

# FORFEITURE LAWS AND PROCEDURES IN THE UNITED STATES OF AMERICA

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## I. INTRODUCTION

On the 25<sup>th</sup> Anniversary of the U.S. Department of Justice’s asset forfeiture programme in 2009, United States Attorney General Eric Holder – who, as Deputy Attorney General in the 1980s had helped get the programme off the ground - stressed the success and vitality of the United States’ programme. “When we look back,” he said, on the last 25 years of the programme, we see a forfeiture regime that has been transformed from a collection of centuries-old laws designed to fight pirates, enforce customs laws and fight illegal contraband, into an array of modern law enforcement tools designed to combat 21<sup>st</sup> century criminals both at home and abroad.”

Attorney General Holder noted that since 1984, the Department of Justice has deprived criminals of over \$13 billion in net federal forfeiture proceeds. This figure does not include the more recent forfeiture actions taken by the Department of The Treasury, which maintains a separate asset forfeiture fund. He also commented that in 2008 alone, over \$500 million in assets were forfeited and returned to crime victims as restitution. In these remarks, our Attorney General hit upon the key concepts and goals underpinning asset forfeiture regimes anywhere in the world: (1) depriving criminals of their ill-gotten gains in order to disrupt and dismantle criminal organizations; (2) seizing the instrumentalities of their trade in order to prevent others from using the infrastructure in place; (3) frustrating the goal underlying most criminal conduct - greed for material gain; and (4) attempting to make whole victims of crime.

A law enforcement friend of mine once told me why he liked doing asset forfeiture as part of his cases so much. He said that the criminals were never happy about the blue lights of the police cars arriving in order to arrest and handcuff them; but, they knew that jail time was simply a price of doing business which they often had to pay. However, when the yellow lights of the tow truck drove up to take away their Mercedes or Cadillac Escalade, this tough, hardened criminal would break down, weeping, because that was the whole reason that he became a criminal to begin with, and it was more painful to be stripped of his expensive toys than to go to jail. The moral of that story is: criminals may be lot unhappier about having their assets taken away than they are about going to prison. We need to emphasize forfeiture in all of our criminal investigations.

## II. HISTORY OF FORFEITURE IN THE UNITED STATES

### A. Early History of U.S. Forfeiture Laws

Early American forfeiture laws derived from our country’s British heritage. Forfeiture in old England was rooted in the principle of the “deodand,” meaning a thing given to God under religious law because it was used to cause a death. The principle was used primarily for animals causing human death, who were then “forfeited” to the English King or Queen (who stood in for God), and the royal staff sold the animal to give the proceeds to the poor. Often the property owner was permitted to remit the value of the property instead of the animal. This concept of “redemption” became incorporated into the English seizure laws, and also of the United States.

The deodand was never incorporated into American common law. However, the concept of *in rem* proceedings against a “thing” for violating the law was incorporated into American customs and admiralty laws governing the seizure of ships for crimes of piracy, treason and smuggling in the early days of the Republic, and during the American Civil War. In 1966, these procedures were formalized in the

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Supplemental Rules for Certain Admiralty and Maritime Claims which apply to our civil forfeiture cases. This is one reason that the United States has had a non-conviction based forfeiture system from the beginning.

The seizures of assets involved in illegal smuggling, including drug trafficking and stolen goods, as well as acts of piracy, were processed by an administrative agency, such as the U.S. Customs Service. Owners were often allowed to pay an amount determined based on either the violation or the value of the property in order to redeem the property, but there was generally no right to challenge the seizure in a court of law.

### **B. Twentieth Century Reforms in U.S. Forfeiture Laws**

In 1970, the Congress passed the Comprehensive Drug Abuse Prevention & Control Act to respond to the “growing menace of drug abuse in the United States.”<sup>1</sup> This law contained criminal forfeiture authority for defendants convicted of conducting a Continuing Criminal Enterprise (“CCE”), 21 U.S.C. § 848, as well as civil *in rem* forfeiture authority in 21 U.S.C. § 881. Section 881 cross-referenced the procedures for seizure and forfeiture contained in the U.S. customs laws, which by that time did provide an opportunity for property owners to contest the forfeiture in court by filing a claim and cost bond with the seizing agency. In 1982, a criminal forfeiture provision was enacted as part of the Racketeering Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961, which provided for the forfeiture of all property over which the RICO organization exercised an influence. As criminal forfeiture laws, the CCE and RICO provisions were not all that effective because they required a conviction for being a “kingpin” of a drug operation or an organizer of a RICO enterprise. Therefore, in 1984, Congress enacted 21 U.S.C. § 853 as part of the Comprehensive Forfeiture Act, and provided for forfeiture of all direct and indirect proceeds and instrumentalities of drug trafficking upon the conviction of any felony drug offence.

Congress and the American public became well aware that forfeiture authority was not only needed in drug trafficking crimes, but in the burgeoning field of white collar criminal activity, as well. The Money Laundering Control Act of 1986 added new felony provisions at 18 U.S.C. § 1956 for the laundering of the proceeds of certain defined “specified unlawful activity,” as well as prohibiting structuring transactions under 31 U.S.C. § 5324 (with the intent to evade certain reporting requirements). The law also added civil and criminal forfeiture provisions at 18 U.S.C. §§ 981 and 982 for confiscating the property involved in money laundering, for foreign drug trafficking crimes, and for structuring transactions. After 1986, federal forfeiture provisions were added piecemeal as additional federal crimes were added to the criminal code, or to provisions already criminalized, such as corruption, child pornography, telemarketing, identity crimes, smuggling counterfeit goods, munitions and arms export violations, bank and bankruptcy fraud, government programme fraud, and eventually mail and wire fraud, so that there are now over 200 federal and state laws which are predicate crimes for money laundering and forfeiture.

As the Department of Justice’s use of the forfeiture statutes became more robust, the defence bar began to fight back in the political arena, leading to the enactment in 2000 of the Civil Asset Forfeiture Reform Act (“CAFRA”).<sup>2</sup> This law in some ways helped U.S. prosecutors because, for the first time, uniform definitions for concepts like “innocent owner” were established, as well as procedures for when and how property owners could challenge a forfeiture action. It also expanded the ability to civilly and criminally forfeit the proceeds of many more U.S. criminal offences. However, certain other “reforms” contained in CAFRA increased the difficulty level for obtaining forfeitures under U.S. law, including the deletion of the reverse burden for civil forfeitures. Prior to CAFRA, as in many other countries today, once the prosecutor demonstrated “probable cause” (i.e., a reasonable ground for belief) that the property was subject to forfeiture, the burden shifted to the owner to establish its legitimacy. That burden-shifting provision was taken away in CAFRA. Most seriously, however, CAFRA imposed liability on the U.S. government for an owner’s attorney fees if the owner successfully litigated a civil forfeiture action and won release of his/her property. The spectre of this financial liability has, in some instances, chilled the bringing of forfeiture cases. However, for the most part, U.S. forfeiture law is alive and well, and being employed with vitality and vigour.

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<sup>1</sup> H.R. Rep. No. 1444, 91st Cong., 2d Sess., pt. 1, at 1, *reprinted in* 1970 U.S. Code Cong. & Admin. News 4566, 4567.

<sup>2</sup> H.R. Rep. 1658, 106th Cong., 2d Sess., Pub. L. 106-185, *reprinted in* 2000 U.S. Code Cong. & Admin. News.

### III. OVERVIEW OF CURRENT U.S. FORFEITURE PROCESSES

#### A. Preference for Administrative Forfeiture

Each year, the majority, generally over 60 percent, of federal forfeitures in the U.S. are obtained through administrative forfeiture. The reason is that most seizures are not contested. This may seem strange at first, but when one considers that most of the property seized for forfeiture in the U.S. constitutes large bundles of cash, it is readily apparent why many seizures are not challenged, particularly if the person from whom the cash was seized is not arrested or later indicted. No one really wants to come forward to swear that he or she has an interest in such large amounts of generally quite unexplained U.S. currency. Administrative forfeiture is not used for real property or businesses. Since 1990, the Customs laws (19 U.S.C. § 1607, et seq.) have permitted administrative forfeiture of currency and monetary instruments<sup>3</sup> without limit, and of other personal property up to a value of \$500,000.

An administrative forfeiture usually begins when a federal law enforcement agency seizes an asset identified during the course of a criminal investigation.<sup>4</sup> The investigation may be a purely federal one, or may be a task force which also involves state and/or local law enforcement agencies. The asset seizure must be based upon “probable cause” to believe that the property is subject to forfeiture. Once the asset is seized, attorneys for the seizing agency are required by CAFRA to send notice to any persons whom the government has reason to believe may have an interest in the property. Such notice must be sent within 60 days of the seizure if a federal agent seized the property. An administrative forfeiture can also be based upon an “adoptive seizure,” where a state or local officer has seized the property under the authority of state or local law, but then transfers it to federal custody for forfeiture. In that case, the federal adopting agency has 90 days after the seizure within which to send notice. Notice is usually sent by Certified Mail or Federal Express, so that the agency has proof of delivery. The agency must also publish its intent to forfeit for three successive weeks in a newspaper of general circulation in the area where the property was seized, or via a government internet publication website. A person receiving notice has 30 days within which to file a sworn claim with the seizing agency, asking for one of two types of relief: (1) the opportunity to challenge the forfeiture in court; or (2) remission or mitigation from the forfeiture. In the second option, the property owner is basically acknowledging the forfeiture, but claiming some mitigating circumstance. If a timely claim is filed under the first option, the seizing agency refers the matter to the appropriate U.S. Attorney’s Office to file a judicial forfeiture action in the case. If no one files a claim after the deadlines provided in the notice and publication expire, the property is summarily forfeited to the United States. Remission or mitigation may be provided if certain guidelines are met.

#### B. Civil (Non-Conviction Based) Judicial Forfeiture in the U.S.

In the United States, non-conviction based (“NCB”) forfeiture is known as “civil forfeiture.” This judicial process may be brought at any time prior to or after criminal charges are filed, or even if criminal charges are never filed. It is an action filed in court against a property, not against a person.<sup>5</sup> Once the U.S. Attorney’s Office receives a referral from a seizing agency of a seized asset case, that office has 90 days to *either file a civil judicial case or include the seized asset in a criminal indictment and name it for criminal forfeiture.* 18 U.S.C. § 983(a)(3)(A). If a civil case is not filed within those 90 days, the CAFRA “death penalty” will prevent the United States from *ever* filing a civil forfeiture case. 18 U.S.C. § 983(a)(3)(B). If the asset is included in an indictment and the defendant is later acquitted or has a conviction reversed on appeal, the property cannot be forfeited. For this reason, many U.S. prosecutors choose to file a timely civil forfeiture action *and* include the property for criminal forfeiture in an indictment. The law also allows the prosecutor or the claimant to obtain a “stay” of the civil forfeiture case while a criminal investigation is

<sup>3</sup> Monetary instruments include such items as bank checks, traveller’s checks, money orders, and bearer paper, but not bank or other financial accounts.

<sup>4</sup> In the U.S., as in most countries, each agency is responsible for the enforcement of a different category of criminal laws: for example, the Drug Enforcement Administration (“DEA”) investigates drug crimes; the Federal Bureau of Investigation (“FBI”) investigates most white collar crime and terrorism; and the Immigration and Customs Enforcement (“ICE”) and Customs and Border Patrol (“CBP”) of the Department of Homeland Security investigate smuggling violations, intellectual property violations, human trafficking, passport fraud, drug violations at the border and bulk cash smuggling. Note that not all federal law enforcement agencies have administrative forfeiture authority.

<sup>5</sup> This is why civil forfeiture actions in the U.S. have names like *United States v. One Sixth Share*, 326 F.3d 36 (1st Cir. 2003) (because civil forfeiture is an *in rem* proceeding, the property subject to forfeiture is the defendant); *United States v. All Funds is Account Nos. 747.034/278*, 295 F.3d 23 (D.C. Cir. 2002) (civil forfeiture actions are brought against property, not people).

pending. Thus, if the defendant is convicted of an offence which will give rise to the forfeiture, the forfeiture may be obtained more easily in the criminal case, although it will not be final until all appeals are exhausted.

Because civil forfeiture does not depend upon a conviction, it may be filed at any time. Often the case will be filed *under seal* before criminal charges are brought, providing for Warrants of Arrest in Rem to be issued for the assets which may be served by the law enforcement officers at any time. These warrants are similar to seizure warrants, and are issued by the presiding judge in the civil forfeiture case. Rule G(8) of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Rule G(8)") prescribes the procedures which must be followed in a civil forfeiture action, which include: (1) notice to all potential claimants, even if notice was already provided in an administrative process; and (2) full publication notice by either newspaper or internet. Claimants have 30 days from when they are notified to submit a sworn claim indicating the basis for asserting an interest in the property (even if a claim was already submitted in an administrative case), and must, within 20 days after a Claim is filed, file an Answer with the court directly responding to the allegations in the prosecutor's judicial complaint. If those deadlines are not met, the prosecutor can seek a "default" judgment of forfeiture, which will generally be granted, particularly if the claimant is represented by counsel who blew the deadlines!

If a timely claim is filed, the case will follow the Federal Rules of Civil Procedure in U.S. District Court. Civil discovery in the nature of interrogatories and depositions may take place. Prior to discovery, either side may file for a judgment on the pleadings. Following discovery, either side may file for summary judgment on legal issues supported by uncontested facts. If the case survives this "motions practice," either side may request a trial by civil jury of nine persons, of whom a majority must agree on a verdict of forfeiture in order for the property to be civilly forfeited to the United States. The government has to prove by a "preponderance of the evidence" that the property is linked to the underlying crime as alleged.<sup>6</sup> In the United States, civil forfeiture is not available for any type of "value-based" forfeiture judgment, money judgment, or property which is equivalent to the criminally-derived or involved property. Such forfeitures require that the defendant be bound by *in personam* jurisdiction. Because the jurisdiction in civil forfeiture is *in rem*, U.S. law requires a "nexus" to the crime – either as proceeds or instrumentality, or – in the case of money laundering – an "involvement in" the crime in some manner.

A Claimant in a civil forfeiture case may take one or both of two approaches to defending a forfeiture: (1) he or she may challenge the government's ability to sustain its burden to prove the property has a "nexus" to the crime; and/or (2) he or she may assert an "innocent owner" status which would deny forfeiture even if the government proves forfeitability. If the Claimant asserts "innocent owner" status, he or she has the burden to prove that defence by a "preponderance of the evidence". A civil forfeiture judgment may be appealed from the U.S. District Court to the U.S. Court of Appeals of that federal circuit. The appeal is first heard by a three judge panel; and, the losing party may seek rehearing by the panel or by the entire *en banc* panel of the circuit's appellate judges. If the case involves a novel issue or one which has created a conflict between any of the eleven federal circuits, then certiorari may be granted by the U.S. Supreme Court.

### **C. Ease of Criminal Judicial Forfeiture in the U.S.**

As previously noted and as in most countries providing for criminal forfeiture, criminal forfeiture in the United States is dependent upon a conviction of a defendant for a crime which provides a basis for the forfeiture. For example, if a defendant is charged with securities fraud and income tax evasion, and is convicted of the tax evasion charges, but not the fraud offences, there can be no forfeiture because U.S. law does not provide for forfeiture based upon tax evasion. Over the years, United States criminal forfeiture laws have gradually expanded, and in 2000, CAFRA added 28 U.S.C. § 2461(c) which provides that if any law provides for civil forfeiture, then the prosecutor may also include a criminal forfeiture for the property in a criminal indictment. Now prosecutors often seek parallel civil and criminal proceedings against the same property.

Criminal forfeiture is *in personam*, against the defendant. One drawback to this type of forfeiture under U.S. law is that only property in which the defendant has a true interest may be forfeited criminally. Property which is held by "nominees" or straw owners on behalf of the defendant may be forfeited

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<sup>6</sup> The "preponderance of the evidence" standard is also known in the United States as "more likely than not" and abroad is frequently referred to as a "balancing of the probabilities."

criminally, but the government must prove that the defendant is the true owner. Any property which is truly owned by other parties who are not convicted as part of the criminal case, such as a spouse or other family member or business partners, may not be forfeited criminally. Such property may be forfeited only in an *in rem* civil action.

The greatest advantage which criminal forfeiture holds for prosecutors in the U.S. is that it affords the possibility of a money judgment for the amount of the proceeds of the crime, and property involved in the crime. If that property – for example, the direct proceeds obtained by a fraudulent scheme or the mansion which was used to store narcotics – is no longer owned by or in the possession of the defendant, the government can get a judgment against the defendant for an amount equivalent to the value of that property. Rule 32.2 of the Federal Rules of Criminal Procedure permits the government to seek forfeiture of “substitute assets” belonging to the defendant. The procedure for obtaining criminal forfeiture is a bifurcated process. First, the defendant must be found guilty by proof “beyond a reasonable doubt” by either a judge (if the defendant elects) or by a unanimous twelve person jury. Or the defendant may decide to plead guilty to the charged crimes. Following the entry of a guilty verdict or plea which will support forfeiture, the judge or jury will consider whether the government has shown the required “nexus” between the property named for forfeiture and the crime of conviction. If forfeiture is ordered, a Preliminary Order of Forfeiture is entered against the defendant, which becomes final at sentencing. This order may be appealed, along with the defendant’s convictions. Appeal is taken to the court of appeals for the relevant circuit, and beyond that to the U.S. Supreme Court if the issues are sufficiently important.

The Preliminary Order of Forfeiture must be served on anyone whom the prosecutor has reason to believe may have an interest in the property, and must be published unless it is a money judgment alone. Any interests asserted by third parties are heard in a separate part of the criminal case called an “ancillary proceeding,” which is held after a guilty verdict or plea against the defendant. To the extent that any third party proves by a preponderance of the evidence that he or she has an interest in the forfeited property which is superior to the defendant’s, the court must carve out that interest from the final order of forfeiture.

#### **D. Strategy of Using Criminal vs. Civil Forfeiture Processes**

##### **1. Pros and Cons of Civil Forfeiture**

###### *(i) Pro: Lower standard of proof of the crime and no need for conviction*

The entire case in a civil forfeiture proceeding need be proven only by a “preponderance of the evidence” to a majority of a jury of nine. Thus, if there are proof problems which may make it difficult to prove the criminal conduct beyond a reasonable doubt to a unanimous jury of twelve, a civil proceeding may be the best venue for the forfeiture. If there are other impediments to obtaining a criminal conviction, such as the absence, death or incapacity of the defendant, a civil forfeiture proceeding will permit the forfeiture of the criminally linked property. This mechanism is exceedingly important in seizures of property, such as currency, where often the prosecutor cannot prove the exact crime which may have generated the unusual amount of cash, but has some evidence of criminal activity – such as a canine alert or ion scan<sup>7</sup> positive hit for the presence of narcotic solvent or drugs on the money, and perhaps previous criminal activity by the property owner which may explain the cash. Because of the lower burden of proof, forfeiture may be available in these cases. Also, if a criminal conviction is reversed on appeal, a civil forfeiture proceeding (which may have been stayed during the course of the criminal case) may rescue the forfeiture.

###### *(ii) Pro: Property belonging to non-defendant parties may be forfeited*

In a civil case, the prosecutor does not have to prove that the property owner committed or participated in the commission of the underlying criminal activity. As long as there is proof that the property is sufficiently linked to a crime, and the owner cannot satisfy the test for “innocent owner” by a preponderance of the evidence, the property may be forfeited.

The “innocent owner” definition in the U.S. code depends upon when the owner acquired an interest

<sup>7</sup> An ion scan is a portable, state-of-the-art mass spectrometry device which ionizes chemical compounds, generating charged molecules whose mass-to-charge ratios can be measured. Ion scans are used to detect the presence of explosives, drugs and drug residue in parts per billion. Scans can detect the particulate residue of over twelve types of narcotic drugs. In addition to scanning currency for seizure, ion scans are used to inspect cargo containers and luggage, to identify hidden compartments, and for passenger security at many airports.

in the property. For persons having an interest in the property *at the time* the crime was committed, the claimant must show that he or she did not know of the criminal conduct or upon learning of it “did all that reasonably could be expected under the circumstances to terminate such use of the property.”<sup>8</sup> For property which is acquired *after* the crime occurred (for example, proceeds of the crime), he or she must prove by a preponderance that he or she : (1) was a bona fide purchaser for value; *and* (2) did not know or was reasonably without cause to believe that the property was subject to forfeiture. 18 U.S.C. § 983(d)(A). A hardship provision is included which guarantees that third parties will retain a minimum shelter needed for survival as long as the property was not criminal proceeds. Only a bona fide purchaser for value without notice or knowledge can defeat a civil forfeiture of criminal proceeds.

*(iii) Cons: Deadlines, duplicated resources, and liability for attorney’s fees*

The CAFRA “death penalty” mentioned earlier means that if any of the filing deadlines are missed for a seizing agency giving notice, and the prosecutor filing an action, a civil forfeiture action is forever barred. Criminal forfeitures are not subject to any deadlines. If a stay is not granted on the civil case, the discovery and motions practice can create not only extra work for the prosecutor’s office, but also potentially interfere with the criminal prosecution which is proceeding along a different time frame, under different rules of court procedure. Finally, as noted before, if a claimant succeeds at having property released in a civil judicial proceeding, the government may have to pay the claimant’s reasonable attorney’s fee.

**2. Pros and Cons of Criminal Forfeiture**

*(i) Pro: Forfeiture is addressed as part of the same proceeding as the criminal offence*

Successfully obtaining forfeiture of all of the property sought for forfeiture in the criminal case saves an enormous amount of prosecutorial and judicial resources. Quite often, the court in the civil case will grant a “stay” while the criminal case proceeds. If the defendant reaches a point in the criminal prosecution of entering into an agreement to plead guilty to any of the criminal charges, the prosecutor will obtain – as part of that agreement – an agreement which addresses *all* of the assets sought for forfeiture. If a plea agreement is not reached and the case proceeds to trial, a criminal forfeiture judgment (including a money judgment) may be obtained based upon the same evidence as produced in the criminal case. Thus, there is no need for extra witnesses, or another court proceeding or another trial in order to obtain the forfeiture. In drug cases, 21 U.S.C. § 853(d) provides a presumption that any unexplained wealth accumulated during the course of a drug crime (which can include a multiple-year conspiracy), combined with a lack of legitimate income may be considered forfeitable drug proceeds.

*(ii) Pro: A money judgment forfeiture is available and no attorney fees*

Most significantly, if the property generated from the crime or used to commit the crime is no longer available for forfeiture, the prosecutor may request that the judge or jury enter a money judgment which may be collected against the untainted assets belonging to the defendant.

This money judgment is available for collection for years after the criminal case concludes. Finally, if criminal forfeiture is not successful – either because the defendant is acquitted or because a third party succeeds in obtaining release of the property – the government is not liable for anyone’s attorney’s fees.

*(iii) Con: Only the defendant’s property may be forfeited*

Because of this limitation, any legally recognized superior interest by a third party – even if that person knew of the criminal nature of the property – must be forfeited in a parallel civil forfeiture case, or it cannot be forfeited. Thus, often both proceedings are required in order to obtain the maximum forfeiture potential under U.S. law.

**IV. PROPERTY SUBJECT TO FORFEITURE UNDER U.S. LAW**

**A. Proceeds Forfeitures**

Although the U.S. forfeiture system provides robust measures which may be used to deprive criminals of their ill-gotten gains, and U.S. prosecutors aggressively use this system to its best advantage, the truth is that it is overly complicated even for American prosecutors and judges. Most countries have enacted generic asset forfeiture laws, such as the Proceeds of Crime Acts (“POCAs”) found in many Commonwealth

<sup>8</sup> 18 U.S.C. § 983(d)(2)(B) provides that such action may include giving notice to the police, or doing all that was possible to prohibit the criminal from using the premises.

countries and threshold crimes forfeiture systems enacted in many civil law countries. In the United States, property which can be forfeited either civilly or criminally varies greatly from one offense to another. For some crimes, only the proceeds can be forfeited; for others, only instrumentalities and for others, property “involved in” the offense. There are still many felony crimes for which forfeiture is not provided. Yet, all property owned by individuals or organizations involved in any crime related to terrorism may be forfeited. 18 U.S.C. § 981(a)(1)(G). The Department of Justice has attempted several times to obtain passage of an all-crimes approach with the introduction of Proceeds of Crime Act legislation. However, the bill has generally been dead-on-arrival in Congress because there is no apparent urgent need to obtain such a complete overhaul and because of general political ambivalence toward forfeiture. So, we work with our hodgepodge of statutes the best we can.

The closest to an “all crimes” approach to forfeiture of proceeds in the United States is 18 U.S.C. § 981(a)(1)(C) which authorizes the forfeiture of the proceeds of over 200 state and federal offences. Most of these are subject to forfeiture because they are “specified unlawful activities” (“SUAs”) within the definition of 18 U.S.C. § 1956(c)(7). All of the UN Convention required crimes are included, such as terrorist financing, money laundering, arms smuggling, drug crimes, most varieties of fraud (except tax fraud), corruption, human trafficking, smuggling, counterfeiting, securities violations, violent crimes, and environmental crimes. Others are linked through cross-referencing the RICO law (18 U.S.C. § 1961) to state crimes such as gambling, arson, kidnapping, murder, obscenity and nearly all types of theft.

U.S. courts have regarded “proceeds” as including any property, real or personal, tangible or intangible, which would not have been obtained “but for” the commission of the crime. The civil forfeiture law defines “proceeds” in several ways: (1) in cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term “proceeds” means property of any kind obtained directly or indirectly, as the result of the commission of the offence giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offence; (2) in cases involving lawful goods or lawful services that are sold or provided in an illegal manner, “proceeds” includes the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services; and (3) in cases involving bank or other financial fraud, “proceeds” for forfeiture purposes excludes any amount of fraudulent obligation which was repaid.

Under U.S. law, “proceeds” will also include any increase in value which has occurred to property generated from criminal activity. For example, if a house bought with drug proceeds increases in value 100 percent in ten years, the entire house is subject to forfeiture. “Proceeds” may also include the *value* of services and benefits received from criminal activity, such as human trafficking or forced labour, even if the defendant does not actually receive payment for those services. “Proceeds” forfeitures are strong medicine; however, they do require that the police and prosecutors *trace* the property obtained from the criminal activity, and in today’s era of transnational criminal activity, that endeavour can be difficult, if not impossible, in many cases.

## **B. Facilitating Property Forfeitures**

“Facilitating property” is considered to be any property which makes the criminal activity more likely to occur. This term is the United States’ version of an “instrumentalities” of crime confiscation. Criminal and civil forfeiture of facilitating property has long been permitted in drug cases. Most of the forfeitures permitted under the more generic criminal forfeiture law, 18 U.S.C. § 982, and civil forfeiture law, 18 U.S.C. § 981, apply only to criminal proceeds. Immigration, telemarketing, identity theft, child pornography and alien smuggling are exceptions.

CAFRA added the requirement that in “facilitating property forfeitures”, the prosecutor must prove, by a preponderance of the evidence, that the property had a “substantial connection” to the underlying offence. This test has been held to prohibit forfeiture of an entire residence based upon one telephone call from the property, or a vehicle which is used to transport someone to a meeting to discuss the crime. Such uses would be considered “incidental” and not “substantially connected” to the criminal activity.

## **C. Property “Involved In” Money Laundering**

U.S. forfeiture law allows the criminal or civil forfeiture of any property which is “involved in” a money

laundering offence. 18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1). This concept reaches further than “facilitating” or instrumentality property primarily because it allows the prosecutor to forfeit also untainted property which has been commingled with the criminally-related property. For example, if someone uses criminal proceeds to purchase real property in the name of a nominee family member, but half of the purchase price is paid for with legitimate funds, the entire property becomes subject to forfeiture. If tainted funds are used to purchase a business by one partner, but another partner uses untainted funds, the entire business becomes subject to forfeiture if the business partner cannot establish that he was a *bona fide* purchaser for value. The money laundering forfeiture provision is a popular one among U.S. prosecutors.

The primary limitation to its use is the assertion of the 8<sup>th</sup> Amendment defence of “excessive fines and penalties.” The 8<sup>th</sup> Amendment to the U.S. Constitution prohibits the government from imposing an excessive fine or penalty. In *Austin v. United States*, 509 U.S. 602, 622 (1993), the Supreme Court applied the 8<sup>th</sup> Amendment to civil forfeiture cases, determining that such forfeitures must be limited to property which is, in some way, “proportional” to the underlying crime committed. Such a measure is often difficult. Many courts have applied the test of comparing the value of the property sought to be forfeited to the maximum fine which Congress authorized for the underlying crime; however, this has not been adopted as a conclusive measure, and courts generally look to the entire circumstances of a case to determine what is grossly disproportional to the crime, and what is not, for forfeiture purposes.

## V. PROVISIONAL RESTRAINT OF PROPERTY UNDER U.S. LAW

Prosecutors in the U.S. must generally determine whether they will seek to seize or restrain assets prior to the initiation of either a criminal or civil forfeiture proceeding. A seizure always precedes an administrative forfeiture proceeding. The law recognizes the obvious principle that if property can effectively be restrained during the pendency of a forfeiture case, restraint is generally preferable to an actual seizure, which often requires significant expenditure of maintenance and storage fees.

### A. Restraining Orders

U.S. laws provide a three-stage procedure for obtaining restraining orders against assets sought for either civil or criminal forfeiture. Prior to the initiation of criminal charges, a temporary restraining order (“TRO”) may be obtained for 14 days upon an *ex parte* application and without prior notice to anyone with an interest in the property. The prosecutor must establish, in the application that there is probable cause to believe that the property is subject to forfeiture and that providing notice would jeopardize the availability of the property. The 14 day period may be extended upon good cause shown, permitting serial TRO’s until law enforcement agents have completed their “take down” of a criminal operation. Prior to the expiration of the initial TRO, the prosecutor must serve the order upon any potential parties in interest.

After affected parties have received notice and been given an opportunity to request a hearing, the prosecutor must demonstrate that: (1) there is a substantial probability that the U.S. will prevail on forfeiture and that failure to enter the order could result in the property’s becoming unavailable; and (2) the need to preserve the property outweighs hardship to the affected parties. The court may then grant a 90-day restraining order, which can be extended upon good cause.

Once a criminal indictment or a civil forfeiture complaint is filed, the prosecutor may obtain a permanent pre-trial restraining order. The reason for this provision is that in either case, an independent entity has found probable cause to believe that the property will be forfeited, thus satisfying possible judicial concerns about violations of the U.S. Constitution’s 4<sup>th</sup> Amendment protections against unreasonable searches and seizures. In a civil forfeiture, the judge makes that determination based on the civil complaint; in a criminal forfeiture, the grand jury makes the determination based upon allegations in the indictment. Except for a request to pay attorney’s fees (which is not permitted in the U.S. from tainted property), no one is entitled to a hearing on a restraining order issued after an indictment or civil forfeiture complaint has been filed.

### B. Seizure Warrants

Civil and criminal seizure warrants are both available, with slightly different standards. A civil seizure warrant may be issued by the court upon of probable cause to believe the property is subject to forfeiture (18 U.S.C. § 981(b)), which is usually accomplished by an affidavit sworn to by a law enforcement officer. This seizure warrant is used for most administrative seizures.



A criminal seizure warrant requires not only a showing of probable cause for forfeiture, but also that a restraining order is insufficient to maintain the property (or its value) for forfeiture. This provision confirms that restraint during the course of a forfeiture proceeding is preferable; but if the government learns that property is being transferred, damaged, or destroyed, a criminal seizure warrant would be available.

### **C. Management of Restrained or Seized Assets**

Though somewhat beyond the scope of this paper, issues of asset management should be considered when deciding whether and when to restrain or seize property subject to forfeiture. For example, most vehicles and other modes of transportation, such as boats, motorcycles, and recreational vehicles, are generally seized because of the depreciation in their value through continued use. Prior to seizure, a computation should be undertaken as to whether the overall costs of seizing, storing and maintaining the asset will be less than the anticipated sales price.

Real property and businesses present special challenges. A net equity computation of real property is essential, taking into account any liens or mortgages upon the property. As for business forfeitures, the U.S. Marshal's Service has a team of professionals who advise prosecutors on whether – and how best to – seek forfeiture of a business. U.S. law prohibits the seizure of real property before a final forfeiture judgment unless the prosecutor shows the attempted sale, destruction or unlawful use of the property; however, the filing of a *lis pendens* in the public land records office is permitted, as is a restraining order setting forth certain conditions for continued occupancy of the property by its owners. Likewise, restraining orders are most useful in connection with preserving the value of most businesses until a final judgment is entered. If seizure is required, a business manager or receiver can be appointed by the court.

Most financial accounts should generally be simply restrained pending the outcome of the proceeding. Some investment accounts may need to be liquidated or converted with court approval to maintain their value.

### **D. Provisional Restraint of Assets Overseas**

U.S. courts have extraterritorial jurisdiction over assets which are named in either a civil forfeiture action or a criminal indictment. The court may order a criminal defendant to “repatriate” any property named for criminal forfeiture. 18 U.S.C. §853(e)(4). Penalties for a failure to comply with a repatriation order can include a finding of contempt and/or a sentencing enhancement to the defendant for obstruction of justice. Civil forfeiture provisions do not have a repatriation option, but the court can take “any action to seize, secure . . .” the availability of property subject to civil forfeiture, which would include ordering any claimants to the case to take action with respect to foreign assets.<sup>9</sup>

## **VI. USING FORFEITURE FOR VICTIM RESTITUTION**

Restitution to crime victims is mandatory under United States sentencing laws. Because victims have a statutory right to restitution, prosecutors must use all tools available to obtain assets from the defendant to attempt to make victims whole. Experience has shown that unless assets are restrained prior to a conviction at the conclusion of a criminal case, nothing will be left to satisfy an order of restitution to victims.

Restitution has become a prominent objective in the Department of Justice's Asset Forfeiture Strategic Plan for the past several years. Although U.S. law permits a double recovery for forfeiture and restitution, most defendants lack the assets to satisfy both. Thus, the law permits restitution to be applied to net forfeited assets. If a restitution order has been entered in a criminal case, the prosecutor will simply refer the matter to DOJ's Asset Forfeiture and Money Laundering Section (“AFMLS”), along with a report indicating that the listed victims have been identified and validated, and are the only ones known. This process is called “restoration” of the forfeited property, and is the simplest procedure, whether property has been forfeited criminally or civilly. An older process, called “remission or mitigation” of the forfeiture, is a more involved process, also conducted by AFMLS, and is frequently used in conjunction with civil forfeiture where there is no restitution order.

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<sup>9</sup> One caveat our prosecutors must keep in mind is that if they have made an MLAT request to a foreign country asking the government to restrain assets, that restraint must be lifted before a repatriation order can be complied with.

## **VII. ASSET LIQUIDATION IN THE UNITED STATES**

Because the United States has two dedicated Asset Forfeiture Funds, we also have two agencies which manage and liquidate the assets designated for each Fund. The U.S. Marshal's Service ("USMS") is the "custodian" for the Department of Justice Assets Forfeiture Fund ("DOJ AFF"), and the Treasury Executive Office for Asset Forfeiture ("TEOAF") contracts with the custodians of the assets to be deposited to the Treasury Forfeiture Fund. Since 1999, the USMS has used an internet service for auctioning most of the assets for which it is responsible to liquidate. This site, [www.Bid4Assets.com](http://www.Bid4Assets.com), has been successful in netting higher net proceeds for the USMS than in pre-internet years. Assets as diverse as high-end vehicles, homes, commercial and agricultural real properties, timeshare condominium units, recreational watercraft, aircraft, jewellery, artwork, and financial instruments are all sold on the internet site.

For the past several years, deposits to the DOJ AFF have exceeded \$1,000,000,000 (\$1 billion) each year. For 2009, total deposits exceeded \$1.4 billion. The Treasury Fund, which was established in 1993, received \$527,000,000 (\$527 million) deposits in 2009. All forfeited proceeds and the proceeds of the sales of forfeited property are deposited to one of these Funds. The Funds are managed to provide for satisfying expenditures of the forfeiture proceedings – such as appraisals, title searches – and also to pay outstanding liens, and other expenses in need of resolution before liquidation can occur. International sharing, where assistance from our foreign partners is recognized, and "equitable sharing," for our domestic law enforcement partners, are also paid out of the Funds. Both types of sharing are based on the level and type of assistance provided to an investigation.

## **VIII. CONCLUSION**

The United States has a robust and effective asset forfeiture legal regime. In the over 25 years of the Department of Justice's forfeiture programme, much has been accomplished but much remains to be done, including legislative changes to simplify the process and the descriptions of property which may be forfeited. Because of the nature of the United States' democratic political system, these changes take time. Meanwhile, our law enforcement community will continue to assist our international partners in the most effective ways we can under our far from perfect, but quite powerful, forfeiture system.