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ASSET FORFEITURE

13.4 Businesses, Commercial Real Property, and Financial Instruments

ONGOING BUSINESSES (INCLUDING COMMERCIAL REAL PROPERTIES)

1. CRIMINAL FORFEITURE OF AN ONGOING BUSINESS

a. **Updated Business Review:** With respect to a business that is to continue in operation, once the government obtains access to more detailed business records and other information, the business review:

- (1) Should be updated to specifically identify the problems faced by the business and the requirements it needs to succeed.
- (2) Must be able to project operations for the next two years, assuming that a two-year time period will be required to settle all third-party claims and to exhaust any appeals in process.

b. ~~**Preliminary Order of Forfeiture Following a Conviction:** The jury must find that the assets are subject to forfeiture by a separate verdict, referred to as a special verdict of forfeiture.~~

If	Then
A jury agrees on a special verdict of forfeiture.	The district court issues a preliminary order of forfeiture.
The preliminary order of forfeiture is a surprise order (i.e., the USMS had no previous knowledge of the indictment of an operating business).	The entire pre-seizure process must begin immediately.

c. **Post-forfeiture Court Orders:**

When	This Action Occurs
A preliminary order of forfeiture is entered.	New or supplemental court orders may be obtained to provide the USMS with the authority and tools necessary to manage the asset.
A preliminary order of forfeiture is drafted.	The USMS ⁷⁵ should be involved, because a list of authorities needed to undertake certain actions that may not

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	<p>be known to the USAO will need to be included in the order. These include the authority to:</p> <p>Obtain and open mail that is addressed to the business.</p> <p>Obtain control over the business' facilities, computers, and records, including ownership records.</p> <p>Obtain control over, have signatory authority over, and operate the business' bank accounts without the respective banks freezing the operating accounts.</p> <p>Negotiate legal instruments in the legal name of the business (e.g., corporation, partnership, or joint venture).</p>
<p>A preliminary order of forfeiture is drafted. (Continued)</p>	<p>Manage the business, including:</p> <p>Hiring and firing employees.</p> <p>Collecting accounts receivable.</p> <p>Opening bank accounts in the business name.</p> <p>Paying employees and creditors.</p> <p>Hiring temporary staff members, accountants, business consultants, business brokers, appraisers, surveyors, title attorneys, and auditors.</p> <p>Ordering supplies.</p> <p>Entering management agreements.</p> <p>Carrying out all functions necessary either to operate or liquidate the business.</p> <p>Negotiate with suppliers, creditors, and other third parties doing business with the forfeited entity.</p> <p>File and settle obligations with all Federal, State, and local tax and regulatory authorities.</p> <p>Appoint business managers,</p>

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	consultants, or other personnel as agents to assist the USMS with the management, running, or liquidation of the business.
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- d. **Seizure of Business:** USMO activities during and immediately after seizure should be coordinated with the AUSA and with the investigative agency.

Item	Action to be taken by USMO
Timing of the seizure	For legitimate businesses, seize at the end of the week or during business downtime to avoid the disruption of operations.
Operational plan	Develop an operational plan for the takedown. ⁷⁶
Business valuation	Continue the business review procedure. ⁷⁷
Inventory	Conduct an inventory (photographic and video) of business assets and property. Take photographs immediately, both inside and outside, on the first visit to the business before anything is touched.
Environmental and physical condition	<p>Prepare a physical condition report of any visible or likely known physical problems.</p> <p>Identify any obvious environmental problems such as:</p> <p>Lead-based paint contamination associated with residential units.</p> <p>Underground tanks associated with such businesses as gas stations.</p> <p>Hazardous substance contamination commonly associated with such properties as dry cleaners, printing and photography shops, research laboratories, sites with electrical transformers, and manufacturing and refining businesses.</p>
Security	<p>Perform the following tasks if it is necessary to preserve security (e.g., bar previous operators or employees of the business from the premises):</p> <p>Change the locks.</p> <p>Change the alarm combination if an alarm system exists.</p> <p>Require an activity report from any company that provides security services.</p>

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<p>Business records</p>	<p>Regarding documentation related to the operation of the business:</p> <p>Locate and secure all documentation related to the operation of the business, such as the following items:</p> <p>All required business licenses (e.g., medical licenses, liquor licenses, FAA licenses, and environmental permits).</p>
<p>Business records (Continued)</p>	<p>All accounting records, manual and/or automated.</p> <p>All automated systems (e.g., hardware, computer records, and software systems).</p> <p>Other labor-management relations documentation relating to personnel and sub-contractors (e.g., existing employment, medical, and retirement records and union contracts).</p> <p>Regarding other business agreements pertaining to partnerships, management, or lease agreements:</p> <p>Verify the proper ownership of the legal entities and all assets.</p> <p>Obtain copies of all equipment, building, or land lease agreements. Regarding all insurance coverage (e.g., fire, flood, general liability, and workers' compensation).</p> <p>Regarding all insurance coverage (e.g., fire, flood, general liability, and workers' compensation):</p> <p>Confirm that the policies are current and in place.</p> <p>Review the coverage for adequacy.</p> <p>Add the United States as loss payee on the policies and notify the appropriate agencies unless the case is going to result in an immediate final forfeiture</p> <p>Ensure that the insurance is maintained and that the USMO will be notified if there is a threat of the insurance lapsing or being canceled.</p> <p>Arrange to obtain adequate and</p>

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	<p>necessary insurance commensurate with the business' activities if no insurance is currently in place</p>
<p>Personnel</p>	<p>Regarding all employees and parties that have access to the premises:</p> <p>Obtain the following information:</p> <p>Names.</p> <p>Personnel files.</p> <p>Copy of the driver's license or other picture identification.</p> <p>Other current information, such as social security numbers or alien identification documents (green cards).</p> <p>Regarding key personnel:</p> <p>Obtain the following information:</p> <p>A criminal record check [through the National Crime Information Center (NCIC) operated by the FBI⁷⁸ and through the local police department].</p> <p>A credit report.</p>
<p>Operations</p>	<p>Locate and secure all real and personal property, human resources, service contracts or relationships, and accounts related to the business' operation.</p> <p>Ensure that all necessary or essential equipment is secured, available, and useable.</p> <p>Determine who are the key personnel and labor and ensure that they are present.</p> <p>Determine who are the key suppliers of precursor materials or services to the business and ensure that they will continue to provide necessary services.</p> <p>Determine who are the key customers and if they will continue to purchase from the business.</p>
<p>Infrastructure</p>	<p>Evaluate the effectiveness of core administrative functions.</p> <p>Determine if necessary business services (e.g., bookkeeping, payroll,</p>

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	accounting, banking, and insurance) are in place.
Internal controls	Evaluate the effectiveness of internal controls.
	Determine the adequacy of security, cash, and financial internal controls.
Liabilities	<p>Regarding secured and unsecured debt:</p> <p>Identify lienholders and other parties of interest.</p> <p>Provide the AUSA with a list of all such parties for personal notice.</p> <p>Contact and give notice to employees, debtors, vendors, suppliers, customers, State agencies, and anyone else who may be affected by the continued operation of the business or who will be concerned by its closure [e.g., banks, utility companies, essential suppliers, licensing authorities, and the landlord (if the premises are leased)].</p> <p>Identify existing lawsuit and administrative actions filed by or against the enterprise (e.g., employee discrimination suits, tort suits, and other types of suits).</p> <p>Regarding unsecured creditor debts incurred before the seizure and that involve goods and services (i.e., that are essential to the business' operation and are needed on a recurring basis), salaries, utilities, or rental agreements for space and equipment:</p> <p>Pay them from the business accounts of the seized business if there are sufficient funds available.</p> <p>Pay them from the Assets Forfeiture Fund²⁹ if there are insufficient funds available from the business accounts.</p>
Business equity	Determine if the ratio of assets and liabilities is acceptable for proceeding with final forfeiture of the business.
Business operations	<p>Regarding the permanent or temporary closure of the business:</p> <p>Notify the employees of the anticipated length of closure and the possibility of re-employment upon opening.</p>

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	<p>Prepare documents for possible liquidation.</p> <p>Evaluate assets with liabilities.</p>
	<p>Evaluate the need to remove personal property to secure the location.</p> <p>Arrange for the transportation of personal property, if necessary.</p> <p>Arrange to secure real property, if owned, with the assistance of a property manager.</p> <p>Regarding continued business operations:</p> <p>Determine the relative advantages and disadvantages of retaining existing management as compared with contracting with outside sources.</p> <p>Determine who is going to manage the business and whether a monitor, trustee, or business manager is necessary.⁸⁰</p> <p>Have a business operating plan prepared.</p>
	<p>Determine and specify the roles and responsibilities of such personnel as managers and contracted accountants.</p> <p>Coordinate with the appropriate bankruptcy trustees to facilitate the control and management of the business if a U.S. bankruptcy court is involved. (Note: The AUSA prosecuting the forfeiture action must participate in this task.)</p>
<p>Business operations (Continued)</p>	<p>Institute a reporting mechanism for managers/accountants so that business performance and valuation can be tracked.</p> <p>Regarding notification to proper authorities:</p> <p>Notify the following public authorities when the <i>seizure</i> of a business occurs:</p> <p>State or local governments. The USAO should file a <i>lis pendens</i> if required by the type of business property (liens on real property or on unusual assets, e.g.,</p>

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	<p>airplanes, vessels, ship mortgages⁸¹).</p> <p>Secretary of State for the State where the business is incorporated, if the business is a corporation.</p>
	<p>Licensing authorities.</p> <p>City and county authorities, including taxing authorities.</p> <p>Banks and other financial institutions.</p>
<p>Pre-forfeiture liquidation</p>	<p>Evaluate the efficacy of an interlocutory sale or a quick release.</p>
<p>Banks and other financial institutions</p>	<p>Exercise caution when drafting an order (e.g., a restraining order, seizure warrant, or preliminary order of forfeiture) that will be served on the banks and financial institutions where a business' accounts are maintained to prevent the banks and financial institutions from freezing these accounts when they are served with the order and thereby rendering them inaccessible to the Government.</p>
<p>Banks and other financial institutions (Continued)</p>	<p>Ensure that if the business continues to operate, the order contains clear provisions for continued access to the business accounts subject to oversight by the USMO or its designated monitor or trustee.</p> <p>Ensure that the order specifies the manner in which business' bank accounts are styled and provides the bank account numbers.</p> <p>Consider keeping the accounts and changing the signature cards and style of the account if the business is complex and has a number of operating accounts.</p> <p>Re-execute the signature cards at the bank and specify a USMO official and, as appropriate, the monitor, trustee, or contract manager for the business.</p> <p>Ensure that the style of the account reflects that the business is being operated under the oversight or control of the USMS through, as appropriate, its monitor, trustee, or contract manager.</p> <p>Immediately serve banks and financial institutions with a copy of the order once</p>

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	it has been drafted.
	Order new check stock if the existing stock is not to be used.
	Select only banks that are insured by the Federal Deposit Insurance Corporation if the accounts are to be closed and new accounts opened.

e. Ancillary Proceedings Following a Final Order of Forfeiture: Ancillary proceedings may be required to resolve third-party interest(s) in the forfeited property

Notice of the ancillary proceedings must be sent to all possessors, lienholders, owners-of-record, and others with a potential interest in or claim against the property.

- (1) Generally, both individual written notice and notice by publication should be made
- (2) Publication procedures similar to those for civil forfeiture, as described in "Notice requirements", may be used.

Generally, if practicable and consistent with the interests of justice, ancillary proceedings should commence within 30 days of the filing of a petition by a claimant.⁸²

f. Final Orders of Forfeiture:

If	Then
Ancillary proceedings have been held and concluded.	A final order of forfeiture may be issued.
A final order of forfeiture is not required to be issued	The deadline for claimants to file petitions has expired, and no petition has been received.
The district court does not issue a final order of forfeiture because no petition was received.	The AUSA must provide the USMO with written notification stating that: The forfeiture was properly published. No petitions were filed. The USMO may proceed to dispose of the property.
The AUSA does not provide the USMO with written notification.	The USMO must notify the AFO of any failure or refusal by an AUSA to provide such written notification.
Upon receipt of a final order of forfeiture, a review of CATS reveals that the order has not been entered.	The USMO must advise the AUSA that the forfeiture information must be entered into CATS by the USAO.

g. Plea Agreement: The United States may agree to accept a defendant's interest in a

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business (including commercial real property) in a plea agreement only if such interest is the defendant's total interest, as shown in the property records, and is conveyed with clear title to the United States.

If	Then in a Plea Agreement
The property was named in the indictment or information.	The defendant may consent to the forfeiture of his/her interest in the property. However, the plea agreement may provide that the defendant will not contest a civil forfeiture of the assets.
Third-party interests exist.	They cannot be extinguished. Ancillary proceedings may be required to dispose of the rights of such third parties.
The district court approves	A monetary amount ⁸³ may be accepted in lieu of forfeiture of property named in an indictment or information. The USMO responsible for the property being returned must deposit such amounts into the Assets Forfeiture Fund pursuant to 19 USC 1613(c).
Installment payments ("partial payments") in lieu of forfeiture of assets are proposed.	Under DOJ policy, ⁸⁴ the AFO must be consulted and must agree. The USMO must immediately advise the AFO when it is informed of any proposal by an AUSA to enter into a plea agreement that would provide for such payments.

The AUSA must provide the USMO with copies of the plea agreement and any related documents (e.g., deeds). These documents are to be retained in the case file.

2. **CIVIL FORFEITURE OF AN ONGOING BUSINESS:** Under DOJ policy, a single civil judicial forfeiture action should be brought against all assets in which an individual has an ownership interest and that are subject to forfeiture under the same statutory authority and on the same factual basis.⁸⁵

The same considerations are present when a business is targeted for forfeiture in a civil forfeiture action as are present in a criminal forfeiture action.⁸⁶ This section outlines procedures that generally apply to civil forfeiture actions.

a. **Warrants of Arrest in Rem:**

DOJ Policy	Procedure
The AUSA commences a civil judicial forfeiture action.	The AUSA: Files a complaint against the property subject to forfeiture. Prepares a warrant of arrest in rem to formally bring the property within the control of the district court.
Upon the receipt of the warrant of arrest in rem, the USMO must:	The USMO executes the warrant of arrest in rem.

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<p>Ensure that each warrant contains the word "arrest" or "summons" on its face so that the warrant:</p> <p>Meets the requirements of the Federal Rules of Civil Procedure, including the Supplemental Rules for Certain Admiralty and Maritime Claims (Admiralty Rules).</p> <p>Establishes the jurisdiction of the district court.</p> <p>Ensure that, if the property is not to be seized, the warrant:</p> <p>Contains a statement that the business is not being seized or otherwise taken into custody.</p> <p>Does not place the responsibility for the business' operation on the USMS while the forfeiture action is pending.</p>	
<p>The USMO does not take actual custody of the property if:</p> <p>The character or situation of the business property makes taking custody impractical, or</p> <p>It consists of or includes real property.</p>	<p>The USMO shall post, not seize, the property.⁸⁷</p>
<p>When a forfeiture action includes assets located outside the judicial district, the AUSA responsible for the forfeiture action against property must inform the USAO and the USMO in the judicial district where the property is located.</p>	<p>The AUSA advises the USAO and the USMO for the district where the property is located that a forfeiture action against property in that district is being contemplated.</p>
<p>The AUSA is to coordinate the forfeiture action with the USAO and the USMO in the judicial district where the property is located.</p>	<p>If the AUSA fails to contact both of these offices, the USMO in the district where the forfeiture action is being brought must bring this requirement to his/her attention and must contact the USMO in the district where the property is located.</p>

b. Limitations on Executing a Warrant of Arrest In Rem

If	Then
<p>During the USMO's seizure operation, evidence of a crime is observed by a deputy U.S. marshal.</p>	<p>The deputy U.S. marshal who discovers the evidence should:</p> <p>Leave the evidence undisturbed.</p> <p>Secure the area where the evidence was found.</p>

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	Promptly request that the appropriate investigative agent seize the evidence in its original state and at its present location.
The warrant of arrest in rem describes only the business (including commercial real property)	<p>The USMO may not seize other property found in or with the seized business (including commercial real property), unless those items are considered an appurtenance of such business (including commercial real property).</p> <p>Before such items can be subject to forfeiture, they must be the subject of a separate administrative forfeiture action or named in the judicial forfeiture complaint.</p>

- c. **Use of Federal, State or Local Law Enforcement Agents to Assist with Executing Warrants of Arrest In Rem:**⁸⁸ Because a warrant of arrest in rem does not authorize a search, other Federal, State, or local law enforcement agents may only assist with executing a warrant of arrest in rem under certain circumstances.

If	Then
Federal, state or local law enforcement agents are to assist with executing a warrant of arrest in rem.	<p>Their involvement must be necessary to execute the warrant of arrest in rem and must not prejudice the case, and</p> <p>The USMO must:</p> <p>Anticipate that violence or resistance may be encountered in executing the warrant.</p> <p>Believe that available USMO resources are insufficient to meet the threat of violence or resistance.</p> <p>Have consulted the AUSA and obtained his/her concurrence.</p> <p>Advise such agents that the warrant does not, in and of itself, authorize an entry onto private premises or a search for contraband or other evidence of criminal activity.</p>

- d. **Notice Requirements:**⁸⁹ Notice of the United States' intent to forfeit such property must be given to all known persons or entities who may have a possessory or ownership interest in or claim against the defendant property in a judicial forfeiture action. The USAO is required to prepare all notices regarding the property subject to forfeiture by virtue of a warrant of arrest in rem.

- (1) **Notice by Publication:** Although the USMS is not responsible for publishing notices, many USMOs have assumed the responsibility in judicial forfeiture cases for preparing the notices and placing them in the newspaper. In this way the USMO

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may avoid disposition problems associated with unknown claimants. The following actions will be required if the USMO takes on this responsibility:

(a) Upon the execution or posting of a warrant of arrest in rem, the United States will within 10 days cause a public notice of action to be given in a newspaper of general circulation, as designated by an order of the district court.

(b) Generally, the notice is to be published once per week for three consecutive weeks in a newspaper of general circulation in the district where the property is located and, if different, in the district where the forfeiture action is being heard. (Note: Local court rules may provide for different publication requirements.)

The notice must include:

(c) A description of the assets.

(d) The CATS asset ID, forfeiture case name and number, and the name of the judicial district where the case is proceeding.

(e) Notification that parties with an interest in the property who seek to contest the forfeiture must intervene in the forfeiture action by the date specified and in accordance with the Admiralty Rules.

(f) The procedures for filing a petition for remission or mitigation of forfeiture in accordance with 28 C.F.R Part 9.

(2) **Notice by Certified Mail:** Each identified party in interest must be separately notified. These parties include, but are not limited to, possessors, record owners, lienholders, and others claiming an interest in the property. If the business is a private corporation, it will also be necessary to notify the stockholders.

The notice must include, at a minimum, all information contained in the published notice

(3) **Personal Service:** The USMO should consult with the AUSA responsible for the forfeiture action to determine if personal service should be obtained. Effective personal service requires that:

(a) The receipt of the notice is acknowledged in writing by either the potential party in interest or one authorized to accept service for the potential party in interest.⁹⁰

b. The person who is authorized to serve notice on behalf of the United States and who executes service states in writing that service was made to the potential party in interest or to one authorized to accept service for the potential party in interest.

e. **Operating a Seized Business:** The procedures for operating a seized business undergoing civil forfeiture are the same as for operating a seized business undergoing criminal forfeiture.⁹¹

f. **Civil Forfeiture by Settlement:** Settlements of forfeiture actions are encouraged to conserve the resources of both the United States and the claimant(s).

(1) Any settlement binds only the parties to it.

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- (2) Settlements should not provide for installment payments ("partial payments") of settlement amounts in lieu of forfeiture of assets unless approved by the AFMLS in consultation with the AFO.⁹²

g. Responsibilities in Civil Settlements:

Authority	Responsibility
AUSA	<p>Must follow the procedures outlined in Section 3.I.D. of the AFPM to obtain a forfeiture by settlement.</p> <p>Must consult with the USMO and the investigative agency before entering into a settlement.⁹³</p>
USMO	<p>Provides the case AUSA with an updated appraisal of the assets' market value, information on the cash flow, and information on current and prospective expenses to ensure that the settlement is fiscally sound from the United States' perspective.</p> <p>Advises the case AUSA to include in any settlement agreement a hold harmless provision as well as any waivers of actions based on the Federal Torts Claims Act,⁹⁴ Bivens,⁹⁵ and/or the Constitution.</p> <p>Obtains copies of the executed settlement documents (notice of dismissal or stipulations for compromise settlement approved by the district court) from the AUSA and retains them in the case file.</p> <p>Deposits any monetary amount received in settlement and properly forfeited in the Assets Forfeiture Fund, pursuant to 19 USC 1613(c).</p>

Disposal of Businesses & Associated Assets After Forfeiture

Appendices

Footnotes

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