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POLICY



USMS Directives

ASSET FORFEITURE

13.3 Real Property

APPENDICES

A. DEFINITIONS

Abatement: Any set of measures designed to permanently eliminate lead-based paint hazards, including the removal or encapsulation of lead-based paint and lead-dust hazards, as called for in HUD regulations.

Abstract of Title: A complete summary of all consecutive grants, conveyances, wills, records, and judicial proceedings that affect the title to a specific parcel of real property, together with a statement of all recorded *liens* and *encumbrances* affecting the property and their present status.

Ad Valorem: A type of tax or assessment that is based on the assessed valuation of the real property. ~~Each property bears a tax burden proportionate to its value, as opposed to a specific tax per unit based on quantity.~~

Ancillary Proceedings: Proceedings following a preliminary order of forfeiture in a criminal case. These proceedings are similar to civil forfeiture proceedings, except they deal only with the ownership rights that third parties may assert to the forfeited property. After notice of the hearing is published, any party asserting an interest in the property must petition the court for a hearing to adjudicate the validity of his/her interest. At this hearing, the petitioner must establish by a preponderance of the evidence that he/she has a legal ownership interest. Ownership interests may include liens and mortgages on the forfeited property. ~~After the hearing, a final order of forfeiture will be issued, which will resolve and dispose of the interests of any third parties. This can include rejecting any legal ownership interests or providing satisfaction of those interests.~~

Appraisal: An opinion of the value of real property, generally prepared by a licensed appraiser.

Appurtenances and Fixtures: Additions to real property that are considered part of the property (e.g., barns, built-in appliances, equipment and shelves, lighting fixtures, and drapery rods).

"As Is": Words that are included in a contract to signify that no guarantees are given regarding the property and that it is being purchased exactly as it is found. An "as is" indicator is a disclaimer of warranties or representations. Such a provision is inoperative when the seller actively misrepresents the condition of the property; however, if a reasonable buyer would be expected to discover a defect not known to the seller, upon a reasonable inspection, the buyer will be charged with notice.

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Asset Forfeiture Fund: A fund in the Treasury of the United States into which forfeited cash and proceeds from the sale of forfeited property are deposited and from which expenses are paid to cover the management and disposition of forfeited property, equitable sharing distributions, awards for information, and other law enforcement costs. (28 U.S.C. 55 524(c)(l) and (4); 21 U.S.C. 5 881(e)(2)(B))

Auction: The marketing of real property to bidders in an orderly predetermined fashion. Bids can be taken verbally, by mail, or by electronic means (e.g., e-mail, fax).

Auction Without Reserve: An auction in which the property will be sold to the highest bidder regardless of the size of the bid.

Reserve Auction: An auction in which the seller reserves the right to withdraw the real property from sale if the bids fail to reach a minimum level.

Regardless of what type of auction is used to market real property, the USMS always reserves the right to reject any bidder.

Buydown: A financing technique used to reduce the monthly payment for the homebuying borrower. The seller makes subsidy payments (in the form of points) to the lender that "buydown" or lower the effective interest rate paid by the homebuyer, thus reducing monthly payments

Capital Improvement: Any structure erected as a permanent improvement to real property; any improvement made to extend the useful life of a property or to add to its value. Examples include roof replacement, boiler replacement, paving a driveway, and extensive remodeling.

Civil Order of Forfeiture: *In In* a civil case, the court order issued following a *judgment* for the United States that finds that the property, which is the named defendant in the case, is forfeited. The civil order of forfeiture affects "the whole world," including unknown claimants. (See also final order of forfeiture.)

Contaminated Real Property: Real property that has been contaminated or could become contaminated with hazardous substances. Such contamination may have resulted from hazardous substances having been stored on the property for more than 1 year; having been released onto the property; or having been disposed of on the property. Such substances include both legal substances (e.g., gasoline that may have leaked from underground storage tanks, or lead-based paint) and substances resulting from illegal activity (e.g., methamphetamine or cocaine laboratories).

Deed of Trust: A legal document in which title to property is transferred to a third party trustee as security for an obligation owned by the trustor (borrower) to the beneficiary (lender). A *deed of trust* is similar to a *mortgage*; the primary difference is that it involves three parties.

Due Process: As used in this manual, due process refers to the guaranteed fairness of the procedure before the government would deprive an individual of his or her property or liberty, requiring that *notice* and the right to a fair hearing be accorded in advance.

Encumbrance: Any claim, lien, charge, or liability attached to and binding on real property that may lessen its value or burden, obstruct, or impair its use of a property but not

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necessarily prevent transfer of title; a right or interest in a property held by one who is not the legal owner of the property.

Eviction: The legal process of removing a tenant from the premises for some breach of the lease.

Exigent Circumstances: Something arising suddenly out of circumstances and calling for immediate action or remedy; something that needs to be done at once.

Ex Parte: A judicial proceeding, order, injunction, etc., taken or granted for the benefit of one party only, and without *notice* to or contestation by any person adversely interested.

Final Order of Forfeiture: In a criminal case, the court order issued following the disposition of all petitions, or if no petitions are filed in a timely manner, by which the United States gains clear title to property subject to the preliminary order of forfeiture. The order of forfeiture becomes final only when the ancillary proceeding is concluded. [See Fed. R. Crim. P. 32(d)(2).]

Forfeiture: The taking by the United States of property that has been used or acquired illegally, without compensating the owner. (*United States v. Eight (8) Rhodesian Stone Statues*, 449 F. Supp. 193 (C.D. Cal. 1978); *Mayo v. United States*, 413 F. Supp. 160 (ED. Ill. 1976); *Kahn v. Janozoski*, 60 A.2d 519 (MD. 1948).)

General Warranty Deed: A deed that contains a covenant that the grantor (seller) will protect the grantee (buyer) against any and all claims to the title of the real property.

Indemnification: An agreement to reimburse or compensate someone for a loss (e.g., a buyer of real property might require the seller to indemnify the buyer against claims caused by discovery of hazardous substances on the property).

Indictment: A formal written accusation originating with a prosecutor and issued by a grand jury against a party charged with a crime.

Information: An accusation in the nature of an indictment, from which it differs only in being presented by a competent public officer on his/her oath of office, instead of a grand jury on their oath. Any information may be used only when the accusation is a misdemeanor, or when the accusation is a felony and the accused has waived indictment.

Innocent Party: A party free from guilt and acting in good faith and without knowledge of illegal circumstances, defects, or objections.

Inventory: A detailed list of articles of property; a list or schedule of property containing a designation or description of each specific article and including its actual or estimated value.

In Personam: Any legal proceeding directed against an individual. In the context of asset forfeiture, in personam decisions determine ownership of property in relation only to the parties before the court. The power of a court to issue in personam decisions depends upon its ability to obtain jurisdiction over the individual and affects only the interests of that individual.

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In Rem: Any legal proceeding directed solely against property that will determine the ownership of that property. The defendant in an in rem proceeding is the property itself, and the proceeding is totally independent of any criminal action taken against the owner. In rem decisions affect "the whole world," including unknown claimants.

Judgment: The official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit before it. Judgments may include judgment after trial, rendered on the merits of the case; consent judgment, the provision and terms of which are settled and agreed upon by the parties to the action; default judgment rendered as a result of the nonappearance of the defendant; and summary judgment, following a motion by one or both parties based upon the Court's determination that there is no genuine issue of fact and that the party requesting summary judgment is entitled to prevail as a matter of law.

Judgment Fund: A permanent, indefinite appropriation established in the Treasury of the United States by 31 U.S.C. 5 1304 to pay most litigation-related and many administrative awards against the United States. Disbursements from the Judgment Fund are payable only to satisfy judgments and compromise settlements of actual or imminent litigation that by their terms require the United States to pay specified sums of money to certain individuals.

Jurisdiction: The power and authority to hear and determine a case.

Lead-based Paint Inspection: Inspection of all painted surfaces in residential property to determine the presence of lead-based paint.

Legal Description: A description of a piece of real property that is acceptable by the courts of the State where the property is located and is used in real property conveyance documents.

Lien: Qualified rights that a creditor has in certain property of his/her debtor, as security for a debt, or his/her performance of some act for the debtor.

Lis Pendens (Latin for suit pending): A notice filed with the county recorder or registrar of deeds that serves as a warning to all persons that the title to the property is in litigation and that potential purchasers are in danger of being bound by an adverse judgment against the property. The objective of a lis pendens is to prevent a bonafide sale of the property or its refinancing pending the outcome of the forfeiture litigation.

Listing Agreement: A written employment agreement between a property owner and a real property broker that authorizes the broker to find a buyer or a tenant for certain real property. An exclusive listing is one in which the seller agrees to appoint only one broker to sell the property within a specified period of time. An open listing is given to any number of brokers who can work simultaneously to sell the owner's property. The first broker to secure a buyer who is ready, willing, and able to purchase at the terms of the listing earns the commission. In the case of a sale, the seller is not obligated to notify any of the brokers that the property has been sold. An open listing need not contain a definite termination date; however, it terminates after a reasonable period of time. Either party can, in good faith, terminate the agency at will.

Marker Value: The price that a purchaser might be willing but not compelled to pay to purchase a property and the lowest price a seller, willing to but not compelled to sell, would accept. It assumes a motivated buyer and seller, as well as reasonable marketing time.

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Mechanic's or Materialman's Lien: A lien to secure priority for payment for work performed and /or materials furnished in erecting or repairing a structure. The lien attaches to the land, buildings, and improvements.

Mortgage: An interest in real property conveyed by the "owner" (mortgagor or titleholder) to the "lender" (mortgagee, mortgage holder) who holds the mortgage as security for the debt (loan).

Net Equity: The potential amount of sales revenue (proceeds) that the United States will realize after the property is sold, deducting all of the Marshal's expenses (including sales commissions, the transaction costs to dispose of real property, and the seller's estimated closing costs) and recognized liens.

Notice: Information, advice, or written warning intended to apprise an individual of some proceeding in which his or her interests are involved. Notice may be to a defendant of a lawsuit that has been instituted against him or her or of an action in which he or she may hold an interest to defend.

Occupancy Agreement: An agreement signed by the USMO on behalf of the USMS and the party in possession of the real property that is entered into after the civil complaint of forfeiture is filed or following the entry of a preliminary order of forfeiture. The party in possession of the property agrees to maintain it in the same or better condition or better than it was in when it became the responsibility of the USMO. The agreement shall include provisions that the occupants agree to provide for the ordinary and routine maintenance of the property; the procurement of casualty, fire, and liability insurance; the timely payment of any and all mortgage, rent, utility, tax, and/or other, obligations; and the continual maintenance of quiet title to the property.

Official Use: The transfer of ownership of forfeited property to a Federal agency or a State or local agency for its use when authorized by the forfeiture statute [See, e.g., 21 U.S.C. 5 881(e)(1)] and approved by the Attorney General.

Overage Real Property: Real property that has been held for a year or more after the receipt of the forfeiture order by the USMO.

Owners and Encumbrances Report (O&E Report): A report that based upon an examination of the title to real property that tells the State who is the owner of the real property and what encumbrances (e.g., mortgages, taxes, liens, and similar matters) affect the real property. (See also title report.)

Party in Interest: An individual who participates in the performance of any act, who is directly interested in any affair, contract, or conveyance, or who is actively concerned in the prosecution and defense of any legal proceeding relevant to the property. [See Fed. R. Civil P. 17(a)]

Personal Service: Actual delivery to any party of a pleading, notice, or other paper to charge him with its receipt and subject him to its legal effect.

Petition for Remission or Mitigation: A petition submitted to a DOJ official requesting administrative relief from the effects of the forfeiture. Remission of the forfeiture returns the property to the petitioner without any penalty. Generally, remission will be granted to a party

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whose property was illegally used without his/her knowledge or negligence. This includes financial institutions with a security interest in the property (lien or mortgage) and other innocent persons. Mitigation is partial relief from the *forfeiture*, usually conditioned upon the payment of a money penalty.

Points: A onetime charge paid for the use of money; a percentage of the principal conventional loan amount that a lender often charges a borrower for making the loan. Each point is equal to 1 percent of the loan amount. In conventional financing, the points may be paid by the buyer or the seller. An agreement to pay points should be included in the sales contract and should be covered by the broker in the listing agreement.

Posting: The placing of a copy of the forfeiture complaint and the warrant of arrest in rem (the arrest warrant), issued by the clerk of the court pursuant to Rule C(3) of the Supplemental Rules for Admiralty and Maritime Claims, upon the real property that is the defendant in rem in the forfeiture action.. In the case of unoccupied land, the process consists of tacking the arrest warrant in a visible location on the property. Where a structure is involved, the complaint and arrest warrant is tacked on the outside of the structure. [Taken from AFPM, Section I.III.A.1.a.]

Preliminary Order of Forfeiture: The order entered by the court forfeiting all the defendant's interests and assets that the jury has found to be forfeitable in its special verdict. The order should identify specifically each forfeited asset and state that the interest of the defendant in each asset is "forfeited to the United States for disposition in accordance with law." In addition, the order "must authorize the Attorney General to seize the interest or property subject to forfeiture on terms that the court considers proper." [Fed. R. Crim. P. 32(d)(2)]

Preponderance of the Evidence: The general standard of proof in civil cases. It refers to proof which leads the trier of fact (the jury or the judge) to find that the existence of the fact at issue is more probable than not.

Pre-1978 Residential Property: Real property containing any residential housing constructed prior to January 1, 1978; including such things as outbuildings, fences, and play equipment affixed to the property as well as dwelling units and common areas of multi-unit buildings; but excluding housing exclusively for the elderly and dwelling units in which the living area is not separated from the sleeping area (e.g., efficiencies, studio apartments, etc.).

Pre-seizure Planning: Planning that involves the USAO, the seizing agency, and the USMO and that anticipates and makes decisions regarding **what** property is being seized, **how** and **when** it is going to be seized, and, most important, **whether** it should be seized. [Taken from AFPM, Section I.I.B.2. (emphasis in original). In addition, a disposal strategy should be discussed for any business or commercial real property seized.

Probable Cause: The existence of facts and circumstances within an individual's knowledge and of which the individual has reasonably trustworthy information that lead someone of reasonable caution to believe that a crime has been committed.

Protective Order: Any order or decree of a court the purpose of which is to protect a person from further harassment or service of process or discovery, or to preserve property subject to forfeiture. [See, e.g., Fed R. Civil P. 26(c); Fed R. Crim. P 16(d)(1).]

Publication: The placement-under conditions prescribed by law-of an advertisement in a

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newspaper to give notice of the suit to interested parties upon whom personal service cannot be made. Admiralty Supplemental Rule C(4) requires that notice of the forfeiture action be published in a newspaper of general circulation in the district where the lawsuit is filed. Local district court rules govern the specific requirements as to the number and frequency of publication of notice.

Quitclaim Deed: A deed that conveys only the grantor's rights or interest in real estate. It does not state the nature of the rights conveyed and offers no warranties of ownership to the grantor.

Repair: Current expenditures to restore property to its original condition; minor alterations made to maintain the property rather than to extend its useful life.

Restraining Order: An order of the court forbidding the defendant to act until a hearing can be held.

Risk Assessment: The evaluation of a lead-based paint inspection to determine if there are any sources of serious lead exposure (such as peeling paint and lead dust) and what actions are required to address these hazards.

Seizure: The act of taking possession of property by virtue of a warrant or by legal authority. As used in this manual, it includes the transferring of the property to the custody of the court or investigative agency.

Seizure Warrant (warrant of seizure): A form of process issued pursuant to Rule 41 of the Federal Rules of Criminal Procedure and authorized by 21 U.S.C., Section 881(b) and 18 U.S.C. Section 981(b)(2) that secures a judicial determination of probable cause but does not confer jurisdiction upon the court issuing the warrant.

Special Forfeiture Verdict: A special verdict that may be returned by a jury after conviction when the indictment contains a forfeiture allegation. As authorized by Fed. R. Crim. P31(e), the special verdict must specify "the extent of the interest or property subject to forfeiture, if any."

Special Warranty Deed: A deed in which the grantor does not warrant against title defects arising from conditions that existed before he/she owned the real property. Special warranty deeds issued by the USMS normally only warrant the forfeiture process.

Substitute Assets: Assets belonging to a defendant that may be forfeited in lieu of directly forfeitable assets if the forfeitable assets are unavailable at the time the jury returns its special forfeiture verdict. Such assets, up to an equivalent value of those that are unavailable, may be forfeited upon motion to the District Court.

Survey: The process by which boundaries are measured and land areas determined; the onsite measurement of lot lines, dimensions, and position of houses in a lot, including the determination of any existing encroachments, easements, party walls, and compliance with setback requirements.

Title Commitment Report: A report setting forth the condition of title to property as of a certain date, and the conditions which, if satisfied, will cause a policy of title insurance to be issued to the purchaser of real property sold by the USMS.

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Title Insurance: A comprehensive indemnity contract under which a title insurance company warrants to make good a loss arising from defects in title to real property or any liens or encumbrances thereon.

Title Report: A preliminary report showing the current state of the title to real property along with the recorded objections to clear the title (e.g., unpaid mortgages and easements). Unlike an abstract of title, a title report shows only the current state of the title along with the recorded objections to clear the title such as unpaid mortgages and easements. (See also Owners and Encumbrances Report.)

Title Search: An examination of the public records to determine what, if any, defects exist in the chain of title.

Unencumbered Real Property: Real property free from a temporary estate or interest (e.g., free from a mortgage, lien, or dower right).

Waiver of Action: The intentional or voluntary relinquishment of a known right to bring a legal action in a court of law.

Writ of Entry: An order issued by a court that authorizes government agents to enter private areas on real property to undertake an inventory or inspection. A writ of entry may be obtained under the All Writs Act for the limited purpose of making a pre-announced inspection and videotaping of the property when real property is being posted. A writ of entry provision may be included in a seizure warrant when real property is to be seized.

Appendix A, Definitions

Appendix B, Acronyms

Appendix C, Forfeiture Statutes

Appendix D, Policy Authorization Review Decisions

Appendix E, Legal Background

Appendix F, Interest Schedule

Appendix G, Attachments to Real Property Manual

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