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## ASSET FORFEITURE

### 13.3 Real Property

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#### B. ACRONYMS

AFMLS Asset Forfeiture and Money Laundering Section

AFO USMS Asset Forfeiture Office

AFPM Asset Forfeiture Policy Manual

AUSA Assistant United States Attorney

CATS Consolidated Asset Tracking System

CFR Code of Federal Regulations

COTR Contracting Officer's Technical Representative

CSA Controlled Substances Act

DOJ Department of Justice

FHA Federal Housing Administration

GSA General Services Administration

MLCA Money Laundering Control Act

PAR Policy Authorization Review

RICO Racketeer Influenced and Corrupt Organizations Act

USAO United States Attorney's Office

USC United States Code

USMO United States (District) Marshal's Office

USMS United States Marshals Service

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VA Department of Veterans Affairs

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#### C. FORFEITURE STATUTES

1. **18 U.S.C. § 793(h) Espionage, Criminal Forfeiture:** Criminal forfeiture against the proceeds of espionage, including real property purchased with such proceeds
2. **18 U.S.C. § 981 Money Laundering, Civil Forfeiture:** Civil forfeitures against real property involved in a money laundering transaction or real property constituting, derived from, or traceable to any proceeds of a money laundering offense.
3. **18 U.S.C. § 982 Money Laundering, Criminal Forfeiture:** Criminal forfeitures against real property involved in a money laundering offense, or real property constituting, or derived from any proceeds of a money laundering offense.
4. **18 U.S.C. § 1467 Obscene Material, Criminal Forfeiture:** Criminal forfeitures against real property constituting or traceable to gross profits or other proceeds obtained from an offense involving obscene material, or real property used or intended to be used to commit or to promote the commission of such an offense.
5. **18 U.S.C. § 1963. Racketeering:** Criminal forfeitures against real property constituting or derived from racketeering activity or unlawful debt collection, and any real property affording a source of influence over any racketeering enterprise.
6. **18 U.S.C. § 2253 Child Pornography, Criminal Forfeiture:** Criminal forfeitures against real property constituting or traceable to gross profits or proceeds obtained from involving child pornography, or real property used or intended to be used to commit or to promote the commission of such an offense.
7. **18 U.S.C. § 2254 Child Pornography, Civil Forfeiture:** Civil forfeitures against real property used or intended to be used to commit or promote the commission of a child pornography offense, or real property constituting or traceable to gross profits or proceeds obtained from such an offense.
8. **21 U.S.C. § 853 Drug Trafficking, Criminal Forfeiture:** Criminal forfeitures against the proceeds of drug trafficking, real property used to facilitate drug trafficking, and any real property affording a source of control over a continuing criminal enterprise.
9. **21 U.S.C. § 881(a)(6) Drug Trafficking, Civil Forfeiture:** Civil forfeitures against the proceeds of drug trafficking, including real property purchased with drug proceeds.
10. **21 U.S.C. § 881(a)(7) Drug Trafficking, Civil Forfeiture:** Civil forfeitures against real property used to facilitate drug trafficking.

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#### D. POLICY AUTHORIZATION REVIEW DECISIONS

1. PAR decision packages may be submitted by a USMO in any unusual circumstance when the USMO requests AFO concurrence.
2. PAR decisions are **required** before USMOs undertake the following actions:
3. Sale of real property for [REDACTED] of market value *b2, b7E*
4. Disagreements between USAO and USMO regarding decision to forfeit real property
5. Forfeiture actions against contaminated or potentially contaminated real property (including pre-1978 properties)
6. Approval of disposition of historically significant forfeited real property
7. Approval to redeem forfeited property from foreclosure
8. Use of real property undergoing forfeiture in emergency circumstances
9. Disposal of real property with an appraised value in excess of \$1 million
10. Making capital improvements to forfeited real property prior to sale in excess of 5 percent of market value
11. Selling real property encumbered by a lien at an auction without reserve
12. Sealed-bid sale of real property for [REDACTED] of market value *b2, b7E*
13. Destroying structures on forfeited real property

14. Purchaser access to forfeited real property prior to sale
- ~~15. Approval to use a special warranty deed with indemnifications~~
16. Approval to use a general warranty deed
17. Waiver of requirement to cleanup Contaminated property

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#### E. Legal Background

#### 1. FORFEITURES IN GENERAL

A civil forfeiture is intended to confiscate property used or acquired in violation of the law. It can be pursued against property owned by someone other than the person who used it to violate the law. In contrast, a criminal forfeiture is imposed on a wrongdoer as part of his/her punishment following his /her conviction. The procedures involved in the two types of are very different. However, the result of either a civil or criminal forfeiture is the transfer of rights, title and interests in the property to the United States:

- The purpose of civil forfeiture is to confiscate property used in violation of the law and to remove the profits of illegal conduct from the wrongdoer. The threat of forfeiture encourages property owners to take care in managing their property and ensures that they will not permit that property to be used for illegal purposes. Civil forfeiture can be pursued directly against property independent of criminal charges filed against the owner(s).
  - The purpose of criminal law is to punish a wrongdoer, and criminal forfeiture is imposed as part of that punishment following his/her conviction.
2. **Civil Forfeitures Are In Rem:** In rem refers to a legal action directed solely against property that will determine the ownership of that property. A civil forfeiture is an in rem proceeding brought against the property rather than against the wrongdoer, based upon the legal fiction that the property itself is "guilty" of being used in an illegal manner. The defendant in an in rem proceeding is the property itself, and the proceeding is separate from any criminal action taken against the owner. The power of a court to issue in rem decisions does not depend upon having jurisdiction over anyone, as long as the Court has jurisdiction over the property in question. In rem decisions affect "the whole world," including unknown claimants.
  3. **Criminal Forfeitures Are In Personam:** A criminal action (which may or may not include a forfeiture) is considered to be in personam, referring to any legal proceeding directed against an individual. Consequently, in personam decisions determine ownership of that 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 personal jurisdiction over the person.

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4. **Civil Forfeiture:** There are more than 200 civil forfeiture statutes in the laws of the United States. The most common civil forfeiture statutes governing property handled by the USMS are the Money Laundering Control Act (MLCA) (18 U.S.C. § 981) and the Controlled Substances Act (CSA) (21 U.S.C. § 881).

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The procedures covering most federal civil forfeiture statutes are governed by the Tariff Act of 1930 (the Tariff Act) (19 U.S.C. § 1602 et seq.), and the Supplemental Rules for Certain Admiralty and Maritime Claims (the Admiralty Rules).

5. **Jurisdiction Over the Property:** Jurisdiction Over the Property: Because a civil forfeiture action is an in rem action brought against property allegedly involved in criminal conduct, the first step in a civil forfeiture action is to place the property subject to forfeiture under the jurisdiction of the court.

**Most civil forfeiture statutes incorporate by reference the procedures set forth in the Tariff Act and the CSA. These statutes provide that property subject to forfeiture may be seized pursuant to a lawful warrant.**

**Once seized, the property remains in the custody of the United States until the forfeiture action is concluded. However, the United States Supreme Court created one exception that applies to the seizure of real property. Because of the right of privacy associated with a person's residence, a hearing would be required before the seizure of residential property absent exigent circumstances. Therefore, the Supreme Court held that except under special circumstances, due process requires that a court hearing be held before real property can be seized.**

**The Supreme Court also clarified that jurisdiction over real property was accomplished through the arrest (i.e., the posting) of real property, rather than its seizure or custody.**

6. **New Procedures for Real Property Seizure in Civil Forfeiture Cases Created by the Daniel Good Case [United States v. James Daniel Good Real Property, 507 U.S. 983 (1993)]**

The Supreme Court in *Good* held that real property may not be seized, except in exigent circumstances, without giving a property owner notice of the proposed seizure and an opportunity for a court hearing at which he or she may contest the seizure. The Court also addressed a number of issues in the context of this ruling that, taken together, significantly changes in the way the United States conducts civil forfeiture proceedings against real property:

- The Court endorsed a method in which a civil in rem proceeding initiated by posting the property under the Admiralty Rules. Under this method, the actual seizure of the property takes place upon or after forfeiture.
- The Court addressed procedures for preserving property during the pendency of the forfeiture case. If, for example, there is evidence that an owner is likely to destroy or damage his/her property when advised of the pending action, the Court stated that the United States may obtain an ex parte restraining order.
- The Court determined that the United States upon a showing of exigent circumstances may seize real property without a hearing. This requires that the United States demonstrate that a less restrictive measure is insufficient to protect the United States' interest in preventing the sale, destruction, or continued unlawful use of the real property.

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7. **Criminal Forfeiture:** The primary criminal forfeiture statutes under which the USMS handles property are:

- ~~The Money Laundering Control Act (18 U.S.C. § 982);~~
- The Racketeer Influenced and Corrupt Organizations (RICO) Act (18 U.S.C. § 1963); and
- The Controlled Substances Act (21 U.S.C. § 853).

8. **Criminal Trial:** Criminal Trial: The prosecution begins with an indictment or information, which states the criminal charges against an individual. Any property that the United States seeks to forfeit must be named specifically in the indictment or information. If the defendant is found guilty of a crime, the property that has been used to facilitate that crime or the proceeds of that crime and that has been named in the indictment or information is subject to forfeiture.

Upon completion of the criminal trial, if the jury finds the defendant guilty, then it may return a special verdict specifying the property to be forfeited. The special verdict authorizes the Attorney General to seize the property named in the verdict under the terms and conditions fixed by the Court's order." [Fed. R. Crim P. 32(b)(2)]

The judge may also issue forfeiture orders to effectuate a plea agreement.

9. **Ancillary Proceedings to Dispose of Third-party Interests:** The special verdict only forfeits the interests of the defendant in the real property. In order for the United States to have clear title to the property, it is necessary to resolve the legal interests that any third party may have in the property. This is done through ancillary proceedings following the criminal trial. [Fed. R. Crim. P 32(b)(2)]. These ancillary proceedings are similar to civil forfeiture proceedings, except they deal only with the ownership rights to the forfeited property that third parties may assert. After notice is published, any party asserting an interest in the property must petition the Court for a hearing to determine the validity of his/her legal interest in the property. The judge then conducts a hearing that is basically civil in nature. The petitioner must establish by a preponderance of the evidence that he/she has a legitimate ownership interest in the property. Such ownership interest may include liens and mortgages on the forfeited property. After the hearing, the judge will issue a final order of forfeiture that will resolve and dispose of the interests of any third party before the Court. [18 U.S.C. § 1963(1); 21 U.S.C. § 853-(n)] This may include rejecting the third party's interest or providing that the interest will be protected or paid for out of the forfeiture proceeds.

10. **Pretrial Restraint or Seizure of Property Subject to Criminal Forfeiture:** RICO and the CSA each include three pretrial options whereby the United States can seek to prevent the property from being disposed of or removed from the court's jurisdiction. The MLCA incorporates by reference the provisions of the CSA. Upon the filing of the indictment or information, [18 U.S.C. § 1963(d)(1)(A); 21 U.S.C. § 853 (e)(1)(A)] the United States may seek a restraining order or injunction to preserve the availability of the property.

- a. Before the indictment or information is filed and after notice and offer of a hearing has been given to the apparent property owner, the United States may request such a restraining order or injunction. Under this alternative, the court will issue the order or injunction if it determines that there is a "substantial probability" that the property will be subject to forfeiture and that "failure to enter the order will result in the

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property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture." [18 U.S.C. § 1963(d)(1)(B); 21 U.S.C. § 853 (e)(1) (B). Such orders are effective for only 90 days unless extended by the court for good cause.

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- b. Without notice and opportunity for a hearing, a pre-indictment temporary restraining order may be issued if the United States demonstrates that there is "probable cause to believe the property would, in the event of conviction, be subject to forfeiture and that provision of notice will jeopardize the availability of the property for forfeiture." [18 U.S.C. § 1963(d)(2); 21 U.S.C. § 853(e)(2).] This type of restraining order is valid for only 10 days unless good cause for an extension is demonstrated.

**NOTE:** The use of a restraining order or injunction will place certain responsibilities on the USMO regarding the property, even if it is not taken into custody. In addition to these pretrial options, the CSA provides that the United States may request the issuance of a seizure warrant, if the court determines that there is probable cause to believe the property will be forfeited, and if a restraining order may not be sufficient to assure the property's availability for forfeiture. The MLCA incorporates this provision by reference. [18 U.S.C. 5 982(b)(1)(A)].

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