and tangible property.

NOTE: *The fact that the shared property was forfeited as a result of a particular federal violation does not limit its use. For example, when an agency receives a share of property that was forfeited for a federal drug violation, the shared property does not have to be used in a department's drug program. Priority consideration should be given, however, to completely equipping units that generate forfeitures in order to foster future forfeiture investigations.*

2. **Impermissible Uses.**⁹ Impermissible state and local law enforcement uses include:
- a. **Payment of Salaries for Existing Positions** — The payment of salaries for current permanent law enforcement personnel is not permitted where the payment constitutes a supplantation of the agency's appropriated funds. Note that the payment of first year salaries for new, temporary, or not-to-exceed-one-year positions is permitted as these expenditures supplement and do not supplant existing resources.
 - b. **Uses of Forfeited Property by Non-Law Enforcement Personnel** — Use of a shared vehicle or other forfeited tangible property by non-law enforcement personnel for non-law enforcement business is not permitted.
 - c. **Payment of Non-Law Enforcement Expenses** — For example, while shared funds may be used to pay the expenses for drug testing of law enforcement personnel, such a use of these funds for the testing of all municipal employees is not permissible.
 - d. **Uses Not Specified in the DAG-71** — Requesting state and local agencies must specify on the DAG-71 what uses will be made of the shared property. Any departure from such stated uses must be approved in writing by the federal decision-maker or the Asset Forfeiture Office, Criminal Division, unless the use is already specified in paragraph A.1. of this section.
 - e. **Uses Contrary to the Laws of the State or Local Jurisdiction** — Shared funds may not be used for any purpose that would constitute an improper use of state or local law enforcement funds under the laws, rules, regulations, and orders of the state or local jurisdiction of which the agency is a part.
 - f. **Non-Official Government Use of Shared Assets** — Any use that creates the appearance that shared funds are being used for political or personal purposes is not permitted.
 - g. **Extravagant Expenditures** — Receiving agencies should use federal sharing monies prudently and in such a manner as to avoid any appearance of extravagance, waste, or impropriety.

⁹ See Appendix B for further examples of permissible and impermissible uses.

3. **Permissible Pass-Throughs to Other Agencies.** Although state or local law enforcement agencies may not generally pass-through (i.e. transfer) shared cash, proceeds, or tangible property to other governmental agencies, there are four types of transfers that are now permitted:

a. **Cash Transfers** — Receiving agencies may, in their discretion, transfer:

- (1) up to fifteen percent (15%) of any of their shared monies; and/or
- (2) in "windfall situations," (where federal sharing transfers represent over 25 percent of a state or local agency's annual budget), any amount over the 25 percent level

to governmental departments or agencies to support drug abuse treatment, drug and crime prevention and education, housing, and job skills programs, or other community-based programs. Such governmental departments or agencies may, in turn, transfer any monies so received to private, non-profit community organizations to be spent for such purposes.

b. **Tangible Personal Property Transfers** — as provided in subsection X.D. below.

c. **Real Property Transfers** — as provided in subsection X.C. below.

d. **Transfers to Other Law Enforcement Agencies** — Receiving law enforcement agencies may transfer or pass-through a portion of their sharing receipts to another law enforcement agency to be spent by that agency for a law enforcement purpose.¹⁰

Such pass-throughs must be expressly provided for in the DAG-71 and the general purpose indicated, e.g., "drug prevention."

¹⁰ Such expenditures are subject to the no supplantation rule described in Section B below.

4. General Guidance Concerning Use.

- a. **Non-Law Enforcement Use of Interest Income** — Interest on forfeited cash or proceeds is subject to the same use restrictions as shared cash or proceeds.
- b. **Anticipated Shared Property Should Not Be Budgeted** — Do not "spend it before you get it" or budget anticipated receipts. (For example, assume that a local law enforcement agency has filed a DAG-71 to request a 50 percent share of \$100,000. The \$50,000 should not be obligated or budgeted for two reasons: (1) the completion of the forfeiture is uncertain; and (2) the amount of the sharing that will ultimately be approved is also uncertain.)
- c. **Sharing Monies Should Not Be Retained Unnecessarily** — Sharing monies should normally be expended for their designated use or uses as they are received. It is permissible to retain sharing monies in a holding account for a reasonable period of time so they can be used to satisfy future needs. Generally, monies received should not remain unspent for a period of time exceeding two years from the date of their receipt. The balance in any holding account must be fully reported in the Annual Certification Report described in Section XII and Appendix E, along with the explanation of the contemplated disposition of this balance.

B. Increase and Not Replace

Sharing must be used to increase or supplement the resources of the receiving state or local law enforcement agency or any other ultimate recipient agency. Shared resources shall not be used to replace or supplant the resources of the recipient. In other words, the receiving law enforcement agency must benefit directly from the sharing. If, for example, a police department receives \$100,000 in federal sharing money only to have its budget cut \$100,000 by the city council, the police department has received no direct benefit whatsoever. Rather, the city as a whole has received the benefit of the equitable sharing. The Department of Justice may terminate sharing with law enforcement agencies that are not permitted by their governing authorities to benefit directly from equitable sharing.

C. Transfer of Forfeited Real Property

The transfer of federally forfeited real property is permitted, with the approval of the Office of the Deputy Attorney General, in the following three situations only:

1. For official law enforcement use, where a requesting agency substantially participated in the investigation that led to the seizure or forfeiture and there is a compelling law enforcement need for the property. All such requests should contain a detailed description of the intended use of the property.
2. For community-based use, where the recipient law enforcement agency re-transfers the real property to another governmental agency or to a private non-profit organization to support drug abuse treatment, drug and crime prevention and education, housing, and job skills programs, or other community-based programs.¹¹
3. Under the Controlled Substances Act, to a state for recreational or historic purposes or for the preservation of natural conditions. (See Pub. L. 102-239.)

***NOTE:** Real property may be transferred only to the participating state or local law enforcement agency, or, if such agency is unable to receive title under applicable law, to the state or local government agency empowered to hold such title for the benefit of the participating agency.*

D. Transfer of Forfeited Tangible Personal Property

1. Any forfeited tangible property transferred to a state or local agency for official use must be used for law enforcement purposes only. Moreover, such transferred property is subject to the rules applicable to similar property purchased by a state or local agency with appropriated funds. Finally, forfeited "luxury motor vehicles" (an automobile with a National Automotive Dealers Association (NADA) wholesale value of \$40,000 or more) may be placed in official use only for undercover law enforcement purposes.

Example 1. A federally forfeited motor vehicle is assigned to a state or local law enforcement official who is not authorized to use a government vehicle pursuant to local rule. This is impermissible, as forfeited vehicles are subject to the same use restrictions as purchased vehicles.

Example 2. A federally forfeited Mercedes Benz worth \$60,000 is assigned to a law enforcement official who is authorized to use a

¹¹ Failure to use shared real property for the approved purpose may result in reversion of title to the property to the United States.

government vehicle, but the "luxury vehicle" is used for routine law enforcement work. This is impermissible as a "luxury vehicle" is being used for purposes other than undercover work, thereby wasting government resources and creating an appearance of impropriety.

2. The recipient law enforcement agencies may, in their discretion, transfer the tangible property to another governmental department or agency to support drug abuse treatment, drug and crime prevention and education, housing, and job skills programs, or other community-based programs. Such governmental departments or agencies may, in turn, transfer any tangible property so received to private, non-profit community organizations to be spent for such purposes.

***NOTE:** Vehicles and other tangible property transferred for official law enforcement use must be so used for at least two years. However, if they become unsuitable for such stated purpose before the end of the two-year period, they may be sold.*

E. Reimbursement of Federal Costs

In cases where real or tangible personal property is transferred to a state or local law enforcement agency, the value of that property shall be charged against that agency's equitable share of other assets in the case. In cases where there are insufficient other assets against which to charge that share, the recipient state or local law enforcement agency must pay to the Assets Forfeiture Fund a sufficient amount to compensate the Fund for the federal costs and share. If the requesting agency is unable to pay the costs and the federal share, the property shall be sold and the proceeds equitably distributed. Exceptions to this requirement may be granted by decision-makers in two situations:

1. Where the property will be transferred to a state or local unit of government, or through such agency, to a private non-profit organization to support drug abuse treatment, drug and crime prevention and education, housing, and job skills programs, or other community-based programs; or
2. Where the requesting state or local agency lacks funds or authority to make such payments, and the forfeited property will fill a demonstrable need of the requesting agency.

In no event, however, may such property be transferred until the recipient agency reimburses the Assets Forfeiture Fund for the amount of any liens paid off on the property.

F. Sharing in Task Force and other Multi-Agency Cases

Many task forces involving federal, state, and local law enforcement have pre-agreed upon equitable sharing distribution arrangements based upon relative numbers of personnel dedicated and other contributions to the task force operation. These pre-agreed percentages will be honored when: (1) the agreement is in writing; (2) the decision-maker is satisfied that the percentages agreed upon continue to reflect the true overall agency contributions to the task force; and (3) the task force has a well-defined subject area or organization target as its focus, and the specific seizures are part of the overall investigative function of the task force (e.g., an airport seizure by an airport interdiction task force is part of an investigation of airport drug smuggling, not simply an investigation of a particular smuggler.)

1. Formally Chartered Task Forces

Distribution arrangements are honored by the Department of Justice when the task force itself is a legal entity entitled to receive and spend money. Single checks will be issued to the task force and/or its constituent member agencies, pursuant to their internal sharing agreed percentages, when the agreed percentages fairly reflect overall agency contributions to the task force. The National Crime Information Center (NCIC) number of the task force must be indicated on the DAG-71.

2. Informal Task Forces

When an informal task force is involved, separate checks will be written to each individual law enforcement agency in the task force. So-called task force agreements based merely on jurisdictional boundaries will not be honored. In other words, an agency may not claim a percentage of all seizures occurring within its geographic area without regard to whether it made any significant contribution to the seizure.

Conversely, a joint investigation of a specific target or organization does not constitute an informal task force simply because it is labelled as such. Informal task force agreements will only be honored where the task force is a permanent or semi-permanent entity established to conduct a long-term investigation of multiple targets committing similar violations in a single location (e.g., long-term interdiction operation at local airport), or of a single target engaged in multiple criminal activities over a lengthy period of time such that multiple forfeiture cases over the life of the task force are likely (e.g., long-term investigation of major Colombian drug trafficking organization where participating agencies work on different aspects of investigation). In such instances, sharing agreements will be

honored to the extent that they accurately reflect the proportional contributions of the participating agencies to the entire task force investigation, as the entire task force project is considered to be a single investigation for equitable sharing purposes (as opposed to normal situations where the proportional contributions of requesting agencies are determined by reference to their contributions to a specific seizure or forfeiture case).

XI. ACCOUNTING FOR SHARED CASH, PROCEEDS, AND TANGIBLE PROPERTY

All participating state and local law enforcement agencies must implement standard accounting procedures and internal controls (e.g., tracking share requests and receipts, depositing shares into a separate revenue account or accounting code, restrictively endorsing checks upon receipt, etc.) to track equitably shared monies and tangible property. Those procedures must be consistent with those set forth in Appendix C.

Sharing checks will not under any circumstances be made out to individuals.

Moreover, state and local law enforcement agencies that receive federal shared cash, proceeds, or tangible property valued at over \$100,000 in a single year, or that maintain a federal forfeiture fund account balance of over \$100,000, shall ensure that an independent financial audit is performed annually consistent with the audit requirements set forth in Appendix D.¹² A copy of a state or local government audit report, if consistent with Appendix D, will satisfy this requirement. Alternatively, an independent accounting firm may be engaged to perform the required audit, in which case the audit may be paid for from shared cash or proceeds. Generally, the head of a state or local law enforcement agency that has received equitable sharing proceeds should initiate an audit of such monies whenever circumstances exist that indicate the need for such an audit. Audit reports must be sent to the Executive Office for Asset Forfeiture. If the sharing includes resources received from the Department of the Treasury as well as the Department of Justice, a copy of the audit report must also be sent to the Department of the Treasury's Executive Office for Asset Forfeiture.

¹² For purposes of determining if a financial audit is required in a given year, monies or other property received in equitable sharing are not counted if they are promptly transferred to other law enforcement organizations or governmental agencies pursuant to the provisions of Section X.A.3.

XII. CERTIFICATION REQUIREMENT

For each fiscal year, any state or local agency that received forfeited property or cash as a result of a federal forfeiture shall execute the certification set forth in Appendix E. The certification shall be promptly forwarded to the Executive Office for Asset Forfeiture. This requirement also applies to any agency that had any unspent, previously shared money in a holding account at any time during a fiscal year.

XIII. NONCOMPLIANCE

This Guide describes the sharing process and is binding upon all state and local agencies seeking federal sharing transfers.

At the time agencies receive sharing transfers, they will be asked to certify that the cash or property shared will be used consistent with the DAG-71 or as otherwise authorized and consistent with the policies set forth in this Guide. Noncompliance with the policies of this Guide may subject recipient agencies to one or more of the following sanctions:

- A. Being barred, temporarily or permanently, from further participation in the sharing program;
- B. Offsets from future sharing in an amount equal to impermissible uses;
- C. Civil enforcement actions in U.S. District Court for breach of contract; or
- D. Where warranted, federal criminal prosecution for false statements under 18 U.S.C. § 1001, fraud involving theft of federal program funds under 18 U.S.C. § 666, or other sections of the criminal code, as applicable.

XIV. EFFECTIVE DATE

This Guide applies to seizures made or adopted on or after May 1, 1994.

U.S. DEPARTMENT OF JUSTICE
 Instructions for Completing Form DAG-71
Application for Transfer of Federally Forfeited Property

General Instructions

- o Transfer of federally forfeited property is governed by the Department of Justice Attorney General's Guidelines on Seized and Forfeited Property (Guidelines).
- o 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.)
- o For international transfer of federally forfeited property, contact the Asset Forfeiture Office, Criminal Division, Department of Justice, Washington, D.C.
- o A separate DAG-71 must be completed for each asset (or proceeds) requested.
- o 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.
- o 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.

SUPPLEMENTAL INSTRUCTIONS FOR MULTIPLE ASSETS

Where multiple assets are seized on the same date, in the same case, and the same request is made for each asset, preparation of paperwork can be simplified by using the following method:

- (1) Complete one original of the DAG-71. In Block III, Asset Requested, enter "See asset marked by an 'x' on the attached list."
- (2) Prepare a list of all assets seized in the case, as shown in the sample below.
- (3) Photocopy the DAG-71 and the list as many times as needed. You will need one copy for each asset.
- (4) Enter an "x" in the appropriate place next to one asset on each copy of the list. That copy will serve as the original DAG-71 for the asset marked with an "x."
- (5) Provide original signatures on all DAG-71s.

Below is a sample of such a list:

LISTING OF ASSETS SEIZED
CASE NO.: _____

| <u>Asset ID No.</u> (Fed. Use Only) | <u>Asset Description</u> | <u>Serial Number</u> |
|----------------------------------------|-----------------------------------------------------------------------------------|----------------------------------------|
| ___ 93DEA000789 | \$32,000 U.S. currency | n/a |
| ___ 93DEA000790 | 1993 Lexus 4-dr sedan, metallic gold | 345YG89FE9332 |
| ___ 93DEA000791 | One Panasonic cellular phone | 678954321 |
| <u>X</u> 93DEA000792 | 1992 Jeep Cherokee, red | 777HG90QRW772 |
| ___ 93DEA000793 | Electronic Equipment: IBM PS/1 computer 60 MB hard drive Okidata printer | 8833IBM76321 954673021 785432976 |

Note: This list can also fulfill the requirement to provide a list of all assets seized in a case.

Appendix B

ACTUAL CASE EXAMPLES OF USES OF SHARING PROCEEDS

I. OPERATIONS

- A. A city deposited shared cash received by the police department into the city's general fund. Because the shared cash did not maintain a separate identity in the general fund, auditors could not determine for what purpose it was spent. Law enforcement spending increased by \$52,000 during a year in which \$765,000 in shared cash was deposited into the general fund.

This practice is clearly improper. The assets went into the city's general fund. There is no record that the money was ever spent for any particular law enforcement purpose and total law enforcement expenditures did not increase commensurate with the amount of equitable sharing money received.

- B. A local police department used \$4,000 in shared cash to pay for an audit of asset forfeiture funds by an outside accounting firm.

This use is entirely proper. However, it would raise a supplantation question if there are existing appropriated funds available to cover audits of equitable sharing monies.

- C. A local police department contracted with a private helicopter firm on contingency, paying the firm a percentage of forfeiture proceeds from seizures in which the department used the firm's helicopter services.

This use is improper. The first problem is the commitment to use future equitable sharing monies in a certain way. A local law enforcement agency may not commit in advance to spend seized assets in a certain way — it has no authority to make such a commitment because it has no authority to bind the federal decision-maker either as to the possibility of sharing or as to how the money may be spent. Second, once the money is received by the agency, it is being used to pay for a service already provided, and a liability incurred, hence the money is not being spent to augment law enforcement resources, but rather to supplant the use of existing appropriations to pay off contingent liabilities. Third, this arrangement creates a serious ethical appearance problem because it ties in compensation with the fact and amount of forfeiture — something that is clearly barred for government workers.

It should be noted that a local law enforcement agency that incurs out-of-pocket expenses to contract with a helicopter firm in support of an investigation resulting in a federal forfeiture could seek reimbursement for those expenses independent of equitable sharing, as the Department of Justice is authorized to reimburse such out-of-pocket forfeiture-related expenses.

- D. A city used \$4,000 in asset forfeiture funds to pay for drug testing of all city employees operating motor vehicles, not just law enforcement agency employees.

This use is improper. Money is being spent for drug testing of city employees, not just law enforcement personnel. There could be a supplantation problem even if testing was limited to law enforcement agency personnel, unless the money was being used only for a trial program.

- E. A local police department used shared cash to pay legal fees and damages in suits filed against the city in narcotics-related cases. Prior to the city receiving shared cash, these costs were paid out of general fund monies. Total police department spending has increased each year by at least the amount of shared cash expended.

Using equitably shared money in this way serves a valid law enforcement purpose. However, it must first be clear that under applicable state or local law, appropriated funds may be used to satisfy judgments against the entity involved, and second, that no such funds are currently appropriated to satisfy this particular judgment. Otherwise, the no supplantation rule would be violated.

II. SALARIES

- A. A large city police department budgeted nearly \$1.9 million in shared cash to pay the salaries of 63 new entry-level police officers. General fund support for the police department did not decrease. The city was unable to fund the salaries from any other source. Shared cash had not been used for salaries in prior years.

This use is proper. Despite the supplantation concern, it is appropriate to use equitable sharing monies to pay salaries for new positions on a temporary basis. The rationale is that available law enforcement resources are increasing, assuming no money would otherwise be made available for such positions. Such funding for these positions would be limited to one year.

- B. A county sheriff's department used several million dollars a year in shared cash to pay the salaries of sworn and non-sworn personnel in several special programs. The programs included an anti-drug community education program, narcotics task forces, inmate treatment, and an automated information retrieval system for patrol stations.

This use is proper, unless there is a supplantation problem. The designated uses are proper law enforcement uses. However, it appears from the facts given that these special program personnel were already employed prior to the equitable sharing. Hence, the use of shared monies for their salaries may create a supplantation problem unless these new positions are limited to one year. Sharing proceeds used to pay the installation costs of a new automated information retrieval system were clearly proper.

III. EDUCATION AND TREATMENT

- A. A local police department used shared cash as the main funding source for a youth drug education program. Program expenditures totalled almost \$10,000 and included over \$4,000 for student and advisor meetings and travel (non-law enforcement personnel) and almost \$2,000 for pizza, parties, dances, and movies. Other expenditures included tee-shirts and identification cards.

Using shared proceeds as the main funding source for a youth drug education program operated by the police department is proper. However, the meeting and entertainment costs seem high and should be carefully justified.

- B. A county sheriff's department used \$3-\$4 million in shared cash to educate county students about drug abuse. Sheriff's deputies went into schools to teach children about resisting drugs. The department also used the funds to participate in a public/private sector drug abuse education organization that prepared anti-drug abuse materials and distributed them to the community.

This use is proper. The expenditure of funds to pay the cost to educate students using agency personnel is proper. The sharing agency should document actual expenditures for a project of this magnitude. Where an agency has a question, it should consult the LECC Coordinator or the Executive Office for Asset Forfeiture. It is not clear, though, why \$3 to \$4 million was necessary for this purpose. The money could not be used to cover salaries unless new positions were involved. It could be used to purchase training materials and to cover travel expenses.

- C. A county sheriff's department used \$7 million in sharing proceeds to pay for a treatment program to rehabilitate inmates with drug problems. Program costs included \$1.2 million spent in one year for the salaries of probation officers who worked directly with the inmates. Sharing proceeds also paid the salaries of sheriff's deputies working in the program.

This use is part proper and part improper. Funding an inmate drug rehabilitation program may be a proper law enforcement use when the agency has custodial responsibility for the inmates in question. However, part of the money is going to pay for agency salaries. This use is proper if limited to new positions, and only for the payment of the first year's salaries. See answer to II.A above. The use of sharing proceeds to pay for probation officers' salaries is clearly an improper pass-through to another entity, as the officers are employees of the court and not a law enforcement agency.

IV. EQUIPMENT

- A. A local police department received a forfeited luxury sports car in May of 1989. Six months later, the department traded the vehicle to a car dealer for six other vehicles to be used in police investigations. The transaction did not involve the exchange of cash.

This use may be proper depending on the original intent. The question that needs to be answered is whether the agency had a bona fide use for the luxury car when it first acquired it. Under Department rules, when cars are transferred to local agencies, they must be used by that agency for law enforcement purposes for two years before they may be sold. However, an earlier disposition is proper if the vehicle ceases to be of use after a period of time. Here, it is entirely possible that the vehicle was needed for a legitimate undercover operation, was used for that purpose, and once used, had become known to the criminal element and thus could not be used again. It would be entirely proper, then, to trade the car for six regular cars, which could be used to carry on the agency's mission. As a matter of prudence, the agency should request Department of Justice approval in writing prior to such a trade.

If there was no bona fide intended use for the luxury vehicle, this activity would constitute a violation of the two-year rule. The reason for this rule is to assure that when a local agency places a car into official use, it has a legitimate law enforcement purpose in mind.

- B. A local police department used \$13,000 in shared cash to purchase a property tracking system that tracks all police property using scannable bar codes.

This use is proper. As a capital expenditure, there is no supplantation problem. The system is clearly of benefit to the efficient operation of the agency.

- C. A county sheriff's department purchased 118 semi-automatic weapons. According to the sheriff, he thought the weapons should have been paid for out of the county general fund. However, the county

refused to do so. Because the sheriff considered having the weapons to be an officer safety issue, he approved buying them with sharing proceeds rather than going without them.

This use is proper. The sheriff was correct to say that this is the type of purchase that should be financed with appropriated funds. However, absent such funds, the purchase of additional equipment of any type is permissible so long as it enhances the ability of the agency to do its job.

V. FACILITY COSTS

- A. A state police department used shared cash to make lease payments on substation buildings. General fund monies paid the substation leases in prior years. The leases were paid from an account that contained shared cash and other revenues such as fees for accident reports and a state cellular phone tax. There were no restrictions on uses of the other revenues, which made up about 20 percent of the funds in the account.

This use is an improper supplantation. Sharing proceeds can be used to temporarily lease new facilities, by analogy to the rule on temporary salaries. See II.A above. These appear to be recurring expenditures, and appropriated funds have been made available in the past. Therefore, there is a supplantation problem under these facts.

- B. A city police department used shared cash to pay the costs of operating an off-site undercover narcotics facility. Included in these costs were lease payments, telephone bills, furniture, improvements to the building, and paving the parking lot. The department did not have an off-site narcotics facility prior to using the funds for this purpose.

This use is proper. This is a temporary facility and appropriated funds were not available. This is an excellent use for shared funds.

- C. City council minutes stated that sharing proceeds were being used to fund new carpeting for the city library. This was not readily apparent in the official police department appropriation legislation. However, this legislation reduced the narcotics unit's overtime allocation. At the same time, the library's appropriation was raised by the same amount.

This use is clearly improper. It is clear from the stated facts that the sharing proceeds in fact paid for the carpeting in the public library. Accounting gimmicks made it appear that the money went to agent overtime, but in fact that did not happen. Had the city council minutes not been so candid, the city might have been able to disguise this fact. The justification that all budgets were in fact increased makes no difference where it is clear that but for sharing proceeds, the carpeting would not have been purchased.

VI. USE OF INTEREST INCOME

- A. At two city police departments, interest earned on shared cash maintained in seized asset funds went to the city general funds pursuant to city policy. In both cases, the interest did not maintain a separate identity in the general fund so it could not be determined for what purpose it was spent.

This use is clearly improper. This Guide is clear that interest on equitable sharing monies is subject to the same rules as the monies themselves.

VII. PASS-THROUGHS TO OTHER AGENCIES

- A. A county-based narcotics task force passed-through a portion of shared cash to cities that had law enforcement personnel assigned to the task force. City officials completed documents similar to a DAG-71 stating that the funds would be used for law enforcement purposes. Neither the county nor the task force verified that the cities spent the funds for law enforcement purposes.

This use is improper. This situation involves passing-through money from a county-based narcotics task force to "cities" that had law enforcement personnel assigned to the task force. Cities are not law enforcement agencies and are not entitled to receive money as such, unless, for some reason, a local law enforcement agency is legally unable to receive money directly, and the money, which is then received by the city, is earmarked for a law enforcement activity of that law enforcement agency.

- B. A county sheriff's department contracted with a number of cities within the county to provide law enforcement services. The department passed-through a portion of shared cash to cities in which seizures took place. The contract cities did not maintain their own police forces. One contract city used the cash pass-throughs to pay the county for law enforcement services. Records did not show whether the services paid for with the cash pass-throughs were in addition to normal contract services.

This use is improper. Monies are being spent by a non-law enforcement entity (the cities), and are supplanting existing appropriations. In reference to the pass-through issue, it could be argued that the money is in effect being spent by the recipient agency, as it is receiving the money back from the contract city. This argument might be valid if it were clear that the contract city in fact used the money to pay the agency to perform new services. But we can hypothesize no situation where it would be necessary for the money to go from the agency to the city and then back to the recipient agency.

- C. A city police department donated \$10,000 of the \$50,000 equitable share it received to a "Victim/Witness" program, a community-based, non-profit organization that counsels victims and witnesses.

This use is a valid law enforcement use, as victim/witness counseling is something the police department could validly do itself as a part of its regular law enforcement mission. However, the amount donated for this purpose must be limited to fifteen percent of the amount received (\$7,500) under current Department guidelines (unless the "windfall" provision applies). (See subsection X.A.3.a. of this Guide.)

Appendix C

SAMPLE BOOKKEEPING PROCEDURE

1. Establish a separate revenue account through your Department of Finance for the proceeds from the disposition of federal sharing proceeds. This account should also receive any interest income generated by the funds. This account will be solely for the use of federal sharing proceeds. No other funds may be included in this account.
2. Maintain a log and copies of all DAG-71s forwarded to the Department of Justice. A consecutive numbering system should be used for control purposes. The log should contain seizure type (property or currency), amount, share amount requested, amount received, and date received.
3. Update the log when a check is received from the Department of Justice. The amount received may differ from the amount requested.
4. Designate all checks as restrictive and have them endorsed by the responsible individual immediately upon receipt. (Example: "For Deposit Only to account _____.")
5. Deposit all funds into the revenue account on the date received or no later than the next business day.
6. Safeguard all checks received if not deposited on the day received. Physically place checks in a safe, locked cash box, locked drawer, or other secured place.
7. Establish an internal procedure to recommend expenditures from the revenue account. In many small agencies, the Chief of Police determines the purposes for which the funds are utilized. In larger agencies, committees have been formed to make recommendations for expenditures to the agency head. The agency head must authorize all expenditures from the federal sharing revenue account.
8. In some jurisdictions, approval for expenditures must also be obtained from the governing body, such as a town council or city manager's office.
9. Upon final approval, contracts or purchase orders may be issued to formally disburse deposited assets for goods or services.
10. Purchase orders and contracts are encumbered (definition: charged against account balance).
11. Maintain a record of all expenditures from the revenue account. These expenditures must be in accordance with this Guide.
12. Many agencies issue quarterly and yearly reports that detail the actual amounts and uses of the federal asset sharing funds and property within their jurisdiction.

Appendix D

COMPLIANCE REQUIREMENTS AND AUDIT PROCEDURES

A. SHARE DEPOSITS

Compliance Requirements

- Shares must be deposited into a separate revenue account that is used solely for federal shared assets.
- Any interest income generated by the funds must also be deposited in this account.

Suggested Audit Procedures

- Trace share receipts and interest earned on shares to the accounts in which they are deposited.
- Determine whether any other funds are deposited into the accounts.

B. USE OF SHARES

Compliance Requirements

- Shares must be used for law enforcement purposes as stated on the DAG-71.
- Interest earnings on equitable shares must also be used for law enforcement purposes.
- Shares must supplement and not supplant the resources of the law enforcement agency.

Suggested Audit Procedures

- Examine shared properties, share expenditures, and interest earned on shares to determine if they were used for law enforcement purposes as defined in this Guide. If funds are pro-rated based on use by law enforcement staff, verify adequacy of computations of pro-rated expenditures.
- Examine law enforcement and non-law enforcement budgets for the current and prior fiscal years. Determine whether: (1) the law enforcement budget increased more slowly or decreased more rapidly than the non-law enforcement budget; and (2) changes in the law enforcement budget resulted from actual or anticipated equitable share receipts.

C. SHARED PROPERTY

Compliance Requirements

- Property placed into official use must be used for a law enforcement purpose for at least two (2) years following the transfer. After two years, the property may be sold for the benefit of the law enforcement agency.
- Luxury automobiles may only be used for undercover assignments.
- Real property placed into official use must be used for approved purposes.

Suggested Audit Procedures

- Examine shared properties and disposal records, as appropriate, to determine if they were used for law enforcement purposes for at least two (2) years.
- Examine assignment records for luxury automobiles.
- Examine current use of shared real property.

D. AUDIT STANDARDS

Compliance Requirements

- The Government Auditing Standards, issued by the United States General Accounting Office, will be followed by auditors and audit organizations conducting the required independent financial audit. These standards pertain to the auditor's professional qualifications, the quality of the audit effort, and the characteristics of professional and meaning audit reports.

Appendix E

**FEDERAL EQUITABLE SHARING AGREEMENT
AND
ANNUAL CERTIFICATION REPORT**

Agency: _____ Reporting Period (Your fiscal year): _____
 Address: _____ NCIC Code: _____
 Bank Routing Code and Account Number for EFT Purposes: _____
 Contact Person: _____
 Telephone No.: _____

I. FEDERAL EQUITABLE SHARING PROGRAM AGREEMENT

This Agreement is entered into among (1) the Department of Justice, (2) the (above stated law enforcement agency) and (3) the (governing body) in order to recite the requirements for participation in the Federal Equitable Sharing Program and the restrictions upon the use of federally forfeited property or proceeds from such property that is equitably shared with participating agencies. By their signatures below, the parties agree to be bound by the statutes and guidelines that regulate shared assets and the following requirements for participation in the Federal Equitable Sharing Program:

1. That any shared assets shall be used for the law enforcement purposes specified in the DAG-71 request submitted by the requesting agency; that requests for a change in use from that specified in the DAG-71 must be submitted in writing to the federal decision-maker or the Asset Forfeiture Office, Criminal Division, U.S. Department of Justice, P.O. Box 27322, Central Station, Washington, D.C. 20038.
2. That the misuse or misapplication of shared assets, or supplantation of existing resources with shared assets is prohibited. Failure to comply with this provision shall subject the recipient agency to the sanctions stipulated in A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies (March 1994), hereinafter referred to as the Guide.
3. That this Agreement will be submitted annually to the Executive Office for Asset Forfeiture and the United States Attorney in the district in which the recipient law enforcement agency is located and/or in which the shared asset was forfeited.
4. That this Agreement is considered a part of any and all sharing requests submitted by the above-referenced state or local law enforcement agency.
5. That the parties agree to establish and/or maintain Federal Equitable Sharing Program funds in a separate account, and further agree that funds from state forfeitures or other sources will not be deposited or otherwise commingled with the federal equitable sharing funds. The parties further agree that such account will be subject to the standard accounting requirements and practices employed for other such public monies as supplemented by requirements set out in the Guide.
6. That the recipient law enforcement agency and its governing body agree to conduct an annual audit of any funds or property received or expended under the Federal Equitable Sharing Program to insure compliance with this Agreement and all applicable statutes and policies, and to submit a copy of the audit to the Executive Office for Asset Forfeiture and to the United States Attorney in the district in which the recipient agency is located and/or in which the shared asset was forfeited.
7. That the undersigned law enforcement official certifies that the receiving state or local law enforcement agency is in compliance with the provisions of the Guide and the National Code of Professional Conduct for Asset Forfeiture.

II. ANNUAL CERTIFICATION REPORT

The undersigned hereby certify that the following is an accurate accounting of funds received and expended by the law enforcement agency under the Federal Equitable Sharing Program during this reporting period:

| | |
|----------------------------------------------------------|----------|
| Beginning Fund Balance (beginning of your fiscal year) | \$ _____ |
| Federal Sharing Fund Received (during your fiscal year) | \$ _____ |
| Total Equitable Sharing Funds | \$ _____ |
| Interest Income Accrued | \$ _____ |
| Federal Sharing Funds Expended (during your fiscal year) | \$ _____ |
| Equitable Sharing Fund Balance | \$ _____ |

III. DATA FOR ASSESSING LAW ENFORCEMENT BENEFITS

| | |
|--------------------------------------------------------------------------------|----------|
| Total spent on salaries for new, temporary, NTE 1-year employees, and overtime | \$ _____ |
| Total spent on informant payments | \$ _____ |
| Total spent on travel and training | \$ _____ |
| Total spent on communications and computers | \$ _____ |
| Total spent on firearms, weapons, body armor | \$ _____ |
| Total spent on electronic surveillance equipment | \$ _____ |
| Total spent on building and improvements | \$ _____ |
| Total spent on other law enforcement expenses | \$ _____ |
| Total passed-through for non-law enforcement uses | \$ _____ |

| | |
|-----------------------------------------------------------------------------------|----------|
| Total annual law enforcement budget for your jurisdiction for current fiscal year | \$ _____ |
| Total annual budget for non-law enforcement agencies for current fiscal year | \$ _____ |
| Total annual law enforcement budget for your jurisdiction for prior fiscal year | \$ _____ |
| Total annual budget for non-law enforcement agencies for prior fiscal year | \$ _____ |

Under penalties of perjury, I declare that to the best of my knowledge and belief, the information set forth in this agreement is true and correct.

Signature, Law Enforcement Official

Date

Title

Signature, Designated Representative
of Governing Body

Date

Title

Appendix F

**MAJOR STATUTES ENFORCED BY FEDERAL INVESTIGATIVE
AGENCIES THAT PERMIT EQUITABLE SHARING****Federal Drug Violations**

- Title 21 U.S.C. § 333(e)(3)** A conviction under this section of the Food Drug and Cosmetic Act for distribution of Human Growth Hormones, or for possession with intent to distribute Human Growth Hormones, shall be considered a felony violation of the Controlled Substances Act for the purposes of forfeiture under 21 U.S.C. § 853.
- Title 21 U.S.C. § 853** Criminal forfeiture procedure covering all property used to commit a felony violation of the federal drug laws and proceeds obtained from such violations.
- Title 21 U.S.C. § 881** Civil forfeiture of specific property with a nexus to illegal drug trafficking used or acquired in a prohibited manner.

Money Laundering Violations

- Title 18 U.S.C. § 981** Civil forfeiture of property involved in a federal money laundering violation and the proceeds traceable thereto. Also provides for the forfeiture of proceeds traceable to certain federal bank fraud violations.
- Title 18 U.S.C. § 982** Criminal forfeiture of property involved in a federal money laundering violation and the proceeds traceable thereto. Also provides for the forfeiture of proceeds traceable to certain federal bank fraud violations.

Gambling and Racketeering Laws

- Title 18 U.S.C. § 1963** Criminal forfeiture of certain property, property interests, and proceeds obtained in violation of the federal racketeering law (RICO).
- Title 18 U.S.C. § 1955** Civil forfeiture of property used in an illegal interstate gambling business.
- Title 15 U.S.C. § 1177** Confiscation of gambling devices and means of transportation.

Child Pornography and Obscenity Laws

- Title 18 U.S.C. § 2253** Criminal forfeiture of certain property used or acquired in violation of federal child pornography laws.
- Title 18 U.S.C. § 2254** Civil forfeiture of certain property used or acquired in violation of federal child pornography laws.
- Title 18 U.S.C. § 1467** Criminal forfeiture of property used to commit or promote the commission of a violation of the federal obscenity laws, and proceeds traceable to such violations.

Auto and Electronic Communication Theft Violations

- Title 18 U.S.C. § 512** Civil forfeiture of automobiles and parts involved in specific prohibited conduct.
- Title 18 U.S.C. § 2513** Civil forfeiture of certain property used to illegally intercept wire, oral, or electronic communications.

Other Federal Violations

Illegal War Munitions

- Title 22 U.S.C. § 401** Civil forfeiture of arms, munitions of war, or other articles exported illegally, and conveyances used to export such items illegally.

Copyright Materials

- Title 17 U.S.C. § 509** Civil forfeiture of specific property that has been used to illegally manufacture, reproduce or distribute phonograph records or copies of copyrighted materials.

Smuggling of Aliens

- Title 8 U.S.C. § 1324(b)** Civil forfeiture of conveyances that have been used in the attempted or accomplished smuggling of aliens into the United States or transportation of illegal aliens within the United States.

Drug Paraphernalia

- Title 21 U.S.C. § 857** Civil forfeiture of drug paraphernalia.

Types of Federal Forfeiture Actions

Criminal forfeiture is an action brought as a part of the criminal prosecution of a defendant. It is an *in personam* (against the person) action and requires that the government indict (charge) the property used or derived from the crime along with the defendant. If the jury finds the property forfeitable, the court issues an order of forfeiture.

For forfeitures pursuant to the Controlled Substances Act (CSA), Racketeer Influenced and Corrupt Organizations (RICO), as well as money laundering and obscenity statutes, there is an ancillary hearing for third parties to assert their interest in the property. Once the interests of third parties are addressed, the court issues a final forfeiture order.

Civil judicial forfeiture is an *in rem* action brought in court against the property. The property is the defendant and no criminal charge against the owner is necessary.

Administrative forfeiture is an *in rem* action that permits the federal seizing agency to forfeit the property without judicial involvement. The authority for a seizing agency to start an administrative forfeiture action is found in the Tariff Act of 1930, 19 U.S.C. § 1607. Property that can be administratively forfeited is:

- merchandise the importation of which is prohibited;
- a conveyance used to import, transport, or store a controlled substance;
- a monetary instrument; or
- other property that does not exceed \$500,000 in value.

Appendix G

NATIONAL CODE OF PROFESSIONAL CONDUCT FOR ASSET FORFEITURE

- I. Law enforcement is the principal objective of forfeiture. Potential revenue must not be allowed to jeopardize the effective investigation and prosecution of criminal offenses, officer safety, the integrity of ongoing investigations, or the due process rights of citizens.
- II. No prosecutor's or sworn law enforcement officer's employment or salary shall be made to depend upon the level of seizures or forfeitures he or she achieves.
- III. Whenever practicable, and in all cases involving real property, a judicial finding of probable cause shall be secured when property is seized for forfeiture. Seizing agencies shall strictly comply with all applicable legal requirements governing seizure practice and procedure.¹
- IV. If no judicial finding of probable cause is secured, the seizure shall be approved in writing by a prosecuting or agency attorney or by a supervisory-level official.
- V. Seizing entities shall have a manual detailing the statutory grounds for forfeiture and all applicable policies and procedures.
- VI. The manual shall include procedures for prompt notice to interest holders, the expeditious release of seized property where appropriate, and the prompt resolution of claims of innocent ownership.
- VII. Seizing entities retaining forfeited property for official law enforcement use shall ensure that the property is subject to internal controls consistent with those applicable to property acquired through the normal appropriations processes of that entity.
- VIII. Unless otherwise provided by law, forfeiture proceeds shall be maintained in a separate fund or account subject to appropriate accounting controls and annual financial audits of all deposits and expenditures.
- IX. Seizing agencies shall strive to ensure that seized property is protected and its value preserved.
- X. Seizing entities shall avoid any appearance of impropriety in the sale or acquisition of forfeited property.

¹ Generally, real property can only be seized following an adversarial pre-seizure hearing. See United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993).

APPENDIX C:

JUSTICE DEPARTMENT FORFEITURE POLICY DIRECTIVES



U.S. Department of Justice

DIRECTIVE NO. 93-1

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

JAN 15 1993

RECEIVED
JAN 26 11:52
DEPARTMENT OF JUSTICE
CRIMINAL DIVISION

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.

DIRECTIVE NO. 93-1

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

² State or local agencies may redact from investigative reports information which may disclose the identity of a confidential informant.

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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 | appraised value, |
| improvements | whichever is greater |
| All Other Property | |
| Currency, bank | \$ 2,000 |
| accounts, monetary | |
| instruments, | |
| jewelry, <u>etc.</u> | |

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;

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- 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.

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.

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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

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 State Forfeiture Action Initiated: Yes () No ()
Yes () Attach Copy 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 _____



U.S. Department of Justice
Office of the Deputy Attorney General
Executive Office for Asset Forfeiture

DIRECTIVE NO. 93-2

Washington, D.C. 20530

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:

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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. } No. _____
A. B. }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

DIRECTIVE NO. 93-3

Washington, D.C. 20530

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: 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.

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U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

DIRECTIVE NO. 93-4

Washington, D.C. 20530

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

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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.

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.



APPENDIX D:
RESOURCE INFORMATION

RESOURCE INFORMATION

Bureau of Justice Assistance
Office of Justice Programs
U. S. Department of Justice
633 Indiana Ave., NW
Washington, DC 20531
(202) 514-6278

Executive Office for Asset Forfeiture
Office of the Deputy Attorney General
U. S. Department of Justice
901 E St., NW, Room 832
Washington, DC 20530
(202) 616-8000

Asset Forfeiture Office
Criminal Division
U. S. Department of Justice
Bond Building
1400 New York Ave., NW, Room 10100
Washington, DC 20005
(202) 574-1263

Institute for Intergovernmental Research
2888 Remington Green
Tallahassee, FL 32308
(904) 385-0600

National Association of Attorneys General
444 N. Capitol St., NW, Suite 339
Washington, DC 20001
(202) 434-8000

National District Attorneys Association
99 Canal Center Plaza, Suite 510
Alexandria, VA 22314
(703) 549-9222

National Criminal Justice Association
444 N. Capitol St., NW, Suite 618
Washington, DC 20001
(202) 347-4900

Police Executive Research Forum
2300 M St., NW, Suite 910
Washington, DC 20037
(202) 466-7820